PL ISSN 0554-498X

POLISH YEARBOOK OF INTERNATIONAL LAW

XXIII

1997–1998

POLISH YEARBOOK OF INTERNATIONAL LAW

XXIII

1997–1998

Board of Editors

ANDRZEJ WASILKOWSKI (Editor-in-Chief)
RENATA SZAFARZ
WŁADYSŁAW CZAPLIŃSKI

Advisory Board

PIOTR DARANOWSKI, GENOWEFA GRABOWSKA,
KAZIMIERZ LANKOSZ, JERZY MAKARCZYK,
ANDRZEJ MĄCZYŃSKI, JERZY POCZOBUT,
KRZYSZTOF SKUBISZEWSKI, KAROL WOLFKE

POLISH ACADEMY OF SCIENCES
INSTITUTE OF LAW STUDIES

POLISH YEARBOOK OF INTERNATIONAL LAW XXIII 1997–1998

WYDAWNICTWO NAUKOWE SCHOLAR
Warszawa 1999

The Polish Yearbook of International Law publishes articles on public international law, conflicts of laws, and different aspects of relationship between international law and municipal legal system. The *Yearbook* is open for Polish and foreign authors. The principal language of publication is English, but publishing texts in French is possible in exceptional cases.

All texts express exclusively personal views of the authors. Authors bear full responsibility for statements and opinions expressed in the published studies.

Manuscripts should be addressed to:
Dr Władysław Czapliński
Institute of Law Studies
Polish Academy of Sciences
72 Nowy Świat Street
PL 00–330 Warszawa
tel./fax (022) 826 78 53

All manuscripts should be sent in triplicate with footnotes double space at the end of the manuscript. Instruction for authors available on request. If possible, the texts can be sent on IBM–PC diskette elaborated with Word 7.0.

The present volume should be cited as: 23 *PolYBIL* (1997–1998)

© Copyright by Institute of Law Studies
Polish Academy of Sciences, Warszawa 1998

ISSN 0554–498X

Printed in Poland

Wydawnictwo Naukowe SCHOLAR, 00–322 Warszawa
62 Krakowskie Przedmieście Street. Objętość 25 ark. wyd.
e-mail: info@scholar.com.pl

Contents

ANDRZEJ WASILKOWSKI, International Law and International Relations in the New Polish Constitution of 2 April 1997 7
JAN BARCZ, Membership of Poland in the European Union in the Light of the Constitution of 2 April 1997. Constitutional Act on Integration 21
VILENAS VADAPALAS, Codification of the Law of International Responsibility by the International Law Commission: Breach of International Law and its Cónsequences 35
A. MARK WEISBURD, International Crimes of States: The Decay of an Idea 51
JEAN-MARC SOREL, L'avenir du «crime» en droit international à la lumière de l'experience du *jus cogens* 69
WŁADYSŁAW CZAPLIŃSKI, Concepts of *jus cogens* and Obligations *erga omnes* in International Law in the Light of Recent Developments 87
ALFREDO C. ROBLES, JR., La succession d'Etats devant. La Cour internationale de justice 99
SOLEDAD TORRECUADRADA, Le rôle consentement dans la succession d'Etats aux traités 127
NATHALIE MORENO, Le règlement de différends dans la succession d'Etats 171
LECH ANTONOWICZ, The International Legal Status of the Republic of China on Taiwan 191
AGATA ZIĘTEK, The Status of China's Hong Kong Special Administrative Region 201
PIOTR ŁASKI, The Prescription in International Law – Some Remarks.. 219
JOANNA GOMUŁA, The Standard of Review of Article 17.6 of the Anti-Dumping Agreement and the Problem of its Extension to Other WTO Agreements..... 229
MICHAŁ PŁACHTA, "To Extradite or Not to Extradite" (a National): Old Dilemma in a New Setting 251
IRENA RZEPLIŃSKA, Foreigner Crime in Poland 277

Polish Practice in International Law

1) Selected Jurisprudence of the Polish Supreme Court and Constitutional Court Involving Questions of Public and Private International Law – by EWA SKRZYDŁO-TEFELSKA 289
2) A Conspectus of International Agreements Concluded by the Republic of Poland, 1996–1997 – by KATARZYNA MYSZONA..... 295

Book Reviews

U. BEYERLIN, M. BOTHE, R. HOFMANN, E.-U. PETERSMANN, Recht zwischen Umbruch und Bewahrung. Festschrift für Rudolf Bernhardt – by Władysław Czapliński 301
V.D. DEGAN, Sources of International Law – by Władysław Czapliński 303
W. GRAF VITZTHUM, Völkerrecht – by Władysław Czapliński 305
P. MALANCZUK, Akehurst's Modern Introduction to International Law – by Władysław Czapliński 307
S. BLAY, R. PIOTROWICZ, B.M. TSAMENTYI, Public International Law. An Australian Perspective – by Elżbieta Mikos-Skuza, Rudolf Ostrihansky..... 308
W. CZAPLIŃSKI, Territorial Changes in Central and Eastern Europe and their International Law Effects (1990–1992) – by Andrzej Wasilkowski..... 309
M. RAGAZZI, The Concept of International Obligations *erga omnes* – by Władysław Czapliński 311
A. DE HOOGH, Obligations *erga omnes* and International Crimes. A Theoretical Inquiry into the Implementation and Enforcement of the International Responsibility of States – by Władysław Czapliński 312
J.A. FROWEIN, R. HOFMANN, S. OETER, Das Minderheitenrecht europäischer Staaten – by Władysław Czapliński 314
S. BREITENMOSER, Praxis des Europarechts – by Władysław Czapliński 316
A. ZIMMERMANN, Das neue Grundrecht auf Asyl – by Władysław Czapliński .. 317
J. HANDOLL, Free Movement of Persons in the EU – by Katarzyna Pazderska ... 318
R. CHOLEWIŃSKI, Migrant Workers in International Human Rights Law. Their Protection in Countries of Employment – by Katarzyna Pazderska 320
K. STEELE, Anti-Dumping under the WTO: A Comparative Review – by Joanna Gomuła 321
E.-U. PETERSMANN, The GATT/WTO Dispute Settlement System. International Law, International Organizations and Dispute Settlement – by Joanna Gomuła 323
E. VERMULST, P. WAER, E.C. Anti-Dumping Law and Practice – by Joanna Gomuła 325

Polish Bibliography of International Law, 1997 329

23 POLISH YEARBOOK
OF INTERNATIONAL LAW
1997-1998
PL ISSN 0554-498X

International Law and International Relations in the New Polish Constitution of 2 April 1997

ANDRZEJ WASILKOWSKI

Introduction

The new Polish Constitution of 2 April 1997 adopted by the National Assembly (Sejm and the Senate deliberating and voting together) is the first Polish Constitution following fundamental political and legal changes initiated in 1989. In May 1997 the new Constitution was accepted by the society in the national referendum. The Constitution came into force on 17 October 1997.

The preparatory works on the Constitution were prolonged because of different reasons, which will not be discussed here. Several problems resulting from the transformation of the very state order of Poland necessitated constitutional regulation in short time. The preservation of the Constitution of the Polish People's Republic from 1952 was more and more an anachronism unacceptable from the political point of view. That was why in October 1992 the Parliament enacted a Constitutional Act on the relations between the legislative and executive power in the Polish Republic and about the self-government. This Constitutional Act preserved several provisions of the 1952 Constitution – to the extent to which it did not regulate the same matters. Such a solution was clearly temporary and unsatisfactory at the same time.

During the works of the Constitutional Commission of the National Assembly the position of norms of international law and the participation of Poland in the structures of integration were given a lot of attention. The solutions to be chosen are new from the Polish perspective. Important changes took place also in the field of powers of state organs in the sphere of international relations. These three topics are to be discussed in the present article.

The Position of Norms of International Law in Domestic Legal Order

1. To begin with, the widest possible regulation of this matter would deal with the effectiveness in the domestic legal order of all sources of international law i.e. custom, treaties and law-making resolutions of international organisations. The new Polish Constitution does not go so far – it is somehow careful as regards international custom and resolutions of international organisations (with the exception of resolutions

forming part of the integration regime – to be discussed in the next subsection). It contains, however, a complex set of norms dealing with international organisations.

In this regard, the new Constitution could not base itself on the former law. The 1952 Constitution of the Polish People's Republic did not contain any rules governing this topic. The situation did not change radically even after 1989 as regards norms of written law. What actually changed then was the line of judgements of the Polish courts opening the Polish legal order for international law.[1] As regards legislation – one should mention a provision of the 1992 Constitutional Act on the powers of the Parliament in the process of ratification of international agreements (article 33(2)), the regulation of which was at the same time important and only fragmentary.

This provision was a copy of the respective article of the 1921 Constitution (first constitution following the independence of Poland in the 20th century). Pre-war examples were, however, not available in all matters requiring a constitutional regulation. After the Second World War the field of interaction of international and domestic law has widened so much that one should speak about the emergence of a completely new situation. The subjects which were traditionally recognised as constitutional matters (often falling within the exclusive jurisdiction of domestic law) have become an object of international law. As examples – we can invoke human rights (on the universal scale) and matters of state order (democracy, rule of law, respect for the rights of minorities) in Europe.

Such a new situation was a serious challenge for constitution-makers, it has resulted as well in several new solutions.[2] Independently of changes on the line: international law-domestic law, new constitutional problems emerged as a result of a growing number of states participating in the European integration. In such circumstances (which have been merely sketched above) the Polish constitution-makers had simply no choice but to adopt new, modern solutions.

2. One should, however, point out, that the legislators had a remarkable support from the doctrine of law. The lack of rules dealing with international law and its effect in domestic legal order in the 1952 Constitution was an object of strong criticism for several years. Numerous suggestions and conclusions *de lege ferenda* were formulated. Also a very interesting concept of the binding force of international law *ex proprio vigore* (of its own power) in the Polish legal order has been formulated.[3] Complex proposals *de lege ferenda* were made during the 1971 Conference on the reform of the Polish law. Also the Legislative Council assisting the Prime Minister has several time paid attention to this problem in its reports on the state of the Polish law.

The fulfilment of these requests was to be awaited for quite a long time, that is true. But the problem of international law occupied much more important place dur-

---

[1] A. P r e i s n e r: "Prawo międzynarodowe w orzecznictwie sądów polskich" [International Law in the Jurisprudence of the Polish Courts] in: M. K r u k (ed.): *Prawo międzynarodowe i wspólnotowe w wewnętrznym porządku prawnym* [International Law and EC Law in the Internal Legal Order] (1997), p. 127–144.

[2] See for example: A. C a s s e s e: "Modern Constitutions and International Law", RCADI(1985) 192.

[3] The author of this concept was S. R o z m a r y n: *Ustawa w Polskiej Rzeczypospolitej Ludowej* [Act of Parliament in the Polish People's Republic], Chapter VI (1964).

ing the preparations of the 1997 Constitution than could be expected. Also the actual constitutional regulation of the problem is more complex than the one of several other European states.

The 1997 Constitution is open towards international law and friendly with respect to it. Such a general evaluation could not be put into question even by a critical attitude towards one or another of the provisions. From our point of view the Polish Constitution belongs to these which take account of the modern tendencies al on the line international law – domestic law and provide for the complete regulation of the position of international agreements in domestic legal order.

I would like to present the general content of the constitutional regulations in this respect in the framework of diversity of methods of giving effect to international agreements in domestic legal order. I would like to point out some interpretative problems and discuss the position in domestic legal order of the categories of agreements on which the Constitution does not speak expressly.

3. Article 9 of the Constitution reads that the Polish Republic respects international law binding upon it. This provision forms part of Chapter I of the Constitution – "Republic". Its importance is hardly to be overestimated. It refers to the whole of international law (binding upon Poland) as opposed to other provisions dealing only with international agreements. It covers treaties, international custom and (although this is seldom pointed to) law-making resolutions of international organisations (strictly speaking – of international organisations which possess powers to make law with respect to states and of which Poland is or will be a member).

Several critical remarks were made during the preparatory works according to which the binding effect of international law did not depend upon the Constitution of a given State and such a provision as article 9 of the Polish Constitution is superfluous. One cannot deny the merits of such a view.

It was, however, not shared by the law-makers.

There is no doubt that in the sphere of international law article 9 of the Constitution is of a merely declaratory character. This cannot be said as regards the sphere of domestic law. In the latter article 9 has a constitutive character, as it forms the general basis for opening the Polish legal system for international law.

The declaratory character of a legal act (e.g. a norm of a Constitution, international agreement and so on) does not prejudge the lack of the necessity of such an act. Suffice here to refer to the international practice and constitutions of several states to find out the importance of declaratory acts. They have their significance in the world in which breaches of international law are by no way a peculiarity.

Article 9 is a binding guideline for state organs and other subjects; it makes them more sensible for international law, pointing at the necessity of respecting it in both law-making and decision-making processes. Such a duty is independent of the wording of the Constitution, that is true, but is in practice strongly enforced as it becomes a constitutional duty in a state.

What is the most important, article 9 of the Constitution may be a basis for the application by courts and other organs of these norms of international law which

have not been classified as sources of generally binding law in Poland: that is treaties which have not been ratified, international custom and law-making resolutions of international organisations – to the extent to which they are not regulated in article 90 of the Constitution.

Such a solution may be unsatisfactory for those who demanded a wide openness for international customary law and naming it in the catalogue of sources of law generally binding in Poland. The strength of arguments was substantial[4] but resisted by the Constitution-makers. They certainly took the view that one should not declare as a constitutional source of law a group of norms the scope of which cannot be determined with precision and which are not apt for official publication.

Article 9 of the Constitution makes it, however, possible to apply customary law in cases in which precendents already exist or in which a norm generally accepted and sufficiently clear is at stake.

Such a conclusion leads us to a wider observation that the classification of certain categories of norms of international law is not a *conditio sine qua non* of their effectiveness and application. As will be demonstrated, such norms may be given effect and application in different ways, their choice being up to the state. The catalogue of sources of law of general application may rationally encompass norms which fulfil certain formal requirements. Such norms have to have structure and articulation comparable to the ones of acts of Parliament and have to be apt for due publication which is compulsory for acts of Parliament. Such requirements are fulfilled by international agreements (treaties).

4. There is no doubt that the greatest novelty of the new Polish Constitution is the inclusion of international agreements into the catalogue of sources of generally binding law (art. 87) and placing international agreements ratified with the approval of the Parliament expressed in a statute in the hierarchy of the sources of law (art. 91(2)).

From the theoretical point of view this solution may be classified as a step towards monist concepts; however this matter will not be the subject of this article.[5] A more important question must be asked – how to classify the solution chosen by the Constitution in the categories of classic methods of giving effect to international law in the domestic legal order. This topic has a wide literature, so it will be discussed very briefly here and will serve as a starting point for our considerations.[6] To begin

---

[4] These arguments were collected and presented by A. W y r o z u m s k a: "Zapewnianie skuteczności prawu międzynarodowemu w prawie krajowym w projekcie Konstytucji RP" [Providing International Law with Effect in Domestic Law in the Draft of the New Polish Constitution], *Państwo i Prawo* (1996), No. 11, p. 18–21.

[5] See A. W a s i l k o w s k i: "Monism and Dualism at Present" in: J. Makarczyk (ed.): *Theory of International Law at the Threshold of the 21st Century. Essays in Honour of Krzysztof Skubiszewski* (1996), p. 323 ff..

[6] In Polish literature the most complete analysis of these methods is to be found in works by K. S k u b i s z e w s k i, see i.a. "Prawo międzynarodowe w porządku prawnym państwa" [International Law in the State Legal Order] in: A. W a s i l k o w s k i (ed.): *Prawo międzynarodowe a prawo wewnętrzne w świetle doświadczeń państw socjalistycznych* [International Law and Domestic Law in the Light of Experiences of Socialist States] (1980); "Wzajemny stosunek i związki pomiędzy prawem międzynarodowym i prawem

with, the methods in question may be divided into two groups – methods based on reception and methods not based on reception. Sometimes the precise classification of a given method may be difficult.

As is well known, reception means either repeating an international norm (norms) in an instrument of domestic law or transformation (i.e. transfer of an international norm into the sphere of domestic law, providing such a norm with binding effect in the latter). In both cases, norms of international law function as norms of domestic (municipal) law.

The most frequently used method not involving reception is based on reference to international law in domestic acts. The latter indicate norms of international law (customary or treaty one) which may or should be applied. They are, however, applied in the character of norms of international, not domestic law. The same situation will happen in cases in which international law is applicable *ex proprio vigore* (this solution being not an additional method of application of law but rather a theoretical concept).

Methods of adoption or incorporation are more complicated means of introducing international law norms into the domestic legal order. Their final classification depends both upon the practice and the doctrine of law. One may claim that there is no reception also in those cases and international norms adopted or incorporated into municipal law function as norms of international law and not domestic law. The same methods may, however, give rise to reception if the practice indicates that given norms are applied as municipal law. It is not possible to give a solution to this dilemma in abstracto.

5. The question to be put here is how to classify the solution adopted by article 87 of the new Polish Constitution. In particular – does it adopt the method of transformation or incorporation.

Transformation may be either specific or general. The former is the most frequently used; in Poland it was adopted in the 1921 Constitution (so-called March Constitution). It takes place with respect to specific acts of international law – usually international agreements. Such a traditional and certainly effective solution gives rise to no serious doubts. The same may not be said about general transformation – i.e. solutions in which constitution-makers automatically introduce into the domestic legal order whole categories of international norms (what makes it quite close to the method of incorporation). This has been just effected by the Polish constitution-makers with respect to all ratified treaties.

It must be pointed out here that the very act of ratification does not pre-determine any of the methods of introducing international norms into domestic legal order. Unless the law of the state provides otherwise (especially giving an act of ratification the

krajowym" [Mutual Relationship and Binds between International Law and Domestic Law] in: *Ruch Prawniczy, Ekonomiczny i Socjologiczny*. Recently a thorough analysis of the application of these methods – specially in European states – was presented by A. W y r o z u m s k a: "Formy zapewnienia skuteczności prawu międzynarodowemu w porządku krajowym" [Forms of Providing International Law with Effect in Domestic Legal Order] in: M. K r u k: *op. cit.* 1).

effects of transformation or other effects), the act of ratification is neutral from the point of view of the relationship between international law – domestic law. Polish law does not provide for any such effects; consequently the very fact that article 87 of the Constitution places ratified treaties in the catalogue of sources of generally binding law does not predetermine whether we have to do with general transformation or incorporation.

6. As has already been said, treaties may be ratified either by the President himself, with no participation of the Parliament (article 133(1) of the Constitution) or upon the approval of the Parliament expressed in a form of a statute (act of Parliament) (article 89 of the Constitution). Treaties belonging to the first group become sources of generally binding law upon the act of ratification itself, this act possessing no transformatory effects. Treaties belonging to the second group become such sources as a result of a statute authorising their ratification and the act of ratification taken together.

As opposed to the act of ratification, statutes authorising ratification may be attributed effect of transformation. It would be, however, a specific transformation in each case. Such a solution would be rational only in a system which does not in general introduce ratified treaties into the catalogue of sources of domestic law. It would be plausible under the 1992 Constitutional Act, but not under the new Constitution itself, as its article 87 classifies ratified international treaties as sources of law generally binding in the Republic of Poland. The answer to the general transformation – incorporation dilemma does not appear to be given on the basis of division of treaties according to their way of ratification.

Some guidance in this respect may be given by article 91(1) of the new Constitution. It is, however, difficult to construe it unequivocally. It reads: "After promulgation thereof in the Journal of Laws, of the Republic of Poland (*Dziennik Ustaw*), a ratified international agreement shall constitute part of the domestic legal order and shall be applied directly, unless its application depends on the enactment of a statute".

To begin with, the statement according to which such treaties form part of domestic legal order is superfluous as this fact follows from article 87. We will concentrate, however, on the part of this provision dealing with "direct application" of agreements which should form part of domestic legal order.

Different ways of interpretation are possible. First of them would question the logic of the respective provision – if a treaty is to form part of domestic law, it may not be applied directly (as international law). Such a critic is justified if we assume that article 87 of the Constitution adopts the method of general transformation that is it creates norms of domestic law parallel to international law ones. Then the direct applicability of international agreements would be nothing but a misunderstanding.[7]

---

[7] See W. C z a p l i ń s k i: "Prawo międzynarodowe a prawo wewnętrzne w projekcie konstytucji RP (Uwagi na tle artykułu Anny Wyrozumskiej)" [International Law and Domestic Law in the Draft Polish Constitution. (Remarks on the Background of the Article by Anna Wyrozumska)] *Państwo i Prawo* (1997), No. 2, p. 100.

We may, however, adopt another attitude. "Direct applicability" of treaties does not have to result only from a misunderstanding of the law-makers. It may simply indicate that article 87 does not adopt the method of general transformation but incorporation of international law – with no reception and transformation effects. It would mean that ratified treaties are to be applied as international law i.e. directly, unless acts of Parliament are necessary for their application.

It is certainly too soon to adopt decisive position in this respect. One should not exclude the possibility that reference to "direct applicability" was simply to form a reaction to the practice preceding 1989, when the courts faced with critical political situations denied applicability to international agreements. One should wait for the development of the constitutional practice, first of all of jurisprudence. Adopted norms have, however, their own life and – independently of the will of the law-makers – article 91(1) may induce to the conclusion that it was incorporation that was chosen as the method of introducing ratified international agreements to Polish legal order.

We have already mentioned the division of treaties in two groups – according to whether the Parliament participates in their ratification or not. The division is of great importance under the new Constitution, as it provides each of these two groups with a different position in the hierarchy of the sources of law. Article 91(2) provides that treaties ratified upon the prior approval given in form of a statute have priority over statutes when the latter may not be compromised with the former. The status of treaties ratified without the approval of the Parliament is not determined in a direct way.

The reservation of priority of treaties (which were ratified upon statutory approval) over statutes is a response to requests formulated for a long time and it has to be regarded as progress. It places the Polish Constitution in a narrow group of Constitutions reflecting the spirit of the new times. One should also welcome the reservation of this priority for treaties ratified upon the statutory approval of the Parliament. While adopting such a statute the Parliament limits its own field of manoeuvre in matters regulated by statutes. The extension of this privilege to all ratified treaties could hinder appropriate relationships between the legislature and the executive.

7. All this cannot change the fact of emergence in the catalogue of the sources of law of a certain category of acts, the position of which in the hierarchy of these sources is not clear. I mean treaties ratified by the President with no participation of the Parliament. As the present author indicated during the preparatory works on the draft of the Constitution, it would have been more logical to insert into the catalogue of sources of law only treaties ratified with the approval of the Parliament. Such a solution would be preferable not only because of difficulties with determining the position of other ratified treaties in the catalogue of sources of law but also more important substantive premises. If we take a look at the powers of the Parliament in the process of ratification (article 89(1)), we may infer that all treaties important from the point of view of domestic legal order (generally binding law) may not enter into force otherwise than upon the approval in the form of a statute. Other treaties either have no relevance for internal relationships of the State or

refer only to relationships covered by certain ministries and technical regulations adopted within them.

As treaties ratified not upon the Parliamentary approval have been included in the catalogue of sources of law, one should try to determine their position in the hierarchy of sources of law – either by means of interpretation or by means of an act of Parliament on conclusion and renunciation of international agreements.

The first way does not seem to be very promising. One can rely on the sequence of sources of law indicated in article 87(1) and conclude that all ratified international agreements are equal to statutes as they are mentioned before regulations (the highest rank of by-laws) and it is only due to specific provision mentioned above that treaties ratified upon the Parliamentary approval have priority over statutes. Such a conclusion may be defended from the substantive point of view, though critical remarks may be formulated specially from the formal point of view.

As regards the status of treaties which do not require ratification, the problem is still open. The Constitution-makers did not decide to provide such treaties with priority *vis-à-vis* any by-laws. Such a solution seems to be justified. Governmental and ministerial agreements are so diversified from the point of view of their contents and significance that their general constitutional regulation would be simply formalistic and would only curb development of constitutional practice.

8. In this context a dispute arises about how to solve questions which emerge on the grounds of the new Constitution but are not solved by it itself. Specially one may point either at the written law itself or at its interpretation by courts and the Constitutional Court. The first way seems to give more speedy and uniform answers, the second – may allow development of diversified and flexible solutions, being less schematic than the previous ones.

9. To make the picture full, one should mention the fact that the Constitution refers several times to international law regulating certain specific matters.

Article 42(1) providing for the principle *nullum crimen sine lege* makes reservation that "this principle shall not prevent punishment of any act which, at the moment of its commission, constituted an offence within the meaning of international law".

Article 56(2) provides for the possibility of granting the status of a refugee "in accordance with international agreements to which the Republic of Poland is a party".

Articles 116 and 117 speak about international agreements in the context of the state of war and movements of militaries – what will be discussed in a subsequent subsection.

10. The Constitution gives certain powers to the Constitutional Tribunal in the field with which we are dealing at present.

According to article 188, the Constitutional Tribunal rules on the compatibility of statutes and international agreements with the Constitution (point 1), compatibility of statutes with international agreements ratified upon the statutory approval (point 2) and compatibility of norms issued by central state organs with the Constitution, ratified international agreements and statutes (point 3).

Anticipation of the Polish Membership in the Structures of Integration.

1. States applying for membership in the structures of the European integration have to display its openness for the processes taking place within these structures. Constitutional provisions have special significance in this respect. This problem has two aspects.

Firstly, certain fundamental values reflected in the Constitutions are at stake. They must be consonant with values developed in the history of the European democratic states and occupying a main position within the process of their integration. Their reflection in the Constitution is a condition of the very possibility of participation in the process of integration.

Secondly, functional aspects are to be pointed out. They are connected with membership in institutions possessing complex decision-making and substantive powers. As we know, these institutions overtake certain powers of their Member States and make law binding directly in these states. Practical capacity of taking part in the integration structures depends upon addressing these problems in the respective constitutions.

It is just the second aspect that is mainly pointed out when we discuss the future Polish membership in the structures of integration. The basic values finding their expression in the Constitution flow not only from the desire to join the European structures but also from the needs of the society and the State.

It must be stressed here that the values underlying the 1997 Constitution are fully in line with the legal and spiritual achievements of the states of the Western Europe. It refers first of all to the principles of a democratic political system based on free elections, rule of law, respect for human (including minority) rights and basic principles and rules of market economy. It should be added that constitutional provisions on basic rights and freedoms cover institutional and procedural guarantees, which serve for their protection. Among institutional guarantees one should identify independence of judiciary, administrative judiciary, Constitutional Tribunal and Ombudsman. Among procedural guarantees a special mention should be made with respect to the right of action before the Constitutional Tribunal for everybody whose right has been infringed – a new instrument introduced by the new Polish Constitution (art. 79).

2. The Constitution has already regulated basic functional matters which refer directly to the future Polish membership in the European Union.

The matter was discussed very carefully during the preparatory work. Despite certain doubts (whether the matter should not remain an element of negotiations with the European Union) before-hand regulation of the matter has been chosen.

As we can think, two aims were taken into consideration then. First was to establish frames – to be filled in at the moment of accession. In such a situation, no problems connected with constitutional changes would complicate the situation on accession.

The second aim was to demonstrate to partners from the European Union and its organs as well as people in Poland the will of entering the European structures. The opening of the Constitution for these problems was certainly an important signal.

3. The authorisation for entering the European structures was formulated in article 90. It reads:

"1. The Republic of Poland may, by virtue of international agreements, delegate to an international organization or international institution the competence of organs of State authority in relation to certain matters.

2. A statute, granting consent for ratification of an international agreement referred to in para. 1, shall be passed by the Sejm by a two-thirds majority vote in the presence of at least half of the statutory number of Deputies, and by the Senate by a two-thirds majority vote in the presence of at least half of the statutory number of Senators.

3. Granting of consent for ratification of such agreement may also be passed by a nationwide referendum in accordance with the provisions of Article 125.

4. Any resolution in respect of the choice of procedure for granting consent to ratification shall be taken by the Sejm by an absolute majority vote taken in the presence of at least half of the statutory number of Deputies."

Referendum on the accession to the EU may be but does not have to be resorted to. Its specific character lies in the fact that it would replace a statute (statute authorising the President to ratify the treaty), while e.g. the 1997 Constitutional Referendum did not replace voting in the National Assembly but simply confirmed the Constitution adopted by the Parliament.

4. The second element of the opening of the Polish Constitution for the acceptance of the EU membership responsibilities lies in the authorisation for application of the EC law. Article 91(3) of the Constitution reads: "If an agreement, ratified by the Republic of Poland, establishing an international organization so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws".

One may conclude that both the bases for membership in the EU and the adoption of the *acquis communautaire* have been formulated.

There are also constitutional provisions which anticipate the Polish membership in NATO. They are article 116 and 117. The former rules that Sejm may make a resolution on state of war only in cases of an armed attack on the territory of the Polish Republic or "when an obligation of common defence against aggression arises by virtue of international agreements". The Washington Treaty from 4 April 1949 certainly contains such an obligation of collective defence.

Article 117 relates to rules of using armed forces outside the state territory. Such rules may take form of a ratified international agreement or a statute. This provision refers to ratified agreements governing the rules of stationing and movements of military forces of other states on the Polish territory. The former provision relates to participation of Polish forces in peace operations effected together with NATO Member States (like e.g. the Bosnia operations), the latter – to participation of NATO forces in common manoeuvres and their stationing on the Polish territory.

To sum up, the Polish Constitution is not only open for international law as such but also for specific needs of European and Atlantic integration.

The Managing of International Relations

1. In this field special attention should be given to the powers of the President, the Government and the Parliament.

2. The powers of the President in this field flow from certain general provisions of the Constitution (and also from customary international law, which will not, however, be discussed here) and from specific norms. As regards general provisions, one should point at article 126(1) of the Constitution which reads: "The President shall be the supreme representative of the Republic of Poland and the guarantor of the continuity of State authority". Article 126(2) provides further that the President takes care for respect of the Constitution, he defends the sovereignty and the security of the State and the inviolability and unity of its territory. We can accept that the abovementioned provisions form a general framework for the position of the President in the State and may have significance for the interpretation of specific provisions. They do not, however, form an independent basis for powers of the President in international relationships, as article 126(3) reads: "The President shall exercise his duties within the scope of and in accordance with the principles specified in the Constitution and statutes". In this respect fundamental importance is to be attributed to article 133(3) of the Constitution which provides that in the field of foreign policy the President co-operates with the Prime Minister and the competent minister.

The powers of the President in the field of external relations are regulated first of all in article 133 of the Constitution, which reads:

"1. The President of the Republic, as representative of the State in foreign affairs, shall:

1) ratify and renounce international agreements, and shall notify the Sejm and the Senate thereof;

2) appoint and recall the plenipotentiary representatives of the Republic of Poland to other states and to international organizations; [...]

2. The President of the Republic, before ratifying an international agreement may refer it to the Constitutional Tribunal with a request to adjudicate upon its conformity to the Constitution.

3. The President of the Republic shall cooperate with the Prime Minister and the appropriate minister in respect of foreign policy."

The power of the President to ratify treaties is seriously limited due to the powers of the Parliament – to be discussed later. Article 133(3) of the Constitution limits individual activities of the President in the field of foreign policy, which is especially evident if we confront this general provision with the rules on the powers of the Government in this field.

One should add that the Constitution reserves for the President ordering the publication of international agreements (art. 144(3)(7)). In this field the President acts individually and the signature of the Prime Minister is not necessary.

Generally speaking, the new Constitution has narrowed the powers of the President in the field of external relations – as opposed to the 1992 Constitutional Act. In particular, there is no longer any provision according to which the President gener-

ally directs foreign relations – as was provided for in article 32(1) of the 1992 Constitutional Act.

Also the power of the President to ratify treaties with no involvement of the Parliament has been limited as compared with article 33(2) of the 1992 Constitutional Act.

The President has also lost the power to influence the appointment of a Minister of Foreign Affairs (as well as a Minister of Defence and Minister of Internal Affairs) – the power granted him by article 61 of the 1992 Constitutional Act, which obliged the Prime Minister to refer to the President for his opinion on the candidates of these three ministers before making formal proposal with respect to them.

The above-mentioned changes do not bring about the limitation of the activities of the President in the field of external relations, they only make it necessary to resort to negotiations and strict co-operation with the Government which is actually the body responsible for foreign policy of the State.

3. The powers of the Government (Council of Ministers) in this field are regulated by article 146 of the Constitution. Article 146(1) states a principle according to which the Council of Ministers conducts the internal and foreign policy of the Polish Republic. This principle is additionally strengthened by a competence clause inserted into article 146(2) of the Constitution which provides that the Council of Ministers is competent in matters which are not reserved for other state organs and self-government (local organs). This provision should be interpreted, in my opinion, as a presumption of powers of the Government in all affairs of State policy. The competence of the Government does not require additional justification. On the contrary, such a justification is to be presented in favour of other state organs (first of all the President and the Parliament) or organs of self-government.

Such a construction does not make it necessary to regulate the powers of the Council of Ministers in the field of international affairs in more detail. Article 146(4) which enlists different functions of the Council of Ministers refers expressly to the field of foreign relations. Article 146(8) states that the Council of Ministers guarantees external security of the State. According to article 146(9) the Council of Ministers directs in general the relationships with other states and international organizations. According to article 146(10), the Government concludes international agreements requiring ratification and denounces other international agreements.

The provision dealing with general direction of the Council of Ministers in the field of international relations deserves attention. One may claim that the provision in question is superfluous – in face of the norm of article 146(1) according to which the Council of Ministers conducts foreign policy of the State. The dominant position of the Government in the field of external relations could be guaranteed sufficiently by omitting the "general direction of the foreign policy" in the catalogue of powers of the President. One should remind that such a power was provided for in the 1992 Constitutional Act and gave rise to many controversies. The Constitution-makers certainly drew the conclusion that a decisive word must be said in this field (though not because of legal necessity) in order not only to deprive the President of the gen-

eral direction in the field of foreign relations but also to transfer his competence to the Government.

4. The powers of the Parliament in the field of international relations have legislative and control character. Special position is occupied by statutes authorizing the President to ratify international agreements. As has been already said before, the powers of the Parliament in this field are very complex. Article 89 of the new Constitution reads:

"1. Ratification of an international agreement by the Republic of Poland, as well as renunciation thereof, shall require prior consent granted by statute – if such agreement concerns:

1) peace, alliances, political or military treaties;
2) freedoms, rights or obligations of citizens, as specified in the Constitution;
3) the Republic of Poland's membership in an international organization;
4) considerable financial responsibilities imposed on the State;
5) matters regulated by statute or those in respect of which the Constitution requires the form or statute.

2. The President of the Council of Ministers (the Prime Minister) shall inform the Sejm or any intention to submit, for ratification by the President of the Republic, any international agreements whose ratification does not require consent granted by statute.

3. The principles of and procedures for the conclusion and renunciation of international agreements shall be specified by statute."

If we take a look at the catalogue of treaties, the ratification of which requires the approval of the Parliament, the number of treaties ratified by the President himself with no involvement of the Parliament will rather be not substantial. Such treaties will not be allowed to concern matters regulated in acts of Parliament.

Article 89(2) is designed to defend the Parliament from the arbitral decisions of the Government about the choice of ratification procedure (with or without involvement of the Parliament).

Besides, the Constitution refers to statutes (or ratified international agreements) in matters of use of armed forces abroad or stationing and movements of foreign armed forces on the territory of Poland.

Law-making powers of the Parliament concern also the status of different state organs active in the field of international relations.

As regards control functions of the Parliament, they find their expression in plenary debates on foreign policy, interpelations of the Members of Parliament and activities of the Permanent Commission on Foreign Affairs of the Sejm (which i.a. conducts hearings of candidates for ambassadors) and of the Senate. The Parliament is also active in the framework of different forms of inter-parliamentary co-operation.

23 POLISH YEARBOOK
OF INTERNATIONAL LAW
1997-1998
PL ISSN 0554-498X

Membership of Poland in the European Union in the Light of the Constitution of 2 April 1997. Constitutional Act on Integration[1]

JAN BARCZ

Introduction

Polish accession to the European Union will be a complex act – from the legal point of view. This complexity results from the fact that the Union is a supranational organisation[2] i.e. an organisation possessing its own autonomous legal order – distinct from both international law and domestic law. The law of the Union has priority of application within the internal sphere of the Member States.[3] The accession to the European Union will entail far-reaching changes in powers of State organs and in the sphere of the Polish law. That is why one should welcome the fact that the Polish Constitution of 2 April 1997 has provided firm legal bases for this complex process. In this respect the Constitution took into consideration the remarks of the Polish doctrine of law and the constitutional practice of the EU Member States.[4]

Because of the complexity of the process of the future Polish accession to the EU, I suggest to refer to the whole of constitutional provisions addressing this issue as to "constitutional act on integration".[5] The respective provisions must be analysed as

---

[1] The present article is a concretized version of my contribution "Konstytucyjnoprawne problemy stosowania prawa Unii Europejskiej w Polsce w świetle dotychczasowych doświadczeń państw członkowskich" [Constitutional Law Problems of Application of the EU Law in Poland in the Light of the Experiences of the Member States] in: M. K r u k (ed.): *Prawo międzynarodowe i wspólnotowe w wewnętrznym porządku prawnym* [International Law and EU Law in the Internal Legal Order] (1997), p. 203 ff.

[2] See J. B a r c z: "Organizacja ponadnarodowa" [Supranational Organisation], *Sprawy Międzynarodowe* (1991), No. 7–8, p. 89 ff.

[3] This position is accepted by Member States of the EU. It has been developed consequently since the ECJ judgment in the case *Costa v. ENEL* of 15 July 1964, ECR 1964, p. 1251 ff. More on this subject: W. C z a p l i ń s k i: "Akty prawne Wspólnot Europejskich w orzecznictwie Trybunału Sprawiedliwości" [Legal Acts of the EC in the Jurisprudence of the International Court of Justice] in: M. K r u k (ed.), *op. cit.* 1), p. 188 ff.

[4] See K. D z i a ł o c h a: "Podstawy prawne integracji Polski z Unią Europejską w pracach nad nową konstytucją" [Legal Bases of Integration of Poland with the EU in the Preparatory Work on the New Constitution], *Państwo i Prawo* (1996), No. 4–5, p. 9, 10; W. S o k o l e w i c z: "Ustawa ratifikacyjna" [Ratification statute] in: M. K r u k (ed.), *op. cit.* 1) p. 119.

[5] For example in German literature the constitutional bases of the German anticipation in the processes of integration are denoted as "Gesamtakt staatlicher Integrationsgewalt", H.P. I p s e n: "Europäisches Gemeinschaftsrecht" (1972), p. 60, 61.

a whole, only then it will be possible to interpret the Constitution in a systematic way and so as to favour the process of integration. It must be put strongly here that the objective of the respective provisions of the Constitution was to facilitate the process of integration and not to create any new barriers. That is why the positive, favourable attitude of the Constitution towards the process of integration should be presumed, forming a leading rule for the interpretation of the respective provisions.

The constitutional act on integration would consist of three basic elements[6]:

1) decision of the Polish authorities to join the supranational organisation – that is – the European Union.[7] This decision will take the form of a treaty on accession – on the international plane – and of an Act of Parliament authorising the President to ratify such a treaty (and providing it with a strong democratic legitimacy) – on the domestic plane;

2) transfer of powers with respect to certain matters from state organs to the European Union following the afore-mentioned decision. The matters referred to will be determined in the treaty on accession and have to reflect the *acquis communautaire* and the dynamics of the European integration;

3) renunciation of exclusivity of the execution in the domestic sphere of the powers which have been the object of the transfer and the opening of the domestic sphere for the (foreign) law of the supranational organisation (the European Union), the latter law being given primacy over domestic law.

All these elements will be discussed below.

I. Decision of the State Authorities Concerning EU Membership – Specific Requirements Concerning International Agreement Dealing with this Subject

Article 89(1)(3) of the Constitution of the Republic of Poland of 2 April 1997 provides that ratification of an international agreement on membership of Poland in an international organisation requires a prior approval expressed in a form of a statute (act of Parliament). However, a special procedure for expressing such an approval is to be followed in cases in which transfer of powers of state organs in certain matters to an international organisation or an international organ is provided for (article 90(1) of the Constitution). According to this special procedure:

1) a respective act of Parliament approving ratification of a treaty must be adopted by a two-thirds majority in both houses of Parliament (the Sejm and the Senate) in the presence of at least the half of the statutory number of Members of the Sejm (the lower house) and of Senators in the Senate (art. 90(2) of the Constitution).

---

[6] See some modification of the views presented in *op. cit.* 1), p. 206.

[7] Article 90(1) of the Constitution speaks about "international organisation or international organ". I expressed my critical attitude towards this phrase in *op. cit.* 1) (p. 208 ff.) where I presented an analysis of the notion of international organization or international organ. This analysis remains valid also after the entry into force of the new Constitution so I will not discuss the matter any more. I apply the notions: "supranational organisation" or simply "European Union".

2) the Sejm acting by an absolute majority (number of pros being higher than number of cons and abstentions taken together) in the presence of at least half of the statutory number of Members of the Sejm[8] may decide to hold a national referendum with respect to the approval of a given treaty.

In consequence – we have to do with two distinct ways of approving an agreement on accession to the supranational organisation – either by an Act of Parliament[9] or within a national referendum.

Act of Parliament (Statute) Dealing with an International Agreement

Statute concerned with an agreement on membership in a supranational organisation (art. 90(2) of the Constitution) is a qualified form of statute granting the President an authorisation to ratify a treaty (regulated in art. 89 of the Constitution).[10] What makes a difference is an increased scope of democratic legitimacy of the former, while the latter is to be adopted by an ordinary majority of votes in presence of at least half of the statutory number of Members of the Sejm (article 120 of the Constitution). The fact that statutes dealing with supranational organisations are to be adopted according to a specific procedure (art. 90(2)) has a good explanation. The fact is that the law-maker of the supranational organisations is an intergovernmental organ – composed of representatives of executive. Parliamentary assemblies (like the European Parliament) have relatively limited powers. This phenomenon is described as a democratic deficit of supranational organisations.

Statutes connected with international agreements reveal their specific character – as opposed to other acts of Parliament. The differences are also to be seen between statutes dealing with international agreements and statutes connected with agreements on membership in supranational organisations. They are as follows:

– Only the government has the right of initiative with respect to statutes connected with international agreements. Contrary to the normal situation with statutes in general, the right of initiative was denied to Members of the Sejm, the Senate, the President (art. 118(1)) and to groups of 100,000 citizens (art. 118(2)). Exclusive power of initiative reserved for the Government in this respect stems explicitly from art. 146 of the Constitution itself. According to article 146(4)(10) of the Constitution, the Government concludes agreements which have to be ratified. The notion "conclude" is flexible and covers negotiations and all acts necessary for the entry into force of the

[8] See W. S o k o l e w i c z: *op. cit.* 4), p. 123.

[9] I would suggest for such a category of statutes the name: "statute concerned with an international agreement". The name suggested i.a. by W. S o k o l e w i c z (*ibidem*, p. 93 ff.) "ratification statute" is imprecise as the ratification itself is effected by the President. Such a statute would have at least three functions: function of democratic legitimacy (the Sejm and the Senate express their consent for a given treaty; the function of authorization (such a statute authorizes the President to ratify an international agreement) and ranking function (as the issuance of such a statute determines the rank of a given treaty in the hierarchy of domestic legal order). Because of the number of these functions the general notion: "statute concerned with an international agreement" is the most apt to comprise all these functions.

[10] That is why I would not opt for the existence of two types of such statutes – as opposed to W. S o k o l e w i c z, *ibidem*, p. 121.

agreement, including a necessary initiative for a statute approving ratification of an agreement. The powers of the President are listed in article 133 of the Constitution. His powers with respect to international agreements comprise their ratification and renunciation (article 133(1)(1)) and requesting the Constitutional Tribunal to verify their constitutionality prior to their ratification (art. 133(2) of the Constitution). Actually article 133(3) of the Constitution provides for co-operation in the field of foreign policy between on the one hand the President and on the other the Prime Minister and a respective Minister. This "co-operation" may, however, refer to negotiations (of great importance for the future accession treaty) but in no case to initiation of pre-ratification statute proceedings. The scope of permissible activities in this field of the Senate and of the Sejm has been regulated in detail in article 90(2) of the Constitution. It is also hardly possible to allow the initiative of a group of at least 100,000 citizens with respect to ratification or non-ratification of international agreements. Had such a project been prepared with respect to denial of approval of the accession treaty, it would serve at most the Parliament as a signal that a national referendum on the subject is necessary.

– The right to propose amendments to drafts of statutes dealing with ratification of international agreements is limited. Amendments may refer to some extent only to the text of the statute itself, but not of the agreement. Any amendments to the latter would bring about the necessity of new international negotiations or would simply amount to non-accession to a supranational organisation. Statutes dealing with an international agreement may be either approved without any amendments in the form presented by the Government or denied, what amounts to an expression of the will of Poland not to be bound by the agreement in question (not to join an international organisation – in cases of accession agreements). A possible veto of the Senate will remain merely an internal affair if it is subsequently outvoted by the Sejm. It may only affect the required majority in the lower house of Parliament. A veto of the Senate results in requirement of approving a given act with an absolute majority in presence of the half of the statutory number of Members of the Sejm instead of an ordinary majority – applied as a rule. The former requirement is, however, always applied with respect to agreements on accession to supranational organisations, so a possible veto of the Senate will bring about no changes to the procedure to be followed in the Sejm.

– Statutes dealing with international organisations may be adopted within the "quick track" procedure (art. 123 of the Constitution). It may not, however, apply to the EU accession agreement, as article 123(1) of the Constitution provides that the "Quick track" procedure may not be used with respect to statutes dealing with the State order and powers of public authorities. Transfer of powers of state organs in certain matters to an international organisation is always a regulation on the powers of public authorities. Independently thereof, the accession to the EU will affect also the other fields mentioned in article 123(1) of the Constitution – that is, though in an indirect way, elections (the Constitution will have to address the problem of elections to the European Parliament) and the scope of application of the codes, each of those topics precluding resort to "quick track" procedure.

National Referendum

Approval of ratification of an international agreement on the Polish accession to a supranational organisation may be expressed in a national referendum (art. 90(3) and (4) of the Constitution). The Constitution provides that decision in this respect is to be made by the Government (art. 90(4)). Consequently – the President has no such a right – which is an exception to the rule of article 125(2) of the Constitution. Article 90(4) is, however, *lex specialis* with respect to it. It is not clear what *quorum* is necessary for valid consent being given within a referendum. The general norm of article 125(3) of the Constitution provides that the result of a referendum is binding if at least half of the number of people entitled to take part in it has actually participated in the referendum. The specific norm of article 90(3) does not contain any other provision with respect to this matter, it refers generally to article 125 of the Constitution. Does this actually mean that the approval of an international agreement on the Polish accession to a supranational organisation given within a national referendum requires participation of at least half of the people entitled to vote? It would be helpful to refer to article 235(6) of the Constitution which provides for a so-called "approval referendum" for statutes amending the Constitution and concerning the provisions of Chapter I of the Constitution (The Republic), Chapter II (Freedoms, Rights and Obligations of Persons and Citizens) and Chapter XII (Amending the Constitution). A simple majority of people taking part in the referendum is sufficient for such an approval being validly given. If there is no *quorum* requested for the approval of an act amending the Constitution relating to the form of the government and the rights of people, one should conclude that such a majority will suffice for the approval of the ratification of an agreement on the Polish accession to an international organisation.

II. Transfer to the European Union of Powers of State Organs in Certain Matters

According to article 90(1) of the Constitution, the Republic of Poland may on the basis of a treaty transfer powers of state organs to an international organisation or an international organ. This provision indicates the nature of the constitutional act on integration. On the basis thereof the Republic of Poland renounces the exclusivity of its powers in areas determined in the treaty and simultaneously opens up its internal legal order for the international organisation, in particular by providing for direct application of its law in the Polish legal order.

A) Internal Aspects of the Transfer. Objective (Substantive) Scope of the Transfer of Powers

The Constitution is right in making the substantive scope of the transfer flexible. It refers simply to "powers of state organs in certain matters". The latter comprise areas of legislative, executive and judicial power (art. 10(1) of the Constitution) attributed to the Parliament (the Sejm and the Senate), the President, the Council of Ministers, courts

and tribunals (art. 10(2) of the Constitution). Wide scope and diversity of the integration process justify the law-makers in non-referring to any specific substantive or procedural limits of transfer of powers. Powers of state organs in all areas may be subject to this transfer. No balancing between on the one hand the legislature and on the other the executive and judiciary is also required. In fact, the transfer of powers may concern different kinds of power and may be different in scope with respect to any of them, so as to respond to the needs of the participation of Poland in the process of integration. Specific matters transferred to the supranational organisation will be specified by the treaty on accession. There is, however, one limitation to be inferred from article 90(1) of the Constitution – which makes transfer of powers possible only in certain matters, "not in all of them". One should conclude that it makes it impossible to transfer the whole of the state authority to an international organisation.

Effects of the Transfer of Powers in Domestic Law

From the perspective of the Polish law two important consequences of the transfer of powers are to be identified. Namely:

1) The Republic of Poland renounces the exclusivity of its competence in the areas of legislature, executive and judiciary covered by the transfer;

2) Poland accepts the application of acts of the organs of a supranational organisation ("foreign" acts of power) and obliges itself to secure their effectiveness.

Preservation of the Polish Sovereignty in the Integration Processes

Abstracting from a detailed analysis of the evolution of the very notion of "sovereignty", one should stress that the 1997 Polish Constitution guarantees the preservation of sovereignty in the processes of integration.

Firstly, it is difficult to establish the exact relationship between on the one hand – the limitation provided for in article 90(1) of the Constitution according to which powers of state authorities in certain matters may be transferred to an international organisation and – on the other hand – the fact that the whole of state power may not be transferred. Taking into account the diversity of integration processes it should be interpreted in a flexible way. Nevertheless, this relationship will be interpreted within procedures guaranteeing democratic control – in a form of an act of Parliament adopted by a qualified majority (art. 90(2) of the Constitution) or within a national referendum (art. 90(3) of the Constitution).

Independently of this special procedure of democratic control, one should state clearly that transfer of the totality of state powers to a supranational organisation is impermissible according to article 90(3) of the Constitution. Such a transfer (amounting to participation of Poland in a supranational organisation turning itself into a federal state) would necessitate an amendment of the Constitution in accordance with its article 235.

Secondly, the transfer itself does not result in losing sovereignty with respect to transferred powers. What is actually relinquished is the exclusive character of the

powers of state authorities within given areas. This does not amount to losing sovereignty within them. This important aspect was specially emphasized in article 10(2) of the draft of the Constitution of 19 June 1996, which spoke about "transfer of the execution of certain powers of state authorities". It was to be contrasted with transfer of powers as such. Even if in subsequent works one has dropped the notion of the "execution of powers" because of linguistic reasons, this does not mean that the very concept underlying this distinction has been denied. The fact is that transfer of powers is not absolute and may be revoked. Secondly, the State itself may take activities in areas subject to transfer of powers. Both the revocation and the latter activities must be compatible with the respective treaty transferring the powers, otherwise being at variance with both international obligations and domestic law of the state itself. What is here at stake, however, is that the sovereignty in the areas concerned remains to the full extent an attribute of the state itself.[12]

B) Legal Nature of the Transfer

Legal qualification of the very "transfer of powers" has proved to be a controversial issue.[13] Formerly, concepts derived from private law have been referred to in order to explain the nature of "transfer". In such concepts – the state would definitively lose all transferred rights, the transferee being the only subject authorised to deal with them. It has soon become clear that the process of transfer of powers may not be qualified in private law terms. "Transfer" is namely a complex process of a special character, taking place on two levels – international (from the part of an international organisation) and constitutional (from the part of state).[14] Special character of this act results from the fact that it leads to the emergence of a supranational organisation with autonomous character, which affects the internal legal order of its Member States. The result to be obtained largely surpasses the sum of transferred powers.[15] From the point of view of states concerned there is at the same time only renunciation of exclusivity of use of powers and not their definitive losing.

C) "Transfer" *vis-à-vis* the Duty of States to Co-operate with an International Organisation or International Organ

The mere legal qualification of "transfer" is not sufficient to describe a complicated process of co-operation of states with the supranational organisation. The practice of the European Union shows that legal activity of states (supplementary and

[11] See W. S o k o l e w i c z, *op. cit.* 4, p. 122 and authors cited in note 82.

[12] W. S o k o l e w i c z, *ibidem*, p. 122.

[13] See A. R u p p r e c h t: *Die Integrationsgewalt, Eine staatsteoretische und verfassungsrechtliche Studie zu Artikel 24 Absatz 1 des Grundgesetzes* (1969), p. 84 ff.

[14] See K. S t e r n: "Das Staatsrecht der Bundesrepublik Deutschland" vol. 1: *Grundbegriffe und Grundlagen des Staatsrecht, Strukturprinzipien der Verfassung* (1977), p. 387.

[15] See H.P. I p s e n, *op. cit.* 5), p. 56.

[16] "Ein Gleichgewicht sinnvoller Kooperation". Ch. T o m u s c h a t: Artikel 24GG in: *Bonner Kommentar* (1985), p. 2.

executive) is also necessary in matters widely covered by the EU competence. To sum up, the relationship between a member state and a supranational organisation is complicated; it is called in doctrine a "balance of reasonable co-operation". A new important input has been made by the subsidiarity principle, confirmed in the Maastricht Treaty.[17]

III. Opening-up of the Polish Legal Order *vis-à-vis* the Law of a Supranational Organisation

a) Primary Law of a Supranational Organisation and Polish Law

The character of primary law (founding treaties and accession treaties) is a controversial issue. So-called "traditionalists" present the opinion according to which since a supranational organisation is founded on international treaty, its primary law should be qualified in whole as international law.[18] An opposing view is defended by "autonomists". In their opinion, the nature of the founding treaty itself is not decisive for qualifying the legal order of the organisation based on this treaty. The special character of a supranational organisation lies just in the fact that its legal order differs from both domestic and international one, being a separate and specific order, a third way *vis-à-vis* both international and municipal law.[19] Main argument in favour of the special character of primary law of a supranational organisation is reception of constitutional parts of the founding treaties by the organisation itself and treating them as its own law – a process called "parallelisation" (*Parallelisierung*).[20] If such a legal order is effective, one can infer that the process of parallelisation has resulted in an emergence of a new legal order. The European Court of Justice which in the first period treated primary law as international law, since its famous judgment in the case *Costa v. ENEL* presents consequently a view (which has been accepted by the Member States) according to which the Communities form a separate European public authority[21] and the EC Treaty – as opposed to other international agreements – has established its own legal order which must be overtaken by the Member States since the time of the entry into force of the Treaty and which has to be applied by their courts.[22]

---

[17] See E. P o p ł a w s k a: "Organy i procedura stanowienia prawa wspólnotowego oraz udział w niej państw narodowych" [Organs and Procedures of EC Law-Making and Participation Therein of National States] in: M. K r u k, *op. cit.* 1), p. 176 ff.

[18] See Ch. R o u s s e a u: "Droit International Public", vol. II: *Les Sujets du Droit* (1974), p. 465.

[19] See G. O l m i: "Les rapports entre droit communautaire et droit national dans les arrêts des juridictions supérieures des Etats membres", *Revue du Marché Commun* (1981), p. 242 ff.; K. W ó j t o w i c z: "Istota i źródła prawa wspólnotowego, konsekwencje dla prawa krajowego" [The Essence and the Sources of EC Law, Consequences Thereof for National Law] in: M. K r u k (ed.), *op. cit.* 1), p. 145 ff.

[20] See H.H. N o l l: *Die Völkerrechtsubjektivität der Europäischen Gemeinschaften und deren Bindung an das allgemeine Völkerrecht* (1986), p. 25 and literature cited therein.

[21] ECR 1964, p. 1251 ff.

[22] "... die bei seinen Inkrafttreten in die Rechtsordnungen der Mitgliedstaaten aufgenommen werden und von ihren Gerichten anzuwenden sind". *Ibidem*, p. 1269.

The process of parallelisation does not deny the character of the founding treaty as an instrument of international law. In effect, primary law has a two-face character – both as an instrument of international law and – from the point of view of the organisation itself – as the constitution within a separate legal order of the organisation itself.[23]

Such a twofold nature of primary law will make it necessary to solve many practical and theoretical problems after the future Polish accession to the European Union.

The least of them may be expected in the field of guaranteeing effectiveness to the primary law of the EU (as international law – treaty) in the Polish legal order. The 1997 Constitution makes relatively clear provisions with this respect, which respond mainly to demands made by the Polish doctrine of law and the jurisprudence of the Polish courts (specially the case-law of the Constitutional Tribunal from a few last years).[24] Firstly, a ratified treaty is a source of generally binding law in the Polish Republic (article 87 of the Constituion); secondly – such a treaty is a part of the national legal order and is directly applied unless its application depends upon the adoption of an act of Parliament (art. 91(1)); thirdly – a treaty ratified after receiving approval in a form of an act of Parliament has a priority over statutes (acts of Parliament) when the latter may not be conciliated with the former (art. 91(2) of the Constitution).

The complex nature of the primary law of the EU and its character as a constitutional law of a supranational organisation in particular will result in two fundamental questions that will face both the Polish doctrine and the Polish Constitutional Tribunal:

1) Is EU primary law "only" international law, i.e. is a conflict norm from the above-mentioned article 91(2) of the Constitution the only norm to be applied in cases of a possible conflict of EU primary law and Polish law, in other words, does primary law have priority only *vis-à-vis* statutes but not the Constitution itself?

2) May the Constitutional Tribunal rule on the constitutionality of the EU primary law (treaty on accession to the EU) and if so, to what extent?

Ad. 1. When considering this problem one should recognize the importance of such a system of solving conflicts between two separate systems of law which would be pragmatic and based on mutual bounds between the two systems. This is even more as the EU law does not contain any clear norm of conflict of laws. What is actually to be found therein is a basic principle according to which Member States are under a duty to guarantee the effectiveness of the EU norms in their legal orders.[25] From a practical point of view this problem is to some extent of minor importance, as the Constitution itself contains clear norms of conflict between treaties and statutes.

---

[23] See H.P. I p s e n, *op. cit.* 5), p. 64 ff., W. C z a p l i ń s k i: "Akty prawne Wspólnot Europejskich w orzecznictwie Trybunału Sprawiedliwości" [EC Acts in the Jurisprudence of the European Court of Justice] in: M. K r u k (ed.), *op. cit.* 1), p. 188 ff.

[24] See A. W y r o z u m s k a: "Formy zapewnienia skuteczności prawu międzynarodowemu w porządku krajowym" [Forms of Providing International Law with Effect in Domestic Legal Order] in: M. K r u k (ed.), *op. cit.* 1), p. 54 ff.; A. P r e i s n e r: "Prawo międzynarodowe w orzecznictwie sądów polskich" [International Law in the Jurisprudence of the Polish Courts] in: M. K r u k (ed.), *op. cit.* 1), p. 127 ff.

[25] See W. C z a p l i ń s k i, *op. cit.* 23), p. 193.

The problem may emerge in the context of a possible examination of the constitutionality of the treaty on Polish accession to the EU (to be discussed below). From a theoretical point of view, primary law of the EU should be given priority *vis-à-vis* the entire domestic law, including the Constitution itself. Such a view may be justified by reference to the complex nature of the constitutional act on integration. One should take into consideration the democratic legitimacy of the decision of the accession to the supranational organisation and the requirement of preserving the unity of the law of the supranational organisation. As secondary law thereof is given priority in the domestic legal order, this priority should not be denied to primary law – forming constitutional bases of the former.

Ad. 2. Problem of examination of constitutionality of primary and secondary law of the EU is frequently faced by constitutional courts of the Member States. The emerging problems have several times brought about constitutional crises in the Member States (e.g. in Germany, Italy).[26] The Polish Constitution makes two provisions which may be of importance from our point of view in this respect. Firstly, article 133(2) provides that the President before ratifying a treaty may ask the Constitutional Tribunal to examine its constitutionality. Secondly, article 188, which determines the scope of jurisdiction of the Constitutional Tribunal, provides that it rules on the compatibility of international agreements with the Constitution.

In the first situation – no problems from the point of view of the EU law emerge. Control of compatibility of treaties with the Constitution preceding their ratification is an internal affair of the State. On other hand, however, results of such an examination may influence the speed of attaining one of the most fundamental strategic interests of the foreign policy of the State. It should be emphasized here that the whole *acquis communautaire* is to be overtaken by new members, with no reservations. Any such reservations made within the procedure of prior examination of constitutionality would amount to stating the impossibility of accession to the EU.

More serious problems may emerge in the context of the examination of the constitutionality of treaties provided for in article 188 of the Constitution. There is no doubt that the Tribunal may conduct such an examination also with respect to agreements which have already entered into force.[27] What is more, it seems that in cases in which treaties were ratified upon a prior approval expressed in a form of a statute, the Constitutional Tribunal will have a choice to rule on the constitutionality of the treaty or the statute concerned, as article 188(1) provides for such a general power with respect to all statutes. In consequence, both direct and indirect examination of validity of treaties are possible. It seems to be logical that the direct way should be given priority, specially as the Tribunal has the right to effect it.[28]

---

[26] See G. E i b a c h: *Das Recht der Europäischen Gemeinschaft als Prüfungsgegenstand des Bundesverfassungsgerichts* (1986).

[27] W. S o k o l e w i c z, *op. cit.* 4, p. 125.

[28] From this point of view the remark of W. Sokolewicz according to which the Constitutional Tribunal may not rule on the constitutionality of the consent given within a national referendum (*ibid.*, p. 125) is of limited practical significance. The Constitutional Tribunal may rule directly on the constitutionality of the treaty, with no respect for the form in which the consent was given.

The treaty on the accession to the EU will: be subject to control of the Constitutional Tribunal from the point of view of conformity with the Constitution (art. 188(1)). When effecting such control, the Tribunal will have to take into consideration the twofold nature of the EU primary law (i.a. of the Treaty on the accession of Poland to the EU, which on the day of its entry into force will become a part of the primary law of the EU). The Constitutional Tribunal will have to provide EU law with effect in the Polish legal order. In sum – it should lead to a search for pragmatic solutions (as was the case when constitutional crises in other Member States were solved), like for example such interpretation of the Constitution which acts in favour of EC law. Within the framework of such an interpretation the Tribunal will strike a balance between the process of European integration on the one hand and the constitutional povisions on the other in such a way as to guarantee the effectiveness of EC law in domestic legal order.

b) Secondary Law of a Supranational Organisation and the Polish Domestic Law

As opposed to the primary law of a supranational organisation, secondary law has a separate character and belongs neither to domestic law nor to international law. Its effectiveness in domestic legal orders is guaranteed by the priority of application. Justifications of its application in domestic legal orders which formerly referred to traditional methods connected with international law – first of all to transformation – have not been accepted.[29] However, also in the first period dominated by the so-called traditionalists a part of the doctrine defended directly the binding character and direct application of the EU law and emphasized that it did not necessitate any special transformation. Secondary law is directly binding and is directly applied in the domestic sphere of Member States being at the same time autonomous *vis-à-vis* domestic law. In fact, this autonomy is not of an absolute character. The two legal orders influence and depend upon each other.[30]

Constitutions of Member States regulate only in an incidental way the application of secondary law. It is the constitutional practice that is the most important and solves fundamental questions.[31] The emergence of a specific provision (art. 91(3)) of the Constitution regulating this issue must be welcomed. According to this provision, law made by an international organisation is applied directly and has priority over statutes when treaty on the establishment of this organisation ratified by Poland provides so.

[29] Secondary law was to be binding in the domestic sphere as transformed law, as article 189(2) of the EC Treaty is to be transformed. As contrasted with transformation of primary law (international agreement) transformation of secondary law is called anticipating transformation, automatic transformation or general transformation (see J. B a r c z: *Między konstytucją a ponadnarodowością. Opcja integracyjna konstytucji RFN* [Between Constitution and Supranationality. Integration Option of the Constitution of the Federal Republic of Germany] (1990), p. 46).

[30] See Ch. T o m u s c h a t: Artikel 24, *op. cit.* 16), p. 56, 57.

[31] See J. B a r c z: *Stosowanie prawa Wspólnot zachodnioeuropejskich w państwach członkowskich. Problemy konstytucyjnoprawne* [Application of the Law of the West-European Communities in Member States. Constitutional Law Issues] (1991), p. 108 ff.

This provision has a special character. It does not regulate – as opposed to art. 91(1) and (2) – application and status of treaties but refers to law made by the international organisation itself. This provision is one of the most fundamental elements of the constitutional act on integration. While art. 90(1) of the Constitution makes it possible to transfer powers of state organs in certain matters to an international organisation, art. 91(3) makes it possible to open domestic legal order for the law of that organisation. What makes a difference between article 91(3) of the Constitution and the norms guaranteeing the effectiveness of international law in domestic legal order is the complex character of the former. What is effected is not only the opening of domestic legal order for law made by a supranational organisation and renunciation of exclusiveness of power in given areas but also actual transfer of powers of state organs to a supranational organisation.

In this context three constitutional problems must be examined – priority of secondary law, possiblity of the examination of its constitutionality by the Constitutional Tribunal and possible application to it of article 193 of the Constitution.

Ad. 1. Primacy of application of secondary law

Article 91(3) of the Constitution rightly speaks about "direct application" of secondary law and "precedence of application" – in cases of conflict with domestic law. The primacy may not concern the rank of norms because domestic and secondary law norms flow from separate legal orders. Consequently, secondary law cannot "abolish", "delete" or "nullify" conflicting domestic norms but has so-called "primacy of application".[32]

On the basis of the constitutional act on integration Poland will open its legal order for the law of the EU, renouncing the exclusive nature of its public authority and providing EU law with primacy of application. This is a good description of the process in question. In cases of conflict of norms, Polish organs will be obliged to apply EU law, which does not mean that the Polish law will lose its validity. Only its scope of application will be narrowed. This aspect is important from the point of view of the dispute about the influence of the European integration upon the sovereignty of Member States. Transfer of powers of state organs in certain matters to a supranational organisation does not result in losing sovereignty with respect to transferred powers, but only the exclusive character of public authority in this respect and leads to the acceptance the application of acts adopted by a foreign power (supranational organisation). Consequently, when norms of a supranational organisation extinct, domestic norms so far contrary to them will be applicable to the full extent, as there will be no longer any element limiting their application.

Drafts of the Constitution were right in speaking about the primacy of the application of secondary law in cases of conflict with **norms of domestic law** (see art. 75(3) of the draft constitution from 19 June 1996). The present wording of article

[32] One can rarely encounter an opinion according to which article 189 of the EC Treaty contains a norm of conflict of laws which "is a true norm determining rank" and which in cases of conflicts would bring about the cancelation of the norm of domestic law. See: *Kommentar zum EWG-Vertrag* (hrsg. von E. G r a b i t z) (1986) (section dealing with article 189 of the EC Treaty).

91(3) of the Constitution, according to which secondary law has primacy in cases of conflict with statutes is not the best. It may only give rise to dispute about the conformity of secondary law with the Constitution, such a dispute having already been solved in the Member States of the EU in favour of the EU law. The scope of jurisdiction of the Constitutional Tribunal in this respect is modest (as will be shown subsequently) and the wording of the provision gives rise to a discussion over problems which all the same will be solved on a different level.

Poland will join the EU on the basis of the constitutional act on integration (possessing special democratic legitimacy). It will have the possibility to influence through the intermediary of its representatives in the EU organs the shape of secondary law made by these organs. Since their adoption acts of secondary law will have to be given – in conformity with the primary law – primacy of application in domestic legal order, also with respect to the Constitution. Its interpretation will be effected only by competent EU organs.

Ad. 2. Jurisdiction of the Constitutional Tribunal to rule on compatibility of secondary law with the Constitution.

This jurisdiction may be considered here in relatively narrow frames. Secondary EU law is neither domestic law ("statute" within the meaning of article 188(1) of the Constitution) nor "legal provisions issued by central state organs" (within the meaning of article 188(3) of the Constitution) nor international law (treaty within the meaning of article 188(1) of the Constitution). The only possibility for their being examined from the point of view of compatibility with the Constitution is connected with the application of article 188(5) of the Constitution dealing with so-called "constitutional complaint". According to article 79(1) of the Constitution, "everyone whose constitutional freedoms or rights have been infringed, shall have the right to appeal to the Constitutional Tribunal for its judgment on the conformity to the Constitution of a statute or another normative act upon which basis a court or organ of public administration has made a final decision on his freedoms or rights or on his obligations specified in the Constitution". The Constitutional Tribunal will have two possibilities. It may consider that EU secondary law consists of "normative acts" within the meaning of article 79(1) of the Constitution and consequently to examine their compatibility with the rights of nationals guaranteed in the Constitution. Such cases emerged before the constitutional courts of the Member States and were accompanied (especially in the 1970s and at the beginning of the 1980s) by a discussion on the necessity of guaranteeing human rights also in the European Communities. In effect it was found that the development of human rights protection in the EC/EU is so unequivocal that it guarantees the necessary level of protection and intervention of constitutional courts was held not to be necessary.[33] If the Polish Constitutional Tri-

[33] See J. B a r c z: "Ochrona praw zasadniczych w ramach Wspólnoty zachodnioeuropejskiej. W sprawie kompetencji Federalnego Trybunału Konstytucyjnego RFN" [Protection of Fundamental Rights in the West-European Community. On the Powers of the Federal Constitutional Court of the Federal Republic of Germany] *Zeszyty Niemcoznawcze* PISM, No. 2 (1989).

bunal chooses this way of interpretation of the term "normative acts", it will have nothing to do but to join other constitutional courts of the Member States.

The second solution is to find that the notion of "normative act" within the meaning of article 79(1) of the Constitution does not refer to the EU secondary law. It would be important also because of the necessity of preserving uniform interpretation of the EU secondary law in the context of article 193 of the Constitution.

Ad. 3. Legal questions addressed to the Constitutional Tribunal.

According to article 193 of the Constitution, each court may address the Constitutional Tribunal with a legal question as to the compatibility of a normative act with the Constitution, ratified international agreements or an act of Parliament, if the answer to this question is necessary for the decision in a case before this court. The EC law is unequivacal on the issue who can rule on the constitutionality of the EU secondary law. It is only the Court of Justice that can give preliminary rulings on the validity and interpretation of acts of the EU institutions.[34] Legal questions will have to be turned by the Polish courts to the Court of Justice in Luxembourg. One should infer that the notion "normative acts" does not cover EU secondary law. In face of the wording of article 91(3) of the Constitution, such an interpretation may be one of the first problems examined by the Constitutional Tribunal after the Polish accession to the European Union.[35]

[34] See article 177 of the EC Treaty.

[35] For example one of the first judgments of the Austrian Constitutional Court connected with the Austrian membership in the EU was connected with this problem – judgment in case B 2300 (9–18 of 11 December 1995).

23 POLISH YEARBOOK
OF INTERNATIONAL LAW
1997-1998
PL ISSN 0554-498X

Codification of the Law of International Responsibility by the International Law Commission: Breach of International Law and its Consequences*

VILENAS VADAPALAS

1. General scope of the Project

The International Law Commission has recently completed the first reading of "Draft Articles on State Responsibility". This document is without any doubt one of the most monumental works of the ILC. By its content and complex issues the Draft Articles on state responsibility could be only compared with the Draft Vienna Convention on the Law of Treaties. Even the most problematic articles are of the same origin and complexity: *jus cogens* in the Vienna Convention on the Law of Treaties (famous article 53), and *the international crimes of state* in the Draft articles on state responsibility (articles 19, 40 (paragraph 3), 52 and 53).

Certainly, this article could not cover all questions arising from codification of the international responsibility of States in the ILC Draft Articles. Drafting of this international code of state responsibility took over 40 years. During this time four Special Rapporteurs: Professor Francisco V. Garcia Amador y Rodriguez, Judge Roberto Ago, Professors Willem Riphagen and Gaetano Arangio-Ruiz were first drafters of this impressive code and thus contributed considerably to the preparation of the Draft Articles on state responsibility.

At its first session, in 1949, the Commission selected state responsibility among the most important topics which it considered suitable for codification. The Commission, at its seventh session in 1955, decided to begin the study of state responsibility and appointed Francisco V. Garcia Amador y Rodriguez as Special Rapporteur for the topic. From 1956 to 1961, the Special Rapporteur presented six successive reports, dealing with the question of responsibility for injuries to the persons or property of aliens.[1]

---

* The author expresses his gratitude to Professor Jochen Abr. Frowein, Director of the Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, and to Mr. Joachim Schwietzke, Library Director at the Max-Planck-Institut for a possibility to prepare this article at the Library of the Institute.

[1] See *Yearbook of the International Law* Commission (hereinafter – *YILC*) 1969, vol. II, p. 229; F.V. Garcia Amadory y Rodrigues: *Recent Codification of the Law of State Responsibility for Injuries to Aliens* (1974); F.V. Garcia Amador y Rodrigues: *The Changing Law of International Claims* (1984), vol. I–II; C.F. Amerasinghe: *State Responsibility for Injuries to Aliens* (1967); R.B. Lillich (ed.): *International Law of State Responsibility for Injuries to Aliens* (1983).

Nevertheless, in 1962, the Commission decided to change the scope and approach of its work on state responsibility. At that time of the Cold War it was very difficult to make universal codification of state responsibility for injuries to aliens, especially for injuries caused by deprivation of foreign property. This traditional area is still a part of non-codified customary general international law. Certainly, first Special Rapporteur Francisco V. Garcia Amador y Rodriguez finally has not taken part in *travaux préparatoires* of present Draft articles. However, his conclusions were taken into consideration in subsequent stages of drafting. On the other hand, main principles laid down in the ILC Draft Articles are applicable to responsibility for injuries to aliens (e.g., article 22 "Exhaustion of local remedies", article 42 "Reparation", etc.). Nevertheless, special rules of responsibility for injuries to aliens are of such practical importance that it seems that this topic may be still a subject of future codification works. The very rich practice of the Iran-USA claims tribunal, even taken alone, could show such necessity. Last year the International Law Commission started to deal with other traditional area of international responsibility, namely, diplomatic protection, which is closely related with the international responsibility for injuries to aliens.[2]

From 1969 to 1979, the Commission considered famous eight reports on state responsibility which have been prepared by Special Rapporteur Roberto Ago and on that basis drafted Part One ("Origin of international responsibility") of the Draft Articles.[3] From 1980 to 1986, the Commission considered reports of Special Rapporteur Willem Riphagen, and from 1988 to 1996, reports of Gaetano Arangio-Ruiz on "The content, forms and degrees of international responsibility" (Part Two) and "Settlement of disputes" (Part Three). It is expected that the ILC will complete its work on state responsibility and submit the conclusions and recommendations to the General Assembly in 2001. Without speaking about the final results, it should be noted that the work of the Commission on state responsibility gave rise to numerous comments and impressive literature on the topic.[4]

As it was noted before, the Draft Articles consist of three parts. The first one, "Origin of international responsibility", is concerned with determining the grounds and circumstances on which a state may be held to have committed an internationally

---

[2] See *Draft Report of the ILC on the Work of Its Forty-ninth Session.* Chapter VIII "Diplomatic Protection". A/CN.4/L. 548 (16 July 1997).

[3] See *YILC* 1980–1986 and 1990 (volume II, part I); R. A g o: "Scritti sulla responsibilitŕ internazionale degli Stati, T. I, II–1, II–2", *Facolta di Giurisprudenza dell'Universitŕ di Camerino*, 1979, 1986.

[4] The following list of literature is, in no way, exhaustive: I. B r o w n l i e: *System of the Law of Nations, State Responsibility* (Part I) (1983); J.A. F r o w e i n: "Reactions by Not Directly Affected States to Breaches of Public International Law" 248 *RCADI* (1994), p. 345–438; R.B. L i l l i c h: "The Current Status of the Law of State Responsibility for Injuries to Aliens" in: R.B. L i l l i c h (ed.): *International Law of State Responsibility for Injuries to Aliens* (1983); F. M a l e k i a n: *International Criminal Responsibility of States* (1985); *La responsabilité dans le système international/Colloque du Mans de la Société Française pour le Droit International (1992); Responsibility of States/Thesaurus Acroasium of the Institute of Public International Law and International Relations of Thessaloniki.* Vol. XX (1993); M. S p i n e d i: *Les crimes internationaux de l'Etat dans les travaux de codification de la responsabilité des Etats entrepris par les Nations Unies* (1984); M. S p i n e d i, B. S i m m a (ed.): *United Nations Codification of State Responsibility* (1987); J. W o l f: *Die Haftung der Staaten für Privatpersonen nach Völkerrecht* (1997); K. Z e m a n e k, J. S a l m o n: *Responsabilité internationale* (1987).

wrongful act which itself is a factual source of international responsibility. The second, "Content, forms and degrees of international responsibility", is aimed to determine the consequences that an internationally wrongful act of a state may have under international law in different cases: cessation of wrongful conduct, reparative or punitive damages, satisfaction, counter-measures (sanctions), etc. The third, "Settlement of disputes" would establish a machinery of the settlement of interstate disputes on responsibility and would consist of such steps and means of settlement as negotiation, good offices and mediation, conciliation, and arbitration.

It is evident that some aspects of international responsibility could not and finally are not covered by the Draft Articles, namely, the Draft Articles do not contain any provision on the acquiescence and prescription (limitation) in responsibility claims, as well as on conclusion of agreement on the issues of responsibility between states concerned. The absence of provisions concerning prescription may be justified by the fact that general international law does not contain any exact time limits for prescription, except if it is established by international treaty binding the parties to the dispute on responsibility. However, the acquiescence exists and it is not covered by notion of consent given state A to state B for non-respect in future of an obligation with regard to state A (article 29 of the Draft Articles).[5] As for the agreement between a victim state and a state which has committed a wrongful act aimed to resolve the issues concerning the consequences of this act (i.e. reparation, restitution, satisfaction, etc.), the absence of relevant provisions in the Draft Articles is due probably to the principle of the free choice of parties to such agreement as to its form and content, provided that the *jus cogens* rule finally was respected.

The purpose of the Draft Articles is not to define the rules imposing on States "primary" obligations whose breach can be a source of responsibility, for example, obligations to respect human rights, diplomatic immunities, free trade regime, etc. On the contrary, according to the Commission, in preparing this draft the ILC "is undertaking to define other rules which, in contradistinction to the primary rules, may be described as 'secondary', in as much as they are aimed at determining the legal consequences of failure to fulfill obligations established by the 'primary' rules".[6] There also should be made a short internal distinction between three categories of rules codified in each of three parts of the Draft Articles. General formula could be defined as follows: the draft articles are dealing the rules describing an internation-

---

[5] Article 29.

1. The consent validly given by a State to the commission by another State of a specified act not in conformity with an obligation of the latter State towards the former State precludes the wrongfulness of the act in relation to that State to the extent that the act remains within the limits of that consent.

2. Paragraph 1 does not apply if the obligation arises out of a peremptory norm of general international law. For the purposes of the present articles, 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.

[6] Report of the ILC to the General Assembly on the work of its XXXI session. *YILC* (1979), vol. II, Part Two, p. 88.

ally wrongful act and its constitutive elements (First Part) which gives rise to its consequences: reparation, satisfaction, counter-measures, etc. governed by the rules of the Second Part. The procedural rules of the Third Part are governing the settlement of disputes on existence in a concrete situation of an internationally wrongful act and, consequently, on the consequences of this act are of different nature: they are not in their true sense the rules of international responsibility. In general terms, negotiation, conciliation or arbitration *per se* are always the same means of settlement of disputes notwithstanding the issue of a concrete dispute: either it concerns an interpretation of treaty, or maritime delimitation, or breach of international obligation, etc. It seems that in general international law there is no "special" means which could be established for settlement of disputes on responsibility. Nevertheless, there are some special procedural aspects of responsibility concerning, in particular, the interim and immediate counter-measures which could be taken by a victim state in some exceptional circumstances and which are aimed to protect its rights against imminent danger, as well as the particularities concerning the resort by a victim state to counter-measures during negotiation, conciliation, arbitration, adjudication or any other procedure of settlement. Another specific procedural area of state responsibility is related, with the fact-finding of wrongful act, burden of proof, presumptions, etc. Bearing in mind that in most cases an internationally wrongful act is committed by a state on its own territory, it seems that the ILC has taken an appropriate decision to include into the Draft Articles special provisions on fact-finding.[7] In the area of implementation of state responsibility it should be also pointed out that from a principle of state sovereignty follows a principle that the responsibility of a state cannot be presumed. At the same time, there are some other presumptions dealing with state responsibility. For example, it should be presumed that a conduct of a state organ is attributed to that state: *a priori* the organs of a state are acting on its behalf. On the contrary, the acts or omissions of private people are not attributed to the state: private people are acting on their own behalf.

One may note some differences in legal techniques used by the Commission in different parts of the Draft Articles. The Articles of First Part seem to be formulated in a more laconic and axiomatic way which is similar to legal techniques used by the Commission in drafting of the Vienna Convention on the law of treaties; on the other hand, some articles of Second and Third Parts (in particular, article 40 "Meaning of injured state", article 43 "Restitution in kind", article 45 "Satisfaction", article 57

[7] Article 57–244/ Task of the Conciliation Commission (extract)

1. The task of the Conciliation Commission shall be to elucidate the questions in dispute, to collect with that object all necessary information by means of inquiry or otherwise and to endeavour to bring the parties to the dispute to a settlement.

2. To that end, the parties shall provide the Commission with a statement of their position regarding the dispute and of the facts upon which that position is based. In addition, they shall provide the Commission with any further information or evidence as the Commission may request and shall assist the Commission in any independent fact-finding it may wish to undertake, **including fact-finding within the territory of any party to the dispute**, except where exceptional reasons make this impractical. In that event, that party shall give the Commission an explanation of those exceptional reasons. (emphasis added)

"Task of the Conciliation Commission") are constructed rather in an explanatory way. Certainly, the First Part of Draft Articles concerning the breaches of international law are complex, but, nevertheless, it is less complex and "dangerous" to codify than the consequences of this breach in the Second Part of the Draft Articles.

Finally, it should be pointed out, that the Draft Articles contain two essentially new concepts of international responsibility. Firstly, the Draft Articles confirmed the concept of an international crime of a state, i.e. of a breach of exceptional gravity, and thus a special regime of responsibility was established. Secondly, the validity of peremptory norms (*jus cogens*) was extended from the law of treaties to the law of state responsibility.

2. Origin of International Responsibility

The main principle of international responsibility of States for internationally wrongful acts is embodied in first article of the Draft Articles.[8] Under this article there is only one origin of state responsibility, its "source" or "*le fait générateur*"[9]: an internationally wrongful act committed by this state. It stresses that *every* internationally wrongful act of a state entails its international responsibility. Article 1 enunciates the fundamental principle attaching international responsibility to every wrongful, under international law, act or omission of a state. The ILC has defined the meaning of "international responsibility of a state" as a new legal situation which was created by an internationally wrongful act, i.e. as a relationship between a state which has committed such an act and an injured state or, as a case may be, the injured states. This legal relationship consists of new rights and obligations of parties to this relationship, for example, an obligation of a "guilty" state to make reparation and a right of injured state (states) to resort to counter-measures.[10]

This, however, does not mean that only an internationally wrongful act could give rise to the duty to provide reparation (compensation) which usually is considered as a main form of responsibility in international law. Harm, giving rise to duty to make reparation, may be caused in different situations. On the one hand, it may be caused by an internationally wrongful act, on the other hand, harm may be caused by certain activities usually related with the risk of "transboundary harm" (pollution, etc.) which *per se* are not prohibited by international law but which, nevertheless,

---

[8] Article 1. Responsibility of a State for its internationally wrongful acts:
Every internationally wrongful act of a State entails the international responsibility of that State.

[9] P.-M. D u p u y: "Le fait générateur de la responsabilité internationale des Etats", 188 *RCADI* (1984), p. 9–134.

[10] In its report to General Assembly, the ILC pointed out, that "by using the term "international responsibility" in article 1, the Commission intended to cover every kind of new relations which may arise, in international law, from the internationally wrongful act of a state, whether such relations are limited to the offending State or extend also to other subjects of international law, and whether they are centred on the duty of the guilty State to restore the injured State in its rights and repair the damage caused, or whether they also give the injured State itself or other subjects of international law the rights to impose on the offending State a sanction admitted by international law". *YILC* (1973), vol. II, p. 175.

entail the duty of compensation of injuries caused by such activities. In this area, at least, a duty to prevent harm which can be really foreseen and to notify the risks of harm is generally recognised. This situation will be described and corresponding rules will be codified by the ILC in an other draft which is entitled as the "Draft articles on international liability for injurious consequences arising out of acts not prohibited by international law".[11] At the same time, one may point out that when harm is caused by activity which is prohibited, it entails "traditional" responsibility. According to the Report of the Working group of the ILC on this topic, "to the extent that existing or future rules of international law, whether conventional or customary in origin, prohibit certain conduct or consequences (e.g. in the field of the environment), those rules will operate within the field of state responsibility (...)." Moreover, when harm which could be prevented was caused or even a risk of serious harm was not notified, such failure to act is an omission which constitutes the internationally wrongful act and, consequently, entails "traditional" responsibility including, as a case may be, even resort to counter-measures. It seems that "the liability in international law" is limited only to situations when transboundary harm was caused notwithstanding the fact that all necessary precautions were taken to avoid such harm. In other words, an obligation of due diligence or due care in such hazardous activity was respected in such situations. According to the Commission, the principles applicable in this situation are "that, on the one hand, States are not precluded from carrying out activities not prohibited by international law, notwithstanding that there may be a risk of transboundary harm arising from those activities, but that, on the other hand, their freedom of action in that regard is not unlimited, and in particular may give rise to liability for compensation or other relief in accordance with the draft articles notwithstanding the continued characterisation of the acts in question as lawful. Of particular significance is the principle that the victim of transboundary harm should not be left to bear the entire loss."[12]

The main principle that every internationally wrongful act of a state entails the international responsibility of that state (article 1) should be combined with the requirement that this act is committed and, consequently, international responsibility of a state is engaged only when all constituent elements of such an act are present *in corpore*. In other words, there should be the conditions required to establish the existence of an internationally wrongful act. Article 3 of the Draft Articles indicates in general terms the conditions which must be fulfilled for there to be an internationally wrongful act of a state: there is an internationally wrongful act of a state when con-

[11] See: *Report of the ILC on the work of its 47th session*. U.N. doc. A/50/10, p. 178–182 and 23–327. "The present topic is concerned with a different issue from that of responsibility. It consists essentially of two elements. The first element is that of the prevention of transboundary harm arising from acts not prohibited by international law (in other words prevention of certain harmful consequences outside the field of State responsibility). The second element concerns the eventual distribution of losses arising from transboundary harm occurring in the course of performance of such acts or activities. The first element of the draft articles covers prevention in a broad sense, including notification of risks of harm, whether these risks are inherent in the operation of the activity or arise, or are appreciated as arising, at some later stage." *Ibid.*, p. 235.

[12] *Ibid.*, p. 236.

duct is attributable (imputable) to the state under international law (the "subjective" element) and that conduct constitutes a breach of international obligation of that state (the "objective" element).[13]

Article 3 of the Draft Articles are laconic and precise. To indicate that an internationally wrongful act was committed it is enough to establish that a breach of international responsibility of a state was made by organs or agents of this state. *Ex contrario*, there is no state responsibility for acts or omissions of private people, whether natural or juridical, provided that the state itself was not involved in such acts or omissions by internationally wrongful act or omissions of its own organs.[14]

The element of fault is not included into the constituent elements of internationally wrongful act under article 3 of the Draft. In general, the problem of fault is avoided in the Draft Articles, as well as in the reports of Special Rapporteur Roberto Ago and comments made by the Commission under the article drafted by Special Rapporteur. Draft Articles are based on the concept of elements of international wrongful act as elaborated by Dionisio Anzilotti and developed by Roberto Ago long before the Draft articles.[15] The main principle of this doctrine is that a breach of international obligation should be attributed to a state without any necessity to find any intent of negligence on the part of the state or its organs. In fact, "fault" is a category of moral and psychological nature which means that an author of unlawful conduct realises or, at least, should realise the unlawful or harmful character of his acts or omissions or/and their harmful consequences. If it is so, this category is hardly applicable to jurisdical people even in domestic law, and even less to international legal persons of the state. People acting on behalf of the state may be guilty or not under domestic or even international law, but this is without any relevance to state responsibility. Of course, one may suppose that in the circumstances such as *force majeure and fortuitous event* (article 31) and *distress* (article 32)[16] there is not any *culpa*

[13] Article 3. Elements of an internationally wrongful act of a State

There is an internationally wrongful act of a State when:

a. conduct consisting of an action or omission is attributable to the State under international law; and

b. that conduct constitutes a breach of an international obligation of the State.

See also commentary of the ILC to this article. – *YILC* (1973), vol. II, p. 179–184.

[14] This rule is embodied in article 11 of the Draft Articles:

Article 11. Conduct of people not acting on behalf of the State (extract)

1. The conduct of a person or a group of people not acting on behalf of the State shall not be considered as an act of the State under international law.

2. Paragraph 1 is without prejudice to the attribution to the State of any other conduct which is related to that of the people or groups of people referred to in that paragraph and which is to be considered as an act of the State (...).

[15] D. A n z i l o t t i: *Cours de droit international.* I vol. (1929); R. A g o: "Le délit international", 68 *RCADI* (1939).

[16] Article 31. *Force majeure* and fortuitous event

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act was due to an irresistible force or to an unforeseen external event beyond its control which made it materially impossible for the State to act in conformity with that obligation or to know that its conduct was not in conformity with that obligation.

2. Paragraph 1 shall not apply if the State in question has contributed to the occurrence of the situation of material impossibility.

levissima of a state or its organs. But here it is enough to note the fact that according to well-established state practice it is considered that in these circumstances the conduct of a state is not wrongful and, consequently, that a state does not bear international responsibility. In such circumstances one may invoke either absence of culpability, or refer to the general principle of law *ad impossibile nemo tenetur*, but all this finally would be nothing more than purely theoretical considerations. It should be added too, that transposition of the requirement of culpability inevitably presupposes application of presumption of innocence: the state is a legal person possessing sovereignty. However, it is very difficult to make the conclusion that there is a uniform practice of international courts and tribunals concerning burden of proof in state responsibility cases. This is a "case by case" practice.

All this does not mean that the element of fault is absolutely irrelevant in the law of the international responsibility of States. A fault of the injured state or its national could be regarded as a circumstance extenuating international responsibility. Article 42 paragraph 2 provides that in the determination of reparation, account shall be taken of the negligence or wilful act or omission of the injured state or a national of that state on whose behalf the claim is brought which contributed to the damage.

In the Chapter V of Draft Articles entitled "Circumstances precluding wrongfulness" special attention should be given to article 33 "state of necessity".[17] Under this article, a state of necessity should justify an act which otherwise would be unlawful and would entail international responsibility. Article 33 is based on the assumption that the category of a state of necessity (emergency) is a category of law of general and universal character which could not be ignored. *Necessitas facit licitum quod alias non licitum est* – necessity makes lawful that otherwise would be unlawful, says a principle of Roman law. Nevertheless, one may find in Roman law also that *necessitas vincit legem; legum vincula irridet* – necessity replaces a statute; it laughs at a statute. Certainly, it does not mean that a state of necessity could not be codified, except the

---

Article 32. Distress

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the conduct which constitutes the act of that State had no other means, in a situation of extreme distress, of saving his life or that of people entrusted to his care.

2. Paragraph 1 shall not apply if the State in question has contributed to the occurrence of the situation of extreme distress or if the conduct in question was likely to create a comparable or greater peril.

[17] Article 33. State of necessity

1. A state of necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act of that State not in conformity with an international obligation of the State unless:

a. the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril; and

b. the act did not seriously impair an essential interest of the State towards which the obligation existed.

2. In any case, a state of necessity may not be invoked by a State as a ground for precluding wrongfulness:

a. if the international obligation with which the act of the State is not in conformity arises out of a peremptory norm of general international law; or

b. if the international obligation with which the act of the State is not in conformity is laid down by a treaty which, explicitly or implicitly, excludes the possibility of invoking the state of necessity with respect to that obligation; or

c. if the State in question has contributed to the occurrence of the state of necessity.

cases of necessity are a matter of compulsory adjudication or other compulsory means of settlement or these cases of necessity are clearly defined in a special treaty binding on parties to the dispute. Some comments made by States during the 1930 League of Nations Codification Conference and recently with respect to Draft Article 33 may prove the absence of *opinio juris* on the acceptance of a category of a state of necessity in general international law.[18] However, one can not ignore situations where the States, by force of circumstances of exceptional gravity or danger, are not respecting their international obligations. Article 33 establishes for these situations several safeguards, restrictions and limits such as an *ultima ratio* character of the measures taken; a requirement that only an essential interest of an acting state to be protected, but not an essential interest of a victim state to be impaired; prohibition of non-respect of obligations arising out of *jus cogens* rules, etc. Moreover, article 33 is constructed in a "negative" manner which gives possibility to invoke necessity only in exceptional circumstances. One shall also take into account the provisions of article 35 providing for the possibility of compensation in all circumstances precluding wrongfulness (exception made only in respect to resort to legitimate counter-measures) specified in the Draft Articles.[19] Finally, the Draft Articles should establish a machinery of compulsory settlement of responsibility disputes and therefore should cover the disputes on eventual "justification" by the extreme necessity. It may justify such "necessity of necessity".

There should be also stressed that, as a matter of principle, under the Draft Articles the rules of domestic law are not relevant for the determination whether the conduct of a state is wrongful or not, as well as for the determination of the consequences which this conduct should entail under international law. There are three provisions establishing general principles in the Draft Articles on this matter.

Firstly, the lawfulness or wrongfulness of an act or omission of a state is determined only by the rules of international law in force; legal characterisation of conduct of a state under international law is not affected by legal characterisation of the same conduct under domestic law (article 4).[20] It is interesting to note that *vice versa* is not necessarily a correct assumption. For example, it could happen in the monistic internal legal system of a state, that the fact that the activity of its organs is unlawful under international law makes it *per se* unlawful under domestic law, too. It would be a perfect case of the rule of law.

Secondly, this concerns also the traditional rule of international responsibility which provides that a state bears responsibility for injuries caused to aliens. The state

---

[18] See: *Conference for the Codification of International Law* (1930), vol. II, p. 633; U.N. doc. A/CN.4/342, p. 5, A/CN.4/342/Add. 2, p. 3. See also arbitral award in Armstrong Cork Company case. RIAA, vol. XIV, p. 163.

[19] Article 35. Reservation as to compensation for damage

Preclusion of the wrongfulness of an act of a State by virtue of the provisions of articles 29, 31, 32 or 33 does not prejudge any question that may arise in regard to compensation for damage caused by that act.

[20] Article 4. Characterization of an act of a State as internationally wrongful

An act of a State may only be characterised as internationally wrongful by international law. Such characterisation cannot be affected by the characterisation of the same act as lawful by internal law.

may resort to diplomatic protection only provided that the injured people have exhausted local remedies available to them under a domestic state which has caused injuries (article 22)[21]. It is evident, that local remedies are established by "local" or domestic law. Nevertheless, the determination of whether the local remedies were exhausted or not, finally belongs to public international law. When, in particular, the domestic legal remedies are not effective or the delays of local procedures are unreasonably long, the requirement of local remedies does not apply under international law. This principle is confirmed, for example, in article 26 of the European Convention on Human Rights according to which the local remedies should be exhausted "*according to the generally recognised rules of international law*".[22]

Thirdly, a state which has committed an internationally wrongful act cannot avoid to fulfill its duty to provide reparation or to pay compensation by referring to the provisions of its domestic law according to which reparation or compensation for such cases are not provided or an amount of compensation is much lower. According to article 42, paragraph 4, of the Draft Articles "the state which has committed the internationally wrongful act may not invoke the provisions of its internal law as justification for the failure to provide full reparation." It does not mean that an amount of compensation due to pay under domestic law might not be taken into consideration for the purposes of awarding compensation under international law.

3. International Crimes of State

It seems that a category of international crimes of states is a well-established category of public international law. The analysis of relevant international practice and doctrine made in 1976 by Roberto Ago in his Fifth Report on State Responsibility shows that the most dangerous and grave breaches of certain international obligations: agression, genocide, etc., can be no longer considered as "ordinary" international wrongful acts. Nevertheless, a description of consequences of international state crimes was essentially a new task in 1976 when Special Rapporteur Roberto Ago drafted famous article 19 of the Draft Articles[23] and is still relatively new nowa-

[21] Article 22. Exhaustion of local remedies

When the conduct of a State has created a situation not in conformity with the result required of it by an international obligation concerning the treatment to be accorded to aliens, whether natural or juridical people, but the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State, there is a breach of the obligation only if the aliens concerned have exhausted the effective local remedies available to them without obtaining the treatment called for by the obligation or, where that is not possible, an equivalent treatment.

[22] Article 26 (European Convention on Human Rights)

The Commission may only deal with the matter after all domestic remedies have been exhausted, **according to the generally recognised rules of international law**, and within a period of six months from the date on which the final decision was taken. (emphasis added)

[23] Originally, in the Fifth report of Special Rapporteur R. Ago It was article 18 *YILC* 1976, vol. II, Part One, p. 54. Final text of article 19 reads as follows:

Article 19. International crimes and international delicts

1. An act of a State which constitutes a breach of an international obligation is an internationally wrongful act, regardless of the subject-matter of the obligation breached.

days. Recognition of the special regime of international crime means that special legal consequences should be established in addition to traditional consequences which international law attaches to breaches of state obligations. The law of international responsibility of States was traditionally based on bilateral and compensatory consequences (reparation *lato sensu*) accompanied, if necessary, by resort to reprisals by the injured state which has unsuccessfully claimed reparation.

Draft Article 19, paragraph 2, describes an international crime of a state as "an internationally wrongful act which results from the breach by a state of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole". Under paragraph 3, there should be "a serious breach" of one of four categories of the most important international obligations, i.e. of an international obligations of essential importance for the maintenance of international peace and security (subparagraph a), for safeguarding the right of self-determination of people (subparagraph b), for safeguarding the human being (subparagraph c), for the safeguarding and preservation of the human environment (subparagraph d). All these obligations are obligations imposed by the rules of *jus cogens,* and therefore their grave breaches should concern all States. According to the judgment of the International Court of Justice in the case of *Barcelona Traction, Light and Power Company, Limited* (1970), these obligations are obligations *erga omnes*. i.e. obligations with respect to all members of the international community.[24] However, it does not mean that every breach of these obligations constitutes an international crime. Special Rapporteur Roberto Ago wrote in this respect that the infringements of such obligations "should not be included in the category of the internationally wrongful acts which are more severely treated unless the infringement is characterized by a certain degree of gravity."[25] Therefore, article 19, paragraph 3, refers only to the most grave and serious breaches of the most important international obligations such as agression, colonial domination, slavery, genocide, apartheid, massive pollution of the atmosphere or

---

2. An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole constitutes an international crime.

3. Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, inter alia, from:

a. a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;

b. a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of people, such as that prohibiting the establishment or maintenance by force of colonial domination;

c. a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid;

d. a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas.

4. Any internationally wrongful act which is not an international crime in accordance with paragraph 2 constitutes an international delict.

[24] *ICJ Reports* (1970), p. 32.

[25] *YILC* (1976), vol. II, Part One, p. 53.

of the seas. The wording "an international crime may result, *inter alia*, from (...)" means that article 19 does not contain any exhaustive list of international crimes. It gives only the criteria for establishing the existence of an international crime in each particular case. Special Rapporteur Roberto Ago has noted also that "the finding of the existence of an 'international crime' should be made, in a specific case, by an international instance".[26] However, it seems that until now the Commission has not yet overcome all difficulties in establishing a mechanism of finding the existence of an international crime. Finally, the Commission decided to confine itself to the mechanisms for dispute settlement in Part Three. The options of negotiations, conciliation, arbitration or reference to the International Court of Justice under its existing Statute would be available to the state accused of the crime. At the same time, the Draft Article 39 "Relationship to the Charter of the United Nations" which refers to the provisions and procedures of the Charter of the United Nations relating to the maintenance of international peace and security shall apply.[27] It could mean, for example, that under article 39 of the Charter and according to articles 2 and 4 of the Definition of Aggression (Resolution of the General Assembly 3314(XXIX) of 14 December 1974) the Security Council is entitled to determine that an armed attack or other act of use of force constitutes aggression. The role of the General Assembly should be also stressed in this context. Professor J.A. Frowein writes in this regard:

"The General Assembly of the United Nations may discuss any sort of reaction, including economic sanctions by which one state reacts to what it considers to be a violation of any obligation *erga omnes*. Whenever it would be certain that the reacting state cannot find any support within the United Nations General Assembly this may have a limiting effect on its decision to take measures."[28]

One may doubt whether traditional options of negotiation, conciliation and arbitration, even combined with the procedure of the Charter of the United Nations relating to the maintenance of international peace and security could resolve all issues of multilateral dispute in cases of international crimes. Some members of the ILC have expressed their opinion that the only appropriate body to fulfill this task was the International Court of Justice, a principal organ of the United Nations, to whose Statute virtually all states are parties, and in whose proceedings other states could intervene. This opinion was based on the analogy between settlement of disputes related with the international crimes and the disputes concerning *jus cogens* under article 66, subparagraph (a) of the Vienna Convention on the Law of Treaties.[29]

After article 19 was introduced into the Draft Articles in 1976, and later, in 1996, when the Chapter IV of the Draft Articles "International crimes" concerning

---

[26] *Ibid.*

[27] Article 39. Relationship to the Charter of the United Nations:

The legal consequences of an internationally wrongful act of a State set out in the provisions of this Part are subject, as appropriate, to the provisions and procedure of the Charter of the United Nations relating to the maintenance of international peace and security.

[28] J.A. F r o w e i n: "Reactions by Not Directly Affected States to Breaches of Public International Law", 248 *RCADI* (1994), p. 424.

[29] See *Report of the ILC on the work of its 48th session*. U.N. doc. A/51/10, p. 166–167.

the consequences of international crimes was drafted, it seems that two regimes of state responsibility were recognised: on the one hand, the regime of responsibility for the "ordinary" wrongful acts or, using the terms of article 19, "delicts", and on the other hand, that of international crimes of States. The first one is rather traditional, the second one is sometimes called to be a "criminal" regime taken from penal law and thus unacceptable with regard to sovereign legal bodies of States. It is interesting to point out that the International Law Commission in its report of 1996 to the General Assembly noted that alternative phrases such as "an internationally wrongful act of a serious nature" or "an exceptionally serious wrongful act" could be substituted for the term "crime", thus, *inter alia.* "avoiding the penal implication of the term."[30]

However, it seems that a punitive element is not very alien to state responsibility in international law. For example, traditional punitive damages are codified in the Draft Articles and are applicable irrespectively of the origin of state responsibility: a delict or an international crime. Punitive damages are included into article 45 "Satisfaction" which stipulates that in cases of gross infringement of the rights of the injured state satisfaction may take the form of damages reflecting the gravity of the infringement.[31] One may invoke here the commentary of the ILC under article 30 "Countermeasures" concerning the purpose of countermeasures:

"The countermeasures with which this article is concerned are measures the object of which is, by definition, to inflict punishment or to secure performance – measures which, under different conditions, would infringe a valid and subjective right of the subject against which the measures are applied. This general feature serves to distinguish the application of these countermeasures, sometimes referred to as 'sanctions' from mere exercise of the right to obtain reparation for damage."[32]

The measures described by the ILC were also known as "reprisals" which, by definition, should have and have indeed a punitive nature.

The most important problem concerning the international crimes of States is not to define an international crime, but rather to establish its legal consequences. The main starting point here is the determination of the injured state. According to article

[30] U.N. doc. A/51/10, p. 141.

[31] Article 45. Satisfaction

1. The injured State is entitled to obtain from the State which has committed an internationally wrongful act satisfaction for the damage, in particular moral damage, caused by that act, if and to the extent necessary to provide full reparation.

2. Satisfaction may take the form of one or more of the following:

a. an apology;

b. nominal damages;

c. **in cases of gross infringement of the rights of the injured State, damages reflecting the gravity of the infringement;**

d. in cases where the internationally wrongful act arose from the serious misconduct of officials or from criminal conduct of officials or private parties, disciplinary action against, or punishment of, those responsible.

3. The right of the injured State to obtain satisfaction does not justify demands which would impair the dignity of the State which has committed the internationally wrongful act. (emphasis added)

[32] *YILC* (1979), vol II, Part Two, p. 116.

40, paragraph 1, "injured state" means any state a right of which is infringed by the act of another state, if that act constitutes, in accordance with Part One, an internationally wrongful act of that state". Paragraph 5 of this article *expressis verbis* states that "injured state means, if the internationally wrongful act constitutes an international crime, all other states". Therefore, as a matter of principle, every state has its own legal interest in a situation which was created by an international crime. It means, that a state which is not directly injured by international crime is entitled, at least, to claim the cessation of an act constituting an international crime.[33] In this respect, each state could be regarded as a potential claimant in a dispute concerning an international crime. However, the consequences of international crime are not limited to such "procedural" possibility and comprise restitution in kind, satisfaction and even resort to countermeasures, etc. In this respect several members of the International Law Commission have expressed their view that from the fact that a crime was a breach of an *erga omnes* obligation does not follow the conclusion that all States had the same entitlements *vis-à-vis* the state which has committed an international crime. It seems thus that further elaboration and distinction of possible different legal consequences of international crimes should be made.

Chapter IV of the Draft Article "International Crimes" describes the consequences of an international crime. The main idea of this legal construction is that an international crime entails legal consequences additional to those of any other internationally wrongful act (article 51).[34] However, these consequences are of general character without any distinction between the rights of directly or indirectly injured States. Draft Article 52 provides that where an internationally wrongful act of a state is an international crime, an injured State's entitlement to obtain restitution in kind or satisfaction is not subject to certain limitations established in Draft Articles for "ordinary" internationally wrongful acts, i.e. for the delicts (articles 43 (c) and (d) and 45, paragraph 3). It means that in this situation the re-establishment of the situation which existed before the wrongful act was committed could "involve a burden out of all proportion to the benefit which the injured state would gain from obtaining restitution in kind instead of compensation" or "seriously jeopardize the political independence or economic stability of the state which has committed the internationally wrongful act, whereas the injured state would not be similarly affected if it did not obtain restitution in kind" (article 43 (c) and (d)). It would mean also that the right of the injured state to obtain satisfaction could "justify demands which would impair the dignity of the state which has committed the internationally wrongful act" (art. 45, paragraph 3). One could hardly imagine how this special and unlimited legal regime

---

[33] Professor J.A. Frowein wrote in this respect: "Many of the supporters of the concept of international crimes agree that all other States, even if not directly injured, have, under international customary law, the right to require from the State author of the breach the cessation of the wrongful act." J.A. F r o w e i n, *op. cit.*, p. 413.

[34] Article 51. Consequences of an international crime

An international crime entails all the legal consequences of any other internationally wrongful act and, in addition, such further consequences as are set out in Articles 52 and 53.

would be applicable in practice. On the contrary, it seems that article 53 "Obligations for all States" does not make major difficulties. It provides for the obligations of all States: (a) not to recognize as lawful the situation created by the crime; (b) not to render aid or assistance to the state which has committed the crime in maintaining the situation so created; (c) to cooperate with other States in carrying out these obligations; and (d) to cooperate with other States in the application of measures designed to eliminate the consequences of the crime.

4. *Jus cogens* in the ILC Draft Articles

What role could *jus cogens* play in the law of international responsibility?

On the one hand, article 53 "Treaties conflicting with a peremptory norm of general international law" of the Vienna convention on the law of treaties is dealing exclusively with the nullity of a treaty which conflicts with the *jus cogens*: [35] "a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law". On the other hand, the same article defines a peremptory norm as "a norm from which no derogation is permitted". Would it mean in principle that not only a derogation which was made by way of conclusion of a treaty, but all other possible derogation is permitted? The ILC Draft Articles give us four situations of such nature.

First situation deals with a consent of the injured state. Article 29, paragraph 1, provides that a consent of an injured state precludes wrongfulness of the act of another state which otherwise would be wrongful. However, according to paragraph 2 this provision does not apply if a consent was given to non-respect of a peremptory norm of general international law.[36] The Commission has treated such consent as a kind of "special agreement" between the two directly interested States. Here the Commission concluded:

> "The rules of *jus cogens* are rules whose applicability to some States cannot be avoided by means of special agreements. In other words, by their very nature they defeat any attempt by two States to replace them in their relations by other rules having a different content."[37]

Nevertheless, the situation of "consent" remains in traditional limits of nullity of agreements or treaties which conflict with *jus cogens*. The remaining three situations: a state of necessity (article 33), restitution in kind (article 43) and prohibited countermeasures (article 50) are of absolutely different nature.

---

[35] Vienna Convention on the Law of Treaties

Article 53. Treaties conflicting with a peremptory norm of general international law (*jus cogens*):

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, 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 only by a subsequent norm of general international law having the same character.

[36] See footnote 5.

[37] *YILC* (1979), vol. II, Part Two, p. 114.

The second situation is a state of necessity which, according to article 33, paragraph 1, may preclude the wrongfulness of an act committed when an act committed by a state provided that this act was the only means of safeguarding an essential interest of this state against a grave and imminent peril. In any case, according to paragraph 2, a state of necessity does not justify an act of non-respect of obligation arising out of a peremptory norm of general international law.[38] In the third situation, described in the Draft Articles, where the peremptory rules of general international law do no permit any derogation is a claim for restitution in kind. Under article 43 (b) the injured state is not entitled to claim the re-establishment of the situation which existed before the wrongful act was committed (restitution in kind) if such re-establishment would involve a breach of an obligation arising from a peremptory norm of general international law.[39] Finally, in the fourth situation which is specified in article 50 (e), the countermeasures in contravention of a peremptory norm of general international law were prohibited.[40] All these situations have nothing in common with the nullity of international treaties or agreements conflicting with the *jus cogens*. Moreover, there is nothing in common between each of these three situation, except there is no derogation permitted. The only one to explain their existence is to say that legal effect of the *jus cogens* rule is not limited to the nullity of treaties conflicting with the peremptory norms of general international law but goes far beyond it and thus excludes any other derogation from peremptory norms of general international law. This is one of the most interesting conclusions which could be drawn from the work of the International Law Commission on the Draft Articles on state responsibility.

---

[38] See footnote 17.

[39] Article 43. Restitution in kind (extract)

The injured State is entitled to obtain from the State which has committed an internationally wrongful act restitution in kind, that is, the re-establishment of the situation which existed before the wrongful act was committed, provided and to the extent that restitution in kind (...) would not involve a breach of an obligation arising from a peremptory norm of general international law (...).

[40] Article 50. Prohibited countermeasures

An injured State shall not resort by way of countermeasures to:

a. the threat or use of force as prohibited by the Charter of the United Nations;

b. extreme economic or political coercion designed to endanger the territorial integrity or political independence of the State which has committed the internationally wrongful act;

c. any conduct which infringes the inviolability of diplomatic or consular agents, premises, archives and documents;

d. any conduct which derogates from basic human rights; or

e. any other **conduct in contravention of a peremptory norm of general international law** (emphasis added).

23 POLISH YEARBOOK
OF INTERNATIONAL LAW
1997–1998
PL ISSN 0554-498X

International Crimes of States: The Decay of an Idea

A. MARK WEISBURD[1]

Introduction

The concept of international crimes of states has been much discussed among international lawyers for over twenty years, since the 1976 adoption by the International Law Commission (ILC) of Article 19 of its draft treaty on state responsibility.[2] It was in that Article that the ILC sought to formalize a distinction between an international crime, defined as "the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole", and a lesser international wrong, labelled an "international delict" in Article 19.[3] The ILC's completion of the first reading of the draft treaty in 1996[4] provides a convenient opportunity to assess the current status of this concept. This article attempts such an assessment. It will seek to show that the ILC's approach to the issue has changed so fundamentally since 1976, and that the concept has therefore become so confused, that retaining Article 19 in any final draft convention on state responsibility could not be justified. The article further argues that the concept is, in any case, fundamentally misconceived.

I. Crimes of State: The ILC's Product

A. The Draft Articles

In addition to Article 19, a number of provisions of the first reading of the draft convention on state responsibility relate to international crimes of state. Article 40, paragraph 3, provides that, for purposes of the convention, the term "injured state" means, in the case of an internationally wrongful act which is an international crime, all states other than the state perpetrating the wrongful act.[5] The three articles dealing

[1] The author acknowledges with gratitude the assistance in writing this article rendered by the North Carolina Law Foundation.

[2] *YILC* (1976), vol. II, part 2, U.N. Doc. A/CN.4/SER. A/1976/Add. 1, part 2, p. 73–75, § 78.

[3] *Ibid.*, p. 75.

[4] *Report of the International Law Commission on the Work of Its 48th Session*, U.N. Doc. A/51/10 (1996) (hereafter cited as *ILC 48th Sess. Rept.*), p. 124, §§ 63–64.

[5] *Ibid.*, p. 141.

directly with the consequences of international crimes are Articles 51 through 53. Article 51 provides that the legal consequences of crimes are the same as those for delicts and include additonally the consequences set out in Articles 52 and 53.[6] Article 52 specifies the legal consequences imposed upon states perpetrating crimes, which take the form of the elimination of certain limitations on reparations. Specifically, Article 52(a) eliminates, in the case of crimes[7], Article 43's prohibitions on restitution in kind that would either "involve a burden out of all proportion to the benefit which the injured State would gain from obtaining restitution in kind instead of compensation"[8] or would "seriously jeopardize the political independence or economic stability of the State which has committed the internationally wrongful act".[9] Similarly, the prohibition in Article 45 of demands for satisfaction "which would impair the dignity of the State which has committed the internationally wrongful act"[10] are eliminated by Article 52(b).[11]

Article 53 also addresses the consequences of crimes, imposing on all states the obligations:

(a) not to recognize as lawful the situation created by the crime;

(b) not to render aid or assistance to the State which has committed the crime in maintaining the situation so created;

(c) to cooperate with other States in carrying out the obligations under subparagraphs (a) and (b); and

(d) to cooperate with other States in the application of measures designed to eliminate the consequences of the crime.[12]

B. Gaps and Inconsistencies in the Draft Convention

The ILC 's draft convention on state responsibility contains a number of inconsistencies and gaps as it relates to crimes of states, particularly when read in light of the accompanying commentary. This portion of this paper will highlight these problems. The object of this part of the discussion is not to cast aspersions on the serious efforts the ILC has made in this area for decades. Rather, it is to underline the contradictions which are, it is suggested, inherent in this topic, and which constitute one important reason for rejecting the idea embodied in Article 19.

Obviously, the most important element of the draft articles is their text, and the text of the draft articles, standing alone, raises problems regarding crimes of states. The most serious involves the consequences of crimes. As noted above, Article 52(a) eliminates, in the case of international crimes, certain restrictions on restitution in

---

[6] *Ibid.*, p. 146, Art. 51.
[7] *Ibid.*, p. 146, Art. 52(a).
[8] *Ibid.*, p. 142, Art. 43(c).
[9] *Ibid.*, Art. 43(d).
[10] *Ibid.*, p. 143, Art. 45.3.
[11] *Ibid.*, p. 146.
[12] *Ibid.*, p. 146.

kind otherwise applicable by reason of Article 43. Relevant here is the elimination of the prohibition on restitution in kind which would "seriously jeopardize the political independence or economic stability of the State which has committed the internationally wrongful act, whereas the injured State would not be similarly affected if it did not obtain restitution in kind."[13] The problem arises because of a limitation the draft imposes on "countermeasures".[14] Article 50 prohibits, among other types of forbidden countermeasures, "extreme economic or political coercion designed to endanger the territorial integrity or political independence of the State which has committed the internationally wrongful act."[15] It, thus, seems that Article 52(a) permits demands for restitution in kind that would "seriously jeopardize the political independence or economic stability" of a state which committed a crime, but that Article 50 forbids countermeasures which are "extreme economic or political coercion designed to endanger the territorial integirty or political independence" of the wrong-doing state. If the wrong-doer refuses to make restitution in circumstances when doing so would seriously jeopardize its political independence, it would therefore appear that other states must figure out some way to coerce it into doing so without using economic or political means designed to endanger that independence. In other words, victim states may be entitled to insist that the wrong-doing state committ suicide, but if that state refuses, the victims may not use means of coercion that are designed to kill that state. Not only does this distinction make little sense, but it may not be possible to apply it. After all, how can a countermeasure aimed at forcing a state to carry out a form of restitution in kind which seriously jeopardizes the political independence of the wrong-doing state *not* be designed to endanger that independence, at least in its ultimate aim? In short, one of the very few provisions aimed at creating some sort of distinction between crimes and delicts comes very close to being contradicted by another article of the convention.

Another but less serious difficulty arises from Articles 27 and 53(b) when they are read together. Article 27 provides:

> Aid or assistance by a State to another State, if it is established that it is rendered for the commission of an internationally wrongful act carried out by the latter, itself constitutes an internationally wrongful act, even if, taken alone, such aid or assistance would not constitute the breach of an international obligation.[16]

As noted above, Article 53(b) provides, "An international crime committed by a State entails an obligation for every other State (...) not to render aid or assistance

[13] *Ibid.*

[14] "Countermeasures" are defined in Article 47 as an injured state's refusal to "comply with one or more of its obligations towards a State which has committed an internationally wrongful act in order to induce it to comply with its obligations under Articles 41 to 46, as long as it has not complied with those obligations and as necessary in the light of its response to the injured State that it do so," *ibid.*, p. 144, Art. 47.1. Articles 41 to 46 set out the rights of states injured by internationally wrongful act and the obligations of wrong-doing states upon the latter's commmitting such an act, *ibid.*, p. 141–143.

[15] *Ibid.*, p. 145, Art. 50(b).

[16] *Ibid.*, p. 134.

to the State which has committed the crime in maintaining the situation so created." Presumably, Article 53(b) is intended to add something to the obligation embodied in Article 27, but it is difficult to see what that something might be. Presumably, maintaining the situation created by the commission of a crime is at least a delict, if not a crime itself, and thus is itself an international wrong. Article 27 would therefore appear to address the question completely, rendering Article 53(b) redundant.

Article 53(c) presents another source of confusion. That provision requires all states "to cooperate with other States in carrying out the obligations under subparagraphs (a) and (b)"[17] (Article 53(a) requires all states "not to recognize as lawful the situation created by the crime"[18]). The difficulty comes from trying to imagine what sort of obligation Article 53(c) creates. The duties imposed by Articles 53(a) and (b) would not seem to lend themselves to cooperation. Indeed, it is difficult to see what one state could do to assist another in not recognizing a situation as legal, or in refraining from aiding a criminal state.

Article 53(d) also seems problematic. It imposes a duty on all states "to cooperate with other States in the application of measures designed to eliminate the consequences of the crime."[19] But since – according to the ILC's commentary to Article 51 – the obligations under Article 53 "arise for each State as and when it formed the view that a crime had been committed,"[20] confusion can easily result. Are states not convinced that a crime has been committed obliged to cooperate with measures undertaken by states who believe that a given act constitutes a crime? Or suppose two states agree that a crime has been committed, but disagree as to the best response. Can one such state in essence conscript the other by undertaking measures *designed* to eliminate the consequences of the crime and then point to the obligation under Article 53(d)? If not, what is the nature of the obligation?[21]

As unfortunate as these contradictions are, the draft articles' potential for causing confusion is multiplied when the articles are read with the commentaries designed to

[17] *Ibid.*, p. 146.

[18] *Ibid.*

[19] *Ibid.*

[20] *Ibid.*, p. 165.

[21] Several problems with Article 53 may have been caused by the ILC's decision to discard Special Rapporteur Arangio-Ruiz's suggested method of ensuring international control over the determination that a crime has been committed. Article 53 is derived from Article 18 of Arangio-Ruiz's draft of the Second Part of the convention. As drafted, Article 18(c) required states to "assist each other in carrying out their obligations under subparagraphs (a) and (b) and, in so far as possible, coordinate their respective reactions through available international bodies or ad hoc arrangements," Gaetano Arangio-Ruiz, *Seventh Report on State Responsibility*, U.N. Doc. A/CN.4/469 and Add.1 (1995) (hereafter cited as "Arangio-Ruiz, *Seventh Report*"), p. 3 of Add. 1 (emphasis supplied). The emphasized portion of Arangio-Ruiz's 18(c) was, of course, eliminated by the ILC's Drafting Committee from the final version of Article 53(c). Similarly, Article 53(d) seems to have been derived from Arangio-Ruiz's Article 18(f), which required states to "take part, jointly or individually, in any lawful measures decided or recommended by an international organization of which they are members against the State which has committed or is committing the international crime," *ibid.* Both of Arangio-Ruiz's provisions establish duties to cooperate in the context of supervision of reactions to crimes through international bodies. Apparently, when the Drafting Committee elected not to provide for any international control of the detemination that a crime had been committed, it also deleted language from what is now Article 53 which assumed a high degree of control or coordination by international bodies of state reactions to an international crime.

accompany them. The commentary to Article 19 clearly assumes that the obligations on states guilty of committing the crimes defined in Article 19 have obligations beyond making reparation. Thus, the commentary states that:

> The Commission must (...) emphasize here and now that it would be absolutely mistaken to believe that contemporary international law contains only one regime of responsibility applicable universally to every type of internationally wrongful act, whether more serious or less serious and whether injurious to the vital interests of the international community as a whole or simply to the interests of a particular one of its members.[22]

It goes on to assert, regarding internationally wrongful acts, that:

> The idea that they always entail a single obligation, that of making reparation for the damage caused, and that all they involve is the determination of the amount of such reparation, is simply the expression of a view which has not been adequately thought out.[23]

This understanding of Article 19 is reinforced when consideration is given to Special Rapporteur Roberto Ago's 1976 report, which proposed what became Article 19. In that report, Ago argued that international law recognized distinctions between international wrongs of greater or lesser magnitude, and that states committing the more serious wrongs, which he labelled crimes, were subject to a regime of responsibility different from that applicable to less serious wrongs and possibly subjecting the wrong-doing state to sanctions independent of any duty to make reparation.[24] (Ago's report makes clear that he included within his concept of sanction reprisals, that is, acts otherwise unlawful but legitimized due to their employment as a response to a previous illegal act by the target of the reprisal).[25] Indeed, this difference in normative consequences, according to Ago, was the only justification for distinguishing between crimes and lesser wrongs[26].

Ago expanded on this idea in the ILC's debate on his report. His remarks clearly assume that the responsibility regime for crimes will go beyond requiring reparation and will involve the imposition of what he calls "penalties" upon wrong-doing states[27]. Further, **every** member of the ILC who addressed the question whether the regime for crimes would involve something more than a duty to make reparation assumed that a state perpetrating a crime would in fact be subject to legal consequences beyond the reparative.[28] And this view continued to be the ILC's position through 1979.

---

[22] *YILC* (1976), vol. II, part 2, *supra* n. 2, p. 117, § (53).

[23] *Ibid.*

[24] *YILC* (1976), vol. II, part 1, U.N. Doc. A/CN.4/SER.A/1976/Add.1, part 1 (hereafter cited as "II 1976 ILC Y.B., pt. 1"), p. 27, § 83; 28, § 86; 31, § 97.

[25] *Ibid.*, p. 29–30, § 92.

[26] *Ibid.*, p. 26, § 79.

[27] *YILC* (1976), vol. I, U.N. Doc. A/CN.4/SER. A/1976 (hereafter cited as "I 1976 ILC Y.B."), p. 90–91, 91; *Summary Records, 1376th mtg.*, §§ 33, 34.

[28] Yasseen, *ibid.*, p. 63, *Summary Records, 1372d mtg.*, § 16; Sette Câmara, *ibid.*, p. 67, *Summary Records, 1373d mtg.*, § 14; Martínez Moreno, *ibid.*, p. 70, § 25; Ramangasoavina, *ibid.*, p. 76, *Summary Records, 1374th mtg.*, § 26; Kearney, *ibid.*, p. 77–78, § 39; Ustor, *ibid.*, p. 85, *Summary Records, 1375th mtg.*, § 40; El-Erian, *ibid.*, p. 85, *Summary Records, 1376th mtg.*, § 5; Reuter, *ibid.*, p. 245, *Summary Records, 1402d mtg.*, § 61.

The commentary to Article 30, adopted in that year, addresses the purposes of countermeasures. It states that those purposes are "to inflict *punishment* or to secure performance..."[29] The use of the term "punishment" in this context is striking.

But the ILC backed away from this view, a change perhaps reflecting the increasing diversity in scholarly opinion, some commentators taking the position – not easily reconciled with the record – that the concept of crimes was never intended to carry a punitive connotation.[30] In any case, this change manifested itself in the ILC's 1993 commentary to what is now Article 45 of the draft convention. After noting that some authorities considered the remedy of satisfaction to have an afflictive nature, the commentary asserts that "satisfaction's role is certainly not a punitive one..."[31] The commentary goes on to state that "The Commission (...) did not find it necessary to pronounce itself on the question of whether an afflictive nature should be attributed to satisfaction...",[32] and notes the division in doctrinal opinion between those who thought punitive forms of reparation were not compatible with the nature of the international community and those who disagreed with this position.[33]

The ILC finally abandoned the idea of "punishment" as a response to international crimes of state in its commentary to Article 47, the article which introduces the chapter on countermeasures. In describing the permissible purposes of countermeasures, the commentary states, "In particular, an injured State may not take measures in order to inflict punishment on the alleged lawbreaker."[34] This statement flatly contradicts the statement in the commentary to Article 30 that punishment is one of the permissible purposes of countermeasures. Also undercutting the original views of Judge Ago and the ILC is a note appended to Article 40, suggesting alternatives to the use of the term "crime" in Article 19 "thus (...) avoiding the penal implications of the term."[35]

The rejection of the original rationale for Article 19 is confirmed by an examination of Article 52. As noted above, Article 52 provides only two differences between the consequences of crimes and those of delicts; it eliminates the limitations on restitution in kind otherwise applicable because of Articles 43(c) and (d) and the limitation on satisfaction set forth in Article 45.3. Elimination of these limitations, however, merely enlarges the potential scope of reparative remedies. Furthermore, it is easy to imagine a situation in which Article 52 would be irrelevant. Suppose, for

---

[29] *YILC* (1979), vol. II, part 2, U.N. Doc. A/CN.4/SER.A/1979/Add.1, part 2, p. 116, § (3) (emphasis supplied).

[30] M. S p i n e d i: "International Crimes of State: The Legislative History", in: J.H.H. W e i l e r, *et al.*, eds., *International Crimes of States* (1989) (hereafter cited as *International Crimes of States*), p. 7, 52–53; G. A b i-S a a b: "The Concept of 'International Crimes' and Its Place in Contemporary International Law", in: *ibid.*, p. 141, 147–49; B. G r a e f r a t h: "International Crimes: A Specific Regime of International Responsibility of States and its Legal Consequences", in: *ibid.*, p. 161, 163–64; T.L. S t e i n: "Observations on 'Crimes of States'", in: *ibid.*, p. 195, 196–197.

[31] *YILC* (1993), vol. II, part 2, U.N. Doc. A/CN.4/SER.A/1993/Add.1, part 2, p. 80, § (18).

[32] *Ibid.*, p. 80–81, § (21).

[33] *Ibid.*, p. 81, §§ (22)–(25).

[34] *ILC 48th Session Report*, *supra* n. 4, p. 156, § (2).

[35] *Ibid.*, p. 141, n.

example, that a state confiscates the property of a particular ethnic minority as a manifestation of ethnic discrimination in violation of international human rights standards; how could restitution in kind threaten the political independence or territorial integirty of the wrong-doing state? What sorts of good faith demands for satisfaction could be made by other states which could, in this context, be described as "humiliating"? But if Article 52 would be irrelevant in such a case, the fact that the act of the wrong-doing state is called a crime makes absolutely no difference in terms of the legal consequences of the wrong.

Thus, the worst a state faces as a result of committing a crime is a duty to make reparation shorn of certain limitations, and it may well find that those limitations would be irrelevant in any case. So far from there being a normative difference between the legal consequences of crimes and those of delicts, the consequences – under Article 52 – will in many cases be identical. Clearly, in the final analysis, the ILC has determined that the only duty incumbent upon a wrong-doing state, regardless of the nature of the wrong, is a duty to make reparation – a view which the ILC characterized, in its 1976 commentary to Article 19, as "not (...) adequately thought out."[36]

A second surprising aspect of the draft convention is its lack of international control of the process of determining that a given act constitutes a crime. The commentary to Article 51 makes clear that it is for each state to determine unilaterally whether a crime has been committed in a given case.[37] The draft convention provides no check on such determinations beyond its general dispute settlement provisions, under which a state against which countermeasures have been taken (whether the alleged wrong which led to the countermeasures is labelled a crime or a delict) may unilaterally submit any dispute to an arbitral panel.[38] Members of the tribunal are to be chosen by the parties, or, in default of party choices, by the President of the International Court of Justice, or by another judge of that court in the event of the President's inability or disqualification from acting.[39] There is no appeal from the arbitral panel's decision to any international body; Article 60 permits the ICJ to hear challenges to the validity of the award,[40] but the commentary to that article states expressly that the ICJ's competence would not extend to a review of the arbitral panel's factual or legal determinations, or of the merits of the award.[41]

This arrangement seems to contradict the assumptions which informed the ILC's debates on the implementation mechanisms applicable to international crimes. In the 1976 debate on Article 19, Special Rapporteur Ago stated that his belief that the

[36] *YILC* (1976), vol. II., part 2, *supra* n. 2, p. 117, § (53).

[37] *ILC* 48th Session Report, *supra* n. 4, p. 165, §§ (3)–(4).

[38] *Ibid.*, p. 148, Art. 58.2.

[39] *Ibid.*, p. 151, Annex II, §§ 1–2.

[40] *Ibid.*, p. 149, Art. 60.

[41] *Report of the International Law Commission on the Work of its Forty-seventh Session*, U.N. GAOR, 50th Sess., U.N. Doc. A/50/10 (1995) (hereafter cited as *ILC 47th Session Report*), p. 188, § (3). The commentary to the relevant article makes clear that the only grounds for challenging the validity of an award are that the tribunal exceeded its powers, that a member of the panel was corrupt, that there was either a failure to state the reasons for the award or a serious departure from a fundamental rule of procedure, or that either the undertaking to aribtrate or the *compromis* was a nullity, *ibid.*, p. 188, § (3) n. 211.

penalties for international crimes should be institutionalized rather than left to individual states.[42] Moreover, in its commentary to Article 30, the ILC asserted that, with respect to some wrongs, not only could the directly injured state resort to countermeasures, but other states could also do so "on the basis of a decision taken by a competent international organization."[43] As recently as the 1994 general debate on international crimes, most members of the ILC who addressed the issue argued strongly for some form of international control of the determination that an international crime had been committed,[44] or at least argued that the matter could not be left to an individual state.[45] Only four members seemed comfortable with leaving the determination to individual states.[46] Further, the debates in 1995 not only evinced support for Special Rapporteur Arangio-Ruiz's suggestion of a two stage mechanism for that purpose,[47] but, when opposition was expressed to that approach[48], produced suggestions for still other approaches to international control of the process.[49] Clearly, the ILC was not completely comfortable with relying on states' unilateral determinations regarding crimes, since it included in the commentary to Article 51 descriptions of several alternative approaches providing for international control of the process, and invited States' comments on them.[50]

The reason for the ILC's discomfort with its result should be obvious. Under Article 40, all states are considered to be "injured" by international crimes[51]; under Articles 47 and 48, injured states may take countermeasures against wrong-doers in order to coerce the wrong-doers into making reparation.[52] The unilateral character of the determination that a crime has been committed means that any state could decide

---

[42] *YILC* (1976), vol. I, *supra* n. 27, p. 90, 91, *Summary Records, 1376th mtg.*, §§ 30, 33.

[43] *YILC* (1979), vol. II, part 2, *supra* n. 31, p. 121, § (21). The commentary further indicates that the international organization to which it refers is the United Nations, *ibid.*, p. 118–119, §§ (12)–(13).

[44] Vereshchetin, [1994] *I Y.B. Int'l L. Comm'n*, U.N. Doc. A/CN. 4/SER.A/1994 (hereafter cited as "I 1994 ILC Y.B."), p. 67, *Summary Records, 2339th mtg.*, § 7; Calero Rodrigues, *ibid.*, p. 72, § 53; Mahiou, *ibid.*, p. 73, § 61; de Saram, *ibid.*, p. 76–77, *Summary Records, 2340th mtg.*, § 22; Pambou-Tchivounda, *ibid.*, p. 78, § 33; Villagrán Kramer, *ibid.*, p. 79, § 46; Yamada, *ibid.*, p. 84, *Summary Records, 2341st mtg.*, § 17; Yankov, *ibid.*, p. 86, § 30; Rao, *ibid.*, p. 91, *Summary Records, 2342d mtg.*, § 3; Bennouna, *ibid.*, § 7; Crawford, *ibid.*, p. 96, § 43; Al--Khasawneh, *ibid.*, p. 99, § 67; Idris, *ibid.*, p. 105, *Summary Records, 2343d mtg.*, § 33.

[45] Bowett, *ibid.*, p. 86, *Summary Records, 2341st mtg.*, § 35.

[46] Pellet, *ibid.*, p. 80, *2340th mtg.*, § 53; Eiriksson, *ibid.*, p. 83, *Summary Records, 2341st mtg.*, § 9; Al-Baharna, *ibid.*, p. 97, *Summary Records, 2342d mtg.*, § 52; Tomuschat, *ibid.*, p. 102, *Summary Records, 2343d mtg.*, § 9.

[47] Under Arangio-Ruiz's system, the first stage of the mechanism would involve adoption by a specified super-majority of either the General Assembly or the Security Council of a resolution finding that an allegation that an international crime had been committed deserved serious consideration by the international community. Upon the adoption of such a resolution, any state would then be entitled to bring a contentious proceeding before the ICJ to resolve the question whether the accused state had in fact been guilty of a crime as defined in Article 19. An ICJ judgment, rendered under the procedure described would, under Arangio-Ruiz's suggestion, be a prerequisite to any state's implementing any legal consequences of an international crime. Arangio-Ruiz, *Seventh Report*, *supra* n. 21, p. 37–40, §§ 100–109.

[48] *ILC 47th Session Report*, *supra* n. 41, 48, p. 121, § 305.

[49] *Ibid.*, p. 125–127, §§ 312–316.

[50] *ILC 48th Session Report*, *supra* n. 4, p. 166–167, §§ (7)–(13).

[51] *Ibid.*, p. 141, Art. 40.3.

[52] *Ibid.*, p. 144–145.

that a crime has taken place, declare itself injured, demand reparation, and engage in countermeasures if reparation was not forthcoming. To be sure, as discussed above,[53] the draft convention permits a state which has been the subject of countermeasures to unilaterally submit to arbitration any dispute regarding its dealings with the allegedly injured state. But such a process would inevitably be subject to delay. Further, suppose the state taking countermeasures was not a party to the ultimate convention? While as a non-party, it could hardly be deemed to have agreed to any dispute settlement provisions in that convention, would it necessarily be unable to rely on the convention as evidence of rules of customary international law permitting it to react as it had to a "crime"?

Yet, another difficulty with the draft articles is that, apparently, they merge the concept of *erga omnes* violations of international law with the concept of crimes. This follows from the definition of the term "injured State" in Article 40. The only circumstance in which that Article defines all states other than the wrong-doer as "injured" is when the wrong in question is a crime.[54] Yet, there seems to be agreement on the ILC that all violations of *erga omnes* obligations are not crimes.[55] The draft articles thus leave no room for the *erga omnes* concept.

In short, we see that, in rejecting both a penal concept of international crimes of states and in establishing no international control over reactions to such crimes, the ILC has essentially turned its back on the assumptions upon which Article 19 was originally adopted. The formulation it has produced is confusing, offers the prospect of chaos as international intermeddlers busily determine acts of other states to be crimes and react to them, and – apparently by accident – leaves no room for non-criminal *erga omnes* violations of international law. As serious as these problems are, however, the ILC's dealings with this topic exhibit basic conceptual flaws. This discussion will next address these problems at the fundamental level.

II. Problems with the Definition of Crimes of States

The foregoing portion of this discussion demonstrates that the concept of international crimes of states as embodied in the draft articles on state responsibility is beset by contradictions and confusion, and – in the unlikely event it was ever embodied in atreaty[56] – would be difficult to apply and, possibly, productive of considerable disorder. But,

[53] See discussion on p. 12–13, *supra*.

[54] *ILC 48th Session Report*, *supra* n. 4, p. 140–141.

[55] See *e.g.*, statements of Pellet, *YILC* (1994), vol. I, *supra* n. 44, p. 89, *Summary Records, 2341st mtg.*, § 63, and Rao, *ibid.*, § 65.

[56] The reaction of the Sixth Committee of the General Assembly to the ILC's completed first reading of the draft convention on state responsibility indicates very strong misgivings among states as to the utility of the ILC's concept of crimes of states, raising doubts whether any treaty of state responsibility will include such a concept. Of the 31 states whose representatives participated in the Sixth Committee's debate on the draft articles and addressed the subject of international crimes, 13 expressed opposition to the concept: Austria, U.N. GAOR 6th Comm., 51st Sess., 34th mtg., U.N. Doc. A/C.6/SR.34 (1996) (hereafter cited as "A/C.6/51/SR.34"), p. 9, § 39; United Kingdom, *ibid.*, p. 10, § 42; Germany, *ibid.*, p. 14, § 60; Brazil, *ibid.*, p. 15–16, §§ 66–67; United States, U.N. GAOR 6th Comm., 51st Sess., 35 mtg., U.N. Doc. A/C.6/51/SR.35 (1996)

striking as these problems are, they should not obscure the more fundamental conceptual confusion that underlies the concept of international crimes of states.

Article 19.2 defines an international crime as "the breach by a State of an international obligation so essential for the protection, fundamental interests of the international community that its breach is recognized as a crime by that community as awhole..."[57] It would thus appear that a breach must meet two criteria: the obligation must in fact be essential for the protection of fundamental interests of the international community and that community as a whole must recognize the breach as a crime; indeed, the ILC read the definition in that way.[58] Examination of the ILC's commentary to Article 19, however, suggests two problems in its application of this definition. First, the ILC appeared to objectify the first criterion – the importance of the obligation breached – and to label as crimes breaches of obligations the *Commission* considered essential, paying relatively little attention to the recognition criterion. Second, the commentary is quite vague as to the method of determining whether the recognition criterion has been satisfied.

A. The ILC's Handling of "Recognition by the international community as a whole"

It is striking to observe how little attention the ILC paid to concrete indications of states' attitudes towards the concept of crimes of state in general and to the categories specified in Article 19.2 in particular. For example, its justification for putting forward the concept of crimes of state begins with the statement that the horrors of World War II "have implanted in people the conviction of the paramount importance of prohibiting the use of force as a means of settling international disputes."[59] The Nazi genocide has "pointed to the need" that international law forbid such practices, and "has prompted the most vigorous affirmation of the prohibition of crimes such as genocide, *apartheid* and other inhuman practices..."[60] "The solidarity of broad strata of the world's population" supports the "general prohibition" of colonial domina-

(hereafter cited as "A/C.6/51/SR.35"), p. 2, § 2; Ireland, *ibid.*, p. 6–7, §§ 22–27; France, U.N. GAOR 6th Comm., 51st Sess., 36th mtg., U.N. Doc. A/C.6/51/SR.36 (1996) (hereafter cited as "A/C.6/51/SR.36"), p. 6–7, §§ 25–29; Sri Lanka, *ibid.*, p. 12, § 53; Australia, *ibid.*, p. 18, § 83; Nigeria, U.N. GAOR 6th Comm., 40th mtg., U.N. Doc. A/C.6/51/SR.40, p. 10–11, § 42; and Mexico, U.N. GAOR, 6th Comm., 51st Sess., 41st mtg., U.N. Doc. A/C.6/51/SR.41 (1996) (hereafter cited as "A/C.6/51/SR.41"), p. 15, § 15. Three states refused to take a position, calling for more work on the concept of crimes of states: Japan, A/C.6/51/SR.36, p. 12, § 52; Portugal, U.N. GAOR 6th Comm., 51st Sess., 39th mtg., U.N. Doc. A/C.6/51/SR.39 (1996), p. 14, § 65; and India, *ibid.*, p. 15, § 71. Ten states supporting the retention of Article 19 in the draft articles disagreed with aspects of the approach the ILC had taken to the subject: Czech Republic, A/C.6/51/SR.35, p. 3–4, §§ 9–12; Italy, A/C.6/51/SR.36, p. 3–4, §§ 8–10; China, *ibid.*, p. 5, § 19; Argentina, *ibid.*, p. 10–11, § 46; Cameroon, *ibid.*, p. 13, § 58; Bulgaria, *ibid.*, p. 14–15, § 67; Iran, *ibid.*, p. 16, §§ 73–74; Ukraine, *ibid.*, p. 17, § 79; Spain, *ibid.*, p. 18, § 85; Uruguay, A/C.6/51/SR.40, p. 7, § 26. Only six states supported the ILC's approach to the question of crimes of states without suggesting fundamental changes: Bahrain, A/C.6/51/SR.34, p. 12, § 52; South Africa, *ibid.*, p. 13, § 56; Morocco, A/C.6/51/SR.36, p. 8–9, § 37; Jordan, *ibid.*, p. 11, §§ 45–46; Algeria, A/C.6/51/SR.41, p. 4, § 7; and the Republic of Korea, *ibid.*, p. 11, § 48.

[57] *ILC 48th Session Report*, *supra* n. 4, p. 131.

[58] *YILC* (1976), vol. II., part 2, *supra* n. 1, p. 119, § (61).

[59] *Ibid.*, p. 101, § (15).

[60] *Ibid.*

tion.[61] And their realizations of the dangers of pollution "have led states to realize" the need to protect the environment,[62] though the commentary does not specify the evidence of this realization. These general statements would hardly support the conclusion that *states*, in large numbers, have generally accepted the concept of international crimes as a matter of international law.

The ILC is somewhat more specific in citing three facts as being of considerable significance in the formulation of the concept of crimes of state: the then-recent establishment of the category of *jus cogens* rules, the development of the principle that individuals may be criminally liable for violations of international law, and the fact that the United Nations Charter "attaches specific consequences" to certain breaches of international law.[63]

Unfortunately, there is less to this reasoning than might at first appear. The *jus cogens* concept is embodied in a treaty which, even today, has fewer than 100 parties and has never actually been applied in international relations. That is, concrete examples of states' application of *jus cogens* was very weak in 1976. The treaties permitting prosecution of individuals hardly demonstrate a determination that *states* should be treated as entities capable of criminal behavior. And, as of 1976, the provisions of the Charter cited by the ILC had been applied quite rarely, and indeed have been rarely applied since, despite numerous occasions on which they were arguably applicable.[64]

The commentary then analyses state behavior alleged to support its specification of four non-exclusive categories of international crimes specified in Article 19.3,[65] but this discussion also pays little attention to evidence of the actual practice of states. Thus, according to the commentary, the criminal character of breaches of obligations regarding peace and security is established by Article 2, paragraph 4, of the Charter of the United Nations, by the enforcement provisions of the Charter, and by the General Assembly's "Definition of Aggression" resolution.[66] Regarding maintenance of colonial domination, the comentary cites several General Assembly resolutions, the decision of the ICJ in *Namibia* case[67] and the Security Council's actions regarding Southern Rhodesia.[68] The criminal status of breaches of obligations regarding the safeguarding of the human being is supported primarily by reference to General Assembly resolutions relating to *apartheid*.[69] Relying upon these authorities, the ILC

---

[61] *Ibid.*

[62] *Ibid.*

[63] *Ibid.*, p. 102, § (16).

[64] See discussion p. nn. 74, 77–81, *infra*.

[65] The four categories are: a serious breach of an international obligation of essential importance for the maintenance of international peace security, a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of people, a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, and a serious breach of essential importance for the safeguarding and preservation of the human environment. *ILC 48th Session Report*, *supra* n. 1, p. 131.

[66] *YILC* (1976), vol. II, part 2, *supra* n. 1, p. 105–106, §§ (24)–(25).

[67] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Order No. 1 of 26 January 1971*, 1971 I.C.J. 54.

[68] *YILC* (1976), vol. II, part 2, *supra* n. 1, p. 106–107, § (27).

[69] *Ibid.*, p. 107–108, § (28).

felt able to conclude that colonialism and *apartheid* were breaches of obligations "within the legal system of the United Nations – and probably in general international law as well..."[70] The Commission further concluded that such "offences" were liable to produce more severe legal consequences than other international wrongs, even though acknowledging that there was no consensus as to the actions that might be taken in response to them.[71] The ILC's conclusion that the last of Article 19.3's four categories – perpetration of environmental harm – amounted to an international crime was based on its own view of the dangers that could arise from harms to the environment, the language of a declaration adopted at a United Nations conference on the environment, and the fact that the General Assembly had included in its agenda for the forthcoming session the discussion of a treaty banning attempts to influence the environment for military purposes.[72]

There are a number of comments one might make in response to the foregoing. It is difficult to see how the ILC could acknowledge that there was no consensus as to the legal consequences of colonial domination and *apartheid* and simultaneously conclude that those consequences were more severe than would be true for other violations of international law while adhering to its own proclaimed requirement that the status of a particular type of breach as a crime required recognition by the international community as a whole. Further, the Commission apparently sought to demonstrate recognition of a special legal status for particular acts by pointing to states' adherence to instruments whose legal effect was either doubtful or acknowledged to be non-existent, such as resolutions and declarations of the General Assembly and declarations of international conferences. Indeed, the ILC placed weight on the mere inclusion of an item in the General Assembly's agenda. And of course, the ILC relied on its own assessment of the importance of harm to the environment. To be sure, the ILC asserted that its discussion was an "investigation into the conviction shown by States regarding the main problem which the present article is called upon to solve..."[73] However, its exclusive reliance upon more formal pronouncements of states, without reference even to the binding character of the instruments cited, let alone to the actual practice of states, surely weakens any argument that it sought to rely upon concrete demonstrations by states that they considered certain breaches of international law so serious as to differ from others in kind, not merely in degree.

Of course, as a matter of logic, the fact that the ILC did not rely on the actual practice of states in drafting and framing the comments to Article 19 does not exclude the possibility that such practice existed and fully supported its conclusion. In fact, however, state practice in each of these areas was inconsistent with the ILC's formulations. That is, not only did the ILC seek to base its approach on a narrow range of state behaviors which were, moreover of dubious legal significance; it also reached conclusions which could not be reconciled with states' actual conduct.

---

[70] *Ibid.*, p. 108, § (29).
[71] *Ibid.*
[72] *Ibid.*, p. 109.
[73] *Ibid.*, p. 110, § (34).

Thus, even at the time Article 19 was adopted on first reading, the world had experienced enough cross-border attacks by states upon other states to make questionable the flat assertion that Article 2, paragraph 4, of the United Nations Charter described restraints that states were in fact willing to observe; one might mention the attack by Arab states upon Israel in 1948, the invasion of the Republic of Korea by the Democratic People's Republic of Korea in 1950, the invasion of Hungary by the Soviet Union in 1956, the infiltration and invasion of the Republic of Vietnam by the Democratic Republic of Vietnam in the 1960's, the invasion of India by the People's Republic of China in 1962, the Soviet Union's invasion of Czechoslovakia in 1968, and the Turkish invasion of Cyprus in 1974.[74] With respect to self-determination, the commencement of Morocco's efforts to take control of the former Spanish Sahara and Indonesia's conquest of East Timor had both occurred prior to 1976.[75] Both of those cases involved states incorporating by force areas not previously recognized as part of their territory, despite strong opposition from the inhabitants – actions hardly consistent with the principle of self-determination. States' reactions to human rights violations likewise would have leant weak support to the ILC's positions. The generally flaccid international reaction to the 1971 massacres by the Pakistan Army in what is now Bangladesh, for example, was hardly consistent with any serious recognition that such behavior was a violation of international law, let alone a serious violation.[76] And there was simply no state practice in a concrete case treating environmental harm as a matter of special gravity.

Events and analysis since 1976 have underlined the lack of support in state practice for the categorizing as crimes of the acts mentioned in Article 19.3. With respect to aggression, states' reactions have been mixed. Vietnam's invasion of Kampuchea in 1978, the Soviet Union's invasion of Afghanistan in 1979, Argentina's invasion of the Falkland Islands in 1982, and Iraq's conquest of Kuwait in 1990 all produced strong negative reactions from third states, most obviously the last mentioned, in which, under the auhtority of the Security Council third states launched a war to expel Iraq from Kuwait.[77] However, even in these cases, international reaction was not uniform; for example, Latin American states expressed support for Argentina during the Falklands crisis.[78] Furthermore, several significant uses of force produced rather muted international reactions, among them China's invasion of Vietnam in 1979 and the Iran-Iraq war of 1980–88.[79] Most recently, international reaction to the fighting in the former Yugoslavia seems inconsistent with what would be expected under Article 19. To be sure, third state involvement played a role in ending the fighting; however, the agreement that brought the cease-fire about established a Ser-

[74] A.M. W e i s b u r d: *Use of Force: the Practice of States Since World War II* (1997) (Hereafter cited as W e i s b u r d: *Use of Force*), p. 100–107, 120–128, 141–143, 152–155, 211–213, 224–226, 261–264.

[75] *Ibid.*, p. 244–251.

[76] International Commission of Jurists, *The Events in East Pakistan*, 1971 24–45 (1972). And see *ibid.*,p. 76–86 for the lack of any response by the United Nations to this situation beyond provision of humanitarian aid.

[77] W e i s b u r d, *Use of Force*, *supra* n. 74, p. 42–47, 52–58.

[78] *Ibid.*, p. 55.

[79] *Ibid.*, p. 47–52, 280–284.

bian entity within Bosnia, despite very strong evidence that the Federal Republic of Yugoslavia in fact controlled the Bosnian Serbs' efforts to break up Bosnia-Herzegovina.[80] Furthermore, the tribunal established by the Security Council in response to that conflict has jurisdiction over individuals only, not over international entities; indeed, its competence even in respect of individuals is limited to punishing violations of humanitarian law and does not extend to convictions for aggression.[81]

The standing of the principle of self-determination has also been weakened as part of the fallout from the conflict in Yugoslavia. In 1991, the European Community established an arbitral panel to resolve certain legal questions presented by the disintegration of Yugoslavia.[82] In 1992, this panel issued an opinion responding to Serbia's inquiry as to whether the Serbian populations of Croatia and Bosnia-Herzegovina had the right to self-determination. In addressing this question, the panel concluded that international law did not "spell out all the implications of the right to self-determination", but concluded that self-determination was in any event subordinate to the principle of *uti possidetis juris*.[83] If violation of the principle of self-determination is an international crime, that principle's subordination to *uti possidetis* is hard to understand.

Violations of human rights principles have likewise not been treated as international crimes by states in the period since 1976. Then Professor Cassese observed in 1987 that states' reactions to such violations normally did not amount to sanctions, that is, otherwise unlawful actions justified only by the previous unlawful conduct of the wrong-doer; were undertaken only by Western states, raising doubts as to the generality of state opposition to human rights violations; and in any case were very infrequent in comparison to the actual number of human rights violations.[84] Kamminga's investigations led him to conclude that states reacting to violations of the human rights of people not their nationals do not claim that such actions violate international law.[85] And Professor Frowein's 1993 study turned up only one case in which a state not directly affected by a human rights violation responded by terminating a treaty – and the terminating state relied on the *clausula rebus sic stantibus* rather than claiming a right to take reprisals in such circumstances.[86]

---

[80] A.M. Weisburd: "The Emptiness of the Concept of Jus Cogens, As Illustrated by the War in Bosnia-Herzegovina", 17 *Mich. J. Int'l L.* 1 (1995), p. 5–10.

[81] Statute of the International Tribunal for the Prosecution of People Responsible for Serious Violations of Humanitarian Law Committed in the Territory of the Former Yugoslavia, Arts. 1–5, Annex, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. SCOR, 47th Sess., U.N. Doc. S/25704 (1993).

[82] M. Ragazzi: *Introductory Note*, 31 *I.L.M.* (1992), p. 1488.

[83] Conference on Yugoslavia Arbitration Commission, Opinion No. 2, 31 *I.L.M.* (1992), p. 1497, 1498.

[84] A. Cassese: *Remarks on the Present Legal Regulation of Crimes of States, III International Law at the Time of Its Codification: Essays in Honour of Roberto Ago* 49 (1987), p. 55–56.

[85] M.T. Kamminga: *Inter-State Accountability for Violations of Human Rights* (1992), p. 25–62.

[86] J.A. Frowein: *Reactions by Not Directly Affected States to Breaches of Public International Law*, [1994-IV] *RCADI*, p. 345, 400–401, 420–421.

As for gross violations of rules protecting the environment, Cassese was able to assert flatly in 1984 that such actions had not been regarded as crimes of state.[87] This view has also been expressed by members of the ILC.[88]

In summary, then, there is very great reason to doubt that either the concept of crimes of states or the particular categories of crimes listed in Article 19.3 were in 1976 or are now in fact recognized as such by states. The ILC, that is, is not applying its own criterion. What difference would it make if that criterion were applied? The next portion of the discussion addresses that point.

B. Problems Inherent in Article 19.2

It is one thing to say that the ILC has failed to apply its own definition. It is another to assert that the definition is inherently unworkable. That this is in fact the case, however, seems clear. This point is best demonstrated by examining that portion of the commentary to Article 19 addressing its definitional section.

That discussion does not explain the method of determining whether a given breach has been recognized as a crime by the international community as a whole; it simply asserts that the ILC is using the system adopted in the Vienna Convention on the Law of Treaties to determine the content of *jus cogens*, and equates the phrase "international community as a whole" with "all the essential components of the international community."[89] This phrase is somewhat vague, but certain statements by Special Rapporteur Ago make it more concrete. In the ILC's debate on Article 19, Ago indicated that the "essential components of the international community" were the "main groups of states making up the international community."[90] At a 1984 international conference addressing Article 19, Ago expanded somewhat upon this explanation, stating that the reference to the international community as a whole was meant to include the East, the West, and the various elements of the Third World.[91]

Even with this elucidation, it is hard to grasp how the process of recognizing a given wrong as a crime by the international community as a whole would have worked. During the Cold War, it was at least possible to characterize the "components" of the international community, though one may wonder if the tripartite division suggested by Special Rapporteur Ago was not somewhat oversimplified. But how exactly would the East, the West and various elements of the Third World have gone about establishing the criminal status of breaches of a particular rule of international law? Obviously, states may by treaty impose upon themselves whatever obligations they choose. But neither prior to 1976 nor since have states shown any dispo-

---

[87] A. Cassese: *Remarks on the Present Legal Regulation of Crimes of States, International Crimes of States, supra* n. 30, 91, p. 201.

[88] Al Baharna, *YILC* (1994), vol. I, *supra* n. 44, p. 97, *Summary Records, 2342d mtg.*, § 51; Kusumu-Atmadja, *ibid.*, p. 105, *Summary Records, 2343d mtg.*, § 30.

[89] *Ibid.*, p. 119, § (61).

[90] *YILC* (1976), vol. I, *supra* n. 27, p. 251–252, *Summary Records, 1403d mtg.*, § 41.

[91] R. Ago: *The Concept of "International Community as a Whole": A Guarantee to the Notion of State Crimes*, in: *International Crimes of States, supra* n. 30, 91, p. 252, 253.

sition to accept special rules of responsibility for particularly serious breaches of international law. If the ILC looks to the process of forming customary international law rather than to treaty-making to establish criminal rules of international law, how could one be satisfied that state practice demonstrated, not merely the existence of a legal rule, but that the legal rule established an especially serious obligation? And, in light of the rejection in the ILC's commentary to Article 19 of any requirement that states recognize a rule's criminal character unanimously,[92] did the ILC see the criminal character of particular rules as applying to states who were not parties to relevant treaties, and had persistently objected to relevant rules of customary law? Furthermore, with the end of the Cold War, could there be any alternative to a requirement that all states must recognize a wrong as a crime before it would in fact attain that status? After all, however dubious the claim of block leaders to speak for their blocks during the Cold War, such a claim would be completely unsustainable now.

Aside from the difficulty of determining the mechanism by which the international community as a whole can recognize a wrong as a crime, the ILC's two-pronged definition is fundamentally misconceived. In requiring as it does that a wrong satisfy an objective test as well as the recognition by states criterion to qualify as a crime, the ILC assumed that the essential character of an obligation is somehow independent of the attitude states take towards the obligation. In fact, however, it seems impossible to apply any objective test in such circumstances. If states were to treat wrongs as crimes – whatever that treatment may entail – then the wrongs are crimes in international law, however trivial the wrongs may appear. Conversely, if states see no necessity to treat the breach of a given obligation as a crime, how could it be argued that the obligation is "essential for the protection of the fundamental interests of the international community"? Presumably, the states making up the international community are the entities best able to determine which obligations in international law are "essential".

If the foregoing argument is correct, however, it reinforces the conclusion that there can be no justification for the ILC's unwillingness to take into account actual state practice, including practice undermining its preferred conclusions, in dealing with the subject of crimes of states. Rather, it would seem that the only way to identify the wrongs states have been willing to criminalize is to determine which wrongs have been treated as criminal by states in concrete cases; focusing on the language of non-binding declarations and resolutions, or even on the language of treaties so ignored in practice that no sane official would rely upon them, amounts to ignoring the only behavior in fact relevant in these circumstances.

Conclusion

The foregoing discussion has shown that the provisions relevant to crimes of states of the ILC's draft convention on state responsibility, together with their accom-

[92] *YILC* (1976), vol. II part 2, *supra* n. 2, p. 119, § (61).

panying commentary, are poorly drawn and contradict one another. It has also made clear that the ILC failed to apply its own criteria in determining whether states in fact treat particular wrongs as crimes and in listing purported crimes, and that the criteria in fact cannot work.

But perhaps the most important observtion is the fallacious character of the objective element in the ILC's definition of crimes. The idea that the essential interests of the international community can somehow be distinguished from the interests states in fact treat as essential presupposes an arrangement like that of a domestic legal system, in which it might make sense to see certain interests as so fundamental that they somehow transcend the day to day workings of that system. But the international legal system simply does not fit this model. Rather, it offers a means of facilitating cooperation between states if states choose to cooperate. Given the current structure of the world, the international legal system can be nothing more. Attempts to cull transcendent legal values from various formal instruments honored as often in the breach as in the observance merely obscures the actual character of the system, raising hopes that cannot be satisfied and hindering, rather than furthering, efforts to determine how to expand such areas of cooperation as have come to exist.

23 POLISH YEARBOOK
OF INTERNATIONAL LAW
1997-1998
PL ISSN 0554-498X

L'avenir du «crime» en droit international à la lumière de l'experience du *jus cogens*

JEAN-MARC SOREL

La Commission du Droit International travaille, à l'heure actuelle et depuis de nombreuses années, sur des projets de codification ayant le «crime» pour dénominateur commun. Néanmoins, derrière ce concept juridique connu en droit interne se cache une multitude de crimes différents. En effet, il est nécessaire de distinguer le projet concernant le statut d'une Cour Criminelle Internationale lié au projet de Code des crimes contre la paix et la sécurité de l'humanité, de celui concernant la responsabilité des Etats qui établit une distinction entre les crimes et les délits internationaux. Si dans le cas de la Cour Criminelle et du Code des crimes il s'agit de réprimer pénalement des crimes commis par des individus, en revanche le crime au sens du projet sur la responsabilité des Etats ne concerne que les Etats et n'emporte pas – du moins en théorie – une connotation pénaliste. Il y a donc «crime» et «crime» en droit international et la confusion sémantique implique souvent une confusion dans le régime juridique découlant de ces crimes. C'est essentiellement le «crime d'Etat»[1] découlant du projet sur la responsabilité des Etats[2] qui retiendra notre attention car il possède une liaison très forte avec la notion de *jus cogens*, de norme impérative. Cette notion de crime en liaison avec le responsabilité des Etats, et sa distinction avec la notion de délit, trouve son origine dans la volonté du rapporteur spécial[3] de ce projet de procéder à une sorte de pénalisation...sans droit pénal...du droit international. Le célèbre article 19 du projet d'articles en est le symbole:

«Le fait internationalement illicite qui résulte d'une violation par un Etat d'une obligation internationale si essentielle pour la sauvegarde d'intérêts fondamentaux de la communauté internationale que sa violation est reconnue comme un crime par cette communauté dans son ensemble constitue un crime international» (§ 2).

Le concept est né et est communément admis depuis 1976 avec des confirmations dans le langage des Etats lors de crises graves comme la guerre du Golfe. Nous avons

---

[1] Nous reviendrons dans le II, infra, sur les autres «crimes».

[2] Rappelons que ce projet auquel la *CDI* travaille depuis 1955 comporte trois parties: 1) l'origine de la responsabilité internationale, 2) le contenu, les formes et les degrés de la responsabilité internationale, 3) le règlement des différends.

[3] Il s'agit de Roberto Ago qui fut rapporteur du projet de 1959 à 1969.

par conséquent atteint un point de non retour de cette notion sans pour autant l'avoir consacrée. En cela, le crime d'Etat se rapproche d'une notion qui a déjà fait couler beaucoup d'encre: celle du *jus cogens*.

Comme le *jus cogens*, le crime est apparu en réaction au cynisme du droit international. Mais, comme le *jus cogens*, le crime révèle un décalage entre son acceptation (qui serait contre?) comme notion et l'acceptation de sa formulation, de son contenu et de ses conditions d'application. Il faut différencier l'ampleur de l'adhésion internationale à la reconnaissance du *jus cogens* ou du crime comme catégories normatives de l'absence d'unanimisme quant à la détermination de leur contenu respectif. Les questions de la définition, de la portée ou de l'identification animent le débat sur le crime comme elles avaient animé les débats sur le *jus cogens*. En 1969, on a préféré prévoir les garanties institutionnelles du *jus cogens* plutôt que d'en formuler une véritable définition. En ira-t-il de même pour le crime? Ces différentes interrogations animeront les propos qui suivent puisque la liaison entre la norme impérative et le crime existe dans le projet sur la responsabilité des Etats. En clair, si le crime est consacré en droit international, on ne pourra éluder la question de sa liaison avec le *jus cogens*.

L'objectif des remarques qui suivent est d'insister sur la nécessité pour le crime d'échapper aux faiblesses du *jus cogens*, de ne pas être un butoir pédagogique au même titre que la norme impérative. Le droit international est trop souvent ressenti – par les étudiants ou les collègues internistes – comme la vague «quête d'un idéal universel» sans effectivité. Le *jus cogens* a souvent permis – à son corps défendant – d'apporter des arguments à ces détracteurs. Le crime doit, à l'inverse, apporter plus de certitudes que de questions.

Pour tenter de répondre à ces incertitudes, nous nous pencherons successivement sur la nature hasardeuse du *jus cogens* (1), puis sur l'obligation de définir autrement le crime international (2), avant d'envisager le caractère erga omnes des obligations lié à l'actio popularis comme représentant un pont crédible entre le crime et le *jus cogens* (3). Cette brève étude ne peut avoir pour ambition de donner tous les arguments sur un aussi vaste sujet. Il s'agit uniquement de remarques ponctuelles et non exhaustives.[4] Le lecteur qui souhaite poursuivre la réflexion pourra utilement se reporter aux nombreuses études sur ces questions, dont quelques unes seront citées.

La nature hasardeuse du *jus cogens*

Pour déterminer la nature hasardeuse du *jus cogens*, il nous faudra remonter à la Convention de Vienne de 1969 sur le droit des traités qui a consacré cette notion (1.1) en esquissant une liaison entre la norme impérative et la future notion de crime (1.2),

[4] Pour cette raison, nous excluons (sauf quelques remarques ponctuelles) de ces réflexions la question des tribunaux pénaux *ad hoc* créés pour l'ex-Yougoslavie et la Rwanda. S'il est évident que ces tribunaux (et notamment celui sur l'ex-Yougoslavie) influenceront largement une éventuelle Cour Criminelle Internationale, ils n'en restent pas moins des tribunaux provisoires et uniquement pénaux alors que le «crime» sera essentiellement envisagé comme celui résultant du projet sur le responsabilité des Etats.

avant de constater l'évolution de la notion de *jus cogens* depuis la Convention aussi bien sur les plans de la définition, de l'identification, de l'invocation que de la portée (1.3).

Le *jus cogens* dans la Convention de Vienne de 1969

Il n'est pas question de revenir sur l'ensemble des origines du *jus cogens* qui fut déjà longuement évoqué dans de nombreuses études. Nous souhaitons simplement rappeler quelques incertitudes qui apparaissent en 1969 et qui vont perdurer par la suite. En effet, on peut considérer qu'il y a le *jus cogens* de la Convention de Vienne et celui d'après.

A Vienne, se posait la question de la définition du *jus cogens*. Sur le plan de la méthode de définition, le choix pouvait s'opérer entre une définition énumérative ou synthétique. Si l'on souhaite une notion évolutive, seule la définition synthétique est acceptable. Comme la nature de la norme impérative – contrairement au droit naturel – est d'être évolutive, cette dernière acception l'emporta:

> Article 53 – Traités en conflit avec une norme impérative du droit international (*jus cogens*): «Est nul tout traité qui, au moment de sa conclusion, est en conflit avec une norme impérative du droit international général. Aux fins de la présente Convention, une norme impérative du droit international général est une norme acceptée et reconnue par la communauté internationale des Etats dans son ensemble en tant que norme à laquelle aucune dérogation n'est permise et qui ne peut être modifiée que par une nouvelle norme du droit international général ayant le même caractère».[5]

Néanmoins, privilégier une définition évolutive ne mettait pas à l'abri d'incertitudes. Au contraire, on peut estimer que les problèmes commencèrent avec cette définition car le critère d'identification de la norme devenait le critère matériel de la nature et de l'importance de cette norme se déclinant en une acceptation et une reconnaissance par la communauté internationale des Etats dans son ensemble. Le matériel se déclinait donc dans l'organique et le problème se trouvait repoussé d'un cran. De plus, «la communauté internationale des Etats dans son ensemble» constitue une notion circulaire qui pouvait faire craindre à un législateur sans contrôle et sans responsabilité, simplement dominé par la loi du nombre.

Il s'avérait, dès le départ, difficile de consacrer une norme de subordination sans un instrument adéquat vis-à-vis des Etats. Le dilemme est connu: comment imposer un système vertical de normes dans une société internationale organisée horizontalement?[6]

---

[5] Rappelons que l'article 64 de la même Convention prescrit la nullité du traité en cas de survenance d'une nouvelle norme impérative. Le caractère évolutif de la norme impérative est ainsi définitivement consacré. On peut également penser que l'article 64 va trop loin en envisageant la nullité des engagements souscrits.

[6] Sur ce dilemme, voir: J. C o m b a c a u: «Le droit international: bric-à-brac ou système?», *Archives de philosophie du droit* (1986).

Pour certains, ce dilemme pouvait être contourné puisque le rôle du *jus cogens* n'était pas d'être un instrument opérationnel mais un instrument de dissuasion. S'il n'est pas possible de concrétiser la notion, celle-ci reste efficace si on la «sent» car elle produit alors des effets dissuasifs. En tant que qualité suprême donnée à une norme, le *jus cogens* renvoie ainsi plus à la notion d'ordre public qu'à celle de supraconstitutionnalité. En clair, les Etats peuvent librement conclure des traités mais ils doivent savoir que certaines prescriptions sont incontournables. Cela signifie que le *jus cogens* peut faire régner l'ordre sans avoir à se dévoiler, et si l'article 53 reste flou, il faut reconnaître que cela est vrai de nombreuses notions en droit international et que la détermination de la coutume ne présente pas non plus des garanties de précision. Les défenseurs de ce *jus cogens* dissuasif s'appuient également sur la banalisation du phénomène: quoi de plus naturel dans un système juridique que d'admettre la supériorité d'une norme?

On le constate dans ce résumé très sommaire (et simplifié) des thèses en présence, la discussion autour du *jus cogens* faisait apparaître des sensibilités très différentes selon que l'on se plaçait sur le terrain du système en général, ou sur le terrain concret des normes à définir. Ce dernier point fut pourtant au centre des débats: que mettre dans le *jus cogens*? Malgré la définition de l'article 53 qui par son caractère évolutif ne pouvait inclure des exemples, la question fut longuement discutée, chacun émettant des propositions. Pour Sir Gerald Fitzmaurice qui fut rapporteur du projet, un Etat qui rompt certaines lois de la guerre en rapport avec le traitement des populations civiles en temps de guerre, avec des prisonniers ou des blessés ou malades; un traité contraire à des règles créées pour la protection des individus, un traité par lequel deux Etats s'entendent pour commettre un acte d'agression ou encore la violation de la règle du pacta sunt servanda...sont autant d'exemples de la violation d'une norme impérative. Mais au-delà des exemples cités par le rapporteur, les propositions abondaient dans des directions très variées,[7] à tel point qu'il était permis de se demander s'il existe des règles non impératives en droit international! Cette imprécision et cette profusion va nuire à l'avenir du *jus cogens*.

La liaison entre le crime et le *jus cogens* lors de la Convention de Vienne

Les exemples précités prouvent que le *jus cogens* se rattache, dans l'esprit de ses concepteurs, à un manquement grave au droit international. Dès lors, l'idée de «crime»

[7] A titre d'exemples (non exhaustifs), le Liban proposait d'inclure les règles d'inspiration morale (droit humanitaire, esclavage, génocide, traitement des personnes, des blessés, des populations civiles en temps de guerre) ainsi que les règles les plus importantes du droit constitutionnel international (celles de l'article 2 de la Charte des Nations Unies), Chypre proposait l'interdiction de la menace ou de l'emploi de la force, l'esclavage, la piraterie, le génocide, les droits de l'homme, le droit à l'autodétermination, l'interdiction des traités inégaux et inéquitables..., la Biélorussie proposait le maintien de la paix entre les peuples et la lutte contre la domination coloniale, l'Italie proposait la menace ou l'emploi de la force, la sauvegarde des droits fondamentaux de la personne humaine ou la protection de l'indépendance de l'Etat, l'URSS insistait sur les traités léonins ou inégaux conclus en violation de la souveraine égalité des Etats, le Népal proposait l'apartheid et la discrimination raciale, la Pologne proposait la liberté en haute mer, l'interdiction de l'esclavage et du génocide, la France procédait plutôt par exclusion (des règles propres à certains systèmes) etc...

n'était pas loin. Lors de la 15ème session de la *CDI* (mars-juillet 1963), Humphrey Waldock qui fut aussi rapporteur du projet, envisageait notamment d'inclure dans le *jus cogens* les actes ou omissions qualifiés par le droit international de «crime international». L'expression n'est pas lancée au hasard puisque le projet parallèle sur la responsabilité des Etats est aussi en chantier, même si l'article 19 de ce projet n'a pas encore été formalisé sous la plume de Roberto Ago. La liaison entre le crime et le *jus cogens* s'esquisse mais elle a alors une connotation très pénaliste qui renvoie plutôt au crime de l'individu tel qu'il sera envisagé dans les projets de Cour Criminel International et de Codes des crimes. Cela vise des traités portant engagement de commettre des actes criminels en vertu du droit international. Finalement, le commentaire de la *CDI* lié au projet d'articles sur le *jus cogens* mentionnera comme exemple les «traités qui envisagent l'exécution de tout autre acte constituant un crime au regard du droit international», en sus des traités qui envisagent un emploi illicite de la force contraire aux principes de la Charte. La Commission précise qu'il s'agit d'actes «à la répression desquels tout Etat est tenu de coopérer»...tout en indiquant qu'il ne faudrait pas laisser croire que la portée de l'article (futur article 53) sera limitée aux actes qui constituent des crimes au regard du droit international. Cette précision est d'autant plus sage que le crime n'a pas encore été défini.

Même si l'ensemble est entouré d'un flou quasiment volontaire, il y a lieu de remarquer que dès la préparation de la Convention de 1969 un lien semble exister entre le *jus cogens*, le crime et l'actio popularis ouverte à tous les Etats.

La Convention de Vienne ne concrétisera pas cette liaison préférant s'abriter (à la demande expresse des Etats occidentaux) derrière un article 53 évolutif et le filet de sécurité de l'article 66 qui met, en dernier ressort, le contrôle du *jus cogens* dans les mains du juge. Il y a tout lieu de penser qu'un tel filet de sécurité sera également nécessaire pour le projet sur la responsabilité de manière à éviter «d'inventer» des crimes.

L'évolution du *jus cogens* après la Convention de Vienne

C'est plus l'évolution du *jus cogens* après la Convention que les discussions autour de cette notion avant ou pendant cette Convention qui permet d'affirmer que le «crime» devra être envisagé autrement pour éviter certaines dérives. Un ballon d'essai fut lancé en 1969 à Vienne, mais l'essai ne fut pas transformé.

Il est surprenant de constater que le débat n'a guère évolué et que les principales interrogations sur le *jus cogens* étaient déjà présentes dans les réflexions de Michel Virally alors que la Convention définitive n'avait pas été adoptée.[8]

Après 1969, le *jus cogens* possède une définition, un régime juridique mais toujours pas de contenu. Il existerait mais il est difficile de savoir en quoi il consiste et par quoi il est «révélé». La notion souffre du manque d'actes positifs d'identification formelle de la règle.

---

[8] M. Virally: «Réflexions sur le *jus cogens*», 12 *AFDI* (1966), p. 5–29.

Concernant son identification, le débat en est resté aux spéculations. Qui peut le révéler? Et comment? Comme il paraît délicat de rester au stade où l'on peut se contenter de «sentir» le *jus cogens* sans jamais le voir, il eût été préférable de l'affirmer positivement par un organe adéquat. A défaut d'une compétence de constatation dévolue à un organe précis, on pouvait penser que l'Assemblée générale des Nations Unies pourrait jouer ce rôle. Néanmoins, en l'absence d'un pouvoir législatif (sauf par le processus aléatoire de l'accumulation), il était difficile de lui attribuer, a fortiori, un pouvoir supralégislatif, d'autant que la loi du nombre risquait de fausser la reconnaissance de la norme. Le Conseil de sécurité était-il dès lors le mieux placé? Là encore, les difficultés liées à une possible action en dehors du droit (dans le cadre du chapitre VII) ainsi qu'un éventuel contrôle de légalité de ses actes[9] viennent réduire cette possibilité. Il reste la Cour internationale de Justice dont nous constaterons la timidité volontaire dans l'acte d'identification du *jus cogens*. Finalement, il semble préférable d'accepter un processus diffus d'identification à l'image de la coutume[10] puisque la norme impérative ne pourra s'imposer qu'avec une pratique générale et constante liée à une *opinio juris*. L'interdiction du recours à la force dans les relations internationales semble avoir suivi cette voie. En ce sens, le *jus cogens* ne peut être limité aux traités car il s'apparente «naturellement» à la coutume.[11] Mais de nombreuses «traces» de la norme impérative surgissent au détour des actes internationaux. Lorsqu'un traité interdit des réserves (ou certaines réserves), on ne peut y déroger, ce qui s'apparente au *jus cogens*.[12]

Si le *jus cogens* ne peut guère être strictement identifié, il peut se révéler par son invocation explicite ou tacite. En effet, l'invocation du *jus cogens* – même sans contenu – peut avoir pour objectif de jeter une présomption d'illégalité contre celui à l'encontre duquel il est invoqué. En pratique, ceci fut peu probant. L'invocation d'une norme impérative par la Commission d'arbitrage de la Conférence pour la paix en ex-Yougoslavie à propos du droit des minorités[13] fut plutôt maladroite lorsque l'on

---

[9] On pense au contrôle possible qui pourrait résulter de l'affaire dite de «Lockerbie» à la suite des ordonnances en indication de mesures conservatoires de 1992. Voir notre étude dans la 97 *RGDIP* (1993/3), p. 689–726.

[10] C'est déjà dans ce sens que s'orientaient les réflexions de M. Virally (*op. cit.*, p. 29) qui s'interrogeait sur la manière de véhiculer la norme.

[11] L'effet d'une dérogation à la norme impérative ferait sentir ses conséquences sur les traités conformément à la Convention de 1969, mais la norme impérative peut être d'origine coutumière. On peut même estimer que la norme sera d'autant plus impérative qu'elle émane à la fois d'un traité et d'une coutume. L'exemple de la prohibition du recours à la force dans les relations internationales avec sa double source (Charte des Nations Unies/coutume) est à cet égard pertinent.

[12] Le Comité des droits de l'homme a remis en cause le droit pour un Etat de formuler des réserves au Pacte international de 1966 sur les droits civils et politiques en estimant que des réserves contraires à des normes impératives ne seraient pas compatibles avec l'objet et le but du Pacte.

[13] Avis n°2 du 11 janvier 1992 qui invoque des «normes, maintenant impératives, du droit international général». A.Pellet y voit «la première consécration jurisprudentielle indiscutable de la notion de *jus cogens*» dans: «Note sur la Commission d'arbitrage de la Conférence pour la paix en Yougoslavie», 37 *AFDI* (1991), p. 826. Outre le caractère discutable de la qualité juridictionnelle de cette Commission, il convient de constater que cette «menace» n'eût pas l'effet escompté. On trouve également des références à la norme impérative dans l'avis n°1 du 29 novembre 1991 96 *RGDIP* (1992), p. 265, n°9 du 4 juillet 1992; 97 *RGDIP* (1993), p. 591 et n°10 du même jour 97 *RGDIP* (1993), p. 594.

connaît la suite du conflit. On trouve également une référence explicite au *jus cogens* dans la sentence du Tribunal arbitral pour l'affaire de la Délimitation de la frontière maritime opposant la Guinée-Bissau au Sénégal (31 juillet 1989): «Du point de vue du droit des traités, le jus cogens est simplement la caractéristique propre à certaines normes juridiques de ne pas être susceptibles de dérogation par voie conventionnelle» (§ 41[14]). En l'espèce, le Tribunal refusera l'application de cette norme impérative à la Guinée-Bissau qui l'invoquait pour remettre en cause le principe de l'uti possidetis juris. De plus, l'adverbe «simplement» a quelque peu tendance à dévaloriser le propos et la force de la norme impérative.

Le bilan «explicite» est donc très maigre. Ceci n'inquiète pas certains commentateurs qui estiment que cela prouve simplement que la norme impérative intimide et que les Etats la redoutent.[15]L'essence de ces normes serait de ne pas avoir à jouer selon un effet purement dissuasif déjà mentionné. Les Etats connaissant la valeur de la norme feraient en sorte de ne pas l'enfreindre.

Il en résulte que la portée de la norme impérative est bien difficile à juger. Le *jus cogens* serait-il renvoyé à «l'ordinaire» de la normativité? Sans doute pas, mais il semble que la violation d'une norme de *jus cogens* sera toujours celle qui viendra après celle constatée en l'espèce...Vide de contenu (ou du moins de précédents de sanction d'un traité pour une violation d'une norme impérative), et comme tel dissuasif, ou cantonné dans la consécration de principes éminents mais sans enjeu actuel, le *jus cogens* n'a, en tant que tel, guère sinon pas d'effets pratiques. Plus proche de la notion d'ordre public que du droit «constitutionnel» (Charte des Nations Unies), il reste vague. On peut également s'interroger sur son effet dissuasif qui, faute de contenu (à l'inverse de la dissuasion nucléaire!), n'impressionne pas toujours.[16] Installée au Panthéon du droit, la notion inspire respect mais peu de craintes.

Le débat reste spéculatif car la pratique manque de références, et l'on constate un décalage entre le *jus cogens* comme objet juridique et comme objet de discussion (ou de politique juridique). On peut penser que le débat s'est apaisé avec la fin (relative) des antagonismes Est-Ouest et Nord-Sud, mais on peut également penser que le débat s'est enlisé. Le *jus cogens* correspond clairement à une certaine vision tiers-mondiste et il semble que la manière de poser le débat soit dépassée,[17] même si la notion ne l'est pas.

---

[14] *RGDIP* (1990), p. 234.

[15] Sur cet aspect, voir l'opinion du juge ad hoc Lauterpacht suite à l'ordonnance du 13 septembre 1993 dans l'affaire relative à l'*Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine/Yougoslavie [Serbie et Monténégro])*, *Recueil* (1993), p. 440.

[16] On pense notamment à l'attitude du Royaume-Uni lors de l'adhésion de l'URSS à la Convention de Vienne de 1969 le 11 octobre 1989. Le Royaume-Uni a objecté à la réserve soviétique qui rejetait l'application de l'article 66 lié à la partie V (caractère obligatoire du règlement des différends pour le *jus cogens*). Il en a résulté une suspension de l'application de cette Partie V entre les deux Etats, Partie qui contient le *jus cogens*. Ainsi, la norme impérative n'existait pas entre les deux Etats (le Japon aura la même attitude que le Royaume-Uni), ce qui implique que le respect du *jus cogens* ne constitue pas en lui-même une norme impérative!

[17] Cet élément a été souvent souligné, notamment par les auteurs positivistes qui rejettent la notion telle qu'elle est présentée. En France, J. Combacau (qui distingue entre l'objectivisme de la notion et le fondement volontaire et consensuel du droit international) ou P. Weil (qui considère que la «boîte» du *jus cogens* doit rester

L'obligation de définir autrement le crime international

La notion de crime qui apparaît parallèlement au *jus cogens* dans les années 60 mérite d'être définie autrement que ce dernier. Le crime doit échapper aux hasards du *jus cogens* (2.1), l'article 19 du projet d'articles de la *CDI* doit établir une liaison plus claire entre le crime et le *jus cogens* (2.2) pour que la définition du crime international ait un avenir moins sombre et mieux tracé que la norme impérative (2.3).

Le crime doit échapper aux hasards du *jus cogens*

Si la sanction du crime veut devenir effective, il faut que sa définition et son contenu échappent à la «quête d'un idéal universel» qui caractérise le *jus cogens*. Certes, il n'est pas rare dans un ordre juridique (car le crime renvoie à un certain ordre juridique) que la substance précède la forme (c'est logique) et que l'existence formelle précède l'effectivité. Mais aucun ordre juridique, aussi intégré soit-il, ne parvient apparemment à bien supporter les conséquences d'une hiérarchie matérielle des normes qui ne s'accompagne pas d'une certaine différenciation formelle. Or, le crime appelle une hiérarchie matérielle et implique par conséquent une différenciation formelle. A la différence du *jus cogens*, le crime ne peut s'offrir le luxe de ne pas servir et d'être simplement dissuasif.

On peut objecter que le crime échappe aux hasards du *jus cogens* puisqu'il est distingué formellement d'autres violations du droit international (le délit étant ce qui n'est pas dans la catégorie des crimes), mais il s'agit plus d'une différence de nature que de degré et la définition de l'article 19 du projet d'articles n'est guère satisfaisante. Le paragraphe 3 de celle-ci donne une liste d'exemples[18] qui est souvent critiquée comme ne correspondant pas à l'essence d'un projet de codification et étant datée et mal rédigée (en clair, correspondant aux préoccupations – désormais dépassées – des pays en développement et des pays du bloc socialiste). Cette liste a donc toutes les chances de disparaître du projet final s'il doit aboutir. On serait alors confronté à la situation du *jus cogens*: un concept défini qui existe, mais sans contenu.

On retiendra également – entre autres – dans ce projet d'articles les dispositions concernant «l'Etat lésé» (article 40) qui n'établissent pas de liaison avec les crimes et délits et ne distinguent pas entre les Etats subjectivement ou objectivement lésés...

---

vide, et que les buts du droit international sont encore ceux définis par l'arrêt de la CPJI de 1927 dans l'affaire du Lotus), sont des exemples de cette pensée. Même si notre position vis-à-vis du *jus cogens* est critique, il faut remarquer que les auteurs positivistes ont tendance à repenser le droit comme ils souhaiteraient qu'il fût. En réalité, un telle notion est incompatible avec le volontarisme puisqu'elle est définie par ses conséquences.

[18] Le paragraphe 3 cite: a) la violation grave d'une obligation internationale d'importance essentielle pour le maintien de la paix et de la sécurité internationales, comme celle interdisant l'agression, b) la violation grave d'une obligation internationale d'importance essentielle pour la sauvegarde du droit des peuples à disposer d'eux-mêmes, comme celle interdisant l'établissement ou le maintien par la force d'une discrimination coloniale, c) la violation grave et à une large échelle d'une obligation internationale d'importance essentielle pour la sauvegarde de l'être humain, comme celles interdisant l'esclavage, le génocide, l'apartheid, d) la violation grave d'une obligation internationale d'importance essentielle pour la sauvegarde et la préservation de l'environnement humain, comme celles interdisant la pollution massive de l'atmosphère ou des mers.

Or, tout le monde n'est pas lésé de la même manière. En effet, le paragraphe 3 de cet article nous indique simplement que si le fait internationalement illicite constitue un crime, l'Etat lésé désigne tous les autres Etats. On retrouve là les mêmes symptômes que pour le *jus cogens*: des effets possibles dans l'action sans une définition claire. Ceci est confirmé par la note liée à ce paragraphe 3 dans le projet d'articles qui précise que le terme «crime» est utilisé pour établir une cohérence avec l'article 19 mais qu'on peut lui substituer les expressions «fait internationalement illicite de nature grave» ou «fait illicite d'une exceptionnelle gravité» pour éviter l'implication pénale du terme «crime». On peut dès lors s'interroger sur la nécessité de maintenir, en général dans ce projet, le terme «crime».

Un certain «flou artistique» règne entre les concepts de crime et de *jus cogens*, et pourtant, il semble bien que les deux notions ont un lien très fort même si elles ne se recoupent pas.

Le crime et le *jus cogens* dans l'article 19 du projet d'articles de la *CDI* sur la responsabilité des Etats

Un lien naturel de parenté existe entre les notions de crime et de *jus cogens* au regard des exigences d'un ordre public international. Ce lien est notable dans le projet d'articles de la *CDI* sur la responsabilité des Etats sans être pour autant explicite. Une incertitude perdure par conséquent depuis que ce lien s'est inscrit dans les travaux de la Commission du Droit International lors de la préparation de la Convention de 1969 sur le droit des traités.

La lecture de l'article 19 (cité supra) indique la liaison entre le crime et le *jus cogens*. En effet, comment comprendre la notion «d'obligation internationale si essentielle pour la sauvegarde d'intérêts fondamentaux de la communauté internationale» autrement que comme une norme impérative du droit international général? De la même manière, les exemples cités dans le paragraphe 3 de l'article 19 utilisent systématiquement l'expression «obligation internationale d'importance essentielle» pour qualifier les champs couverts par le crime, champs qui s'apparentent largement aux multiples exemples cités par les membres de la *CDI* ou les Etats au moment de la Convention de Vienne de 1969: maintien de la paix, droit des peuples à disposer d'eux-mêmes, esclavage, génocide, apartheid... Toujours dans cette perspective, on remarquera que les précisions données par la *CDI* sur la possible permutation du terme «crime» par les expressions «fait internationalement illicite de nature grave» ou «fait illicite d'une exceptionnelle gravité» pour l'article 40 § 3 sur «l'Etat lésé», montrent qu'il s'agirait d'une violation d'une norme pour le moins impérative.

La relation est à la fois évidente et très forte. Néanmoins, il n'y a pas superposition totale des notions de crime et de *jus cogens*, ce qui vient compliquer le maniement de ces concepts et nous conforte dans l'idée d'une nécessaire clarification. Il existe, en fait, une relation à sens unique dans l'article 19 du projet d'articles qui implique qu'un crime sera toujours la violation d'une norme impérative alors que la

réciproque n'est pas vraie.[19]Il en découle que la violation d'une norme de *jus cogens* n'entraîne pas nécessairement la constatation d'un crime international. Par exemple, un manquement à la règle du pacta sunt servanda constitue sans doute la violation d'une norme de *jus cogens* mais ne s'identifie pas pour autant à un crime international (sous réserve de l'ampleur et du champ de ce manquement). La catégorie des crimes internationaux représente, en quelque sorte, un sous – ensemble des normes impératives. Pour cette raison, il serait souhaitable de la circonscrire, à défaut de la définir, de manière à maîtriser correctement une partie des normes impératives et de donner à cette notion un contenu...au moins partiel.

La clarification de ce lien est d'autant plus souhaitable que l'article 19 – malgré ses imperfections nombreuses – a l'avantage de vouloir circonscrire le crime par son objet, c'est à dire par l'importance que la communauté internationale attache à l'intérêt protégé de la norme, et non simplement par ses effets comme le fait l'article 53 de la Convention de Vienne de 1969 à propos du *jus cogens*.[20]Dans ce sens, l'article 19 est plus logique, mais en l'absence d'achèvement de la notion de crime, le résultat est, pour le moment, largement similaire.

L'avenir de la définition du crime international

Une grande confusion règne en matière de crimes. Comme nous avons eu l'occasion de le souligner, la *CDI* travaille sur plusieurs projets incluant un concept de crime sans que celui-ci corresponde à la même réalité, ni ne s'applique aux mêmes sujets. Il en résulte un certain manque de cohérence de l'ensemble, manque de cohérence que l'on retrouve à l'intérieur de chacun des projets. Ceci n'est guère étonnant lorsque l'on sait que le projet sur la responsabilité des Etats est à l'ordre du jour de la *CDI* depuis 1955 avec une succession de rapporteurs. Si l'on ajoute que les circonstances évoluent, que les membres de la *CDI* changent et que les perspectives et les enjeux se modifient, on parvient à un projet comportant plusieurs strates de sédimentation.

Pour le projet sur la responsabilité des Etats qui nous intéresse principalement, on remarque que la deuxième partie est assez faible et qu'elle est mal reliée aux première et troisième parties. Peut-être ces imperfections tiennent-elles à la conception plus philosophique que juridique qui se dégage de l'article 1er du projet: «Tout fait internationalement illicite d'un Etat engage sa responsabilité internationale». Le manquement devenant l'épicentre – et non le dommage – la tâche est plus compliquée. On pourrait citer plusieurs exemples qui montrent l'équilibre précaire de l'édifice, mais il suffira de mentionner la partie concernant les contre-mesures qui semble donner un blanc-seing à ce type de ripostes et qui aurait pu constituer un projet à part, ou la partie consacrée au règlement des différends qui consacre une procédure longue et

[19] Sur ce point, voir le commentaire de Roberto Ago, *ACDI* 1976, vol. II, 1ère partie, 33-34, et 2ème partie, 111.

[20] Voir G. A b i-S a a b: «Cours général de droit international public», 207 *RCADI* (1987), p. 433.

rigide en obligeant les Etats à se soumettre finalement à un tribunal arbitral avec une intervention possible de la CIJ en cas de contestation de la sentence.[21]

Le crime se trouve peu ou mal relié à ces différentes parties et le chapitre V de la IIème partie consacré aux crimes internationaux ne nous éclaire guère. Il crée essentiellement une obligation de non reconnaissance du crime et une obligation de coopération (article 53) sans apporter une solution à l'institutionnalisation de la riposte au crime[22] pour éviter des contre-mesures en défense qui sont, par ailleurs, assez peu encadrées (sauf l'obligation de négociation avant l'action découlant de l'article 48). Un Etat pourra toujours prendre des mesures unilatérales en invoquant la défense des intérêts de la communauté internationale.[23] Peut-être aurait-il été souhaitable de s'inspirer de la technique de l'article XXIII du GATT permettant à l'Etat de prendre des mesures parallèlement à une procédure de règlement pacifique.

Ces incertitudes se doublent d'une multiplicité de crimes ne s'appliquant pas aux mêmes sujets. Le projet sur la responsabilité vise un crime d'Etat sans connotation pénale (a priori), alors que les projets sur la Cour Criminelle Internationale (CCI) et le Codes des crimes contre la paix et la sécurité de l'humanité visent une procédure pénale applicable à des individus. Cette évidence mérite d'être précisée car les mêmes crimes sont parfois indiqués dans les projets avec des conséquences différentes. L'article 20 du projet de Cour Criminelle Internationale[24] vise une série de crimes[25] dont le préambule du projet nous précise qu'il s'agit des «crimes les plus graves qui intéressent la communauté internationale dans son ensemble». On notera que l'acteur concerné («la communauté internationale dans son ensemble») est le même que celui de l'article 53 de la Convention de Vienne de 1969 pour le *jus cogens*. De son côté, le projet de Code des crimes connaît une fluctuation inquiétante dans la liste des crimes qui sont passés de 12 à 5[26]! De nombreuses incertitudes demeurent. Certains crimes

---

[21] Ce qui laisse peu de marge à la liberté des Etats et semble méconnaître le caractère facultatif du règlement des différends devant la Cour internationale de Justice.

[22] Le Conseil de sécurité pourrait jouer ce rôle, mais l'utilisation d'une législation d'exception (chapitre VII) n'est sans doute pas la mieux adaptée pour le respect du droit.

[23] La France a pratiqué cette argumentation au moment des événements en Afghanistan (1979), en Pologne (1981) ou en Argentine (1982).

[24] On sait que ce projet connaît quelques difficultés puisque certains pays (dont la France) posent des conditions. Concernant la France, celle-ci demande que le consentement pour que la Cour puisse être saisie provienne de trois catégories d'Etats: l'Etat sur le territoire duquel le crime a été commis, l'Etat de la nationalité de la victime et l'Etat de la nationalité du suspect. Ces conditions rendent la saisine de la Cour tout à fait aléatoire, voire improbable.

[25] Le crime de génocide, le crime d'agression, la violation grave des lois et coutumes applicables dans les conflits armés, le crime contre l'humanité, ainsi que des crimes énumérés en annexe provenant de traités et qui «constituent des crimes de portée internationale qui sont d'une exceptionnelle gravité» (infractions graves aux Conventions de Genève, capture illicite d'aéronef, crime contre la sécurité de l'aviation civile internationale, apartheid et crimes connexes, crime contre une personne jouissant d'une protection diplomatique, prise d'otage, tortures et traitements dégradants, actes illicites contre la sécurité de la navigation maritime, crime concernant le trafic de stupéfiants). On retrouve dans cette dernière énumération beaucoup des grandes conventions du droit international sur des sujets sensibles.

[26] L'agression, le génocide, le crime contre l'humanité, le crime de guerre et le crime contre les personnels des Nations Unies. L'apartheid, le crime contre l'environnement, le terrorisme ou le trafic de stupéfiants (par exemple) ont soit disparu, soit se retrouvent dans certains articles seulement. Voir: K. A m b o s: «Establishing

semblent avoir une assise solide et bénéficient de l'aura du *jus cogens*: c'est le cas du crime de génocide dont K. Ambos estime: «The crime of genocide (article 17 Draft paper Code 1996) has a solid treaty basis and is universally recognized constituting a *jus cogens* norms»[27]. A l'inverse, l'agression laisse place à de nombreuses hésitations: il est difficile de distinguer entre la «guerre d'agression», «l'acte d'agression» ou la «menace d'agression». De même, l'inclusion de la catégorie des crimes contre le personnel des Nations Unies semble largement circonstanciée par les récents événements dans les opérations de maintien de la paix. En revanche, les atteintes graves à l'environnement ont disparu alors qu'elles sont citées comme exemple à l'article 19 du projet d'articles sur la responsabilité. Où est la cohérence?

Il n'en reste pas moins que ces «crimes» ne peuvent être confondus. Les uns visent une procédure spécifiquement pénale touchant l'individu responsable, les autres (les crimes d'Etat du projet sur la responsabilité) visent une procédure ni pénale, ni civile, mais tout simplement internationale. Dans ce cadre, le terme «crime» n'est pas le plus propice car on pense plus à punir qu'à réparer les dommages, ce qui entraîne la connotation pénaliste reprochée au projet sur la responsabilité. Si le crime d'Etat se profile, il ne correspond pas à l'Etat criminel. Or, la confusion est présente et laisse entendre qu'un Etat pourrait commettre des crimes au sens pénal (ce qui est, par ailleurs, discutable). Peut-être serait-il préférable d'abandonner le terme «crime» pour le projet sur la responsabilité pour laisser cette dénomination à la responsabilité pénale des dirigeants, agents de l'Etat ou individus dans le cadre de la Cour Criminelle Internationale ou du Code des crimes? Comme l'article 19 du projet ne tire pas les conséquences du concept de crime (pas de régime propre), il est encore temps d'abandonner ce terme et de lui substituer celui plus approprié de «violation d'une obligation essentielle», de «manquement grave»....ou tout autre expression équivalente que la *CDI* utilise dans son projet ou dans ses commentaires.

3. Le caractère *erga omnes* et l'*actio popularis*: un pont crédible entre le crime et le *jus cogens*?

Le lien établi par le caractère *erga omnes* des obligations

Les champs du *jus cogens* et du crime sont mal délimités: est-ce la sanction particulière, le caractère non dérogeable, la gravité exceptionnelle...qui l'emporte? De nombreuses interrogations sont pendantes. P.Weil les résume ainsi: «La liste des obligations erga omnes coïncide-t-elle avec celle des obligations nées des normes de jus

---

an International Criminal Court and an International Criminal Code», 7 *EJIL* (1996–7), p. 519–544; Y. D a u d e t: «Les travaux de la *CDI*», 41 *AFDI* (1995), p. 561–580. Ces auteurs soulignent la question de la dichotomie entre l'internationalisation de la justice criminelle et «l'internalisation» des procédures pour poursuivre les personnes. C'est exactement le problème auquel est confronté le Tribunal pénal pour l'ex-Yougoslavie à l'heure actuelle dont on peut noter la similitude – naturelle – dans la série des crimes justiciables: infractions graves aux Conventions de Genève, violations des lois et coutumes de la guerre, génocide, crime contre l'humanité. On remarquera néanmoins que le projet de Code des crimes est plus large puisqu'il englobe notamment l'agression, autrement dit le crime contre la paix.

cogens? ou avec celle des obligations dont la violation constitue un crime d'Etat?».[28] Une réponse à ces questions serait la bienvenue pour éclaircir la portée de ces concepts. S'il n'y a, pour le moment, aucune réponse définitive, des pistes existent. La récurrence du caractère erga omnes de ces obligations ainsi que l'affleurement de l'actio popularis en sont quelques-unes.

La superposition entre les obligations *erga omnes*, les obligations nées du *jus cogens* et celles dont la violation constitue un crime de l'Etat n'est pas absolue mais des zones communes apparaissent. Le caractère *erga omnes* implique une opposabilité absolue qui ne peut être confondue avec l'impératif à caractère moral découlant du *jus cogens* et implicitement du crime de l'Etat. Par exemple, le respect de la liberté de navigation en haute mer présente un caractère *erga omnes* mais sa violation ne peut être confondue avec un crime international. De la même manière, nous avons constaté que le crime international ne correspondait pas forcément à la violation d'une norme impérative. *Erga omnes*, *jus cogens* et crime ne se superposent pas mais toute constatation d'un crime ou de la violation d'une norme impérative semble entraîner une opposabilité absolue résultant du caractère erga omnes de l'obligation de ne pas commettre ce crime ou de ne pas violer une norme impérative. C'est en quelque sorte le plus petit dénominateur commun de cet ensemble.

La reconnaissance de ce caractère *erga omnes* commun nous mène sur la voie d'un intérêt pour agir lui aussi commun à l'ensemble des Etats, autrement dit vers l'actio popularis. Si l'opposabilité est absolue, chacun doit pouvoir la dénoncer. Le projet d'articles de la *CDI* n'ignore pas cette possibilité et la suggère même, mais d'une manière assez obscure, à travers la question de l'Etat lésé (article 40). Nous avons remarqué que si le fait internationalement illicite constitue un crime, l'Etat lésé désigne tous les autres Etats. Il s'agit à n'en pas douter de la représentation d'une forme d'actio popularis malgré l'absence de liaison claire avec le crime[29] et la non distinction entre l'Etat subjectivement ou objectivement lésé. Comme le signale très justement Y. Daudet, il aurait peut-être été préférable de différencier entre le «défenseur de la légalité» et la «victime directe du dommage».[30] Cela ne retire rien à l'*actio popularis* mais permet d'établir des degrés d'intervention selon l'implication de l'Etat. L'Etat victime directe d'une agression n'est pas dans la même position qu'un Etat à l'autre bout de la planète qui proteste contre la violation du droit international même si cette agression n'a aucune répercussion sur ses intérêts propres.

Le sentiment que s'esquisse dans ces domaines une sorte de dénominateur commun est renforcé par la position de la Cour internationale de Justice qui, faute d'une

---

[27] *Ibid.*, 535. Voir également le très intéressant tableau en annexe (540–544) comparant l'évolution du projet de la Cour Criminelle Internationale avec le statut du Tribunal pénal pour l'ex-Yougoslavie et pour le Rwanda.

[28] Dans: «Le droit international en quête de son identité», 237 *RCADI* (1992), p. 288.

[29] Nous nous référons au commentaire de la *CDI* indiquant la possibilité de remplacer l'expression «crime» par un «fait internationalement illicite de nature grave» ou un «fait illicite d'une exceptionnelle gravité» pour éviter l'implication pénale du terme «crime», comme nous l'avons signalé, *supra*.

[30] *Op. cit.*, p. 572.

reconnaissance expresse du *jus cogens* ou du crime de l'Etat (qui ne serait pour le moment qu'une reconnaissance coutumière), s'appuie plus ou moins directement sur le caractère erga omnes des obligations et, dans une moindre mesure, sur une possible *actio popularis*.

La position de la Cour Internationale de Justice

On sait que la Haute Juridiction n'a jamais directement et explicitement reconnu l'existence d'une norme de *jus cogens*. Des allusions indirectes ainsi que des opinions des juges à la suite d'arrêts rendent néanmoins compte de la conscience de cette question.

Dans son avis consultatif de 1975 sur le Sahara occidental, la Cour qualifiait le droit des peuples à disposer d'eux-mêmes de «principe fondamental régissant la politique de décolonisation de l'Assemblée générale»[31] Dans l'affaire du *Personnel diplomatique et consulaire des Etats-Unis à Téhéran*, elle indique qu'il existe des «obligations impératives» dans les relations diplomatiques et consulaires découlant des Conventions de Vienne de 1961 et 1963,[32] soulignant dans l'arrêt «l'extrême importance de principes de droit dont elle est amenée à faire application».[33] Dans son célèbre arrêt sur les *Activités militaires et paramilitaires au Nicaragua et contre celui-ci*, la Cour se contente de reconnaître l'interdiction du recours à la force contenu dans la Charte des Nations Unies et le droit coutumier,[34] et ses références au *jus cogens* ne sont que la reprise d'expressions utilisées par les Parties et indiquées comme telles. Plus récemment, dans l'affaire du Timor oriental, la Cour indique qu'il existe des «principes essentiels du droit international contemporain»,[35] mais ne s'engage pas dans la voie du *jus cogens* alors que certains juges n'hésitent pas à le faire dans les opinions séparées.[36] De nouveau, dans l'avis consultatif sur la Licéité de la menace ou de l'emploi d'armes nucléaires du 8 juillet 1996, la Cour utilise le *jus cogens* d'une manière détournée pour l'écarter en l'espèce.[37] La Cour se concentre sur l'applicabilité de certains principes et règles et non sur leur nature juridique, même si elle ne refuse pas explicitement de reconnaître que certaines règles sont impératives lorsqu'elle affirme:

«Il a été soutenu au cours de la présente procédure que ces principes et règles du droit humanitaire font partie du jus cogens tel que défini à l'article 53 de la Convention de Vienne sur le droit des traités du 23 mai 1969. La question de savoir si une règle fait partie du jus cogens a trait à la nature juridique de cette règle. La demande que l'Assemblée générale

[31] *Recueil* (1975), p. 34 (§ 60).
[32] *Recueil* (1979), mesures conservatoires, p. 20 (§ 41).
[33] *Recueil* (1980), fond, p. 42 (§ 92).
[34] *Recueil* (1986), p. 99 (§ 188).
[35] *Recueil* (1995), p. 102 (§ 29).
[36] C'est très nettement le cas du juge Ranjeva qui considère que «...le *jus cogens* relève du droit positif», *Ibid.*, p. 131.
[37] *Recueil* (1996), § 83.

a adressée à la Cour soulève la question de l'applicabilité des principes et règles du droit humanitaire en cas de recours aux armes nucléaires, et celles des conséquences que cette applicabilité aurait sur la licéité du recours à ces armes, mais elle ne soulève pas la question de savoir quelle serait la nature du droit humanitaire qui s'appliquerait à l'emploi des armes nucléaires. La Cour n'a donc pas à se prononcer sur ce point».

Il existe, vis-à-vis de la Cour Internationale de Justice, ce que l'on pourrait qualifier de «syndrome du premier pas», comme si concrétiser la notion reviendrait à l'anéantir. Surtout, la Cour ne semble pas accepter le rôle tacite qui lui est dévolu de révélateur du *jus cogens*. Elle estime probablement que ce rôle revient aux Etats et qu'il n'appartient pas à une juridiction de «légiférer» sur un aspect aussi délicat alors que les Etats peinent à se mettre d'accord sur ce sujet.

Les suggestions de la Haute Juridiction sont, en revanche, beaucoup plus explicites concernant le caractère erga omnes de certaines obligations, et les obligations ainsi qualifiées coïncident le plus souvent avec des normes proches du *jus cogens* et du crime.

Le point de départ est incontestablement le célèbre dictum de l'arrêt sur la Barcelona Traction du 5 février 1970:

«Une distinction essentielle doit (...) être établie entre les obligations des Etats envers la communauté internationale dans son ensemble et celles qui naissent vis-à-vis d'un autre Etat dans le cadre de la protection diplomatique. Par leur nature même, les premiers concernent tous les Etats. Vu l'importance des droits en cause, tous les Etats peuvent être considérés comme ayant un intérêt juridique à ce que ces droits soient protégés; les obligations dont il s'agit sont des obligations erga omnes».[38]

Révérence au *jus cogens* (logique si l'on considère que l'arrêt intervient l'année qui suit l'adoption de la Convention sur le droit des traités)? ou relativisation de la notion tout en affirmant l'opposabilité absolue de certaines normes? La question reste posée selon que l'on veut y voir la chose sans le mot ou pas. A la suite de son dictum, la Cour cite quelques exemples d'obligations *erga omnes* comme celles découlant des actes d'agression, du génocide et des droits fondamentaux de la personne humaine (esclavage, discrimination raciale).

Force est de constater que la Cour utilise très souvent le qualificatif d'obligation *erga omnes* lorsqu'apparaît le spectre – jamais consacré – du *jus cogens*. L'affaire du Timor oriental en offre un nouvel exemple lorsqu'elle explique qu'une règle *erga omnes* n'entraîne pas automatiquement la compétence de la Cour.[39] En l'espèce, c'est l'importante question du droit des peuples à disposer d'eux-mêmes à travers l'un des derniers cas de décolonisation de la planète qui est en jeu. Plus explicitement, dans l'arrêt du 11 juillet 1996 concernant les exceptions préliminaires dans l'affaire de *L'application de la Convention pour la prévention et la répression du crime de géno-*

[38] *Recueil* (1970), p. 32 (§ 33).
[39] *Op. cit.*, *Recueil* (1995), p. 102 (§ 99).

cide entre la Bosnie-Herzégovine et la Yougoslavie (Serbie et Monténégro), elle indique que «les droits et obligations consacrés par la Convention sont des droits et obligations *erga omnes*»[40] alors que le demandeur avait plaidé le *jus cogens*. L'*erga omnes* deviendrait-il l'esquive ou la parade à un *jus cogens* toujours redouté? Il s'agit pour le moins d'un régime minimum imposé à des obligations ressenties comme impératives, même si pas qualifiées ainsi. En l'absence de précisions supplémentaires, le crime pourrait suivre la même voie.

Il n'en reste pas moins que la qualification d'obligation *erga omnes* est plutôt un concept procédural qui gouverne l'intérêt à agir mais ne définit pas la nature de l'obligation. On le sait, l'*actio popularis* n'a pas suivi une voie linéaire dans la jurisprudence de la Cour depuis le célèbre – et très critiqué – arrêt du 18 juillet 1966 dans l'affaire du *Sud-Ouest Africain* où la Cour niait cette possibilité.[41] Pourtant, toutes les affaires se référant aux obligations *erga omnes* impliquent une certaine forme d'*actio popularis* depuis l'affaire de la Barcelona Traction. Les affaires récentes précitées de Timor oriental ou de l'*Application de la Convention pour la prévention et la répression du crime de génocide* vont dans ce sens.

En conséquence, l'actio popularis liée à l'opposabilité absolue – erga omnes – de la norme semblent progressivement s'imposer et pourraient utilement suppléer la crainte qu'inspire le *jus cogens*, et que pourrait inspirer le crime.

En guise de conclusion sur l'avenir de cette liaison

Il est trop tôt pour savoir comment ces normes (impératives, de *jus cogens*), ces obligations (*erga omnes*) et la reconnaissance de violations du droit international (donc la violation d'obligations découlant de normes *a priori* impératives) vont s'agencer. L'incertitude existe aussi bien pour la voie conventionnelle que coutumière, ou même la reconnaissance d'un droit positif par la Cour Internationale de Justice (L'arrêt sur le fond dans l'affaire de la Convention sur le génocide nous en dira peut être plus?).

Il est simplement certain que cet entrecroisement de normes et d'obligations répond à un certain besoin de transcendance[42] du droit international qui s'exprime d'une manière diffuse pour le moment. Il est également certain qu'il existe une imprégnation dans la conscience des acteurs de ces normes impératives et de ces obligations absolues, imprégnation qui expliquerait la rareté de son invocation (caractère dissuasif).[43] Il est tout aussi évident que l'individu en deçà de l'Etat (agent ou particulier) peut ignorer ces prescriptions, d'où la nécessité de compléter l'arsenal juridique par des aspects pénaux touchant directement la personne (Cour Criminelle Internationale ou Code des crimes).

---

[40] *Recueil* (1996), § 31.

[41] *Recueil* (1966), p. 47 (§ 66).

[42] Ce que Charles Chaumont qualifie de «besoin de transcendance à tendance scientifique», voir: «Mort et transfiguration du *jus cogens*», *Mélanges Gonidec* (1985), p. 469.

[43] Peut-on imaginer un traité autorisant un génocide?

Une fois de plus, il faudra être patient. Le droit s'appuie sur la réalité pour la transformer et non l'inverse. Pour éviter l'épisode inachevé du Nouvel Ordre Economique International, il est préférable d'attendre que se décantent ces notions dont l'expression procédurale d'obligation *erga omnes* est, pour le moment, la manifestation la plus achevée.

Nous sommes également en droit de nous demander si la Commission du Droit International est l'organe le plus approprié pour mener à bien cette mission. A partir du moment où sa mission est la codification de la coutume, la règle étant déjà obligatoire, la transcription est facilitéeÀ (mais pas toujours évidente). Mais si elle souhaite s'immiscer dans le domaine du développement progressif du droit international, comme elle le fit en 1969 pour le *jus cogens*, la tâche s'avère beaucoup plus ardue. La *CDI* est-elle encore adaptée à cette mission? Nous n'avons pas la prétention de répondre à cette question, mais elle mérite d'être posée car cette Commission ne semble plus à même de convaincre les Etats du bien fondé de ses projets de conventions.

23 POLISH YEARBOOK
OF INTERNATIONAL LAW
1997–1998
PL ISSN 0554–498X

Concepts of *jus cogens* and Obligations *erga omnes* in International Law in the Light of Recent Developments

WŁADYSŁAW CZAPLIŃSKI

1. The conflict around inspections of Iraqi military materials factories and depots menacing with the new armed conflict in the Gulf brought our attention to some theoretical issues connected with the use of force and state responsibility under public international law. Considered together with the recent codification by the ILC on the state responsibility and on code of crimes against peace and humanity, practical developments show the growing interest to a new look at the issues of *jus cogens* and obligations *erga omnes*.

The invasion of Kuwait by Iraq in July 1991 caused a (surprisingly) immediate reaction by the Security Council. Resolution 660(1990) of 2 August 1990[1] adopted unanimously condemned the Iraqi invasion and obliged Iraq to withdraw its armed forces to the pre-war positions. As Iraq reacted neither to this resolution nor to any of the following ones, Resolution 678(1990) of 29 November 1990[2] authorized Member States of the U.N. to undertake all necessary steps (including military action) to liberate Kuwait. The operation "Desert Storm" led to withdrawal of Iraqi armed forces and to acceptance of the terms of armistice by the government of Iraq. No formal peace treaty was concluded. Instead of it, the Security Council passed Resolution 687(1991) on 3 April 1991.[3] The Resolution defined the conditions of armistice to be accepted by Iraq which included i.a. the destruction or removal under international supervision (to this purpose a Special Inspection Commission was established and far-reaching inspection competence was granted to the IAEA) all chemical and biological weapons and all ballistic missiles, and a unilateral acceptance of an obligation not to possess, dispose or develop nuclear weapons and nuclear-weapons-usable material. The Security Council decided finally to remain seized of the matter (what is a standard formula used in the S.C. Resolutions) and to take such further steps as may be required for the implementation of the present Resolution and to secure peace and security in the area (para. 34 of the Resolution).

Iraq several times violated the terms of peace. Finally, it refused to admit U.N. inspectors to presidential palaces suspected of serving to manufacture and store arms

---

[1] *ILM* (1990), p. 1325.
[2] *ILM* (1990), p. 1565.
[3] *UNYB* (1991), p. 172.

of mass destruction. The U.S. decided to use force against Iraq in order to implement the Resolution 687. The action by the U.S. and her allies gave rise to opposition by some States including permanent members of the Security Council: France, Russia and China. The conflict was finally resolved without the use of armed force against Iraq[4] but it left a number of interesting international legal questions unanswered, one of them being whether the U.S. government is allowed under current international law to use force unilaterally in order to enforce the implementation of Resolution 687 by Iraq.

2. Although certain elements of moral nature can be found in the jurisprudence of the PCIJ (in particular in opinions by individual judges), the notion of *jus cogens* was introduced to international law by Art. 53 of the Vienna Convention on the Law of Treaties of 23 May 1969. The well-known definition (*For the purposes of the present Convention, 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*) has been criticised as tautology – it defines a norm through its effect; and no state can invoke a violation of a norm which is not clear and precise. It seems also generally accepted that under contemporary international law only customary law can become *jus cogens*, as three international treaties only have got general acceptance.[5] We should consider, therefore, whether the notion of peremptory norms constitutes part of customary law or it is binding exclusively upon the parties to the Vienna convention on the law of treaties. At different stages of *travaux preparatoires* objections to the concept of *jus cogens* were made. Some participants to the conference stated that it constitutes a progressive development of international law (e.g. Argentina, Mali, Sierra Leone) while the others were of the opinion that it expresses a codification of existing international law. Article 53 of the Convention was adopted with 87 votes in favour, 8 against (including France, Belgium, Australia) and 12 abstentions (including Japan and the U.K.). As an invalidity concerns exclusively agreements contrary to *jus cogens* concluded after the entry into force of the Vienna Convention, the effects of peremptory norms are not retroactive. It seems manifest that *jus cogens* did not constitute part of customary law before the concluding of the Vienna Convention and it binds exclusively parties to the Convention.

One cannot exclude, however, that *jus cogens* became part of customary law after the entry of the Convention into force. As the trend to abuse the notion of *jus cogens* is always present among international lawyers, we must emphasize that there is a necessity to observe a particular test for formation of the norms of this kind. Ac-

[4] According to Memorandum of Understanding between the U.N. and Iraq of 23 February 1998, 37 *ILM* (1998), p. 501, Iraqi authorities accorded international agencies access to all institutions and installations, and the UNSCOM obligated to respect rights and legitimate interests of Iraq.

[5] We mean here the U.N. Charter and two Vienna Conventions: on Diplomatic Relations of 1961 and on Consular Relations of 1963. It is important, however, that the latter instruments to a large extent codify existing customary law.

cording to Art. 38 of the Vienna Convention on the Law of Treaties, a conventional norm can be binding upon third states if it is transformed into customary law. The mechanism of such a transformation has been analyzed in the judgment of the ICJ in the *North Sea Continental Shelf* case.[6] The Court stated that the transformation is possible in two ways: through the influence of the treaty itself (three conditions must be fulfilled: the treaty must be of a normative nature, circle of participants must be wide, and practice intensive) or through the interpretation of third states non-parties to the agreement (in such circumstances reference must be made not only to the practice but also to the *opinio juris*). In fact there is no international practice referring to the concept of *jus cogens*. One decision of the ICJ only (in the *Nicaragua* case) referred directly to the principle of non-use of force as example of *jus cogens*; it did not stated that this principle is of peremptory nature but invoked to opinions of the parties to the dispute and the position of the ILC in this respect. In the case concerning the *American Diplomatic and Consular Staff in Tehran*[7] the ICJ referred to norms of diplomatic law as fundamental and imperative, but in our opinion the term "imperative" was not used in the same meaning as in Art. 53 of the Vienna Convention.[8] Also the arbitral award of 31 July 1989 on *the delimitation of maritime boundary between Guinea-Bissau and Senegal* contained a mention on *jus cogens*, but the arbitrators did not declare it as universally binding. In the *East Timor* case the ICJ invoked "essential principles of contemporary international law" having in mind decisively the same category of hierarchically superior norms of international law.[9] The Badinter Committee referred in its instruments to certain norms concerning human rights and rights of minorities defining them as *jus cogens*.[10] Finally, in several spectacular cases concerning bilateral treaties (including the Egypt–Israeli agreement of Camp David of 17 September 1978)[11] the idea of invalidity of treaties allegedly contrary to peremptory norms of international law was rejected. Generally speaking, states are not particularly wishing to invalidate their international obligations because of their hypothetical non-conformity with *jus cogens*.

3. On the other hand one should refer here to the famous *obiter dictum* by the ICJ in the *Barcelona Traction* case. The Court drew a clear distinction between multilateral obligations which in fact are formed of a network of bilateral obligations (*inter*

[6] *ICJ Rep.* (1969), p. 38.

[7] *ICJ Rep.* (1986), p. 100–101.

[8] The same remark concerns the notion of imperative international obligations in the *Aegean Sea Continental Shelf* case, *ICJ Rep.* (1976), p. 41. It must be noted, however, that by introducing in Draft Art. 50 on State Responsibility a limitation to resort to countermeasures involving violation of inviolability of diplomatic envoys the ILC placed respective norms of diplomatic law on a higher level.

[9] *ICJ Rep.* (1995), p. 102.

[10] Cf. Opinion No. 2 of 11 January 1992, 96 *RGDIP* (1992), p. 263. The conclusions of the Committee go in our opinion too far, as it recognized the peremptory nature of the right to self-determination which in fact depended strongly upon recognition by the international community, i.e. upon political considerations, and was not absolute. The evaluation of other peremptory norms was also unclear.

[11] This and some other examples were quoted by G. G a j a: "*Jus cogens* Beyond the Vienna Convention", 172 *RCADI* (1981), p. 282–289; N. R o n z i t t i: "Trattati contrari a norme imperative del diritto internazionale?", in: *Studi in onore G. Sperduti* (1984), p. 209.

partes), and certain categories of international obligations, the observance of which constitutes an interest of the international community as a whole, which can be called obligations *erga omnes*.[12] The Hague Judges indicated ban on aggression and genocide and the obligation to respect fundamental human rights including protection from slavery and racial discrimination as examples of the latter norms. Some of them belong to general international law while the others can be found in international instruments of universal or quasi-universal character. The Court recognized, therefore, the legal interest of all states in respect for international law but it did not define any mechanism of protection of these rights.

The concept of obligations *erga omnes* in the meaning invoked by the Court was connected with earlier decisions dealing with the rights of third states to claim international responsibility in cases of violations of international law. In our opinion it had not only substantive but – first of all – procedural aspect. It was not totally new in international law. For the first time the rights of the states indirectly affected by the violations of international law were dealt with in the *Wimbledon* case.[13] The Court recognized the right of British, French, Italian and Japanese governments to bring international claims against alleged violations of the status of the Canal of Kiel by Germany. In the *South-West Africa* case[14] the Hague Court was ready to grant to Ethiopia and Liberia locus standi in the proceeding concerning the violations of mandate by South Africa. The decision was subsequently overruled by the decision in the 2nd stage (1966);[15] the Court decided that the states non-parties to the mandate had not been granted with any rights dealing with it, and that these states could not bring any claims under international law as the concept of *actio popularis* was unknown to the international legal system. The action would have been admissible exclusively if the applicants had proved that their own interests had been violated. Consequently the claim was rejected. Several judges (including Wellington Koo, Koretsky, Tanaka, Forster, and Mbanefo) dissented to the decision of the majority and emphasized that the claimants had legal interest in bringing their claim. In the *Nuclear Tests* cases several dissenting judges were ready to accept a certain legal interest of third states in observance of the rules of international law but they were not willing to recognize the validity of *actio popularis* in international law.[16] One should notice as well that in its

[12] In the international legal writing the notion of effects *erga omnes* has often been used as synonimous to opposability of international legal acts to third states. See among Polish authors interesting and convincing analysis by A. W y r o z u m s k a: "O skutku *erga omnes* traktatów" [On the Effects of *erga omnes* Treaties], 40 *PiP* (1985), No. 11–12, p. 109; as to foreign authorities we can quote P. R e u t e r: *Introduction au droit des traités* (1972), p. 101; J.J. R u i z: "Las obligaciones erga omnes en derecho internacional publico", in: *Estudios de derecho internacional.* Homenaje al Profesor Miaja de la Muela, Madrid (1979), vol. I, p. 222; R. A g o: "Obligations *Erga Omnes* and the International Community", in: *International Crimes of States* (Weiler, Cassese, Spinedi, eds.), (1987), p. 237; C. A n n a c k e r: "The Legal Regime of *Erga Omnes* Obligations in International Law", 46 *AJPIL* (1994), p. 135–136.

[13] *PCIJ Publ.*, Series A, No 1, p. 20.

[14] *ICJ Rep.* (1950), p. 128.

[15] *ICJ Rep.* (1966), p. 6.

[16] Joint opinion by Judges Onyeyama, Dillard, Jimenez de Arechaga and Waldock, *ICJ Rep.*, p. 369; opinions by Judges de Castro and Gross, *ibidem*, p. 425 and 288, respectively.

earlier decisions the Hague Court referred mostly to obligations *erga omnes* while in the recent judgment in the *Genocide Convention* (*Bosnia & Herzegovina v. RFY* [*Serbia & Montenegro*]) case it invoked also rights deriving from the said 1948 Convention as opposable *erga omnes*. This means in our opinion that substantive element of these norms corresponding with the other superior norms of international law is strongly emphasized.

4. The postulated hierarchy of international legal norms was developed by the ILC in the draft articles on state responsibility. R.Ago proposed Article 19 introducing a notion of international crime (*1. An act of a State which constitutes a breach of an international obligation is an internationally wrongful act, regardless of the subject matter of the obligation breached. 2. An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole constitutes an international crime*).[17] The ILC emphasized the necessity of drawing a distinction between the regime of state responsibility for violation of international of lesser and of less general importance for the international community, and the regime applicable in cases of serious violations of obligations of fundamental importance for the international community. The proposal by the ILC involves a number of important questions:

Firstly, what is the relationship between peremptory norms of international law within the meaning of Art. 53 of the Vienna Convention of 1969, obligations *erga omnes*, and international crimes. It is manifest that the notion of *jus cogens* was formulated exclusively for the purposes of the Convention; on the other hand, it would be unreasonable to suppose that both concepts remain unrelated if one remembers that generally any distinction among norms of international law has been consequently rejected. It must be recalled, however, of *jus cogens* norms amounts to international crime (which is a backstep comparing to Art. 53 of the Vienna Convention of 1969). From the logical point of view, it would also be unreasonable to suppose that two attempts to change this approach were made at the same time taking into account different criteria. Secondly, the catalogues of peremptory norms, of obligations *erga omnes* and of norms the violations of which amount to international crimes correspond with each other.[18] Thirdly, the problem of consequences of violations of funda-

[17] Draft of 1996, U.N.-Doc. A/CN.4/L.528/Add. 2. Para. 3 of the said Draft gives examples of international crimes: aggression, colonial domination as a form of violation of the principle of self-determination, slavery, genocide, apartheid, massive pollution of environment. We should refer here also to the two drafts of international instruments: ILC Draft Code of Crimes against the Peace and Security of Mankind (U.N.-Doc. A/CN.4/L.532 of 1996) and Draft Statute for the International Criminal Court (A/AC.249/1998/CRP.6 of 1 April 1998). Both of them deal with international criminal responsibility of individuals but they contain catalogues of offences subjected to the punishment corresponding with the norms referred to as peremptory ones, the violations of which amount to international crimes (aggression, war crimes against humanity, crimes against the United Nations). The definitions invoked are formulated in a more detailed way than those in the earlier international acts dealing with the "higher international law" but this can be due to requirements of criminal law.

[18] Cf. e.g. H. Thierry: "L'évolution du droit international", 222 *RCADI* (1990), p. 67; V. Starace: "La responsabilité résultant de la violation des obligations à l'égard de la communauté internationale", 153

mental norms of international law occurs. The ILC Draft was elaborated in this respect by two eminent international lawyers: W. Riphagen and G. Arangio-Ruiz. The relevant provisions of the Draft are Articles 40 and 51–53.

5. Art. 40 introduced a notion of an injured state. Normally the relationship of state responsibility is bilateral, so that the injured state means the other party of such relationship directly injured by the wrongful act. However, it covers also third states in three configurations: the states parties to a multilateral treaty or a norm of general customary law which have been violated but the rights of which have not been directly affected; any other party to the multilateral treaty, if the right infringed by the act of a state arises from a multilateral treaty, if it is established that the right has been expressly stipulated in that treaty for the protection of the collective interests of the states parties thereto; and **all other states** (all members of the international community) if an internationally wrongful act constitutes an international crime. The two former provisions correspond with Art. 60 of the Vienna Convention on the Law of Treaties while the latter is a new one connected with the whole system of the law on state responsibility as proposed by the ILC. It is interesting that the Commission has considered also another version of that provision indicating that all other states can be treated as injured states if a violation is of a serious nature or is exceptionally wrongful. Although the formulas proposed were intended to avoid any association with the criminal responsibility, they show that the ILC tends to expand the notion of an injured state.

Articles 51–53 provide for specific consequences of international crimes. An international crime should entail all consequences of an international delict and some further consequences connected with the gravity of the act committed in violation of fundamental norms of international law. However, special positive consequences provided for in Article 52 concern exclusively specific rights of the injured state which is entitled to obtain restitution in kind not limited by provisions of Article 43(c) and (d).[19] The letter of Article 52 *juncto* Article 40 should be read as meaning special rights for a directly injured state which suffered specific damage because of the internationally wrongful act. It is unclear what is the scope of rights of indirectly injured states – however, it seems clear that any form of reaction by these states must be

RCADI (1976), p. 271; A. de Hoogh: *Obligations erga omnes and International Crimes. A Theoretical Inquiry into the Implementation and Enforcement of the International Responsibility of States* (1996), in particular, p. 55–57 where the author analyses the relationship between these categories of norms in the jurisprudence of the *ICJ*. It is interesting to notice that Art. 50 of the *ILC* Draft on State Responsibility of 1996 suggests an extensive interpretation of peremptory norms of international law. It prohibits countermeasures by an injured state amounting to the threat or use of force contrary to the U.N. Charter, to the extreme economic or political coercion designed to endanger the territorial integrity or political independence of the state-author of the violation, to violations of diplomatic law (inviolability of diplomatic or consular agents, archives and premises), to derogation from fundamental (core) human rights, and to any other conduct in contravention of a peremptory norm of general international law. Such a provision suggests that all norms mentioned above are considered as hierarchically superior to other norms of international law, and therefore being of a peremptory character.

[19] The obligation of the perpetrator of an internationally wrongful act to grant restitution in kind cannot be limited by reasons of proportionality and political and economic situation.

proportional to injuries suffered. As their interest is usually limited to observance of international legal norms by all members of the international community, international law lacking an *actio popularis* – the capacity to act in the field of international responsibility for international crimes is limited to acts aimed at cessation of violations of international law.

Article 53 defines duties and obligations of all states (in our opinion, it should be read as dealing with the obligations of states indirectly affected by the internationally wrongful act). They should refrain from recognizing the situation arising from such an act as legal, should render all possible help to a state directly affected by the international crime, cooperate with other states to carry out their obligations as defined under the ILC draft, and to cooperate with other states in order to eliminate the consequences of the international crime. The formula used in order to define the obligations of third states suggests in fact that although all the additional consequences of the international crime refer to violations of all fundamental norms of international law, in fact they are meant mostly to wipe out the effects of aggression (or, generally speaking, the effects of illegal use of force). The question arises whether the last alinea (d) of Article 53 imposes upon states an obligation to cooperate with individual states reacting to violations amounting to international crimes or whether this obligation is limited to participation in actions undertaken by the international community as a whole. In order to answer this question, we should consider whether specific states are entitled to undertake any steps against the perpetrator state. Some authors present the view that notwithstanding collective sanctions (or if competent organs of respective international organizations are unable to take any decision on the point) international crimes allow all possible steps to be undertaken by the states.[20] Other authors, however, suggest – i.a. by referring to the *Barcelona Traction* and *French Nuclear Tests* cases – that obligations *erga omnes* are owed towards the international community as a whole.[21] Because of the lack of centralized international enforcement authority, the rule that every state has right to define its legal position under international law remains actual. Such a right would be excluded if a norm expressly derogating it and passing an exclusive competence to act to the international body (like the United Nations) could be found. However, no rule of the U.N. Charter provides for such an exclusive right. Although the Charter contains a regulation concerning the reactions to certain kind of violations of international law threating to international peace and security, it does not in any way limit the reaction for viola-

[20] M. M o h r: "The ILC's Distinction between 'International Crimes' and 'International Delicts' and Its Implications", in: M. S p i n e d i, B. S i m m a (eds.): *UN Codification of State Responsibility* (1987), p. 129, 131; J.M. K o l o s o v: *Otvetstvennost' v mezhdunarodnom prave* (1975), p. 67; V. V a d a p a l a s: "Osuschchestvlenye mezhdunarodno-pravovykh sanktsyy", 81 *SEMP* (1988); R. H o f m a n n: "Zur Unterscheidung Verbrechen und Delikt im Bereich der Staatenverantwortlichkeit", 45 *ZaöRV* (1985), p. 203; J.A. F r o w e i n: *Collective Enforcement of International Obligations, ibid.*, vol. 47(1987), p. 68.

[21] See e.g. G. G a j a: "Obligations *Erga Omnes*, International Crimes and *Jus Cogens*: A Tentative Analysis of Three Related Concepts", in: W e i l e r, C a s s e s e, S p i n e d i (eds.): *International Crimes, op. cit.*, p. 151; R. A g o: "Obligations *Erga Omnes* and the International Community", *ibidem*, p. 238; C. A n n a c k e r: "The Legal Régime", *op. cit.*, p. 160.

tions of these norms to the actions of the U.N. agencies. Even if it had done so, it would have not stopped the non-member states from a possible unilateral reaction. We should also remember that the action of the Security Council can under circumstances be paralyzed by the veto power of one of the permanent members of the Council. Unilateral action of particular states should not, therefore, be excluded. Such a conclusion seems to be confirmed by international practice. During the last years many states or groups of states undertook decentralized sanctions against states having violated international law in a serious way. Sanctions concerned e.g.: aggression and intervention in domestic affairs of states (the Soviet intervention in Afghanistan and Argentinean attack against the Falklands/Malvinas), mass violations of human rights (sanctions against the USSR and Poland after the proclaiming of martial law in Poland 1981), and violations of diplomatic law (sanctions against Iran 1979). All these sanctions were decided without any decision by the Security Council the decisions of which were found insufficient or could not be taken because of political reasons.

It seems, therefore, that the international community tends to accept that certain norms of international law do have a special nature, recognizable mostly in connection with the responsibility of states for violations of law.

However, neither the catalogue nor the effects of these violations are precisely defined. The practice concerning the status of the alleged hierarchically higher norms under the present international law is disputable, in particular as far as their implementation and responsibility for the violations thereof are concerned, so that the present Author is sceptical whether it is possible to speak of their "special" nature.[22] However, there exists a certain consensus as to the distinction between different kinds of norms either *de lege lata* or *de lege ferenda*, so that we have decided to discuss the nature of international legal obligations formulated in the Resolution 687 from the point of view of their hierarchical status, the possible reactions to their violations and subjects entitled to react.

6. We have recognized that there exist direct connections between all categories of international legal norms classified as "higher" law. Several questions should be asked in reference to possible consequences of violations of Resolution 687 by Iraq. Can such violations constitute international crimes or just infringement of obligations *erga omnes*? Are countermeasures allowed in order to make Iraq complying with Resolution 687? Can the U.S. use forcible countermeasures unilaterally? What is the scope of possible countermeasures by the individual states?

According to Article 47 of the 1996 Draft on State Responsibility, an injured state is entitled to take countermeasures in order to force the state having committed an international delict to comply with its obligations under international law on state responsibility. Let us recall that such a state is obliged to cessation of further violations of interna-

[22] W. Czapliński, G. Danilenko: "Conflicts of Norms in International Law", 21 *NethYBIL* (1990), p. 3 ff. Prof. Danilenko, the co-author of the article , precised and modified his position as to the *jus cogens* issues in his book: *Law-Making in the International Community* (1993), p. 211 ff.

tional law and to wipe out to the largest possible extent all consequences of its wrongful act.[23] The conditions of applying the countermeasures were formulated in the arbitral awards in the *Naulilaa* and *Cysne* cases,[24] and subsequently reformulated in the sentence concerning *the France–U.S. Air Service Agreement* (1978), and repeated in Art. 48 and 49 of the ILC Draft on State Responsibility. The taking of countermeasures should be preceeded by negotiations between the states concerned, and they should be proportional to the gravity of a wrongful act and to the effects thereof upon the injured state(-s). The ILC Draft introduced an additional requirement that countermeasures should be subjected to a special settlement procedure evaluating their legality and conformity with the requirements of international law; however, it seems that such a procedure does not correspond with the general international law.[25] Certain categories of countermeasures are prohibited: in particular involving the threat or use of force, extreme economic or political coercion endangering the territorial integrity or political independence of the state committing a wrongful act, violations of inviolability of diplomatic and consular agents, of fundamental (core) human rights and amounting to violation of any peremptory norm of international law. The catalogue of forbidden countermeasures corresponds, therefore, with these norms of international law which we have defined above as hierarchically superior.

If one accepts a position that every injured state can take countermeasures, we should consider whether the scope of possible countermeasures is the same in relation to all states. There is no doubt that the state whose rights have been directly injured can take all possible and available countermeasures; the reactions by other states, however, should be proportional to injuries suffered and, therefore, limited to cessation of violations of international law and to guarantee of non-repetition of violations. The latter category of countermeasures should be read as allowing measures aimed at disabling the wrong-doer to continue violations or to commit another delict in future. In relation to international crimes countermeasures can go extremely far including the destruction of a military potential of the state violating international law. The measures provided for in Resolution 687 certainly are aimed in this direction. They can be referred to as directly concerning the most important values of international community: peace and security.[26] In this meaning they certainly constitute obligations *erga omnes*. The use of force by Iraq would certainly be classified as

---

[23] The classical statement comes from the decision of the PCIJ in the *Chorzów Factory* case, *PCIJ Publ.* Series A, No. 17, p. 47: *The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.*

[24] 2 *RIAA* 1026 and 1956, respectively.

[25] See generally on countermeasures: E. Zoller: *Peacetime Unilateral Remedies. An Analysis of Countermeasures* (1984); O.Y. Elagab: *The Legality of Non-Forcible Countermeasures in International Law* (1988); D. Alland: *Justice privée et ordre juridique international* (1994); and presentations by E. Klein and W. Fiedler at the 1997 Session of the German Society for International Law (to be published by Heymanns Verlag).

[26] *Considerans* of the Resolution 687 refers directly to the threat that all weapons of mass destruction pose to peace and security in the region of the Middle East.

aggression under international law; it would be condemned by the international community as the most important and dangerous violation of international law and certainly would involve reactions by third states. Although the World Court did not expressly condemn the use of nuclear weapons, it also did not accept it. But the possible use of mass destruction weapons (in particular chemical and bacteriological ones) by Iraq would certainly amount to serious violations of humanitarian law (also under customary rules). Losses in human beings, damages to environment and other possible consequences of the use of these weapons certainly justify the interest of the international community in assuring respect for international obligations of Iraq. In this meaning obligations formulated in the Resolution 687 constitute obligations *erga omnes*.

If such a nature of violations of the Resolution has been established, we should discuss the problem who is entitled to react to such violations. We have indicated above that although there are certain reasons to limit the right to react for such infringements of international law to the U.N. agencies (in particular the Security Council), the reaction by other subjects of international law cannot be excluded, in particular if it manifests that because of controversies between the permanent members of the Council the organized action by the U.N. is highly questionable. If the Council is unable to undertake the action, we must refer to the arbitral award in the *Air Service Agreement* case again. According to it, every state is entitled to evaluate its own international legal situation. If it finds that its rights have been infringed, it can take such steps it finds adequate to the nature and degree of violations of international law.

We should also keep in mind that the competence of the Security Council is in a way limited to certain categories of violations of international law. It can react only in cases dealing directly with peace and security and threat to them; in such a situation only it is competent to take decisions binding upon member states. The Council is not, therefore, empowered to a general statement as to the existence of a violation of international law. In all cases other than covered by Chapter VII of the U.N. Charter the states can undertake all steps they find necessary to force the state violating international law to stop its actions.[27]

Under these circumstances we can state that all individual states can take action in order to enforce the provisions of the Resolution 687. One could suggest only that request addressed to the government of Iraq to comply with the Resolution would be a precondition of any enforcement action. However, such request was made several times before the U.S.A. and its allies threatened to use armed force.

Finally, the question should be posed whether the U.S. Government in cooperation with other states is entitled to apply forcible countermeasures. Some authors deny

[27] So G. Arangio-Ruiz: "Fifth Report on State Responsibility" (1993), A/CN.4/453/add. 3, p. 14; similarly the ILC in its *Report of the 1994 Session*, A/49/10, p. 350. The views among authorities are divided. Within the ILC, Ch. Tomuschat denied such a possibility, and D. Bowett accepted it (*YBILC* 1992, vol. I, p. 167 and 82, respectively). As to other authors, M. Mohr ("The ILC's Distinction between "International Crimes" and "International Delicts" and its Implications", in: M. Spinedi, B. Simma (eds.): *United Nations Codification on State Responsibility* (1989), p. 131) is for the right to use countermeasures, and C. Annacker (*op. cit.*, p. 161) rejects it.

such a possibility even in respect of violations of obligations *erga omnes*, limiting the reactions by individual states to peaceful countermeasures.[28] The others require a consent of the Security Council in order to allow any action noting, however, that the future of enforcement of international law belongs to such actions.[29] According to the ILC Draft, countermeasures of this kind are prohibited only if contrary to the Charter of the U.N. (in particular – taking into account the wording of Article 2.4 of the Charter – if directed against the territorial integrity or political independence of any state).[30] In the case of Iraqi non-respect of the Resolution, passed in a valid way by the competent organ of the U.N., the use of force in order to ensure the implementation of U.N. law would certainly be consistent with the aims and the letter of the Charter fact, in particular as Resolution 687 directly refers to the commitment of all Member States of the U.N. to the sovereignty, territorial integrity and political independence of Kuwait **and Iraq**.

7. On the basis of these considerations we can sum up that the trend to draw a distinction between different categories of international legal norms is always present, in particular among authors. The criteria of distinction and – first of all – means of enforcement of "higher" law are, however, still unclear. It must be concluded that in the absence of precise enforcement mechanisms general rules of state responsibility apply. Under these rules all states can evaluate their legal position and adopt the measures necessary to cease violations of international law. These measures can in extreme cases amount to the use or threat of force in purposes compatible with the UN Charter if they are proportional and preceded by a request to cease violations. These remarks are actual in respect of actions aimed at the implementation of Resolution 687.

---

[28] See lately e.g. a very persuasive statement by J.A. F r o w e i n: "Legal Consequences for International Law Enforcement in Case of Security Council Inaction" in: J. D e l b r ü c k (ed.): *The Future of International Law Enforcement. New Scenarios – New Law?* (1993), p. 123; similar view was expressed by C h. T o m u s c h a t in his comments, *ibidem*, p. 158.

[29] So B. S i m m a: "Does the UN Charter Provide an Adequate Legal Basis for Individual or Collective Responses to Violations of Obligations *erga omnes*", *ibidem*, p. 139; also R. W o l f r u m in his comment, p. 163–164.

[30] Cf. the analysis of this formula by A. d e H o o g h, *op. cit.*, p. 288 291.

23 POLISH YEARBOOK
OF INTERNATIONAL LAW
1997–1998
PL ISSN 0554–498X

La succession d'Etats devant. La Cour internationale de justice[1]

ALFREDO C. ROBLES, JR.

Le recours à la Cour internationale de justice pour régler les différends relatifs à la succession d'Etats est peu fréquent, reflet de la préférence traditionnelle des Etats pour le règlement non juridictionnel des différends,[2] confortée par l'incertitude autour des règles en la matière. Nous n'avons dénombré que cinq affaires où la succession d'Etats ait surgi.[3] Quatre d'entre elles ont impliqué des Etats nouvellement indépendants au sens de la Convention de Vienne de 1978 sur la succession en matière de traités (ci-après «Convention de Vienne de 1978») et se sont déroulées après la conclusion de celle-ci. Mais faute d'entrée en vigueur de la Convention de Vienne de 1978, et en l'absence d'une demande de l'une des parties d'en tenir compte[4], l'atti-

[1] Je tiens à exprimer mes remerciements à Monsieur le Professeur Pierre-Michel Eisemann, directeur de recherches de la section de langue française, et aux participants au Centre de leurs conseils et commentaires précieux.

[2] Selon Brigitte Stern, rapporteur du Comité de l'International Law Association sur «Aspects of state succession», la pratique de la négociation «prévaut concernant la succession en matière de traités». «Rapport préliminaire sur la succession d'Etats en matière de traités», présenté à la Conférence d'Helsinki de l'International Law Association (août 1996), p. 38.

[3] Il s'agit des affaires suivantes:

1. Affaire du *Temple de Préah Vihéar (Cambodge c. Thaïlande)*, Fond, Arrêt du 15 juin 1962, *C.I.J. Recueil* (1962), p. 6 (ci-après «l'affaire du temple (Cambodge c. Thaïlande»).

2. *Différend frontalier (Burkina Faso/Mali)*, arrêt du 22 décembre 1986, *C.I.J. Recueil* (1986), p. 554 [ci-après «Différend frontalier (Burkina Faso/Mali)»].

3. *Différend frontalier terrestre, insulaire et maritime [El Salvador/Honduras; Nicaragua (intervenant)]*, Arrêt du 11 septembre 1992, *C.I.J. Recueil* (1992), p. 351 [ci-après «Différend frontalier terrestre, insulaire et maritime (El Salvador/Honduras)»].

4. *Différend territorial (Jamahiriya arabe libyenne/Tchad)*, Arrêt du 3 février 1994, *C.I.J. Recueil* (1994), p. 6 [ci-après «Différend frontalier (Libye/Tchad)»].

5. *Application de la convention pour la prévention et la répression du crime de génocide (Bosnia-Herzégovine c. Yougoslavie (Serbie et Montenegro)*.

a. Mesures conservatoires, ordonnance du 8 avril 1993, *C.I.J. Recueil* (1993), p. 3 [ci-après «Affaire de la *convention sur le génocide (Bosnie-Herzégovine c. Yougoslavie)*, 1ère ordonnance»];

b. Mesures conservatoires, ordonnance du 13 septembre 1993, *C.I.J. Recueil* (1993), p. 325 [ci-après *«Affaire de la convention sur le génocide (Bosnie-Herzégovine c. Yougoslavie)*, 2ème ordonnance»];

c. Exceptions préliminaires, arrêt du 11 juillet 1996 [ci-après *«Affaire de la convention sur le génocide (Bosnie-Herzégovine c. Yougoslavie*, exceptions préliminaires (arrêt)»].

[4] Dans l'affaire du *plateau continental (Tunisie/Libye)*, le compromis avait demandé à la Cour de prendre une décision conformément, inter alia, aux nouvelles tendances acceptées à la troisième conférence sur le droit de la mer» (Article 1). *Plateau continental (Tunisie/Jamahiriya arabe libyenne)*, arrêt du 24 février 1982, *C.I.J. Recueil* (1982), p. 23, para. 4.

tude de la Cour a varié selon la nature du différend qui lui est soumis.[5] Jusqu'à l'affaire de la convention sur le génocide (Bosnie-Herzégovine c. Yougoslavie), les rares cas où la succession d'Etats avait été évoquée avaient trait surtout a la délimitation des frontières des Etats successeurs. Dans ces cas, la Cour a adopté une approche téléologique, dans laquelle le souci d'affirmer la stabilité des frontières à orienté la recherche d'une solution aux problèmes de succession. Dans la mesure où le principe de stabilité des frontières fait l'objet d'un consensus de la part des Etats, cette démarche a permis à la Cour de régler les questions de succession d'Etats, à l'abri des controverses dans ce domaine. Cependant dans l'affaire de la convention sur le génocide (Bosnie-Herzégovine c. Yougoslavie), l'approche téléologique s'avère d'un maniement plus difficile, car les principes bien établis qui puissent guider le règlement des problèmes de succession à cette convention font défaut. C'est plutôt le pragmatisme qui caractérisera la démarche de la Cour.

I. Une démarche téléologique: La Cour et la délimitation des frontières des Etats successeurs

Le principe de la stabilité des frontières est l'un des principes les mieux établis de droit international. Les traités de frontière sont protégés par la règle qui fait une exception en leur faveur à la règle de *rebus sic stantibus*, même lorsqu'une succession intervient. Mais le principe de l'*uti possidetis* est censé jouer le même rôle. C'est précisément dans la consécration de l'*uti possidetis* comme principe général de droit international que réside le principal apport de la Cour en la matière. Paradoxalement, cette consécration va de pair avec une conscience de plus en plus aiguë de ses limites en tant que méthode de délimitation de frontières.

A. L'*uti possidetis*, principe général applicable à la succession

La succession d'Etats marque inévitablement une rupture du statu quo territorial qui peut être source de conflits entre le(s) Etat(s) successeur(s) et l'Etat prédécesseur, entre le(s) Etat(s) successeur(s) et un (des) Etat(s) tiers, ou entre les Etats successeurs eux-mêmes. L'une des sources de conflit auxquels la succession peut donner lieu est la question de la délimitation des frontières de l'Etat successeur vis-à-vis de l'Etat prédécesseur, d'un Etat tiers ou d'un autre Etat successeur. Dans ce contexte potentiellement conflictuel, le principe de la stabilité aux frontières, lorsque celles-ci existent, impose l'obligation de respecter leur continuité, indépendamment du changement de souveraineté qui est intervenu. La pratique des Etats et la doctrine sont d'accord pour reconnaître que la nécessité d'assurer la stabilité des relations juridiques justifie

[5] Pour autant que l'on sache, la Cour n'a fait référence à la Convention qu'une fois, dans l'affaire *du plateau continental (Tunisie/Jamahiriya arabe libyenne)*. Constatant que la frontière entre les deux pays avait survécu à toutes les vicissitudes de deux guerres mondiales», elle a noté au passage que «la meme règle de continuité *ipso jure* des traités de frontière et des traités territoriaux est reprise dans la Convention de Vienne de 1978 sur la succession d'Etats en matière de traités» (*Ibid.*, p. 66, para. 84).

également l'application aux Etats successeurs d'un principe qui découle du principe de l'intégrité territoriale des Etats.[6]

Lorsqu'il existe un traité conclu par l'Etat prédécesseur avec un Etat tiers qui fixe les frontières de l'Etat issu de la succession, le traité demeure en vigueur. L'existence d'une règle coutumière selon laquelle l'Etat successeur succéde *ipso jure* aux traités de frontières conclus par l'Etat prédécesseur est incontestable.[7] Bien qu'au lendemain de leur indépendance les Etats nouveaux aient paru remettre en question cette règle, leur pratique témoignerait d'un respect de la règle du droit; en effet «pendant la décolonisation, aucune demande en nullité de traités de frontières n'a été relevée.»[8]

C'est dans l'affaire du Temple de Préah Vihéar (Cambodge c. Thaïlande) que l'on a souvent trouvé la confirmation par la Cour du concept de succession *ipso jure* aux traités de frontières.[9] Selon l'arrêt, le souci d'assurer la stabilité et continuité des frontières est réputée être à la base de tout traité de frontières:

> D'une manière générale, lorsque deux pays définissent entre eux une frontière, un de leurs principaux objectifs est d'arrêter une solution stable et définitive. Cela est impossible si le tracé ainsi établi peut être remis en question à tout moment, sur la base d'une procédure constamment ouverte, et si la rectification peut en être demandée chaque fois que l'on découvre une inexactitude par rapport à une disposition du traité de base. Pareille procédure pourrait se poursuivre indéfiniment, et l'on n'atteindrait jamais une solution définitive aussi longtemps qu'il serait possible de découvrir des erreurs. La frontière, loin d'être stable, serait tout-à-fait précaire.[10]

A première vue il n'est pas évident comment cette affaire a confirmé une règle de succession d'Etats. Il ne faut pas oublier que ce n'était pas le Cambodge, Etat qui a succédé à la France, qui avait mis en cause les traités franco-siamois, mais la Thaïlande, signataire originel de ceux-ci. Certes, parmi les exceptions préliminaires, la Thaïlande avait soutenu que le Cambodge ne pouvait pas s'appuyer sur un traité franco-siamois de 1937 pour fonder la compétence de la Cour, étant donne qu'il n'était pas partie au traité et que, selon «les règles générales du droit international coutumier» s'appliquant à la séparation d'Etats, le Cambodge n'aurait pas pu succéder aux dispositions politiques des traités conclus par l'Etat prédécesseur.[11] Ayant rejeté l'exception préliminaire présentée par la Thaïlande qui portait sur la succession, la Cour s'est trouvée compétente dans l'affaire et n'a donc pas cru bon d'y répondre. Par la suite, la Thaïlande a reconnu que le différend avait pour origine les règlements de frontière effectués entre la France et la Thaïlande dans la période allant de 1904 à 1908,

---

[6] J. Tyranowski: «Boundaries and boundary treaties in the law of State succession», 14 *Thesaurus Acroasium* (1983), p. 468.

[7] J. Tyranowski: «State succession: boundaries and boundary treaties», 10 *POLYBIL* (1980), p. 123.

[8] A. Gruber: *Le droit international de la succession d'Etats* (1986), p. 260.

[9] E.g., J. Tyranowski, *op. cit., supra* note 6, p. 530.

[10] Affaire *du temple (Cambodge c. Thaïlande), C.I.J. Recueil* (1962), p. 34.

[11] C.I.J. *Temple de Préah Vihéar*, Mémoires, vol. I., p. 145, para. 40.

sans contester la succession du Cambodge aux traités.[12] Il a été soutenu que le Cambodge, en tant que successeur de la France, avait bénéficié du comportement de la Thaïlande à l'égard de l'Etat prédécesseur[13], mais il est permis de se demander si ce n'est pas l'accord explicite de la Thaïlande pour reconnaître le Cambodge en tant que successeur de la France, et non l'application par la Cour d'un principe général de succession d'Etats, qui explique que la succession du Cambodge à la France n'ait pas été contestée. A notre avis cette affaire ne représente pas vraiment un cas de succession d'Etats; elle illustre davantage l'application de la règle qui fait d'un traité de frontières une exception à l'invocation de la clause de *rebus sic stantibus*.

La jurisprudence récente de la Cour, à partir du Différend frontalier (Burkina Faso/Mali), déclare sans ambiguïté que «l'obligation de respecter les frontières internationales préexistantes en cas de succession d'Etats découle sans aucun doute d'une règle générale de droit international»[14]. Cependant sur les trois affaires de délimitation des frontières qui soulevaient des questions de succession [Différend frontalier (Burkina Faso/Mali); Différend frontalier terrestre, insulaire et maritime (El Salvador/Honduras); Différend frontalier (Libye/Tchad)], les deux premières se déroulaient entre Etats successeurs issus d'un même Etat prédécesseur. Par conséquent il n'y avait pas de frontières internationales préexistantes à proprement parler entre les Etats successeurs mais des limites ou divisions administratives au sein de l'ancien Etat impérial. Animée par le souci de promouvoir la stabilité des Etats successeurs et la paix entre eux, la Cour a donc fait appel au principe de l'*uti possidetis*, par lequel «l'Etat nouveau s'engage à conserver comme frontières les limites qui étaient celles du territoire dont il est issu».[15] Le terme «limites» a l'avantage de recouvrir à la fois les frontières établies par un traité international et les limites administratives internes à un territoire colonial.

L'*uti possidetis* a fait son apparition dans le droit international de la succession avec la première grande vague de décolonisation, celle de l'Amérique latine au XIXe siècle.[16] Selon ce principe, les frontières des anciennes provinces espagnoles devenaient les frontières de nouveaux Etats; même les territoires non occupés ou non habités étaient censés appartenir à l'Etat qui avait succédé à la province espagnole à laquelle ils avaient été rattachés par la législation coloniale. De ce fait il n'existerait pas de territoire sans maître en Amérique latine au moment de l'indépendance. L'objectif était double. D'une part, il s'agissait de prévenir les visées territoriales des Etats

---

[12] Affaire *du temple, C.I.J. Recueil* (1962), p. 16. Le conseil du Cambodge a expliqué que le Cambodge, Etat protégé qui avait accédé à l'indépendance, n'aurait pas perdu le bénéfice des dispositions d'un traité qui avait été conclu en son nom et qui constituait une garantie de ses frontières (Plaidoirie de Reuter, *C.I.J. Affaire du Temple, Mémoires*, I, p. 79; cf. Jean-Pierre Cot, «L'arrêt de la CIJ dans l'affaire du Temple Préah Vihéar (Cambodge c. Thaïlande). Exceptions préliminaires», 7 *AFDI* (1961), p. 231–232.

[13] J. T y r a n o w s k i, *op. cit.*, *supra* note 6, p. 530.

[14] *Différend frontalier (Burkina Faso/Mali), C.I.J. Recueil* (1986), p. 566, para. 24.

[15] J.-M. S o r e l, R. M e h d i: «L'*uti possidetis* entre la consécration juridique et la pratique: essai de réactualisation», 40 *AFDI* (1994), p. 11.

[16] Le juge Ajibola a fait un historique du principe de l'uti possidetis depuis ses origines en droit romain. *Différend frontalier Libye/Tchad, C.I.J. Recueil* (1994), op. ind., p. 83–92, para. 115–34.

non latino-américains sur le continent.[17] Il en résulte que «des empiétements et des tentatives de colonisation intempestives de l'autre côté de la frontière, comme aussi les occupations de fait, devenaient sans portée et sans conséquence en droit».[18] D'autre part ce principe cherchait à empêcher les différends territoriaux entre les Etats successeurs et servait de base au règlement des différends qui surgissaient.

Qu'est-ce que le principe de l'*uti possidetis* apporte au droit de la succession d'Etats? La principale fonction juridique de l'*uti possidetis* est alors de créer «legal basis for actually existing boundaries».[19] La règle traditionnelle porte sur la succession soit aux traités de frontières soit aux régimes de frontière établis par un traité. Dans la mesure où l'*uti possidetis* comporte le respect des frontières internationales établies par un traité, le principe de l'*uti possidetis* ne fait que confirmer la règle traditionnelle. Les frontières internationales sont celles «ayant formé séparation entre la colonie d'un Etat et la colonie d'un autre Etat, ou entre le territoire d'une colonie et celui d'un Etat indépendant ou d'un Etat soumis à protectorat mais ayant conservé sa personnalité internationale.»[20] Cependant il faut également envisager le cas des Etats issus d'une seule puissance coloniale, entre lesquels il n'existait, avant l'indépendance, que des «délimitations entre divisions administratives ou colonies».[21] Dans une telle situation, la reconnaissance de l'*uti possidetis* aboutissait à transformer les situations de fait en situations juridiques.

Un siècle plus tard, l'*uti possidetis* semblait utile pour les nouveaux Etats d'Afrique qui refusaient d'accepter le principe de la succession *ipso jure* aux traités de frontières conclus par les puissances coloniales. Au nom de la stabilité et de la paix, ils se sont engagés à respecter les frontières existant au moment de l'indépendance. Mais l'obligation qu'ils ont ainsi assumée découle d'un acte de leur volonté. Bref, le principe de l'*uti possidetis* est «substitute for the lack of succession *ipso jure* in respect of boundary treaties».[22]

En revanche, l'affaire de Différend frontalier (Burkina Faso/ Mali) ne soulevait pas de question de succession aux traités de frontière, puisque les deux Etats étaient issus de la même puissance coloniale. Tous deux avaient fait partie de l'Afrique occidentale française: au moment de la décolonisation, le Burkina Faso correspondait à la colonie de Haute Volta et le Mali, à celle du Soudan français.[23] Dans ce cas, «l'application du principe de l'*uti possidetis* emporte la transformation de limites administratives en frontières internationales proprement dites.[24]

---

[17] *Différend frontalier (Burkina Faso/Mali), C.I.J. Recueil* (1986), p. 566, para. 23; op. ind., juge ad hoc Abi-Saab, *Ibid.*, p. 661, para. 13.

[18] Sentence arbitrale du Conseil fédéral suisse de 1922 (Colombie c. Venezuela), RSA, I, p. 228, citée in *Différend territorial (Libye/Tchad), C.I.J. Recueil* (1994), op. ind., Ajibola, p. 84, para. 118.

[19] J. T y r a n o w s k i, *op. cit.*, *supra* note 6, p. 132.

[20] *Ibid.*, p. 566, para. 24.

[21] *Différend frontalier (Burkina Faso/Mali), C.I.J. Recueil* (1986), p. 566, para. 23.

[22] *Ibid.*, p. 132.

[23] *Ibid.*, p. 564, para. 19.

[24] *Ibid.*, p. 566, para. 23.

Pour les Etats d'Amérique latine, l'*uti possidetis* était un principe à la fois de droit constitutionnel et de droit international.[25] Toutefois, son statut en tant que principe général de droit international ne faisait l'unanimité ni des Etats ni de la doctrine. En dehors de l'Amérique latine les tentatives d'étendre le champ géographique de son application, lors de la décolonisation de l'après-guerre, avaient rencontré la résistance de plusieurs Etats en Afrique (notamment le Maroc, la Somalie, la Tanzanie et l'Ouganda) et en Asie (l'Inde, le Vietnam, la Chine et le Cambodge).[26] Cette notion n'avait pas été recueillie dans la jurisprudence de la Cour, ayant été reléguée à quelques déclarations et opinions individuelles ou dissidentes.[27] La doctrine était quant à elle divisée: si pour Brownlie l'*uti possidetis* pouvait bien constituer un titre au territoire, en revanche de l'avis de Bardonnet, il ne s'agissait que d'un principe politique. Plus significatif est le doute qui émane des spécialistes hispanophones. Selon l'Argentin Barberis, l'*uti possidetis* n'est pas une norme juridique en elle-même; elle n'aurait qu'une valeur conventionnelle. Il est significatif que Barberis n'ait relevé aucune affaire où l'*uti possidetis* ait été appliqué en tant que coutume générale ou principe de droit en Amérique hispanique.[28]

En dépit de doutes dont le principe était l'objet, l'arrêt de la Chambre de la Cour saisie de l'affaire du Différend frontalier (Burkina Faso/Mali) l'a érigé en principe «bien établi en droit international, en matière de décolonisation», ayant une «portée générale».[29] De l'avis du juge Ajibola, l'arrêt de la Cour dans l'affaire du Temple (Cambodge c. Thaïlande) ainsi que l'arbitrage Rann de Kutch démontrent son application en dehors du contexte latino-américain.[30] Pour la Chambre de la Cour, lorsque les Etats d'Afrique l'invoquent, ce n'est plus

> une simple pratique qui aurait contribué à la formation graduelle d'un principe de droit international coutumier dont la valeur serait limitée au continent africain, comme elle l'aurait été auparavant à l'Amérique hispanique,[31]

mais une «application en Afrique d'une règle de portée générale». A l'appui de cette affirmation la Cour cite «les nombreuses déclarations faites par des responsables africains, lors de l'indépendance de leur pays», qui «contenaient en germe les

---

[25] J. de Pinho Campinos: «L'actualité de l''uti possidetis'», in *Société Française pour le droit international*, Colloque de Poitiers, La frontière (1980), p. 95–111.

[26] L.I.S. Rodríguez: «*Uti possidetis*: la reactualización jurisprudencial de un viejo principio (A propósito de la sentencia del TIJ [Sala] en el asunto Burkina Fasso/República de Mali», 40 *REDI* (1988), p. 128.

[27] Sánchez Rodríguez cite les déclarations et opinions individuelles ou dissidentes du juge Carneiro dans l'affaire de *Minquiers et Ecrehous* (*C.I.J. Recueil* (1953), p. 104–05), des juges Moreno Quintana et Urrutia Holguin dans l'affaire de la sentence arbitrale du roi d'Espagne (*C.I.J. Recueil* (1960), p. 217–18, 226–27) et des juges Ago et Jiménez de Aréchaga dans l'affaire du *plateau continental (Libye/Tunisie)* (*C.I.J. Recueil* (1982), p. 97–98, 131).

Ibid., p. 123.

[28] J.A. Barberis: «La regla del *uti possidetis*.p. en las controversias limítrofes entre Estados hispanoamericanos», Liber Amicorum. Colección de Estudios Jurídicos en homenaje al Prof. Dr. D. José Pérez Montero, 125–142 (1988), cité in *ibid.*, p. 121.

[29] *Différend frontalier (Burkina Faso/Mali), C.I.J. Recueil* (1986), p. 565, para. 20.

[30] *Différend territorial Libye/Tchad, C.I.J. Recueil* (1994), op. ind., Ajibola, p. 88, para. 127.

[31] *Différend frontalier (Burkina Faso/Mali), C.I.J. Recueil* (1986), p. 565, para. 21.

éléments de l'*uti possidetis*» [32]. Si la Charte de l'Organisation de l'Unité Africaine ne l'a invoqué qu'indirectement, en revanche la 1ère conférence au sommet de l'OUA, tenue au Caire en juillet 1964, vit l'adoption par les chefs d'Etat d'une résolution (AGH/Rés. 16(I)), qui déclarait «solennellement que tous les Etats membres s'engagent à respecter les frontières existant au moment où ils ont accédé à l'indépendance».[33]

En l'espèce, le fait de souligner le caractère coutumier de l'*uti possidetis*[34] visait à prévenir toute contestation du principe de l'*uti possidetis* pour le motif que la résolution de l'OUA citée avait été adoptée quelques années après l'indépendance des deux Etats en litige. Comme l'a déclaré la Chambre de la Cour,

> il est évident qu'on ne saurait mettre en doute l'applicabilité de l'*uti possidetis* dans la présente affaire simplement parce que, en 1960, année de l'accession à l'indépendance du Mali et du Burkina Faso, l'OUA, qui a proclamé ce principe, n'existait pas encore et que la résolution précitée...ne date que de 1964.[35]

Néanmoins l'*uti possidetis* pouvait entrer en conflit avec un autre grand principe, celui de l'autodétermination des peuples. Comment alors justifier l'*uti possidetis*? Il est en effet paradoxal, du moins à première vue, que les Etats ayant mené un combat pour l'indépendance «tiennent tant à leur legs colonial».[36] Il est bien connu que les puissances coloniales avaient établi des frontières artificielles, sinon arbitraires, entre leurs possessions africaines, sans tenir compte de réalités politiques, économiques, ethniques, culturels sur le terrain. La tentation était donc forte pour les Etats nouveaux, après l'accession à l'indépendance, de revendiquer la (re)constitution en leur sein de véritables nations qui avaient été dispersées dans plusieurs Etats.[37]

Cependant les Etats nouveaux se sont aperçus que de telles revendications pourraient aboutir à des conflits sans fin, comportant même le risque de la disparition des Etats africains. La Chambre de la Cour note que dans ces circonstances le maintien du statu quo territorial en Afrique apparaît souvent comme une solution de sagesse visant à préserver les acquis des peuples qui ont lutté pour leur indépendance et à éviter la rupture d'un équilibre qui ferait perdre au continent africain le bénéfice de tant de sacrifices.[38]

---

[32] *Ibid.*

[33] *Ibid.*, p. 564, para. 19; *Différend territorial (Libye/Tchad), C.I.J.Recueil* (1994), op. ind., Ajibola, p. 47, para. 125.

[34] Qualifié de «principe de droit international coutumier», *Différend territorial (Libye/Tchad), C.I.J. Recueil* (1994), op. ind., Ajibola, p. 88, para. 127.

[35] *Différend frontalier (Burkina Faso/Mali), C.I.J. Recueil* (1986), p. 567, para. 26. Voir dans le même sens l'opinion individuelle du juge Ajibola:

> Vu que la Libye a obtenu son indépendance en 1951 et le Tchad en 1960...pouvait-on envisager qu'une déclaration faite en 1963 et en 1964 (4 années plus tard dans le cas du Tchad et 13 années plus tard dans le cas de la Libye) s'impose à ces Etats?

Différend territorial (Libye/Tchad), C.I.J. Recueil (1994), op. ind., Ajibola, p. 90, para. 29.

[36] *Différend frontalier (Burkina Faso/Mali), C.I.J. Recueil* (1986), op. ind. du juge ad hoc Abi-Saab, p. 661, para. 13.

[37] Sorel, Mehdi, *op. cit., supra* note 15, p. 20–21.

[38] *Différend frontalier (Burkina Faso/Mali), C.I.J. Recueil* (1986), p. 567, para. 25.

La Chambre explique ainsi la préoccupation qui faisait triompher l'**uti possidetis** sur le principe de l'autodétermination:

> C'est le besoin de stabilité pour survivre, se développer et consolider progressivement leur indépendance dans tous les domaines qui a amené les Etats africains à consentir au respect des frontières coloniales et à en tenir compte dans l'interprétation du principe de l'autodétermination des peuples.[39]

C'est cette préoccupation qui a amené la Cour à passer outre aux hésitations de la pratique et de la doctrine à l'égard de l'*uti possidetis*. L'affirmation de la portée générale de l'*uti possidetis* manifeste le souci de la Cour de promouvoir plus particulièrement la stabilité des frontières et plus généralement la paix entre Etats successeurs.

Dans le Différend frontalier terrestre, insulaire et maritime, caractérisé par le juge ad hoc Torres Bernárdez comme étant «essentiellement une affaire de succession d'Etats,[40] la pertinence de ce principe pour les Etats parties, Etats successeurs de l'Espagne, était évidente, au point qu'il a été le premier principe appliqué pour la détermination des frontières terrestres du Salvador et du Honduras, bien qu'il n'en soit pas fait expressément mention à l'article 5 du compromis, ni dans le traité général de paix».[41] Si la Cour a reconnu que cette lacune était bien «chose inhabituelle pour une affaire de ce genre», c'est bien l'objet de l'affaire qui a autorisé le recours au principe innommé dans le compromis.

C'est que l'on attribue à l'*uti possidetis* des «vertus sécurisantes»:[42] la transformation de frontières coloniales ou de limites administratives en frontières internationales des Etats successeurs permet d'arriver à des frontières stables pour ceux-ci tout en évitant d'aborder la problématique de la succession. C'est en quelque sorte une façon d'évacuer celle-ci. En effet, l'*uti possidetis* représente le tracé des frontières ou des limites administratives à un moment donné, l'instantané, pour ainsi dire. S'il était possible d'établir avec certitude cet «instantané», on espère que les problèmes épineux de détermination des frontières seraient résolus.[43]

L'on comprend aisément que la recherche de la stabilité commande le recours à l'*uti possidetis*; en revanche sa mise en oeuvre en tant que méthode de délimitation des frontières n'est pas exempte de difficultés pratiques.

---

[39] *Ibid.*

[40] *Différend frontalier terrestre, maritime et insulaire (El Salvador/Honduras), C.I.J. Recueil* (1992), op. ind., p. 631, para. 1. Il a aussi fait remarquer, non sans circularité, que «le fait que les deux Parties aient invoqué cet *uti possidetis juris* en tant que norme ou principe fondamentaux» souligne bien que l'affaire était «fondamentalement une question de 'succession d'Etats'». *Ibid.*, para. 3.

[41] *Ibid.*, p. 386, para. 40.

[42] Sorel, Mehdi, *op. cit.*, *supra* note 15, p. 19.

[43] Je remercie Monsieur le Professeur Eisemann de ces observations.

B. L'*uti possidetis*, méthode de délimitation des frontières

L'*uti possidetis* semble offrir les avantages d'une méthode toute prête de délimitation des frontières.[44] En réalité, elle renvoie à d'autres questions auxquelles il faut répondre avant de pouvoir s'en servir comme méthode de règlement de différends frontaliers.

Tout d'abord il faut distinguer deux conceptions différentes de l'*uti possidetis*: l'*uti possidetis juris* et l'*uti possidetis de facto*. Les conséquences ne seront pas indifférentes selon que l'on choisit l'une ou l'autre de ces conceptions. La première, accepté par les Etats issus de l'empire espagnol, renvoie à la possession de titres sur le territoire en question, tandis que la seconde, soutenu principalement par le Brésil, invoque l'occupation ou l'exercice *de facto* de souveraineté. L'*uti possidetis de facto* est le principe qui régit les rapports entre le Brésil et les Etats successeurs de l'Espagne.[45] Sur le continent africain, c'est l'*uti possidetis juris* qui a été privilégié par la Chambre de la Cour saisie du Différend frontalier (Burkina Faso/Mali).[46] Ce serait la seule solution rationnelle pour l'Afrique, selon Tyranowski. C'est que dans bien des régions, particulièrement dans les régions désertiques, il n'y avait pas d'occupation ou de possession effective; et même si des traités de frontière avaient été conclus entre les puissances coloniales, il n'y avait pas nécessairement de frontières sur le terrain.[47]

Quelle que soit la conception privilégiée, il faut fixer la date critique qui sert de repère pour la détermination de l'*uti possidetis*.[48] En ce qui concerne l'Amérique latine l'identification de cette date est facilitée par le fait que la décolonisation n'a impliqué que deux puissances coloniales. Il n'empêche que les Etats issus de l'empire espagnol ont accédé à l'indépendance à des dates diverses. Il a fallu donc arriver à un accord entre les Etats au sujet de la date critique. Sans cet accord l'application mécanique de l'*uti possidetis* ne lui aurait pas permis de remplir ses fonctions. Deux dates critiques sont généralement retenues: 1810 pour l'Amérique du Sud et 1821 pour l'Amérique centrale. C'est cette dernière date que la Cour a choisie comme point de départ dans le Différend frontalier terrestre, maritime et insulaire (El Salvador/Honduras).[49] Quoique ces dates soient quelque peu artificielles, elles sont incontestablement utiles en tant que point de départ du règlement des différends.

---

[44] Sorel et Mehdi l'appellent un «prêt-à-porter juridique». Cf. S o r e l, M e h d i, *op. cit.*, *supra* note 15, p. 25.

[45] S. R o d r í g u e z, *op. cit.*, *supra* note 20, p. 131.

[46] «Le premier [élément], mis en relief par le génitif latin **juris**, accorde au titre juridique la prééminence sur la possession effective comme base de souveraineté». *Différend frontalier (Burkina Faso/Mali), C.I.J. Recueil* (1986), p. 566, para. 23.

[47] J. T y r a n o w s k i, *op. cit.*, *supra* note 6, p. 131; S o r e l, M e h d i, *op. cit.*, *supra* note 15, p. 23–24.

[48] S. R o d r í g u e z, *op. cit.*, *supra* note 20, p. 130.

[49] «Le titre d'El Salvador ou du Honduras, au sens de source de leurs droits sur le plan international, est celui de la succession des deux Etats à la Couronne espagnole pour ce qui est des territoires coloniaux de celle-ci, l'étendue de territoire dont chaque Etat a hérité étant déterminée par l'uti possidetis de 1821. *Différend frontalier, terrestre, insulaire et maritime (El Salvador/Honduras), C.I.J. Recueil* (1992), p. 388, para. 45.

La situation est plus compliquée en Afrique, qui avait été morcelée entre plusieurs puissances coloniales. Lorsque le différend oppose deux Etats successeurs d'un seul Etat, comme c'était le cas pour le Burkina Faso et le Mali, il n'est pas trop difficile d'arriver à un accord sur la date critique. Les deux Etats ont reconnu qu «au moment de leur indépendance il y avait une frontière bien définie»; que cette frontière était celle qui existait en 1959–1960; et que depuis 1960 il n'y a eu aucune modification de cette frontière.[50] Qu'en est-il si les Etats parties relevaient de puissances coloniales différentes? La Libye, dépendance italienne, avait accédé à l'indépendance en 1951, tandis que le Tchad, territoire de l'Afrique équatoriale française, était devenu indépendant en 1960. Encore une fois, c'est l'accord des parties qui a permis de fixer une date critique: les deux parties ont explicitement reconnu que le traité d'amitié et de bon voisinage conclu en 1955 entre la Libye et la France, à laquelle le Tchad a succédé, constitue «le point de départ logique» de l'examen du différend.[51]

Le rôle de l'accord suggère que la date critique peut ne pas être celle de l'indépendance. De fait, la Chambre de la Cour qui à tranché le Différend frontalier terrestre, maritime et insulaire (El Salvador/Honduras) est d'avis qu'une date ultérieure peut apparaître, représentant la date de la conclusion d'un traité de frontière ou d'une décision judiciaire.[52] Reste à savoir si ce genre d'accord ne met pas en cause la notion d'*uti possidetis* elle-même (voir ci-dessous).

Ces questions préalables réglées, l'on peut passer a l'examen des titres des parties en litige. Toutefois, la notion de titre est plus complexe qu'elle ne paraît au premier abord. Comme la Chambre de la Cour l'a noté, l'on a souvent tendance à assimiler le titre «exclusivement à l'idée de preuve documentaire». Toutefois pour la Cour il peut se rapporter aussi bien à «tout moyen de preuve susceptible d'établir l'existence d'un droit que la source même de ce droit.»[53]

Il faut avouer que l'examen des titres est parfois une tâche délicate. Sur le plan de principes, l'appréciation de l'*uti possidetis* de 1959–60 dans le différend frontalier (Burkina Faso/Mali) supposait nécessairement la prise en compte du droit colonial français. Mais le droit colonial était-il alors le «relais juridique» du droit international? Le juge ad hoc Abi-Saab a très nettement souligné que la référence au droit colonial comportait le risque d'une «légitimation rétroactive de l'institution colo-

[50] *Différend frontalier (Burkina Faso/Mali), C.I.J. Recueil* (1986), para. 29, 33.

[51] *Différend territorial (Libye/Tchad), C.I.J. Recueil* (1994), p. 20, para. 36.

[52] «Le principe de l'uti possidetis est quelquefois affirmé en termes presque absolus, comme si la situation à la date de l'indépendence était toujours déterminante; comme si, en bref, il ne pouvait y avoir d'autre date critique. Or...il ne saurait en être ainsi. Manifestement une date critique ulterieure peut apparaître, par exemple, par suite d'une décision d'un juge ou d'un traité frontalier. Ainsi, dans le cas des précédents arbitrages latinoaméricains relatifs à ces frontières, c'est maintenant la sentence arbitrale qui est déterminante, bien qu'elle soit fondée sur une certaine appréciation de la situation découlant de l'uti possidetis juris. L'appréciation que fait la sentence de la situation résultant de l'uti possidetis juris prévaut, et elle ne peut maintenant être remise en question du point de vue juridique....Ainsi la date de la sentence est devenue une nouvelle date critique, une date postérieure...» *Différend frontalier terrestre, maritime et insulaire (El Salvador/Honduras), C.I.J. Recueil* (1992), p. 401, para. 67.

[53] *Différend frontalier (Burkina Faso/Mali), C.I.J. Recueil* (1986), p. 564, para. 18.

niale».[54] Afin de contourner ce risque, l'arrêt dans l'affaire du *différend frontalier* (Burkina Faso/Mali) a tenu à préciser que le droit international «ne fait aucun renvoi au droit établi par un Etat colonisateur,» et qu'il n'offrait qu'un moyen de preuve et de démonstration.[55] Toutes ces précautions n'ont pas empêché la Chambre de la Cour de se pencher longuement sur le droit colonial français; on ne voit pas comment elle aurait pu faire autrement.[56]

On peut très bien imaginer les difficultés matérielles auxquelles le juge se heurte: il doit se reporter aux textes législatifs et réglementaires, qui n'ont même pas tous été publiés, aux cartes et croquis dressés à l'époque, dont la précision et la fiabilité sont parfois douteuses et qui se contredisent, ainsi qu'à des documents administratifs établis pour un système de gouvernement qui n'existe plus depuis près de trente ans, documents qu'il a fallu recueillir dans divers dépôts d'archives.[57]

Les difficultés matérielles s'accentuent lorsqu'il faut remonter à 1821, dans le différend frontalier terrestre, maritime et insulaire (El Salvador/Honduras).[58] Pour ne citer qu'un exemple des difficultés, dans l'Empire espagnol il existait des limites administratives de nature et de degré variables. Les provinces, *alcaldías mayores*, *corregimientos*, *intendencias*, *audiencias*, *capitanerías generales*, vice-royaumes, sans compter les divisions militaires et les juridictions ecclésiastiques, se chevauchaient ou se superposaient.[59] Que doit faire le juge lorsque la confrontation des titres ne lui permet pas d'établir l'*uti possidetis* à la date critique? En l'espèce, il n'avait pas été possible de déterminer la souveraineté sur les îles par l'application simple du principe de l'*uti possidetis juris* de 1821. Faut-il alors se référer à la pratique des Etats, aux effectivités «coloniales», et si oui lesquelles?

Les effectivités coloniales, selon la Chambre de la Cour saisie du différend frontalier (Burkina Faso/Mali), renvoyaient à «la conduite des autorités coloniales en tant que preuve de l'exercice effectif de la juridiction territoriale pendant la période coloniale,» et deuxièmement, à la possession effective ou l'administration par un Etat autre que le titulaire du titre ou indépendamment de ce titre».[60] De l'avis de la Cour, plusieurs hypothèses concernant les rapports entre les titres et les effectivités seront à distinguer. D'abord, lorsque le fait correspond au droit, c'est-à-dire l'administration effective s'ajoute à l'*uti possidetis* juris, l'effectivité ne sert qu'à confirmer l'exercice du droit. Si le fait ne correspondait pas au titre, ou si le territoire en question était administré effectivement par un autre Etat que celui qui possédait le titre juridique,

[54] *Ibid.*, op. ind. Abi-Saab, p. 109, para. 4.

[55] *Ibid.*, p. 568, para. 30.

[56] Cet examen occupe les paragraphes 67 à 178 de l'arrêt (*Ibid.*, pp. 589–649), ce qui a valu à la Chambre le reproche du juge ad hoc Abi-Saab: «en l'espèce l'arrêt est allé au-delà des limites de ce sage énoncé [p. 568, para. 30], en fondant son raisonnement presque exclusivement et avec abondance de détails sur cet élément [c'est-à-dire le droit colonial]». *Ibid.*, op. ind., Abi-Saab, p. 659–60, para. 4.

[57] *Ibid.*, p. 587, para. 64.

[58] E. D e c a u x: «Le différend frontalier terrestre, insulaire et maritime (El Salvador/Honduras). Arrêt de la chambre de la C.I.J. du 11 septembre 1992. La délimitation terrestre», 38 *AFDI* (1992), p. 426.

[59] *Différend frontalier terrestre, maritime et insulaire (El Salvador/Honduras), C.I.J. Recueil* (1992), p. 394–95, para. 54–56.

[60] *Différend frontalier (Burkina Faso/Mali), C.I.J. Recueil* (1986), p. 586–87, para. 63.

c'est celui-ci qui l'emporterait. Au cas où l'effectivité ne coexisterait avec aucun titre juridique, elle serait inévitablement prise en considération. Enfin, lorsque le titre existe mais n'indique pas précisément l'étendue territoriale sur laquelle il porte, les effectivités peuvent être essentielles dans l'interprétation du titre dans la pratique.[61]

Cette hiérarchie paraît certainement très logique, mais les «effectivités coloniales» peuvent être aussi insaisissables – et pour les mêmes raisons – que l'*uti possidetis* à la date de l'indépendance. Dans le différend frontalier terrestre, maritime et insulaire (El Salvador/Honduras), les incertitudes du droit espagnol ont amené la Cour à prendre en compte les effectivités d'Etat, c'est-à-dire les comportements étatiques, non pas avant l'indépendance, mais postérieurement à l'indépendance. Par exemple, s'agissant du premier secteur de la frontière terrestre, la revendication salvadorienne s'appuyait sur un titre accordé en 1976 à la communauté indienne de Citala dans la province de San Salvador; malheureusement, le titre mentionnait que ces terres étaient situées dans la province de Gracias a Dios, qui se trouvait en Honduras. La décision de la Chambre de la Cour au sujet de ce secteur s'est fondée sur le fait que le Honduras n'a avancé ses revendications pour la première fois qu'en 1972. Ce qui est troublant dans cette démarche, c'est le fait que la Chambre de la Cour,

> «au lieu d'examiner les délégations de compétences dans la vice-royauté espagnole, s'attache au comportement des parties».[62] Pour se justifier, la Chambre a déclaré qu'elle n'estimait pas que l'application du principe de l'*uti possidetis juris* ...avait pour effet de figer pour toujours les limites des provinces qui, avec l'indépendance, ont constitué les frontières entre les nouveaux Etats. Il était évidemment loisible à ces Etats de modifier par accord les frontières les séparant; et certaines formes d'activité ou d'inactivité pourraient valoir acquiescement à une limite différente de 1821.[63]

Certes, mais il est permis de se demander si de fil en aiguille l'on ne finit pas par affaiblir la portée de l'*uti possidetis*.

Le juge ad hoc désigné par le Honduras, un Espagnol, a eu beau jeu de critiquer la façon dont la Cour maniait la distinction entre «effectivités coloniales» et «effectivités d'Etat». D'après lui, ce sont essentiellement les effectivités coloniales dont il faut tenir compte pour apprécier l'*uti possidetis* à l'indépendance; ce principe étant essentiellement rétrospectif, «sa mise en oeuvre est fondée essentiellement sur la notion de preuves rétrospectives, sur la législation ou documents délivrés par les autorités coloniales espagnoles civiles ou ecclésiastiques».[64] Il en résulte que «l'application simultanée du principe de l'*uti possidetis* juridique des Républiques hispano-américaines et d'une règle de droit international fondée sur la notion d'effectivité d'Etat» est une «impossibilité juridique».[65] Les effectivités d'Etat postérieures à l'indépendance ne

---

[61] *Ibid.*

[62] E. D e c a u x, *op. cit.*, *supra* note 58, p. 409.

[63] *Différend frontalier terrestre, maritime et insulaire (El Salvador/Honduras), C.I.J. Recueil* (1992), p. 408, para. 80.

[64] *Ibid.*, op. ind. Torres Bernárdez, p. 641, para. 24.

[65] *Ibid.*, p. 641, para. 23.

peuvent être assimilées aux effectivités coloniales; la bonne démarche serait de déterminer en premier lieu la ligne *uti possidetis* et seulement en second lieu déterminer si cette ligne a été modifiée par le comportement des parties.[66] Autrement l'*uti possidetis* risque d'être vidé de sa substance.[67]

La tentation est grande de supposer que ce soient les difficultés de mise en oeuvre du principe de l'*uti possidetis* juris qui expliquent, au moins en partie, la plus grande prudence dont a fait preuve la Cour dans le Différend territorial (Libye/Tchad), et plus particulièrement, le silence de l'arrêt à ce sujet.[68] Tirant les leçons des affaires précédentes, les deux parties s'étaient appuyées sur ce principe pour défendre leurs positions.[69] Elles étaient d'accord sur le fait que le traité d'amitié et de bon voisinage conclu en 1955 entre la Libye, indépendante depuis 1951 et la France, Etat prédécesseur du Tchad, devait constituer le «point de départ logique» de l'examen de l'affaire.[70] Aux termes de l'article 3 de ce traité, les deux Etats «reconnaissent que les frontières...sont celles qui résultent des actes internationaux en vigueur à la date de la constitution de la Libye, tels qu'ils sont définis dans l'échange de lettres ci-jointes (Annexe I).» Pour la Libye le traité avait déclaré l'*uti possidetis* de 1951; s'il n'y avait pas de frontière résultant des actes internationaux en question, le traité de 1955 n'aurait pas pu en créer. En revanche, le Tchad affirmait que l'accord a bien interprété l'*uti possidetis* de 1951, et cette interprétation lie les parties, qu'elle corresponde au non à la situation existant sur le terrain.

La Cour, toujours ayant à l'esprit la règle de la stabilité des frontières, a néanmoins refusé de tenir compte des arguments fondés sur l'*uti possidetis* et a invoqué les règles bien établies d'interprétation des traités pour attribuer le territoire en litige au Tchad. En s'appuyant sur le traité de 1955 conclu entre la France et la Libye, la Cour a pu éviter d'aborder de très difficiles questions de succession d'Etat que la Libye avait soulevées. En effet, selon celle-ci, la revendication du Tchad reposait sur la revendication héritée de la France, laquelle reposait à son tour sur des actes qui n'avaient pas créé de frontière dans le territoire en litige. En revanche, la Libye prétendait qu»au niveau international, il existait une communauté de titre entre le titre des peuples autochtones et les droits et titres de l'empire ottoman, transmis à l'Italie en 1912 et hérités par la Libye en 1951". Les peuples autochtones comprenaient des tribus ou des confédérations de tribus ou d'autres peuples qui devaient allégeance à une organisation connue sous le nom de l'Ordre sennousi.[71] Dès la fin du XIXe

[66] *Ibid.*, p. 642, para. 25; p. 643, para. 27.

[67] «Uti possidetis est sans cesse menacé d'oubli et d'abandon. La place faite à l'acquiescement, à l'acceptation au detour d'une note imprudente ou d'une négociation oubliée, marque bien la fragilité de l'uti possidetis». Decaux, 1992, p. 426. Cf. aussi Laurent Lucchini, «Le différend entre le Honduras et El Salvador devant la Cour Internationale de Justice: Aspects insulaires et maritimes», 38 *AFDI* (1994), p. 430, 435, 442.

[68] Voir Martti Koskenniemi, «L'affaire du différend territorial (Jamahiriya arabe libyenne c. Tchad). Arrêt de la Cour internationale de justice du 3 février 1994», 40 *AFDI* (1994), p. 442–464.

[69] Dans ce paragraphe nous suivons essentiellement l'argument de Marcelo G. Kohen, «Le règlement des différends territoriaux à la lumière de l'arrêt de la C.I.J. dans l'affaire Libye/Tchad», 99 *RGDIP* (1995), p. 327–328.

[70] *Différend territorial (Libye/Tchad), C.I.J. Recueil* (1994), p. 20, para. 36.

[71] *Ibid.*, p. 11, para. 17.

siècle, la frontière entre la Libye, et le Tchad avait été tracée par une série d'accords entre la France, l'Angleterre, l'Empire ottoman, et l'Italie: accords franco-britanniques de 1890, 1898, et 1919; accords franco-italiens de 1900, 1912, et 1919 (sans compter un traité non ratifié de 1935) et une convention franco-ottomane de 1910. Une analyse de ce réseau conventionnel complexe semblerait indiquer, disait le juge Ago dans une déclaration, qu'au moment de l'indépendance, la frontière méridionale de la Libye avec les colonies françaises n'avait pas encore fait l'objet d'une délimitation.[72]

Si la Cour avait suivi la Libye sur ce terrain, il lui eût fallu examiner des problèmes épineux, tels que la succession de la Libye aux titres de l'Ordre senoussi; aux accords conclus entre celui-ci et l'Empire ottoman; et aux titres de l'Italie, qui avait contesté l'opposabilité des conventions franco-britanniques.[73] Il y avait sans doute là un chemin semé d'embûches; aussi n'est-il guère surprenant que la Cour ait purement et simplement refusé de se pencher sur ces questions, par une affirmation assez tranchante: «La Cour ne pense pas qu'il y ait lieu de statuer sur ces questions».[74] Cette démarche a permis à la Cour de régler le différend avec une économie de moyens remarquable, sans avoir à entrer dans un domaine aussi controversé que celui de la succession d'Etats.

Si le principe de stabilité des frontières n'est pas toujours apte à résoudre les problèmes de succession aux frontières, du moins est-il utile comme point de départ. A défaut d'un principe qui jouisse d'un consensus aussi large, c'est le pragmatisme qui caractérisera la démarche de la Cour relative aux problèmes de succession. C'est ce qui ressort de l'examen de l'arrêt de la Cour dans l'affaire de la convention sur le génocide.

II. Une démarche empreinte de pragmatisme: La Cour et la succession aux traités

Rarement la Cour a été saisie d'un différend juridique «aussi dramatique que la tragédie bosniaque».[75] La Cour avait été saisie par la Bosnie-Herzégovine le 20 mars 1993, alléguant une série de violations de la convention pour la prévention et la répression du crime de génocide de 1948, violations que la Bosnie-Herzégovine attribuait à la Yougoslavie (Serbie-Montenegro). La Bosnie-Herzégovine invoquait comme base de compétence de la Cour l'article IX de la convention, que la République fédérative socialiste de Yougoslavie (ci-après «RSFY») avait signée le 11 décembre 1948 et ratifiée, sans réserves, le 27 avril 1950.[76] Aux termes de l'article IX de cette con-

[72] *Ibid.*, p. 43.

[73] K o h e n, *op. cit.*, *supra* note 69, p. 312, 329.

[74] *Différend frontalier (Libye/Tchad)*, *C.I.J. Recueil* (1994), p. 22, para. 45.

[75] L.B. d e C h a z o u r n e s: «Les ordonnances en indication de mesures conservatoires dans l'affaire relative à l'application de la convention pour la prévention et la répression du crime de génocide», 39 *AFDI* (1993), p. 514.

[76] Affaire de la convention sur le génocide (Bosnie-Herzégovine c. Yougoslavie (Serbie et Montenegro)), Exceptions préliminaires (arrêt), p. 17, para. 17.

vention les différends entre les Parties contractantes relatifs à l'interprétation, l'application ou l'exécution de la présente convention, y compris ceux relatifs à la responsabilité de l'Etat en matière de génocide ou de l'un quelconque des autres actes énumérés à l'article III, seront soumis à la Cour internationale de justice, à la requête d'une partie au différend.[77]

La requête bosniaque supposait donc que la Bosnie-Herzégovine ainsi que la Yougoslavie (Serbie et Montenegro) soient parties contractantes à la convention.

C'est une prémisse qui au premier abord ne paraît pas être dénuée de fondement. Lors de la proclamation de la République fédérative de Yougoslavie (ci-après «RFY»), l'Assemblée de la RFSY avait adopté la déclaration suivante:

> La République fédérative de Yougoslavie, assurant la continuité de l'Etat et de la personnalité juridique et politique internationale de la République fédérative socialiste de Yougoslavie, respectera strictement tous les engagements que la République fédérative socialiste de Yougoslavie a pris à l'échelon international.[78]

Pour sa part, la Bosnie-Herzégovine a communiqué, le 29 décembre 1992, au Secrétaire général des Nations Unies, en tant que dépositaire de la convention sur le génocide, une «notification de succession» aux termes de laquelle: le Gouvernement de la République de Bosnie-Herzégovine, ayant examiné la convention pour la prévention et la répression du crime de génocide, du 9 décembre 1948, à laquelle l'ex-République fédérative socialiste de Yougoslavie était partie, souhaite être le successeur de cette dernière et s'engage à respecter et exécuter scrupuleusement toutes les clauses figurant dans ladite convention, avec effet à compter du 6 mars 1992, date à laquelle la République de Bosnie-Herzégovine est devenue indépendante.[79]

Le 18 mars 1993, le Secrétaire général a communiqué aux parties à la convention sur le génocide la notification suivante:

Le 29 décembre 1992, la notification de succession par le Gouvernement de la Bosnie-Herzégovine à la convention susmentionnée a été déposée auprès du Secrétaire général, avec effet au 6 mars 1992, date à laquelle la Bosnie-Herzégovine a assumé la responsabilité de ses relations internationales.[80]

Cependant la Yougoslavie a présenté des exceptions préliminaires qui contestaient que la Bosnie-Herzégovine soit devenue Etat partie à la convention sur le génocide par le mécanisme de succession. En même temps, la continuité de la RFY avec l'ex-RFSY est refusée par un très grand nombre d'Etats, ce qui soulève des doutes quant à son statut par rapport à la convention sur le génocide. Par son arrêt du 11 juillet 1996, la Cour a déclaré que les deux Etats étaient bien parties à cette convention. Quelle que soit la décision de la Cour sur le fond, il est d'ores et déjà possible de faire une analyse de la façon dont elle a traité les questions de succession. L'arrêt de

---

[77] *Ibid.*, 1ère Ordonnance, *C.I.J. Recueil* (1993), p. 14, para. 19.

[78] *Ibid.*, Exceptions préliminaires (arrêt), p. 18, para. 17.

[79] *Ibid.*, p. 18, para. 18.

[80] *Ibid.*, p. 18, para. 18.

la Cour laisse transparaître la difficulté qu'elle a éprouvée à trouver des solutions juridiques aux problèmes d'une succession qui a lieu sur la toile de fond de l'incertitude des règles juridiques et d'un conflit politique et militaire. On peut retenir deux principaux problèmes que l'affaire a mis en lumière: la licéité de la succession, et les mécanismes de succession.

A. La licéité de la succession

Pour la Bosnie-Herzégovine, il était évident qu'elle avait remplacé l'ex-RFSY «for the international relations of what was the Federal Republic of Yugoslavia before the dissolution of former Yugoslavia».[81] Au contraire, la troisième exception préliminaire de la Yougoslavie présentée à l'audience publique niait que la Bosnie-Herzégovine soit Etat partie à la convention de 1948. Aux dires de la Yougoslavie, cet Etat n'a pas établi sa qualité d'Etat indépendant conformément au principe de l'égalité des droits et du droit des peuples à disposer d'eux-mêmes et pour cette raison n'a pu succéder à la convention de 1948 pour la prévention et la répression du crime de génocide.[82]

Comme l'a rappelé le juge ad hoc désigné par la Yougoslavie, pour qu'une notification de succession puisse produire les effets juridiques voulus, «the actual succession must have been lawful»,[83] c'est-à-dire la succession doit se dérouler, aux termes de l'article 6 de la convention de Vienne de 1978, conformément au «international law and, in particular, the principles of international law embodied in the Charter of the United Nations».[84] Or la proclamation de la Bosnie-Herzégovine aurait violé la norme de l'égalité des droits des peuples et celle de l'auto-détermination des peuples.[85]

Le respect de l'égalité des droits des peuples aurait exigé une décision en faveur de l'indépendance de la Bosnie-Herzégovine par les représentants élus des trois peuples constitutifs de cette République fédérée de la RFSY.[86] Mais est-ce que chaque peuple qui vit à l'intérieur d'une république dispose d'un «separate right» à l'autodétermination? Selon le juge ad hoc Kreca, la norme d'auto-détermination est incomplète et imparfaite, du moins lorsqu'elle s'applique à des Etats composés de plusieurs peuples.[87] Puisque le droit international n'a pas donné de définition précise d'un «peuple»,[88] il faudrait donc interpréter la norme à la lumière du droit interne, celui de l'ex-RFSY. La norme d'auto-détermination ne deviendrait opératoire que lorsque le droit interne d'un Etat multi-ethnique a posé le droit à l'autodétermination externe et organisé la procédure pour l'exercice de ce droit.[89]

---

[81] Mémoire, para. 4.2.1.26, cité in *Ibid.*, Op. diss., Kreca, p. 70, para. 83.
[82] *Ibid.*, Exceptions préliminaires (arrêt), p. 14, para. 14.
[83] *Ibid.*, Op. diss., p. 73, para. 86.
[84] *Ibid.*, p. 71, para. 84.
[85] *Ibid.*, p. 74, para. 87.
[86] *Ibid.*, p. 60, para. 66.
[87] *Ibid.*, p. 43, para. 45.
[88] *Ibid.*, p. 63, para. 69.
[89] *Ibid.*, p. 43, para. 45.

En l'espèce les deux conditions ne seraient pas réunies. En effet, la Constitution de la RFSY de 1974 ne reconnaissait pas le droit à l'autodétermination des Républiques fédérées; seuls les peuples possédaient ce droit. La Bosnie-Herzégovine elle-même avait été constituée comme une communauté de trois peuples, Serbes, Croates, et Musulmans (depuis 1963), seuls les peuples constitutifs pouvaient exercer ce droit.[90] S'il est vrai que la République de Bosnie-Herzégovine avait organisé un referendum, tenu les 29 février et 1er mars 1992, et dont l'objectif était de «déterminer le statut» de la Bosnie-Herzégovine, la Constitution de cette République n'autorisait pas l'organisation d'un referendum à cette fin; d'ailleurs la constitution de la RFSY interdisait les modifications de la frontière de celle-ci sans le consentement de toutes les Républiques.[91] Non seulement le referendum serait inconstitutionnel; il serait également insuffisant pour permettre l'expression de la volonté de chaque peuple.[92]

La Cour ne s'est pas attardée sur ces considérations; pour décider si la Bosnie-Herzégovine était partie à la convention sur le génocide, elle a renvoyé à la décision des Nations Unies de l'admettre à la suite des décisions prises le 22 mai 1992 par le Conseil de sécurité et l'Assemblée générale, organes compétents en vertu de la Charte. Or en l'article XI de la convention sur le génocide ouvre celle-ci à «tout Membre des Nations Unies»; dès son admission au sein de l'Organisation, la Bosnie-Herzégovine pouvait donc devenir partie à la convention. Peu importent alors les circonstances dans lesquelles elle a accédé à l'indépendance.[93]

Et la Cour d'ajouter:

> Il ressort de ce qui précède que la Bosnie-Herzégovine pouvait devenir partie à la convention par l'effet du mécanisme de la succession d'Etats. Du reste, le Secrétaire général des Nations Unies a considéré que tel avait été le cas, et la Cour en a pris note dans son ordonnance du 8 avril 1993...[94]

L'on ne peut s'empêcher de s'interroger sur les raisons de ce renvoi à l'ONU. En effet, le principe selon laquelle la succession doit se dérouler conformément au droit international est un principe largement accepté. Lors de la Convention de Vienne sur la succession d'Etats en matière de traités, les Etats occidentaux ont exprimé l'avis qu'il était superflu de le préciser, car le régime de la convention se fondait sur l'hypothèse de la licéité de la succession. Il pourrait même être risqué d'insérer une disposition en ce sens, car elle pourrait libérer l'Etat qui aurait succédé à un autre Etat dans des conditions non conformes au droit international, des obligations imposées par la convention à tout Etat successeur (telle que l'obligation de respecter les frontières et régimes territoriaux).[95] Pour ce qui est du droit à l'autodétermination, la jurispru-

---

[90] *Ibid.*, p. 46, para. 53; p. 48, para. 55; p. 50, para. 58; p. 52, par. 60.
[91] *Ibid.*, p. 55–58, para. 62–65.
[92] *Ibid.*, p. 66, para. 60.
[93] *Ibid.*, Exceptions préliminaires (arrêt), p. 18, para. 20.
[94] *Ibid.*, p. 18, para. 21.
[95] A. M a r e s c a: *La successione internazionale nei trattati* 110, (1983), note 2.

dence de la Cour a eu maintes fois l'occasion de souligner son caractère *erga omnes*;[96] des spécialistes éminents considèrent même qu'il s'agit d'une norme de *jus cogens*.[97]

A notre avis, ce sont les mutations actuelles de ce principe et les controverses qu'elles suscitent qui expliquent la prudence de la Cour. Jusqu'à la dissolution de la Yougoslavie et de l'URSS, il était généralement entendu que ce principe s'appliquait en priorité dans un contexte colonial. Les peuples coloniaux disposaient «du droit de se soustraire à un statut politique impliquant une subjugation, domination ou exploitation étrangère afin de choisir eux-mêmes leur statut»: ce droit comportait «le droit de libération dont l'une des formes était la sécession».[98] Il va sans dire que le principe risquait de poser une menace à l'intégrité territoriale des Etats; ainsi ce principe ne pouvait-il être invoqué contre les Etats issus de la décolonisation. En dehors du contexte colonial, les Etats se sont toujours opposés à reconnaître l'existence d'une règle juridique reconnaissant le droit à l'auto-détermination, interne ou externe, à des groupes ethniques ou nationaux, ni aux minorités culturelles ou religieuses.[99] Les Etats qui se comportent conformément au principe de l'égalité des droits et de celui de l'autodétermination des peuples et possèdent un gouvernement représentatif de la totalité de la population sans distinction de race, croyance ou couleur ont le droit au respect de leur intégrité territoriale et de leur unité nationale.

La revendication depuis ces dernières années par les différents peuples des Etats multi-ethniques en Europe orientale du droit à l'autodétermination a bousculé les conceptions traditionnelles et a placé les autres Etats devant un dilemme. Sans encourager l'exercice de ce droit par des peuples se trouvant à l'intérieur des Etats existants, ils ont néanmoins protesté contre l'emploi de la force pour supprimer les mouvements indépendantistes; et lorsque la sécession semble être un fait accompli, ils ont fini par prendre acte de l'exercice de ce droit, tout en posant des conditions à la reconnaissance de nouveaux Etats.[100] Il n'empêche que la pratique internationale n'a pas cristallisé au point que l'on puisse répondre sans hésiter à la question de savoir si les Serbes ou les Croates de Bosnie-Herzégovine peuvent revendiquer ce droit.

Compte tenu de ces considérations l'on comprend aisément que la Cour ait préféré ne pas examiner en détail les arguments de la Yougoslavie fondés sur le principe de l'autodétermination. Alors que la condition de conformité d'une succession au droit international visait surtout celle qui pourrait avoir lieu à la suite d'une agression, il aurait été trop risqué pour la Cour de porter un jugement sur les conditions actuelles de l'exercice du droit à l'autodétermination, jugement qui pourrait être démenti par la

---

[96] *Affaire du Timor oriental, C.I.J. Recueil* (1995), p. 102; *Sahara occidental*, avis consultatif, *C.I.J. Recueil* (1975), p. 31–33, para. 54–59, cités dans *Affaire de la convention sur le génocide, exceptions préliminaires*. Op. diss., Kreca, p. 62, para. 68.

[97] Voir, p. ex., I. Brownlie: *Principles of Public International Law* (1990), p. 513; A. Cassese: *International Law in a Divided World* (1986), p. 136.

[98] H. Thierry, J. Combacau, S. Sur, Ch. Vallée: *Droit international public* (1986), p. 493.

[99] A. Cassese: «Self-Determination of Peoples and the Recent Break-up of USSR and Yugoslavia», in Ronald St. John Macdonald (ed.): *Essays in Honour of Wang Tieya* (1994), p. 131–132.

[100] R. Mullerson: «Self-Determination of Peoples and the Dissolution of the USSR» in: R.St.J. Macdonald, *op. cit., supra* note 99, p. 567–85.

pratique ultérieure. D'où la déférence de la Cour envers le Conseil de sécurité et l'Assemble générale des Nations Unies, qui sont censés avoir examiné les circonstances de l'indépendance de la Bosnie-Herzégovine dans le cadre du processus d'admission. Non moins aiguës étaient les questions posées par le mécanisme ou les procédures par lesquels les deux Etats sont devenus parties à la convention sur le génocide.

B. Les mécanismes de la succession

C'est au moyen d'une «notification de succession» que la Bosnie-Herzégovine a prétendu succéder à la convention sur le génocide, tandis que la Yougoslavie, sans se référer en particulier à celle-ci, avait émis une déclaration unilatérale de continuité. Derrière la différence de procédures se cache l'opposition classique des deux thèses: la Bosnie-Herzégovine plaidant pour la succession automatique, que la Yougoslavie rejette en faveur de la règle de la table rase.[101] N'eût-il pas été plus raisonnable de reconnaître le principe de la succession automatique aux conventions en matière des droits de l'homme?

1. L'effet de la notification de succession bosniaque

S'il est bien certain que la Bosnie-Herzégovine était devenue Etat partie à la convention sur le génocide (et la Yougoslavie ne l'a pas contesté), encore faut-il savoir par quel mécanisme, et à quelle date. La Bosnie-Herzégovine avait soutenu la thèse de la succession automatique d'Etats sur la base de la nature de la convention comme convention en matière des droits de l'homme (voir plus loin) et sur la base de sa notification de succession.

La Convention de Vienne de 1978 dans son article 34 prévoit bien qu'en cas de séparation («l'Etat prédécesseur se sépare en plusieurs Etats successeurs et il cesse d'exister») ou de séparation d'une partie («l'Etat prédécesseur continue d'exister avec un territoire diminué et l'Etat successeur est formé de la partie séparée de l'Etat prédécesseur»)[102], tout traité en vigueur à l'égard de l'Etat prédécesseur demeure en vigueur à l'égard de chaque Etat successeur. Cela dit, il ne faut pas oublier que la Convention de Vienne de 1978 n'est pas encore entrée en vigueur; en outre la pratique des Etats semble hésitante. Certes, les Etats successeurs de la Yougoslavie se sont déclarés en faveur de la continuité automatique des traites multilatéraux. En dépit de ces prises de position ils n'ont pas continué automatiquement tous les traités multilatéraux de la RFSY.[103]

Comme nous l'avons vu ci-dessus, la Bosnie-Herzégovine a envoyé une notification de succession au Secrétaire général des Nations Unies, en tant que dépositaire de

---

[101] Affaire de la *convention sur le génocide (Bosnie-Herzégovine c. Yougoslavie)*, Exceptions préliminaires (arrêt), Op. diss., Kreca, p. 91, para. 107. Notons que la Slovénie et la Croatie, Etats successeurs de la RFSY, se sont également déclarées en faveur du principe de continuité automatique. S t e r n: «Rapport préliminaire sur la succession d'Etats en matière de traités», *supra* note 2, p. 21.

[102] S t e r n: «Rapport préliminaire sur la succession d'Etats en matière de traités,» *supra* note 2, p. 9.

[103] *Ibid.*, p. 21–22.

la convention sur le génocide, par laquelle elle exprimait le désir de succéder à la Yougoslavie. Lors de la procédure qui a suivi la deuxième demande présentée par la Bosnie-Herzégovine en indication de mesures conservatoires, la Yougoslavie a contesté la validité et l'effet de la notification du 29 décembre 1992. Elle soutenait qu'aucune règle de droit international ne conférait à la Bosnie-Herzégovine le droit de proclamer unilatéralement qu'elle était partie à la convention sur le génocide pour le seul motif que l'ex-RFSY était partie à la convention et que de ce fait la convention serait applicable au territoire de Bosnie-Herzégovine. La Yougoslavie a fait remarquer que la procédure relative aux «déclarations de succession», qui était prévue dans la convention de Vienne de 1978 (traité non encore en vigueur, comme elle l'a reconnu) avait été conçue pour les cas de décolonisation et n'était applicable qu'à ces cas.[104] Aux fins de l'indication des mesures conservatoires, la Cour n'a pas attaché trop d'importance à cette objection; il lui a suffi de constater que la Bosnie-Herzégovine avait succédé et non pas adhéré à la convention.[105]

Les sixième et septième exceptions préliminaires présentées par la Yougoslavie ont à nouveau soulevé la question de la validité de la notification de succession bosniaque; l'enjeu en était l'étendue de la compétence *ratione temporis* de la Cour.

A cet égard la Yougoslavie a présenté une série de dates avant lesquelles la Cour ne serait pas compétente. La première date, le 14 décembre 1995, était celle de la reconnaissance réciproque par les deux Etats dans le cadre des Accords de Dayton. Comme arguments de repli, la Yougoslavie a proposé d'autres dates qui étaient justifiées par la thèse selon laquelle la notification de succession ne pouvait avoir pour effet que l'adhésion de la Bosnie-Herzégovine à la convention: 9 mars 1993 (trois mois après l'envoi de la notification de succession bosniaque au Secrétaire général des Nations Unies); 18 mars 1993 (date de la communication envoyée par le Secrétaire général aux parties à la convention sur le génocide); et 29 décembre 1993 (date de la notification de succession).[106]

Cet embarras de choix n'a pas réussi à amener la Cour à se prononcer sur la notification de succession. Elle a tout simplement dit qu'elle «ne considère pas nécessaire, pour décider de sa compétence en l'espèce, de se prononcer sur les questions juridiques concernant la succession d'Etats en matière de traités qui ont été soulevées par les Parties.»

Que la Bosnie-Herzégovine soit devenue automatiquement partie à la convention sur le génocide à la date de son accession à l'indépendance le 6 mars 1992, ou qu'elle le soit devenue par l'effet – rétroactif ou non – de sa notification de succession du 29 décembre 1992, en tout état de cause, elle y était partie à la date du dépôt de sa requête, le 20 mars 1993.[107]

Suite à l'admission de la Bosnie-Herzégovine à l'ONU, elle pouvait devenir partie à la convention par l'effet du mécanisme de la succession d'Etats. Du reste, le

[104] *Ibid.*, 2e Ordonnance, *C.I.J. Recueil* (1993), p. 16, para. 24.
[105] *Ibid.*, p. 16, para. 25.
[106] *Ibid.*, Exceptions préliminaires (arrêt), p. 15–16, para. 14.
[107] *Ibid.*, p. 19, para. 23.

Secrétaire général des Nations Unies a considéré que tel avait été le cas, et la Cour en a pris note dans son ordonnance du 8 avril 1993...[108]

Vu les arguments soulevés par la Yougoslavie, l'on peut regretter que la Cour ait été laconique au sujet de ce «mécanisme de succession d'Etats».

Pour la Yougoslavie la thèse de la succession *ipso jure* aux traités en cas de séparation d'Etat, tel qu'elle est réglementée par l'article 34 de la Convention de Vienne de 1978, ne reflète pas le droit coutumier. Ainsi, lorsque le Pakistan s'est séparé de l'Inde, il n'a pas assumé les droits et obligations de celle-ci.[109] En outre les travaux de la Commission du droit indiqueraient clairement que la distinction entre la table rase pour les nouveaux Etats indépendants et la continuité pour la séparation d'Etats représentait le développement progressif du droit international.[110] D'ailleurs la pratique ultérieure des Etats et le fait que la convention de 1978 ne soit pas entrée en vigueur confirmeraient la règle de la table rase.[111]

La valeur d'une notification de succession a fait l'objet d'une analyse très serrée par le juge ad hoc désigné par la Yougoslavie. Sur le plan des principes, la notification de succession semblerait contredire la thèse de la succession d'Etats: «Automatic succession» and «notification of succession» are mutually exclusive.[112]

[In case of automatic succession] "notification of succession is essentially unnecessary. It would merely be information that a territorial change had occurred and that, as a result, the rule on the automatic transfer of rights and obligations stated by treaty had been activated."[113]

Une telle notification n'aurait de justification juridique que si la transmission des droits et obligations dépendait d'un acte exprimant la volonté de l'Etat successeur à être lié par un traité.

Ici le juge ad hoc met le doigt sur un dilemme: face à une notification de succession, comment peut-on déterminer si l'auteur a entendu signifier la table rase ou la succession automatique aux traités? A cet égard le rapport préliminaire du Comité spécial de l'International Law Association nous rappelle que lorsque l'on cherche à interpréter l'attitude des Etats, il faut être extrêmement prudent quant aux arguments a contrario. L'adhésion à une convention multilatérale par un Etat successeur peut laisser croire que celui-ci n'accepte pas la règle de la continuité automatique. Or cette conclusion peut être erronée: il semble qu'au contraire, certains Etats se soient empressés d'adhérer pensant ainsi manifester ouvertement qu'ils confirmaient leur succession automatique.[114]

Etant donné les divergences d'interprétation auxquelles le comportement des Etats peut donner lieu, il était plus simple pour la Cour de prendre acte de la notification de

---

[108] *Ibid.*, p. 18, para. 20. Cf. *C.I.J. Recueil* (1993), p. 16, para. 25.
[109] *Ibid.* Op. diss., Kreca, p. 110, para. 94.
[110] *Ibid.*, p. 95, para. 111.
[111] *Ibid.*, p. 93, para. 110; p. 96–97, para. 111–112.
[112] *Ibid.*, p. 99, para. 114.
[113] *Ibid.*, p. 101, para. 116.
[114] S t e r n: «Rapport préliminaire sur la succession d'Etats en matière de traités», *supra* note 1, p. 2–3.

succession émise par la Bosnie-Herzégovine à une convention particulière, sans se prononcer sur l'attitude générale de cet Etat au sujet de la succession en matière de traités.

Mais cette convention particulière, selon le juge ad hoc Kreca, ne cite pas la succession comme moyen d'exprimer le consentement à être lié.[115] En l'absence d'une règle coutumière qui permettrait de considérer la succession comme un moyen de devenir partie à un traité, il faudrait alors, suivant l'article 11 de la Convention de Vienne sur le droit des traités[116] et l'article 34 de la Convention de Vienne de 1978, le consentement ou l'accord des Etats parties pour considérer que la succession aura un tel effet. Or dès qu'elle avait reçu la notification du Secrétaire général de la succession de la Bosnie-Herzégovine a la convention sur le génocide, la Yougoslavie s'est refusée à la considérer comme étant une partie à la convention.[117]

Si selon la Cour, la Bosnie-Herzégovine était Etat partie à la convention sur le génocide au moment où elle a déposé sa requête contre la Yougoslavie, le doute subsiste quant à la date où elle était devenue Etat partie. Il est incontestable que tout Etat membre de l'ONU peut devenir partie au traité et la Bosnie-Herzégovine est entrée à l'ONU le 22 mai 1992. Le fait qu'elle ait envoyé une notification de succession le 29 décembre 1992 laisse supposer qu'elle n'était pas devenue partie à la convention sur le génocide au moment d'entrer à l'ONU, quoique la notification elle-même ait spécifié qu'elle avait un effet rétroactif à la date de l'indépendance, c'est-à-dire le 6 mars 1992. Mais si cela était accepté, on aboutirait au résultat paradoxal que la Bosnie-Herzégovine serait devenue partie à la convention sur le génocide avant son admission à l'ONU. Puisqu'elle ne pouvait pas être identifiée à l'Etat prédécesseur, cet état de choses signifierait-il que la Bosnie-Herzégovine a succédé automatiquement à la convention sur le génocide? Mais les termes de la notification

---

[115] Article XI:

The present Convention shall be open until 31 December 1949 for signature on behalf of any Member of the United Nations and of any non-member State to which an invitation to sign has been addressed by the General Assembly.

The present Convention shall be ratified, and the instruments of ratification shall be deposited with the Secretary-General of the United Nations.

After 1 January 1950 the present Convention may be acceded to on behalf of any Member of the United Nations and of any non-member State which has received an invitation as aforesaid.

Instruments of accession shall be deposited with the Secretary-General of the United Nations.

Cité in Affaire de la convention sur le génocide (Bosnie-Herzégovine c. Yougoslavie), Exceptions préliminaires (arrêt), Op. diss., Kreca, p. 102, para. 117.

[116] «The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.» Cite in *ibid.*, p. 100, par. 116.

[117] Le 15 juin 1993, elle avait envoyé au dépositaire la communication suivante:

Considering the fact that the replacement of sovereignty on the part of the Socialist Federal Republic of Yugoslavia previously comprising the Republic of Bosnia and Herzegovina was carried out contrary to the rules of international law, the Government of the Federal Republic of Yugoslavia herewith states that it does not consider the so-called Republic of Bosnia and Herzegovina a party to the [said Convention] but does consider that the so-called Republic of Bosnia and Herzegovina is bound by the obligation to respect the norms on preventing and punishing the crime of genocide in accordance with general international law irrespective of the Convention on the Prevention and Punishment of the Crime of Genocide. Cité in *ibid.*, p. 103, para. 117.

elle-même suggèrent par ailleurs qu'elle a procédé à un examen cas par cas des conventions conclues par l'Etat prédécesseur, comme l'aurait fait un Etat nouvellement indépendant au sens de la convention de Vienne de 1978. On peut rétorquer que peu importe la forme ou la désignation de l'instrument par lequel la Bosnie-Herzégovine a exprimé son consentement à être liée; l'essentiel demeure sa volonté d'être liée. Ce raisonnement obligerait cependant à tenir compte de l'acte de volonté de la Yougoslavie par lequel elle s'est refusée à considérer la Bosnie-Herzégovine comme partie à la convention sur le génocide.

Le renvoi à la pratique du dépositaire[118], qui considérait que la Bosnie-Herzégovine avait succédé et non pas adhéré à la convention sur le génocide, ne fait pas disparaître ces paradoxes. Cette pratique est elle même hésitante, pour ne pas dire ambiguë, comme nous verrons ci-dessous. Qu'il suffise de rappeler ici, à propos des fonctions du dépositaire que «the depositary is not invested with any compétence to adjudicate upon or to determine matters arising in connexion with the performance of its functions».[119]

En fin de compte, si l'objectif poursuivi par l'exception préliminaire de la Yougoslavie était de limiter la compétence *ratione temporis* de la Cour, paradoxalement la date exacte à laquelle la Bosnie-Herzégovine serait devenue partie à la convention sur le génocide ne serait peut-être pas critique.

S'appuyant sur une lecture de la convention sur le génocide qui est tout-à-fait compatible avec l'objet et le but de celle-ci, la Cour a constaté que l'article IX ne comportait aucune clause «qui aurait pour objet ou pour conséquence de limiter de la sorte l'étendue de sa compétence *ratione temporis*»; par ailleurs, les Parties elles-mêmes n'ont formulé aucune réserve à cet effet, ni à la convention ni à l'occasion de la signature des accords de Dayton-Paris. La Cour en conclut qu'elle «a compétence en l'espèce pour assurer l'application de la convention sur le génocide aux faits pertinents qui se sont déroulés depuis le début du conflit dont la Bosnie-Herzégovine a été le théâtre.»[120] Evidemment cette conclusion suppose que la Yougoslavie soit elle aussi partie à la convention sur le génocide.

2. La portée de la déclaration yougoslave

Au moment de la proclamation la République fédérative de Yougoslavie, l'Assemblée avait adopté une déclaration par laquelle la RFY assurant la continuité de l'Etat et de la personnalité juridique et politique internationale de la République fédérative socialiste de Yougoslavie, respectera strictement tous les engagements que la République fédérative socialiste de Yougoslavie a pris à l'échelon international.[121]

---

[118] *Ibid.*, Exceptions préliminaires (arrêt), p. 18, para. 20.

[119] United Nations Convention on the Law of Treaties, First and Second Sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969, Official Records, Documents of the Conference, p. 89, para. 87, cité in *ibid.*, Op. diss., Kreca, p. 91, 107.

[120] *Ibid.*, Exceptions préliminaires (arrêt), p. 24, para. 35.

[121] *Ibid.*, p. 18, para. 17.

Fait curieux, la requête de la Bosnie-Herzégovine, tout en soutenant que la Bosnie-Herzégovine et la Yougoslavie étaient parties au Statut de la Cour en tant que Membres des Nations Unies, avait souligné en même temps que «la «continuité» entre la Yougoslavie et l'ex-République fédérative socialiste de Yougoslavie «a été vigoureusement contestée par «l'ensemble de la communauté internationale,y compris par le Conseil de sécurité de l'ONU...ainsi que par l'Assemblée générale».[122] En effet, le Conseil de sécurité, dans sa résolution 777 du 19 septembre 1992 avait exprimé l'avis que la République fédérative de Yougoslavie ne pouvait pas assurer automatiquement la continuité de la qualité de Membre de l'ancienne République fédérative socialiste de Yougoslavie aux Nations Unies et a recommandé à l'Assemblée générale que la RFY devrait présenter une demande d'adhésion aux Nations Unies; en attendant, la RFY ne participerait pas aux travaux de l'Assemblée générale. Celle-ci a repris cette recommandation à son compte (rés. 46/1 du 22 septembre 1992).

On peut avoir des doutes quant à la valeur de cette constatation pour la Bosnie-Herzégovine. En fait elle aurait coupé l'herbe sous le pied de sa requête: si la Yougoslavie n'était pas Membre de l'ONU (puisqu'elle devait présenter une nouvelle demande d'adhésion), comment pourrait-elle être partie au Statut de la Cour? Aux fins de l'indication des mesures conservatoires, la Cour a estimé qu'elle n'avait pas «à statuer sur la question de savoir si la Yougoslavie est ou non membre de l'Organisation des Nations Unies.» La porte de secours a été retrouvée grâce à l'article 35 du Statut qui permet à un Etat d'introduire une instance contre un autre Etat qui, sans être partie au Statut, est partie à une disposition d'un traité en vigueur attribuant la compétence à la Cour – à condition évidemment que tous les deux Etats soient parties à la convention sur le génocide.[123]

C'est là le noeud du problème. S'étant peut-être rendu compte de la faiblesse des moyens qu'elle pouvait tirer du statut contesté de la RFY, la Bosnie-Herzégovine n'y a pas insisté dans la suite de la procédure. Néanmoins il fallait bien s'assurer que la RFY était liée par la convention sur le génocide. La preuve de son consentement à être liée était fournie par la déclaration citée ci-dessus;[124] cette intention «exprimée par la Yougoslavie de demeurer liée par les traités internationaux auxquels était partie l'ex-Yougoslavie a été confirmée dans une note officielle du 27 avril 1992 adressée au Secrétaire général...; enfin «il n'a pas été contesté que la Yougoslavie soit partie à la convention sur le génocide.» Cette démonstration plutôt brève a suffi à la Cour pour conclure que «la Yougoslavie était liée par les dispositions de la convention à la date du dépôt de la requête...le 20 mars 1993.»[125]

Le juge ad hoc désigné par la Yougoslavie, tout en étant d'accord que celle-ci était partie à la convention sur le génocide, a contesté l'interprétation que la Cour avait faite de la déclaration yougoslave du 27 avril 1992. L'obligation que la RFY

---

[122] *Ibid.*, 1ere Ordonnance, *C.I.J. Recueil* (1993), p. 12, para. 15.
[123] *Ibid.*, p. 14, para. 18.
[124] *Ibid.*, Exceptions préliminaires (arrêt)), p. 18, para. 17.
[125] *Ibid.*, p. 18, para. 17.

assumait de continuer à respecter les engagements de la RFSY avait été fondée, a-t-il expliqué, sur la prémisse que la Yougoslavie assurait la continuité de l'Etat et de la personnalité juridique et politique internationale de la RFSY.[126] N'ayant ratifié la convention ni accédé à elle, ni envoyé une notification de succession, la seule base juridique qui permettait de la considérer comme Etat partie à la convention était son identité avec l'ex-RFSY.[127] A l'appui de cette conclusion, le juge ad hoc cite la pratique du dépositaire de la convention sur le génocide, qui continuait à noter que la Yougoslavie demeurait partie aux traités multilatéraux dont il était le dépositaire, même après les mutations territoriales de 1991–92.[128] D'ailleurs le conseil juridique des Nations Unies n'a-t-il pas précisé que le statut de la Yougoslavie en tant que partie au traités multilatéraux n'avait pas été affecté par la résolution 47/1 de l'Assemblée générale.[129]

Il est bien évident que la RFY souhaitait être reconnue comme l'Etat continuateur de la RFSY, afin d'acquérir une légitimité internationale fortement atteinte par les événements en Bosnie-Herzégovine. C'est précisément pour lui empêcher de bénéficier de cette légitimité que la communauté internationale a refusé de lui reconnaître la qualité d'Etat continuateur et la considère comme Etat successeur. Dès le 29 novembre 1991, l'avis no. 1 de la Commission d'arbitrage de la conférence internationale pour la paix en Yougoslavie a constaté que la Yougoslavie était «in the process of dissolution». L'avis no. 8 a franchi l'étape suivante en exprimant l'avis que «the process of dissolution of the SFRY referred to in Opinion No. 1 of 29 November 1991 is now complete and that the SFRY no longer exists» (para. 4).[130] L'avis no. 9 a tiré les conclusions juridiques de cette constatation: «New states have been created on the territory of the former SFRY and replaced it. All are successor states to the former SFRY». Il en résulte que «the SFRY's membership of international organisations must be terminated according to their statutes;...none of the successor states may thereupon claim for itself alone the membership rights previously enjoyed by the former SFRY».[131]

Aux Nations Unies, deux résolutions ont été adoptées qui portaient sur le statut de la RFY. La résolution 757 (1992) du Conseil de Sécurité a noté que «the claim by the Federal Republic of Yugoslavia (Serbia and Montenegro) to continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations has not been generally accepted». Elle était suivie de la résolution 777 (1992) dont le préambule considérait que «the state formerly known as the Socialist Federal Republic of Yugoslavia has ceased to exist».[132]

---

[126] *Ibid.* Op. diss., Kreca, p. 78, para. 93.

[127] *Ibid.*, p. 79, para. 94.

[128] *Ibid.*, p. 81, para. 96. Le juge ad hoc semble avoir oublié ce qu'il avait lui-même dit à propos des fonctions du dépositaire.

[129] *Ibid.*, p. 80, para. 95. Plusieurs Etats ont protesté contre la qualification de la Yougoslavie comme Etat successeur, ce qui a amené le Secrétaire général à publier des «errata» qui supprimaient la mention, mais le juge ad hoc Kreca ne pense pas que ces «errata» aient modifié le statut de la RFY. *Ibid.*, p. 80–81, para. 96–97.

[130] Texte anglais dans 48 La Comunità internazionale 45–47 (1993).

[131] *Ibid.*, p. 48.

[132] *Ibid.*, p. 56.

Dès sa proclamation, la RFY a toujours insisté que «Serbia and Montegro do not recognize that Yougoslavia is abolished and does not exist».[133] Cela étant, on voit mal quels moyens la Yougoslavie aurait pu en tirer devant la Cour. Si l'objectif poursuivi était d'empêcher la Cour de connaître de l'affaire, cela ne lui aurait pas servi de nier qu'elle soit l'Etat continuateur de la Yougoslavie, sous peine de se voir opposer cette prise de position dans d'autres instances internationales. Réitérer, comme elle n'a cessé de le faire, qu'elle continuait l'ex-RFSY, revenait à reconnaître qu'elle était partie à la convention sur le génocide et ne lui laissait d'autre moyen que de contester l'entrée en vigueur de la convention entre la Bosnie-Herzégovine et la Yougoslavie. C'est bien cette stratégie qu'elle a adoptée.

Heureusement pour la Cour – qui autrement aurait été obligée de se prononcer sur la continuité de la RFY. Si la Yougoslavie n'existait plus, elle ne pourrait plus être partie à la convention; si la RFY ne continuait pas l'identité de la RFSY, elle n'aurait été partie à la Convention que par l'adhésion. Mais elle n'aurait pas pu adhérer sans être membre de l'ONU. Donc la convention sur le génocide ne serait pas en vigueur entre la Yougoslavie et la Bosnie-Herzégovine? Manifestement ce n'était pas la conclusion à laquelle la Cour souhaitait arriver. Pour se déclarer compétente, ne faudrait-il pas alors constater que la RFY était l'Etat continuateur de la RFSY? Evidemment la Cour ne pouvait pas aller si loin, au risque de contredire la Commission d'arbitrage, le Conseil de sécurité et l'Assemblée générale des Nations. La solution la plus simple était donc d'invoquer la déclaration de la Yougoslavie en faisant abstraction de toutes les conditions que l'auteur de la déclaration y avait attachées. Tout se passe comme si la Cour avait dissocié la déclaration en deux éléments – la continuité de la RFSY, et l'engagement d'assumer les obligations de l'ex-RFSY – pour ne prendre que celui qui était favorable à la compétence de la Cour.

Au vu de ces casse-tête juridiques, il n'est pas étonnant que deux juges se soient demandés s'il ne valait pas mieux considérer que la succession d'Etats à la convention sur le génocide était automatique en raison de la nature spécifique de celle-ci comme convention en matière de droits de l'homme.

3. Vers une succession automatique aux conventions en matière de droits de l'homme?

Comme il fallait s'y attendre, c'est la Bosnie-Herzégovine qui a avancé que «la convention sur le génocide appartient à la catégorie des instruments de protection des droits de l'homme et qu'en conséquence la règle de la «succession automatique» s'impose.» Suivant cette logique elle serait devenue partie à la convention dès son accession à l'indépendance.[134]

La Cour semble avoir été tentée un instant de reprendre cet argument. Sinon, pourquoi citer deux passages significatifs de son avis consultatif du 28 mai 1951

[133] Affaire de la *convention sur le génocide (Bosnia-Herzégovine c. Yougoslavie)*, Exceptions préliminaires (arrêt), Op. diss., Kreca, p. 79, para. 93.

[134] *Ibid.*, Exceptions préliminaires (arrêt), p. 19, para. 21.

afférent aux *Réserves à la convention pour la prévention et la répression du crime de génocide* qui mettaient l'accent sur la spécificité de cette convention?

Dans une telle convention, les Etats contractants n'ont pas d'intérêts propres; ils ont seulement, tous et chacun, un intérêt commun, celui de préserver les fins supérieures qui sont la raison d'être de la convention. Il en résulte que l'on ne saurait, pour une convention de ce type, parler d'avantages ou de désavantages individuels des Etats, non plus que d'un exact équilibre contractuel à maintenir entre les droits et les charges.[135]

La Cour avait ajouté à l'époque:

> L'objet et le but de la convention sur le génocide impliquent chez l'Assemblée générale et chez les Etats qui l'ont adoptée l'intention d'y voir participer le plus grand nombre possible d'Etats. L'exclusion complète de la convention d'un ou de plusieurs Etats, outre qu'elle restreindrait le cercle de son application, serait une atteinte à l'autorité des principes de morale et d'humanité qui sont à sa base.[136]

Après ces citations, la Cour a fait marche arrière, comme si elle était consciente que la pratique des Etats ne confirmaient pas la thèse que la succession aux conventions en matière de droits de l'homme était automatique. Les citations auront servi à rappeler aux Etats l'importance primordiale de ces conventions, peut-être avec l'idée de les persuader précisément de reconnaître la succession automatique à celles-ci.

Ce sont les opinions individuelles des juges Weeramantry et Shahabudeen qui ont longuement insisté sur ce point. Ce n'est pas le lieu approprié d'analyser en détail leurs arguments; nous ne ferons que les passer en revue. Pour le juge Weeramantry, on ne peut déroger aux droits et obligations prévus par la convention, laquelle tend à protéger le plus fondamental des droits de la personne, le droit à la vie.[137] L'avis de la Cour de 1951 avait déjà souligné que la Convention reflète des règles de droit international coutumier; par conséquent les obligations qu'elle impose existent indépendamment de tout lien conventionnel.[138] La règle de la continuité est contestée au nom de la souveraineté de l'Etat successeur; mais les droits de l'homme sont depuis longtemps entrés dans le domaine universel. La convention sur le génocide en tant que traité a des caractéristiques particulières qui commandent la succession automatique. Elle n'impose pas de charge aux Etats; elle ne fait que confirmer la jouissance par des individus soumis à la juridiction des Etats des droits qui leur appartiennent en vertu de leur appartenance à l'humanité.[139] La nécessité d'une succession automatique deviendrait évidente si l'on examinait les conséquences de l'hypothèse contraire, la non succession.

Populations once protected cease to be protected, may be protected gain, and may again cease to be protected, depending on the vagaries of political events.[140]

---

[135] *C.I.J. Recueil* (1951), p. 23, cité in *ibid.*, p. 19, para. 22.
[136] *Ibid.*
[137] *Ibid.*, Op. ind., Weeramantry, p. 9, para. 10.
[138] *Ibid.*, p. 6, paras. 4–5.
[139] *Ibid.*, pp. 4–5, para. 1–3.
[140] *Ibid.*, p. 7, para. 7.

C'est justement lors des périodes de transition qui suivent la dissolution d'un Etat que les individus auront besoin de la protection offerte par la convention. Il serait contraire à l'objet et au but de la convention que "people living under guarantees that génocide will not be committed against them will suddenly be deprived of that guarantee, precisely at the time they need it most – when there is instability in their State."[141]

Comment fonctionnerait la succession automatique? Selon le juge Shahabudeen, il faut interpréter la convention de telle sorte que chaque partie ait l'obligation de considérer qu'un Etat successeur continue dès son indépendance le statut de l'Etat prédécesseur comme partie à la convention. Ce serait un engagement unilatéral qui serait complété par la décision de l'Etat successeur de devenir partie à la convention.[142]

Le juge ad hoc désigné par la Yougoslave était d'accord que les principes incorporés dans la convention sur le génocide exprimaient l'intérêt universel de la communauté internationale dans son ensemble. Il a tout de même tenu à distinguer les principes sur le fond et les dispositions sur le règlement des différends de cette convention. Ces procédures n'expriment pas nécessairement les principes fondamentaux, et par conséquent ne peuvent être obligatoires en dehors de tout lien conventionnel.[143] Il a également mis en doute le caractère «humanitaire» de la convention sur le génocide, qui serait une convention dans le domaine du droit pénal international. Le humanitaire renvoie au droit des conflits armés; qualifier une convention d'«humanitaire» sur la base de son importance, directe ou indirecte, pour le statut juridique des individus, rendrait la plus grande partie du droit international «droit humanitaire».[144]

Notons avant de conclure que selon le rapport préliminaire du Comité spécial de l'International Law Association, «on considère que dans certains domaines, surtout en matière de droits de l'homme, les Etats sont liés même en l'absence de notification de succession.»[145]

Conclusion

Le principal apport de la Cour internationale de justice au droit de la succession d'Etats réside dans sa consécration du principe de l'*uti possidetis* en tant que méthode de délimitation des frontières des Etats successeurs. En dehors de cette hypothèse, la jurisprudence de la Cour est trop faible pour que l'on puisse déceler une politique cohérente. L'arrêt dans l'affaire de la convention sur le génocide marque un point tournant ambigu; dans le désir d'affirmer sa compétence, la Cour a contourné les questions de succession d'Etats, ce qui n'est pas propre à encourager les Etats à recourir à elle pour le règlement de leurs différends en la matière.

---

[141] *Ibid.*, p. 8, para. 7.
[142] *Ibid.*, Op. ind., Shahabudeen, pp. 2–3.
[143] *Ibid.*, Op. diss., Kreca, pp. 98–99, para. 113–114.
[144] *Ibid.*, p. 92, para. 108.
[145] S t e r n: «Rapport préliminaire sur la succession d'Etats en matière de traités,» supra note 1, p. 22–23.

23 POLISH YEARBOOK
OF INTERNATIONAL LAW
1997–1998
PL ISSN 0554–498X

Le rôle du consentement dans la succession d'Etats aux traités[1]

SOLEDAD TORRECUADRADA

I. Introduction

Le but de ce travail est d'établir le rôle du consentement dans la succession d'Etats. La question que nous nous proposons de résoudre est de savoir si le consentement a la même fonction dans tous les domaines matériels dont le droit international s'occupe, où l'on peut identifier quelques specialités ou spécificités dans quelques-uns d'eux, comme celui de la succession d'Etats. Les phénomènes de succession d'Etats posent plusieurs problèmes, fondamentalement dans deux domaines concrets: les traités et les archives, dettes et biens de l'Etat. Dans ce travail, nous étudierons seulement le premier, puisque c'est un domaine qui provoque des problèmes très divers auxquels on n'a pas toujours répondu d'une façon homogène, et dans lesquels la Convention de Vienne de 1978 (qui est en vigueur dès le 6 novembre 1996) a essayé de mettre de l'ordre. Pour le deuxième a été adoptée la Convention de Vienne de 1983, dont les règles ont un caractère subsidiaire par rapport aux accords des parties[2]. Par conséquent, nous prétendons determiner si le consentement dans la succession d'Etats aux traités est un réflet du régime général établi par le droit international, ou par contre, se presente comme une *lex specialis* dans ce domaine matériel concret.

D'abord, nous essayerons de connaître le rôle du consentement dans le droit international pour le comparer avec ce domaine de la succession d'Etats. Pour pouvoir répondre à cette question nous devons prendre comme point de départ le fondement volontariste du droit international public. Le droit dispositif international repose sur la volonté étatique car le consentement de l'Etat est nécessaire pour la création normative internationale, dans laquelle le *jus cogens*, dans tous les cas est un mur infranchissable[3]. Mais, en tout cas, le consentement des Etats revêt en droit international un rôle fondemental, ce qui a été souligné par la CPJI dans l'affaire du *Lotus*:

---

[1] L'auteur tient à remercier pour leur soutien et leur confiance M. le Professeur A. R. Brotons, M.S. Torres Bernardez, sans qui cet article n'aurait jamais été écrit.

[2] La Convention de Vienne de 1978 sur la succession d'Etats aux traités, compte pour l'instant avec 15 Etats parties. La Convention de Vienne de 1983, par contre, n'a pas encore reçu les 15 instruments de ratification que son article 50 exige pour son entrée en vigueur.

[3] *Vid.* par tous M. Diez De Velasco: *Instituciones de Derecho Internacional Público* (1996), p. 82 ss; J.D. Gonzalez Campos, L.I. Sanchez Rodriguez, M.P. Andres Saenz De San-

«Les règles de droit liant les Etats procèdent donc de la volonté de ceux-ci, volonté manifestée dans des conventions ou dans des usages acceptés généralement comme consacrant des principes de droit établis en vue de régler la coexistence de ces communautés indépendantes ou en vue de la poursuite des buts communs. Les limitations de l'indépendance des Etats ne se présument donc pas»[4]

Donc, dans le droit international, il y a des principes qui jouent un différent rôle par rapport au consentement de l'Etat: nous en trouvons quelques-uns qui imposent l'exigence du consentement des Etats; il y en a d'autres qui limitent son domaine d'application. L'exigence du consentement de l'Etat pour l'opposabilité des normes internationales découle du principe de l'égalité souveraine des Etats. Il y a plusieurs manifestations de ce principe dans le droit international, mais une des plus claires c'est sa considération de circonstance qui exclut l'illicitude d'un acte illicite. Une traduction de cette affirmation c'est le principe de non intervention dans la sphère nationale des Etats, qui interdit tous les actes d'intervention qui n'ont pas été demandés, et qui vient garantir l'autonomie de la volonté pour cette catégorie d'affaires. Cependant, le consentement ne joue pas en droit international un rôle absolu. Par contre, il se trouve limité d'abord pour les normes de *jus cogens*, de façon qu'il n'y aura aucune relevance dans les secteurs spécialement protegés par les normes imperatives du droit international[5]. Après, par le respect de l'ordre international; à la fin c'est celui qui donne les compétences étatiques.

D'ailleurs, le consentement des Etats joue en droit international sur deux niveaux: unilatéral, en tant que source des obligations unilatérales, et un deuxième, comme consensus, la coïncidence du consentement de plusieurs Etats. Le point de départ du consensus réside dans les consentements unilatéraux coïncidant dans une norme juridique qui oblige une pluralité de sujets. A ce dernier niveau, il y a deux mécanismes pour la création normative: (1) entre Etats – décentralisé – et (2) au sein d'une organisation internationale – institutionalisée.

Un autre point que nous devons prendre en compte, c'est le rôle du consentement dans plusieurs théories de la succession d'Etats qu'on peut rattacher à deux grandes tendances doctrinales[6]: les *continuistes*, qui défendent la nécessité de continuation des liens juridiques après la succession d'Etats; et, les *négatives*, qui soutiennent l'absence d'une obligation juridique de succéder. Dans les premières, il y a de différentes tendances qui adoptent comme point de départ divers fondements, mais qui

---

t a m a r i a: *Curso de Derecho Internacional Público* (1992), p. 10 et ss.; R. H i g g i n s: *Problems & Process. International Law and How We Use It* (1994), p. 15; J.A. P a s t o r R i d r u e j o: *Curso de Derecho Internacional Público y Organizaciones Internacionales*(1996), p. 39 et ss. ; A. R e m i r o B r o t o n s: *Derecho Internacional Público. 1. Principios Fundamentales* (1982), p. 23 et ss.; N. Q u o c D i n h: *Droit International Public* (1994), p. 64; A. R e m i r o B r o t o n s y O t r o s: *Derecho Internacional* (1997), p. 4 et ss.

[4] *Vid.* l'arrêt du 7 septembre 1927 dans l'affaire *Lotus* en CPJI, Série A, n 9, p. 18.

[5] *Vid.* en ce sens G. L a d r e i t d e L a c h a r r i è r e: «Tendances contradictoires en matière de consentement des Etats», dans Société française pour le droit international, Colloque de Toulouse. L'élaboration du droit international public 184 (1975).

[6] Pour une étude minutieuse des théories sur la succession d'Etats *vid.* par tous P.D. O'C o n n e l l: *State Succession in Municipal Law and International Law. 1. Internal Relations* (1967), p. 8–35.

arrivent à la même conclusion: l'obligation juridique de l'Etat successeur de remplir les engagements internationaux. Conséquemment, le consentement dans ces deux théories ne joue aucune fonction, car il y existe imel'obligation juridique de succéder dans tous les liens juridiques acquis valablement pour l'Etat prédécesseur. Parmi ces théories continuistes nous trouvons celles qui sont fondées sur la succession du droit privé et la succession universelle.

La première (la succession de droit privé) défend l'application des règles de la succession personnelle du droit civil au domaine matériel des Etats[7]. Mais avec une importante différence: les Etats sont toujours obligés au maintien des liens juridiques du prédécesseur, car ils ne peuvent pas accepter la succession sous bénéfice d'inventaire.

La théorie de la succession universelle du droit international public refuse la fiction de l'assimilation de la succession personnelle du droit civil[8]. Son point de départ c'est la double personnalité de l'Etat – juridique et politique. Ses tenants soutiennent que si la personnalité politique peut changer, la personnalité juridique se maintient toujours sans bouleversements. De façon que tous les droits et obligations seraient herités par le successeur, car le nouvel Etat succède dans la personnalité juridique. Bien que cette tendance reconnaisse qu'il y a des domaines qui restent exclus de l'obligation de succéder, ce seront les sphères qui se trouvent dedans la personnalité politique de l'Etat.

Le deuxième groupe des thèories indiquées c'est celui des théories négatives, car elles concluent à la négation de l'obligation juridique de succéder. Si cette obligation n'existe pas, c'est la *tabula rasa* qui s'impose. Différentes théories la représentent. D'abord, la tendance classique de la *tabula rasa*. Elle apparaît en réaction contre les théories traditionnelles qui défendaient la continuité des engagements internationaux dans les situations successorales entre Etats. On considère que les Etats naissent libres et que leur souverainété est originale et ne peut pas découler d'une autre autorité[9]. Le consentement dans cette tendance ne joue aucun rôle parce que les Etats devront s'engager internationalement et acquérir librement leur statut juridique, par la voie de la novation. Une autre interprétation de la théorie de la *tabula rasa* c'est

---

[7] H. Grotius a été l'inspirateur de ces thèories, qui ont été suivies par W.E. Hall: *A Treatise on International Law* (1924), p. 114–115; Halleck: *International Law* (1893), p. 91; H. Wheaton: *Elements of International Law*, J.B. Scott (ed.) (1866), p. 36–44; L. Oppenheim: *International Law: A Treatise* (1905), p. 119–124.

[8] H. Appleton: *Des effets des annexions de territoire sur les dettes de l'Etat démembré ou annexé* (1895), p. 38; E.H. Feilchenfield: *Public Debts and State Succession* (1931), p. 406; A. Hershey: «The Succession of States», *AJIL* (1911), p. 296–297; A.B. Keith: *The Theory of State Succession, With Special Reference to English and Colonial Law* (1907), p. 4; H. Lauterpacht: *Private Law Sources and Analogies of International Law with Special Reference to International Arbitration* (1927), p. 127; D.P. O'Connell: «State Succession in Relation to New States», *RCADI* (1970), p. 108–111.

[9] E.H. Feilchenfield: *Public Debts and...*, *op. cit.*, p. 403; A.B. Keith: *The Theory of State Succession...*, *op. cit.*, p. 4; H. Lauterpacht: *Private Law Sources and...*, *op. cit.*, p. 127; D.P. O'Connell: «Independence and Problems of State Succession», *The New Nations in International Law and Diplomacy* (ed. W.V. O'Brien) (1965), p. 9; L. Oppenheim: *International Law, op. cit.*,p. 119–124; H.A. Wilkonson: *The American Doctrine of State Succession* (1933), p. 14.

celle realisée par la doctrine socialiste[10]. Son fondement n'est pas différent de celui de la théorie classique, car ses tenants essayent de justifier l'application de la *tabula rasa* aux situations de changements produites par des révolutions sociales, comme celles survenues dans la Russie et la Chine.

La dernière théorie négative c'est celle qui entend la mutation territoriale comme une substitution volontaire[11]. Le nouvel Etat a un pouvoir discrétionnaire illimité pour décider des liens juridiques qu'il desire maintenir (doctrine Nyerere). Ici, le consentement est fondemental, parce qu'il devient déterminatif pour établir la position juridique du nouvel Etat. Le nouvel Etat sera le seul qui pourra décider des engagements juridiques qui vont se maintenir et de l'extinction des autres, à cause de la succession. Le consentement étatique se configure dans cette tendance comme le fondement du statut juridique du nouvel Etat, parce qu'il y aura succession seulement par rapport aux liens internationaux auxquels le nouvel Etat volontairement consent.

II. Continuité[12]

A. Qu'est-ce que la continuité

Les changements des éléments constitutifs de l'Etat peuvent produire des effets différents: (a) le maintien du même Etat, dont la conséquence est la continuité[13] de l'Etat qui implique l'absence d'interruption juridique de la personalité de l'Etat[14]; (b) l'apparition d'un nouveau sujet international même s'il présente quelques similarités avec l'Etat originaire. La conséquence du maintien est la continuité de l'Etat.

La continuité et la succession d'Etats sont deux catégories juridiques opposées et qui s'excluent, s'il y existe l'une, il n'y a pas lieu l'autre. En plus, la continuité n'est pas relative, dans le sens qu'un Etat ne peut pas être en même temps continuateur pour certains traités et successeur de lui-même pour d'autres[15]. Cette règle trouve une exception dans la clause *rebus sic stantibus* qui permet – ex article 62 de la Convention de Vienne de 1969 (ci-après: CV69), si les changements sont fondementaux – de provoquer l'extinction d'un traité particulier. Par contre, si l'Etat perd sa personnalité

---

[10] J.F. T r i s k a, R.M. S l u s s e r: *The Theory, Law and Policy of Soviet Treaties* (1962), p. 162.

[11] A. C a v a g l i e r i «Effets juridiques des changements de souveraineté territoriale», *AIDSI* (1931), vol. I, p. 221; A. H e r s h e y: «The Succession ...», *op. cit.*, p. 297; A.B. K e i t h: «The Theory of State Succession...», *op. cit.*, p. 3; H. L a u t e r p a c h t: *Private Law Sources and Analogies of International Law: With Special Reference to International Arbitration* (1927), p. 126; L. O p p e n h e i m (ed.): *The Collected Papers of John Westlake on Public International Law* (1914), p. 482; K. S t r u p p: «Règles générales du droit de la paix», *RCADI* (1935-I), p. 471–487; H.A. W i l k i n s o n: *The American Doctrine..., op. cit.*, p. 13–14.

[12] Le terme de continuité s'utilise dans ce paragraphe avec un sens différent aux suivants, où nous étudierons le *principe de la continuité* des traités dans la succession d'Etats.

[13] D.P. O'C o n n e l l: *State Succession in Municipal Law and International Law. I. Internal Relations* (1967), p. 4–8; K. M a r e k: *Identity and Continuity of States in Public International Law* (1968), p. 1 et ss.; W. F i e d l e r: «Continuity» *EPIL* (1992), p. 806; M. B o t h e, Ch. S c h m i d t: «Sur quelques questions de succession posées par la dissolution de l'URSS et celle de la Yougoslavie», 96 *RGDIP* (1992), p. 825.

[14] W. F i e d l e r: «Continuity...», *op. cit.*, p. 806.

[15] Differente est la situation provoquée par une absorption. Dans ce cas-là, l'Etat qui s'est élargi sera continuateur de lui-même et successeur dans des traités qui étaient applicables au territoire absorbé.

juridique antérieure, il aura le statut juridique de successeur, et en ce cas, lui seront d'application les normes régissant la succession par rapport aux liens juridiques acquis par l'Etat prédécesseur, qu'était necessairement un Etat différent de celui qui prétend à la succession.

D'ailleurs, puisque les Conventions de Vienne -1978 et 1983- portent sur la succession d'Etats, elles ne définissent, bien evidemment, pas la continuation. Il n'existe pas de définition positive de la continuation d'Etats, mais certains auteurs mettent l'accent sur l'idée de l'identité entre l'Etat originaire et l'Etat continuateur. S'il y a identité entre les Etats, il y aura continuité[16]. Mais cette considération nous amène à une autre question conceptuelle: qu'est-ce que c'est l'identité de l'Etat? Nous pouvons lui apporter une réponse générale: l'identité est le présupposé necessaire de la continuation de l'Etat. Mais la relation établie entre ces deux concepts n'est pas univoque, car comme dissait G. CANSACCHI «... on peut donc affirmer que si la continuité d'un Etat comporte forcément l'identité du sujet international personnifié dans cet Etat, l'identité d'un Etat, par elle-même ne comporte pas sa continuité étatique»[17]. Même si l'identité peut provoquer -ou non- la continuité de l'Etat, évidemment, s'il n'y a pas d'identité il n'y aura jamais de continuité.

L'antérieur nous conduit à poser la question dans une perspective bouleversée: quand l'Etat est disparu il n'est pas possible la continuité étatique, mais quels sont les facteurs dont la modification produit comme conséquence la disparition de l'Etat? La doctrine s'est accordée sur les facteurs qui peuvent changer sans produire la disparition de l'Etat (par exemple le changement du nom de l'Etat, de la capitale de l'Etat..., qu'on peut qualifier de mineurs). Cependant, il n'y a pas d'accord par rapport aux changements qui touchent nécessairement l'identité de l'Etat. Il est clair que s'il y a trois éléments constitutifs de l'Etat comme sujet international -gouvernement, population et territoire- la perte absolue et irrémédiable d'un d'entre eux produira également la disparition de l'Etat. Dans les autres hypothèses, on peut donc penser à la continuité de l'Etat[18].

De cette afirmation s'est déroulée l'existence d'une présomption *iuris tantum* de la continuité étatique, car s'est seulement lorsqu'on peut constater l'absence d'un de ses éléments constitutifs, que l'on pourra affirmer que l'Etat a perdu son identité. Présomption selon laquelle, comme dit W. CZAPLIŃSKI «l'Etat continue son existence du point de vue du droit international, à moins qu'on puisse constater sans

---

[16] D.P. O'Connell: *State Succession in Municipal Law...*, *op. cit.*, p. 4–8; K. Marek: *Identity and Continuity...*, *op. cit.*, p. 4; A.G. Mochi Onory: *La succession d'Etats aux traités* (1968), p. 17; G. Cansacchi: «Identité et continuité des sujets internationaux», 130 *RCADI* (1970), p. 9; J. Crawford: *Creation of States in International Law* (1979), p. 400. Plus récemment, par exemple, W. Fiedler: «Continuity...», *op. cit.*, p. 806; W. Czapliński: «La continuité, l'identité et la succession d'Etats – Evaluation de cas récents», *RBDI* (1993-2), p. 374; B. Stern: «Rapport de synthèse», *Dissolution, continuation et succession en l'Europe de l'Est* (1994), p. 379. J.A. Pastor Ridruejo: *Curso de Derecho Internacional Público y Organizaciones Internacionales parle des principes de continuité et d'identité* (1996), p. 314.

[17] G. Cansacchi: «Identité et continuité...», *op. cit.*, p. 10.

[18] Pourtant on pourrait essayer d'argumenter la possibilité hypothétique de la continuation de l'Etat s'il maintient un de ses éléments constitutifs.

aucun doute sa dissolution (la cessation de son existence). Si les conditions de la dissolution ne se sont pas remplies, les changements éventuels de la structure de l'Etat doivent être considérés uniquement du point de vue de la succession de gouvernements»[19]. Cette position ne résout pas tous les problèmes posés par la continuité, mais elle est indicative des tendances du droit international en la matière.

La pratique nous montre que ce sont les changements territoriaux qui font douter de l'identité de l'Etat[20], et amène à se demander quels sont ceux qu'un Etat peut subir, tout en se maintenant identique. On aborde la question de la quantité, pour laquelle il n'y pas de réponse. Il y a eu de grandes pertes territoriales qui n'ont posé aucun problème – les colonies espagnoles, celles du Royaume-Uni ou de la France- et d'autres mineures – l'Autriche et l'Hongrie après la disparition de l'Empire d'Autriche-Hongrie[21], ou la Turquie par rapport à l'Empire Ottoman[22] – ont au contraire produit des effets. Ici, on peut affirmer que ce sont les pertes contiguës territorialement qui font douter du maintien de l'identité et conséquement de la continuité étatique.

Il n'y a pas à l'heure actuelle d'indices objectifs qui nous permettent de savoir *a priori* quand un changement territorial produira ou non un Etat nouveau. K. MAREK a essayè de faire un test d'identité qui trouve son fondement dans le principe *pacta sunt servanda.* Elle affirme que l'Etat sera toujours le même s'il y a une identité juridique en tous les droits et obligations internationales avant et après le changement[23]. A notre avis, la thèse de K. MAREK n'est pas correcte parce qu'il est impossible objectivement de distinguer la continuité de la succession universelle qui suposse aussi la succession en la totalité des droits et obligations internationales. Il y a d'autres thèses (à notre avis plus proches du but), qui utilisent comme fondement les critères basiques de *statehood* modifiés par l'addition de certaines règles particulières dans chaque cas[24].

---

[19] *Vid.* W. C z a p l i ń s k i: «La continuité, l'identité et la succession d'Etats- Evaluation de cas récents», *RBDI* (1993-2), p. 375.

[20] L'élément *population* est connexé avec le territoire, normalement les changements territoriaux suposent la population qui habite ce territoire. Les flux populationnels ne posent pas de doutes sur l'identité de l'Etat. La pratique a affirmé que les changements dans l'élement *gouvernement* n'affectent pas l'identité de l'Etat. Cette affirmation a été même appliquée à la Russie qui aprés 1917 a été considerée continuatrice de l'antérieure Russie – et conséquemment identique – (K. M a r e k: *Identity..., op. cit.*, p. 34–38, G r z y b o w s k i: *Soviet Public International Law. Doctrines and Diplomatic Practice* (1995), p. 92–95). Il y a aussi des auteurs (comme O'C o n n e l l: *State Succession* I, p. 19–21) qui considérant vraie la première prémisse – les changements du gouvernement n'affectent pas l'identité de l'Etat – nient le résultat, et concluent que la Russie avant 1917 n'était pas la même après cette date et aussi après 1922. L'absence d'accord se dégage du fait de ne pas considérer que les révolutions socialistes soient mères de changements de gouvernement.

[21] Les Traités de Saint-Germain et Trianon indiquaient la continuité de l'Autriche et l'Hongrie avec les deux monarchies de l'Empire qui était formalement bicéphale. Il n'y a pas de position doctrinale accordée sur ce point. Il y a des auteurs qui doutent de l'identité de l'Autriche et l'Hongrie avant la fin de la guerre. *Vid.* K. M a r e k: *Identity..., op. cit.*, p. 199–236; M. U d i n a: *L'estinzione del Impero Austro-Ungarico nel diritto internazionale* (1933), p. 15–37.

[22] *Vid. Dette Otomane 1925*, dont l'arbitre BOREL dissait que le traité de Laussanne (1925) reconnaissait à la Turquie la condition de continuateur de l'ancien Empire Otoman.

[23] K. M a r e k: *Identity..., op. cit.*, p. 14.

[24] J. C r a w f o r d: *Création of States..., op. cit.*, p. 403.

B. Rôle du consentement dans la continuité

La question que nous devons nous poser maintenant est la suivante: s'il y existe une identité, l'Etat sera-t-il obligé de se déclarer continuateur ou, au contraire, c'est un résultat immédiat ou automatique? A priori une déclaration de continuité ne sera pas nécessaire parce qu'il y a une continuité juridique qu'implique le maintien de tous les droits et obligations acquis avant la perte territoriale. De cette façon la continuité des liens juridiques est automatique et n'a pas besoin de fondement conventionnel. Si l'on admet que la personnalité juridique n'a pas changé, l'Etat doit remplir ses liens conventionnels en application de la règle *pacta sunt servanda.*

Nous pouvons aussi nous demander si pour acquerir le statut juridique de continuateur la reconnaissance ou l'accord des Etats tiers sont nécessaires. La pratique vient nous confimer l'opinion de la doctrine, selon laquelle la continuité des engagements juridiques dépend de l'accord de tous les Etats parties au système[25]. Dans les cas les plus récents, il y a eu des déclarations qui ont provoqué des réponses des Etats tiers, tant des successeurs de l'Etat qui voit son territoire réduit, comme des autres qui font partie de la communauté internationale. La même pratique nous offre quelques exemples correspondant aux différents modèles conceptuels: celui de l'ex-URSS et des Etats Baltes, confrontés à la résolution différente du cas de l'ex-Yougoslavie, ou encore celui de la RFA comme un exemple d'élargissement étatique. Nous pouvons conclure sur ce point-ci que la continuité de l'Etat n'est douteuse que dans les hypothèses critiques qui sont les cas de grandes pertes territoriales contiguës – à l'exclusion de la décolonisation[26] – étant conséquence d'une rupture traumatique. C'est le cas de la RFS de Yougoslavie. Les hypothéses pacifiques – démembrement ou élargissement territoriaux[27] – en revanche, assurent la continuité.

Les Etats Baltes nous montrent des cas des Etats ressuscités, une hypothèse qui n'est pas habituelle dans la pratique internationale[28], et qui a été niée par K. MAREK[29].

---

[25] *Vid.* A. D'A m a t o: *International Law: Process and Prospects* (1986), p. 21.

[26] Nous pouvons trouver des cas de pertes de territoires qui n'étaient pas coloniaux de *iure*, mais qui l'étaient du point de vue des Etats concernés *de facto*. Ce sont les cas, par exemple de l'indépendence de l'Algérie de la France ou de la Guinée Equatoriale de l'Espagne, qui étaient des divisions administratives provinciales, mais à la date de l'acquisition de l'indépendence personne ne demandait la possibilité continuatrice de la France ou l'Espagne par ces deux nouveaux Etats.

[27] La pratique nous montre que les cas d'élargissement territorial ne posent pas de problèmes par rapport à la continuité, parce qu'ils suposent la disparition d'une entité juridique, mais on assure les relations conventionnelles qui étaient applicables au territoire. Evidemment nous parlons seulement des élargissements licites, parce que ceux qui ne le sont pas ne peuvent pas être reconnus.

[28] M.P. A n d r e s S a e n z d e S a n t a m a r i a: «Problemas actuales de la sucesión de Estados» Cursos internacionales de Vitoria-Gasteiz (1993), p. 178 entend que le cas des Etats Baltes a «mis en relief une volonté politique qui en termes juridiques s'est traduit en la revitalisation des connues catégories d'identité et de continuité des Etats qui vont avoir des implications dans des solutions adoptées pour les problèmes de succession».

[29] Vid. K. M a r e k: *Identité ..., op. cit.*, p. 7–9 qui parlait des *résurrections miraculeuses*. Cette Professeur était de l'avis que la continuité des droits et obligations de l'Etat devait être immédiate et ne pouvait pas disparaître pour réapparaître postérieurement. Nous sommes, par contre, d'accord avec les thèses de C r a w f o r d qui soutient qu'un Etat peut être considéré comme identique quand «après une extinction temporelle, une entité avec substantiellement les mêmes caractéristiques distinctives est rétablie». *Vid.* J. C r a w f o r d:

Le fondement juridique de cette continuité se trouve dans la doctrine Stimson, selon laquelle l'acquisition territoriale par la force ne doit pas être reconnue[30]. A l'occassion du coup d'Etat produit le 19 août 1991 en URSS les Etats Baltes se sont proclamés continuateurs d'eux-mêmes[31] et ils l'ont communiqué aux dépositaires des traités multilatéraux et aux Parties aux traités bilatéraux auxquels ils étaient parties avant la Deuxième Guerre mondiale. Ces notifications étaient nécessaires pour la détermination de leur statut juridique s'agissant d'une situation d'identité sans continuité[32]. La pratique de la communauté internationale par rapport aux Etats Baltes nous montre l'acceptation des prétentions baltiques de continuation des traités conclus avant la Seconde Guerre mondiale[33]. La Communauté Européenne formula une Déclaration des Douze concernant les Etats Baltes le 27 août 1991[34], qui a été le point de départ de la reconnaissances en chaîne des Etats Européens[35].

Quat à la Russie, pendant les mois suivant le putch d'août 1991 les républiques de l'URSS déclarent leur indépendance sauf la République Socialiste Fédérative Soviétique de la Russie. C'est ainsi que la Fédération Russe se «glisse pour ainsi dire progressivement dans la peau de l'ancienne union»[36]. Dans le Protocole d'accord sur la création de la Communauté des Etats Indépendants – CEI – signé à Minsk, le 8 decembre 1991, la République de Biélorussie, la Fédération de Russie et l'Ukraine déclarent que l'URSS a cessé d'exister. La conséquence en est qu'aucune des nouvelles républiques n'est ou ne devient continuatrice de l'Etat originaire. Le 21 décembre

---

Creation of States..., *op. cit.*, p. 403, notre traduction. A.G. Mochi Onory: *La succession d'Etats aux Traités* (1968), p. 18 indique seulement la difficulté d'une hypothèse comme celle-ci «Un cas particulièrement difficile est par exemple celui de la résurrection des Etats disparus après une periode plus ou moins longue».

[30] Id. W. Meng: «Stimson Doctrine», 4 *EPIL* (1982), p. 230 et ss.

[31] Avant cette date la communauté internationale s'est manifestée avec prudence sur les prétentions baltes, les Etats tiers seulement ont fait des déclarations sur la «Non recognition of incorporation of Baltic States into USSR» (déclaration du Royaume Uni du 29 novembre 1989).

[32] J. Crawford: *Creation of States...*, *op. cit.*, p. 407.

[33] Ce qui est vraiement une difficulté d'exécution. Et en plus il y aura quelques traités conclus par l'URSS – dans ce cas-là – dont il y a besoin pour maintenir provisoirement l'application de quelques liens conventionnels -surtout dans le domaine de la cooperation- jusqu' à la conclusion d'un nouvel traité. Solution qui a été retenue par la Finlande et la Pologne. Le refus de les mantenir en vigueur c'est une considération politique, parce que c'est une façon de nier la condition de successeurs des Etats qui ont été annexés de force par l'URSS. D'autre part, en application de la règle de la continuité, l'Allemagne a ajouté son nom parmi les Etats parties de traités multilateraux ratifiés par eux-mêmes avant l'annexion des Etats Baltes par l'URSS. Aussi, avec la Finlande – mais non automatiquement, sinon qu'il a été nécessaire un échange de notes – et la Pologne il y existe une présomption de continuité des traités antérieures à 1940. Par contre, la pratique de l'Autriche, toujours fidèle au principe de la *tabula rasa*, révèle que tous les traités conclus par la URSS ou par les anciens Etats baltes doivent être renégociés.

[34] *Vid.* le texte en espagnol [dans:] J.M. Ortega Terol: *Textos y documentos sobre los desmembramientos de la Unión Soviética y de Yugoslavia* (1996), p. 51.

[35] Il y a deux types d'actes, d'abord ceux des Etats qui n'avaient pas reconnu l'annexion des Etats Baltes par l'URSS, qui font des déclarations d'établisement ou re-établisement des relations diplomatiques comme ceux de la Finlande (29 août), l'Italie (30 août), la Turquie (2 septembre – avec la Lituanie, 3 septembre – avec l'Estonie et 3 octobre – avec l'Estonie); et des autres Etats qui l'avaient reconnue et reconnaissent maintenant les Etats Baltes, comme la Suède (28 août); ou même la reconnaissance du Conseil d'Etat de l'URSS du 6 septembre.

[36] *Vid.* Bothe, Schmidt: «Sur quelques questions...», *op. cit.*, p. 824.

suivant, huit républiques le confirment dans la décision des Chefs d'Etat de la CEI sur l'ONU, signée aussi à Alma Ata[37], où ils décidèrent d'appuyer «la Russie comme successeur de l'URSS à l'ONU, et comme membre permanent du Conseil de Sécurité et des autres organisations internationales»[38], mais il n'y a aucune déclaration de continuation de l'URSS. Il n'y en a pas non plus dans les notes verbales du Président de la Fédération de Russie au Sécrétaire Général des Nations Unies, ni dans celle du Ministre des Affaires Extérieures de la Fédération de Russie au Sécrétaire Général de l'Organisation Maritime Internationale[39].

D'ailleurs, à la fin la Fédération de Russie a été continuatrice de l'URSS, malgré sa déclaration d'extinction, parce que la reconaissance internationale a été déterminative. C'est dans la Déclaration des Douze sur le futur «statut» de la Russie et les autres ex-républiques soviètiques du 23.12.1991, que nous trouvons pour la première fois l'application du statut juridique de continuateur de la Russie. Cette déclaration a été suivi de l'acquiescement des républiques de l'ancienne URSS et de la même Fédération Russe. Donc, il y a eu une coïncidence des volontés de tous les Etats directement ou indirectement affectés.

Le cas de la RFY est le seul où la rupture s'est produite d'une façon violente. C'est pour cela que la Communauté Internationale n'a pas appliqué la présomption de continuité de l'Etat. La déclaration de continuation formulée par les Républiques de Serbie et Montenegro le 27 avril 1992 a été refusée tant par les nouvelles républiques ex-yougoslaves que par la Communauté Internationale – à l'exception de la Fédération de Russie et la Chine[40].

La situation de la RFY est très compliquée. D'un côté, on a reconnu la disparition de la RFSY, et de ce fait l'impossibilité de continuation par l'une des nouvelles republiques nées sur son territoire[41]. D'un autre, le Secrétaire Général des Nations Unies a maintenu le statut juridique de la RFSY par rapport aux traités dont elle était partie. Aussi, en exercice de ses fonctions, il a continué d'informer des traités dont il est depositaire, mais sans admettre le titre de continuateur de la RF de Yougoslavie[42]. Même récemment, la Cour Internationale de Justice n'a pas douté de sa qualité de

---

[37] *Vid. La Communitá Internazionale* (1993-1), p. 48.

[38] La traduction est de l'auteur. *Vid.* en espagnol [dans:] J.M. Ortega Terol: *Textos y documentos...*, *op. cit.*, p. 56. Pendiente insertar documento doce.

[39] *Id.* citation précédente. *Vid.* [dans:] J.M. Ortega Terol: Textos y documentos..., *op. cit.*, 51.

[40] *Vid.* les Résolutions 777(1992), du 19 septembre; et 821(1993), du 28 avril du Conseil de Sécurité, et la Résolution 47/1 du 22 septembre 1992 de l'Assemblée Générale des Nations Unies. Aussi la Déclaration des Douze sur la Yougoslavie du 16 décembre 1991.

[41] *Vid.* en ce sens les décisions 8, 9 et 10 de la Commission Badinter, et aussi les Résolutions du Conseil de Sécurité des Nations Unies (1992), p. 777, du 19 septembre, (1993), p. 821 du 28 avril et (1995), p. 1022 du 22 novembre, aussi la Résolutions 47/1 du 22 septembre 1992 de l'Assemblée Générale.

[42] Selon Z. Radivojevic: «The Status of FR Yugoslavia under Multilateral Treaties deposited with the Unites Nations Secretariat», 47 *Review of International Affairs*, p. 29 – le problème de la RFY par rapport aux traités multilatéraux déposés à l'ONU est celui de sa participation aux *meetings* à titre de partie à ces traités. La pratique régulière de l'ONU a été celle d'interdire sa participation aux travaux des organes créés pour l'application de ces traités. *Vid.* rés. (1992), p. 777 du CdS, du 19 septembre et 47/1 de VAGNU du 22 septembre 1992.

continuatrice pour la Convention de 1948 sur la prévention et la répression du crime de génocide[43].

La question que nous pouvons poser maintenant par rapport à la RFY est celle de savoir si après la reconnaissance de sa continuité par la Macédoine, et récemment aussi par la Bosnie-Herzégovine et la Croatie[44], on pourra parler de résurrection de l'identité de l'ancienne Yougoslavie[45].

Quelles sont les différences entre le cas de l'ex-URSS et celui de l'ex-Yougoslavie, et pourquoi ils reçoivent des réponses opposées? Comme l'indique M.P. ANDRES SAENS DE SANTAMARIA «au cas de l'URSS on a operé un ingrédient fondamental que c'est le consentement des autres parties impliquées; ce consentement n'a pas existé dans l'affaire de la Yougoslavie, mais en plus il y a eu une ferme position contraire de la part des autres Républiques»[46]. On peut déduire des exemples précédents que quand il existe un accord pacifiquement conclu, il n'y a pas d'opposition internationale par rapport à la solution pratiquée[47]. Ici, c'est le principe de la solution pacifique qui a prévalu.

Mais ces cas de continuité n'ont pas été les seuls. Dans la pratique la plus récente s'est aussi produite dans la communauté internationale une hypothèse d'absorption: celle de la RDA par la RFA, ces deux Etats s'étant accordés sur la disparition de la première et l'élargissement de la deuxième. Elles ont reçu la reconnaissance implicite de la communauté internationale, à travers des messages de congratulation. En plus, les Républiques Tchèque et Slovaque se sont accordées sur la disparition de la Tchécoslovaquie et leur décision a été internationalement acceptée.

Alors, quel est le rôle du consentement[48] dans la continuation d'Etats? De la pratique on peut déduire que le consentement de l'Etat qui se prétend continuateur revêt

---

[43] L'arrêt de la CIJ du 11 juillet 1996, dans l'affaire de l'*application de la Convention pour la prévention et la répression du crime de génocide* semble être contradictoire avec la position des Nations Unies, dont elle est l'organe judiciaire principal. La CIJ dans son arrêt du 11 juillet 1996, paragraphe 17 a fondé le statut de partie de la Yougoslavie dans cette Convention par sa déclaration de continuité de la nouvelle Yougoslavie qui a été formulée le 27 avril 1992.

[44] Avec la forme des reconnaissances mutuelles ou réciproques, dans le premier cas dans les Accords de Dayton (du 14 décembre 1995) et l'Accord de normalisation des relations entre la République Fédérative de Yougoslavie et la République de la Croatie du 23 août 1996.

[45] Maintenant il manque seulement la Slovénie pour reconnaître la Yougoslavie comme continuatrice, la question qui se pose c'est si on devra attendre jusqu'à la reconnaissance de cette dernière république pour l'acquisition de ce *status* juridique par la Yougoslavie, qui viendra confirmer l'erreur des opinions antérieures selon lesquelles la Yougoslavie a cessé d'exister. L'exemple de la Yougoslavie va nous servir pour apprendre quel est le rôle du consentement des nouveaux Etats nés dans l'ancien territoire pour la continuation et quel est celui de la réponse de la Communauté Internationale.

[46] *Vid.* M.P. Andres Saenz de Santamaria: «Problemas actuales...», *op. cit.*, p. 201. Notre traduction. Aussi A. Dastis Quecedo [dans:] «La crisis de Yugoslavia en las Naciones Unidas», 44 *REDI* (1992), p. 693.

[47] Un exemple c'est celui de la République Tchèque et de la République Slovaque qui ont déclaré la disparition de la Tchécoslovaquie et on les a reconnues comme nouvaux Etats non pas comme continuateurs de l'accord du 27 août de 1992 par lequel on a décidé la dissolution de la Tchécoslovaquie et sa scission en deux nouvelles républiques. La Communauté Internationale a admis la condition de nouvaux Etats successeurs et non pas continuateurs donc l'ancienne République unique a cessé son existence avec une seule condition: arrangement pacifique des différences et problèmes provenant de la succession.

[48] C'est le consentement des Etats qui prétendent être continuateurs d'eux-mêmes.

un rôle constitutif quand il existe un accord entre les Etats directement et territorialement affectés. Ainsi, dans le cas d'absorption l'accord de l'Etat absorbé est nécessaire. Aux séparations, il faut le consentement des Etats nés de cette sécession. Tant dans les hypothèses d'absorption comme de séparation, il y a différents types d'Etats affectés par le changement – nous sommes en présence de relations triangulaires: les Etats directement affectés par la continuation – l'Etat qui veut être continuateur, le(s) autre(s) Etat(s) produit(s) de la séparation ou ceux qui ont disparu avec l'absorption – et aussi les Etats conventionnellement affectés – les Etats tiers, parties aux traités internationaux. Quand tous les trois réagissent d'une même façon, il n'y a pas de problèmes; mais il peut y en avoir dans les autres hypothèses. Cela confirme que l'identité dans la continuité n'est pas nécessairement automatique, mais peut être le résultat d'un processus. Il convient donc d'étudier les éléments qui fonctionnent comme des indices de continuation. D'abord, s'il existe un accord en faveur de la continuation entre les Etats qui résultent du processus de scission[49]; ensuite l'accord des Etats tiers[50], et enfin la participation aux organisations internationales à la place de l'Etat originaire. S'il n'y a pas d'accord des Etats directement affectés par le changement, la reconnaissance ou l'acquiescement internationaux seront déterminants. Dans le processus indiqué, il faut bien faire attention à la présence d'éléments qui peuvent entraîner la continuité. En même temps, il faut analyser la position des Etats tiers, qui n'est pas determinée seulement par des conditions juridiques, mais aussi (et dans quelques cas surtout) politiques.

La pratique confirme les thèses de CRAWFORD quant à l'importance de la reconnaissance ou de l'accord dans les hypothèses douteuses[51]. Avant même le cas yougoslave, la reconnaissance internationale a été fondamentale dans certaines hypothèses tant pour déterminer la continuation de l'Etat comme pour nier sa condition continuatrice[52].

C. Conséquence de la continuité des traités: maintien ou rupture

La réponse la plus évidente à cette question est que s'il existe une identité subjective, la conséquence devra être que l'Etat assume tous les droits et obligations qui

[49] A l'origine il y a eu accord dans les cas de l'ex-URSS – sur la disparition de l'URSS – et de la Tchécoslovaquie, il n'a en a pas eu dans le cas de l'ex-Yougoslavie.

[50] Même il y a eu des Etats qui ont reconnu la continuation de la Yougoslavie, comme la Chine et la Russie.

[51] M. B o t h e, Ch. S c h m i d t: «Sur quelques questions de succession posées par la dissolution de l'URSS et celle de la Yougoslavie» 96 *RGDIP* (1992), p. 825 *disaient*, par contre, que la réaction des Etats tiers peut être indicative mais non pas conclusive. C h a r p e n t i e r: «Les déclaration des Douze sur la reconnaissance des nouveaux Etats», *ibidem*, p. 351 indique que la distinction entre la condition de continuateur et la succession repose sur la volonté proclamée d'une des parties de se considérer comme tel, associée à l'acceptation de cette qualité par les autres. A ces mots, on doit unir la réflexion de M.P. A n d r e s S a e n z d e S a n t a m a r i a: «Problemas actuales...», *op. cit.*, *Cursos internacionales de Vitoria-Gasteiz*, p. 184 selon qui «l'acquiescement ou l'acceptation des Etats tiers dont la position en ce point est lourdement contaminée par des considérations de convenance politique». Notre traduction.

[52] Ce sont les cas de la Turquie et l'Empire Ottoman – *Vid. Dette Otomane*, 1925 – de l'Autriche par rapport à l'Empire de l'Autriche-Hongrie, de l'URSS et l'Empire Russe.

liaient l'Etat originaire. Il n'y aura pas besoin d'une source conventionnelle pour la conservation de la situation juridique originaire. C'est en application du principe *pacta sunt servanda* que l'Etat continuateur doit remplir les engagements internationaux acquis par l'Etat originaire. Cette règle, comme toutes les règles générales, connaît des exceptions, qui découlent du droit des traités, et, en particulier, de l'article 62 de la Convention de Vienne de 1969 – *rebus sic stantibus* – seulement si «a) l'existence de ces circonstances n'ait constitué une base essentielle du consentement des parties à être liées par le traité; et que b) ce changement n'ait pour effet de transformer radicalement la portée des obligations qui restent à exécuter en vertu du traité».

Alors, la question qu'on doit se poser est celle de savoir qui sera l'organe de décision pour déterminer s'il y a eu un changement fondemental des circonstances. Etant donné que la règle *rebus sic stantibus* est une cause d'extinction d'un traité, la procédure à suivre dans ce cas sera celle prévue à l'article 65 de la CV69: le régime général pour la nullité, l'extinction ou le retrait. La solution que nous avons avancée se trouve également dans la CV78, dans le seul article qu'elle consacre à la continuation. Il s'agit de l'article 35 qui règle la *situation dans le cas où un Etat continue son existence après la scission d'une partie de son territoire.* Cet article dispose que la conséquence générale de la continuité est la continuation des liens conventionnels, sauf dans les trois hypothèses particulières prévues: «a) que les Etats interessés n'en conviennent autrement; b) qu'il ne soit pas établi que le traité se rapporte uniquement au territoire qui s'est séparé de l'Etat prédécesseur; ou c) qu'il ne ressorte du traité ou qu'il ne soit par ailleurs établi que l'application du traité l'égard de l'Etat prédécesseur serait incompatible avec l'objet et le but du traité ou changerait radicalement les conditions d'exécution du traité».

La règle de la continuation des liens conventionnels sera en tous cas subsidiaire de l'accord contraire des Etats intéressés dans le traité, des dispositions du même traité, et de l'objet et but du traité[53].

III. La succession d'Etats

A. Qu'est-ce la succession d'Etats

On trouve la définition positive de la succession d'Etats à l'article 2.1.b) de la CV78 -2.1.a) de CV83-, selon laquelle c'est la substitution d'un Etat à un autre dans la responsabilité des relations internationales d'un territoire. L'idée qui sert de base à la succession d'Etats est la substitution d'un Etat un autre[54], cependant, la substitu-

[53] Par exemple, la Russie se prétend continuatrice de l'URSS pour la Convention de 1948 sur le régime de navigation par le Danube. Bien qu'elle ne soit pas riverain, élément essentiel pour participer à la Commission, elle a formulé son intention continuatrice non seulement pour la Convention, mais aussi pour cet organe. H. Bokor Szegö: «La Succession d'Etats à la Convention Danubienne». Non publié.

[54] O'Connell: The Law of the State Succession 9 (1956) disait qu'«un changement de souveraineté implique seulement la substitution d'une compétence par une autre»; A.G. Mochi-Onory: *La succession d'Etats aux traités* (1968), p. 19 indique de même que «la succession implique un changement de souverainété sur un territoire».

tion, par rapport à la succession d'Etats ne produit pas toujours l'apparition d'un Etat nouveau ni la disparition de l'Etat prédécesseur.

Le caractère distinctif de la succession c'est l'idée de novation dans la succession, qui n'existe pas quand il y a identité subjective. Les différences d'effets entre la continuation et la succession sont fondamentalement au nombre de deux: (1) Le statut juridique de membre d'une organisation internationale. Dans le cas d'une continuation d'Etats, puisqu'il existe une continuation de l'identité de l'Etat, c'est le même Etat qui maintient son statut juridique de membre des organisations internationales. Mais lorsqu'il y a succession, la substitution ne joue pas pour la qualité de membre. L'Etat successeur devra demander, s'il le désire, l'admission aux organisations internationales dont l'Etat prédécesseur était membre. (2) La responsabilité internationale. Quant à la continuation, la responsabilité internationale existe *ab initio*. Si la personnalité de l'Etat se maintient, ne change pas, la responsabilité pour les faits imputables à l'Etat originaire se maintient donc aussi. En cas de la succession d'Etats, l'Etat successeur est responsable internationalement dès la date à laquelle la succession s'est produite. Cela exclut les faits antérieurs à la succession, dont l'Etat prédécesseur est le seul responsable[55].

Il y a différentes sortes de changements territoriaux, et par là différents faits successoraux. *L'Unification d'Etats* est différente de l'absorption: elle suppose une addition de deux Etats aboutissant à la création d'un Etat nouveau. C'est par exemple le cas de la République Arabe Unie de 1958 (Syrie + Egypte). Le régime juridique de l'unification d'Etats est prévu aux articles 31–33 de la CV78, qui établissent l'obligation de succéder aux liens conventionnels des Etats précédents. L'obligation de succéder est la règle générale dans la CV78, mais elle a un caractère subsidiaire de l'accord entre l'Etat successeur et les autres Parties contractantes. En ce sens, la succession ne sera pas possible s'il ressort du traité ou s'il est par ailleurs établi que «l'application du traité à l'égard de l'Etat prédécesseur serait incompatible avec l'objet et le but du traité ou changerait radicalement les conditions d'exécution du traité» (art. 31). L'hypothèse allemande n'est pas un exemple d'unification, mais d'absorption de la RDA par la RFA. L'absorption ne donne pas lieu à la création d'un Etat nouveau, puisque l'absorbant maintient sa personnalité juridique alors que le territoire absorbé peut disparaître – s'il l'a été totalement, comme la RDA – ou non, si l'absorption n'a pas été complète.

Une autre sorte de changement territorial est la *sécession ou séparation*. Contrairement au précédent, ces hypothèses impliquent la division de l'Etat – on parlera de sécession quand la division est violente, et de séparation si la division est pacifique ou acceptée. Il y a deux variables: (a) Avec disparition de l'Etat précédent – dissolution; et, (b) Avec continuation en l'existence du prédécesseur – démembrement. Dans les deux cas, l'article 34 prévoit l'obligation de succéder sauf si la

[55] L'article 177 et ss. du Traité de Saint Germain obligèrent l'Autriche à payer les réparations de guerre, formellement fondées sur la théorie de la continuité quand la nouvelle Autriche avait très peu à voir avec l'Empire de l'Autriche-Hongrie, par contre, les autres Etats qui en étaient successeurs ne fûrent pas considérées responsables de la même façon.

succession d'Etats est une conséquence de la décolonisation. Comme pour le modèle précédent, l'obligation de succéder est subsidiaire quand il y a accord contraire entre l'Etat successeur et les autres Parties, et aussi «s'il ressort du traité ou s'il est par ailleurs établi que l'application du traité à l'égard de l'Etat successeur serait incompatible avec l'objet et le but du traité ou changerait radicalement les conditions d'exécution du traité».

B. Le rôle du consentement dans la succession

La CV78 n'établit pas de régimes différents pour les cas précédemment indiqués. En raison du contexte historique, elle consacra une attention spéciale aux nouveaux Etats nés de la décolonisation. Ce texte conventionnel distingue ainsi les hypothèses selon que les faits successoraux se sont produits dans un territoire colonial ou non. Elle règle séparément les situations issues d'un processus de décolonisation et celles qui ont une origine différente. C'est pour cela que deux régimes différents sont établis -dans deux parties (III et IV) séparées de la Convention- en fonction de l'origine de l'Etat nouveau: (1) un régime spécial pour les Etats nouvellement indépendants[56]; et (2) un régime général mais résiduel pour les autre hypothèses.

Le régime spécial établi pour les Etats nouvellement indépendants a comme point de départ le principe général de la *tabula rasa*[57], principe qui a deux lectures possibles: 1) négation de l'obligation de succéder. L'Etat nouvellement indépendant n'est pas obligé de reconnaître les traités conclus par l'Etat prédécesseur; ou, 2) négation tant de l'existence d'une obligation comme d'un droit de succéder. Selon la première interprétation, l'Etat nouvellement indépendant conserve le droit de choisir les liens conventionnels qu'il veut maintenir et le rôle du consentement sera aussi élargi pour la détermination des engagements internationaux qui continueront. Selon la deuxième interprétation, le consentement n'a pas de place parce que l'Etat ne peut pas choisir la continuation de l'application des traités conclus par l'Etat prédécesseur sauf au moyen de la novation, en s'engageant lui-même de *novo*. Dans ce dernier cas, le consentement sera le fondement des nouveaux engagements, mais pas de la succession, parce que c'est une autre façon d'acquérir un statut juridique international: la *novatio*. Se-

---

[56] La définition d'Etat nouvellement indépendant pourrait comprendre aussi les supposés différents de la décolonisation, parce que selon l'article 2.1.f «l'expression Etat 'nouvellement indépendant' s'entend d'un Etat successeur dont le territoire, immédiatement avant la date de la succession d'Etats, était un territoire dépendant dont l'Etat prédécesseur avait la responsabilité des relations internationales», et les Etats nouveaux qui sont nés récemment en l'Europe de l'Est peuvent être compris dans cette définition. Quoique le commentaire de l'article 2.1.f expressément exclut ces supposés, parce qu'à son avis «restent exclus de la définition des nouveaux Etats, les cas des Etats qui apparaissent comme un résultat d'une division d'une partie d'un Etat existant ou d'une unification de deux ou plusieurs Etats pré-existants. Pour distinguer assez clairement ces cas des cas d'acquisition de l'indépendance par un Etat antérieurement dépendant l'on a choisi l'expression 'Etats nouvellement indépendants' au lieu de l'expression plus brève de 'nouvel Etat'». Conference des Nations Unies sur la succession d'Etats dans les traités. Documents officiels, vol. III, p.8 , paragraphe 8.

[57] *Vid.* en ce sens l'opinion de Mme TAHORE, la représentante de l'Inde à la Conference sur la définition de l'article 2.1.f. Actas resumidas de las Sesiones de la Comisión Plenaria 3eme Session du 6 avril 1977. Conferencia de Naciones Unidas sobre la Sucesión de Estados en los tratados A/CONF. 80/16, p. 26.

lon nous c'est la première interprétation qui a été reprise dans la CV78[58], qui consacre un droit de succession: pour être considéré comme successeur – et pour l'exercice de ce droit – l'Etat intéressé doit manifester son consentement. Ainsi, c'est le consentement qui sert de fondement à la succession aux traités.

Par contre, le régime général établi par la CV78 sera celui de la *successio ipso iure* ou succession automatique[59], pour laquelle le rôle du consentement est très étroit, presque inexistant, parce que l'Etat est obligé de succéder à tous les traités en vigueur[60]. Il entraîne l'obligation de succéder comme règle générale, mais il n'est pas question de consentement car l'Etat nouveau sera nécessairement successeur. A la fin des travaux la Commission du droit international a envisagé un problème qui avait été annoncé dans le premier rapport de Sir H.WALDOCK le de considérer seulement point de vue des Etats nouvellement indépendants, en oubliant les autres hypothèses[61].

D'ailleurs, le consentement pour la succession s'est manifesté en utilisant normalement comme instrument la notification (*vid. infra* IV.1.a.). Et dans ce point-ci nous devons nous demander quelle est sa nature. Alors que le consentement n'est pas remarquable si on considère la notification comme une simple communication, il en va tout autrement si on soutient qu'elle est une proposition des traités dont l'application se prétend continuer. La notification peut avoir un double rôle et ainsi une double nature: 1) une communication du fait successoral. En effet, on peut penser que la notification a une nature déclarative, c'est-à-dire que l'Etat notifie parce qu'il se sent obligé par la succession *ipso iure*. Selon cette thèse, le consentement n'a pas de fonction particulière, parce que la succession aux traités n'est pas alors reliée au consentement. Quand le fait successoral s'est produit, les conséquences juridiques se dégagent de ce fait, indépendement du consentement de l'Etat qui revêt une importance seulement dans des situations ponctuelles – arts. 31, 32 et 36 CV78; 2) une proposition des traités dont l'application peut se maintenir.

Selon cette thèse, il apparaît au premier chef que la notification aura une nature constitutive; l'obligation de maintien ne se dégage que de la manifestation de la volonté de l'Etat. C'est une acceptation de la continuité des relations juridiques. Le consentement ici est une source de la succession aux traités parce que, s'il n'y a pas de consentement, il n'y aura pas de succession aux traités.

Au total, cette analyse sur la signification précise qu'on doit donner au consentement nous conduit à considérer la deuxième thèse comme la plus souhaitable. Elle semble bien d'ailleurs avoir les faveurs de la Cour internationale de Justice dans l'*affaire de l'application de la Convention pour la sanction et la prévention*

---

[58] Le paragraphe 2 du commentaire à l'article 16 le confirme. *Vid.* en Conférence des Nations Unies sur la succession d'Etats aux traités. *Documents officiels*, vol. III, p. 43 et ss.

[59] W. J e n k s: «State Succession in respect of Law-Making Treaties», *BYbIL* (1952), p. 105–144, a soutenu que l'Etat nouvellement indépendant doit se considérer lui-même automatiquement lié par les traités multilatéraux législatifs. La pratique des Etats s'est oppossée à l'obligation formulée par J e n k s.

[60] Sauf quelques exceptions *infra* IV.A.1.a.

[61] *Vid.* DOC A/CN.4/202, dans Comision de Derecho Internacional, *Anuario* (1968), vol. II, p. 87, paragraphe 14. Notre traduction.

du crime de génocide. En l'espèce, la Cour confirme implicitement cette opinion, même si elle ne pose pas la question de la succession automatique en règle générale, mais pour les Etats autres que nouvellement indépendants, et seulement la succession automatique «dans le cas de certains types de traités ou conventions internationaux» – par rapport aux traités qui protègent les principes fondementaux de la communauté internationale. Il nous paraît clair qu'on peut aller jusqu'à soutenir qu'elle met en relief la relation entre la succession et les traités précités[62]. La pratique la plus récente conduit à constater que les Etats nés de la sécession agissent comme s'ils étaient des Etats nouvellement indépendants au sens de la CV78, bien qu'ils soient exclus du régime de la *tabula rasa* selon la CV78. Ils se sont qualifiés comme Etats nouvellement indépendants au sens de la CV78 et cette qualification a été géneralement acceptée. Cette pratique a apporté à la succession d'Etats et à la CV78 la relevance de l'autoqualification de la situation pour décider du régime applicable.

IV. La déclaration de succession

Pour aller plus au fond, il faut étudier la portée d'une déclaration de succession. Encore que la *successio ipso iure* soit dégagée d'une déclaration de succession particulière, la pratique révèle des cas où des questions successorales entraînent la formulation des déclarations de succession. En outre, la CV78 distingue dans sa deuxième partie – seulement pour les Etats nouvellement indépendants – le cas des traités multilatéraux et celui des traités bilatéraux, distinction qui n'est pas maintenue dans la troisième partie de la Convention. La différence de régime est logique si nous considérons que l'importance de l'identité des Parties aux traités multilatéraux et bilatéraux est différente. Pour rappeler les termes de la Conférence des Nations Unies sur la succession d'Etats, *l'équation personnelle* est différente[63]. Nous allons voir maintenant le contenu de la CV78 et la pratique la plus récente, quant aux déclarations successorales de ces deux catégories de traités.

A. La succession aux traités multilatéraux

Selon le nombre des Etats contractants, on peut classer un traité comme bilatéral ou multilatéral[64]. Cette distinction est «fort utile à cause de l'importance qu'ont désormais les traités multilatéraux ou collectifs, capables de régler des matières d'interêt

[62] On peut interpréter en ce sens l'opinion individuelle de WEERAMANTRY, l'opinion dissidente du juge *ad hoc* designé par la Yougoslavie KRECA, et aussi la pratique la plus récente.

[63] *Vid.* dans Commentaire de l'article 23 du Project d'articles de la CDI, Conférence des Nations Unies sur la succession d'Etats dans les traités, p. 71, paragraphe 3.

[64] D'un point de vue technique, le traité multilatéral est relativement récent, les Etats participants à Westfalia (1648), préférèrent conclure plusieurs traités bilatéraux entre eux, et ce n'est qu'au Congrès de Vienne 1815 où les Etats participants ont tous signé l'Acte Final, qu'a commencé un changement cristallisé en 1856 avec le Traité de Paris qui a mis fin à la Guerre de Crimée. *Vid.* [dans:] A.R. B r o t o n s: *Derecho Internacional Público. 2. Derecho de los Tratados* (1987), p. 71.

commun à toutes les nations»[65]. Au sein des traités multilatéraux, on peut distinguer les traités restreints des traités généraux. Dans les premiers, l'importance de l'identité des Etats Parties est fondamentale pour les Etats co-contractants, et on ne peut admettre des Etats nouveaux comme parties qu'après une invitation formelle[66].

La succession dans l'hypothèse de traités multilatéraux restreints est très différente selon qu'il s'agit des Etats nouvellement indépendants – article 17, alinèa 3 – ou d'autres cas – art. 31.2. Concernant le premier cas, la CV78 prévoit que la succession d'Etats exige l'assentiment de toutes les autres parties – c'est l'article 17.3 qui est visé; cela veut dire qu'il y aura besoin d'un comportement positif de toutes les parties directement touchées par le traité – à noter que la disposition dont il vient d' être question joue également pour les traités bilatéraux. Le consentement de l'Etat qui se prétend successeur de ce type de traités amorce le processus successoral, pour lequel la coïncidence de sa volonté avec celle de toutes les autres parties est essentielle.

Les autres cas de succession sont toutefois plus compliqués. La CV78 -article 31.2.b- est en faveur de la présomption de continuité dans l'application d'un traité restreint sauf si «l'Etat successeur et les autres Etats parties n'en conviennent autrement». Pour les cas soit de traités non en vigueur au moment de la succession d'Etats, soit d'accords alors signés par l'Etat prédécesseur sous réserve de la ratification ou de l'approbation, la CV78 établit la même règle que pour les Etats nouvellement indépendants. Par contre, il n'y a aucune disposition concernant la succession d'Etats en cas de séparation ou sécession d'Etat aux traités en vigueur. On doit alors interpréter cette absence en faveur de l'application de la règle de la *successio ipso iure*.

Les traités ouverts ou généraux ont une prétention d'universalité et ils recherchent la participation la plus large. La pratique la plus récente témoigne du maintien en vigueur des engagements internationaux multilatéraux du prédecesseur[67]. Nous voulons ici mettre en relief deux idées: 1) l'application aux traités multilatéraux restreints et généraux du même mécanisme pour se déclarer successeur; et 2) la différence d'effets de ces mécanismes selon qu'on les applique aux traités multilatéraux généraux ou aux traités multilatéraux restreints. Dans ce dernier cas, ces instruments permettent seulement d'ouvrir une procédure qui peut se terminer avec l'admission d'un nouvel Etat, par contre, sur les traités généraux ils ont l'effet signalé par la CV78: même si le nouvel Etat succède à un Etat qui était membre, il devra remplir les conditions de participation et être admis par tous les autres co-contractants[68].

---

[65] *Vid.* [dans:] A.G. M o c h i-O n o r y: *La succession d'Etats aux traités*, *op. cit.*, p. 21.

[66] Un exemple c'est l'article 10 du Traité de Washington constitutif de l'OTAN.

[67] Les traités multilatéraux dont la RFS de la Yougoslavie était partie ont été maintenus en vigueur mais non pas toujours en application de l'article 34.2 de la CV78. Il y a eu quelques fois où les Etats successeurs ont préféré d'adhérer aux conventions que de les maintenir en tant que successeurs automatiques, c'est le cas de la Slovénie par exemple par rapport à la Convention du 25 octobre 1980 sur les aspects civils de l'enlèvement international d'enfants qui avait été ratifiée par l'ex-Yougoslavie.

[68] C'est le cas de la participation de quelques nouveaux Etats de l'Europe de l'Est à la Convention relative à la navigation sur le Danube du 18 août 1948, dont trois Etats parties ont subi des phenomènes successoraux: l'URSS, la Tchécoslovaquie et la Yougoslavie. Il y a des Etats nouveaux qui n'ont pas l'une des conditions pour être parties à la Convention: être riverain, par exemple la République Tchèque ou la Fèdération Russe et qui sont

1. Les formes de la déclaration de succession

Il existe différents mécanismes pour se déclarer successeur aux traités multilatéraux: (a) les notifications par lesquelles l'Etat indique sa volonté de succession à certains traités – comme l'ont fait par exemple des ex-Républiques yougoslaves; et, (b) les déclarations par lesquelles l'Etat exprime sa volonté générale d'être successeur. Les notes des Républiques Tchèque et Slovaque au Sécrétaire Général des Nations Unies à l'égard de tous les traités auxquels l'ancienne Tchécoslovaquie était partie, fournissent un exemple de ces notifications généralistes. Dans tous les cas, il s'agit de notifications au sens de la CV78. Leurs effets sont rétroactifs jusqu'au moment où s'est produite la succession. Les deux mécanismes posent des problèmes relatifs aux effets rétroactifs de l'acte de notification; bref ils soulèvent des questions temporelles – *vid. infra* V.A.; (c) les accords de dévolution ou transfert. Ils ne sont pas des actes unilatéraux mais, comme leur dénomination l'indique, des instruments bilatéraux conclus entre l'Etat prédécesseur et l'Etat successeur pour régler les problèmes posés par la succession.

a. Notification

La notification est l'acte unilatéral par lequel est mis à la connaissance d'un Etat tiers un fait, une situation, une action ou un document desquels on peut dégager des effets juridiques et qui seront en conséquence considérés comme juridiquement connus par le destinataire[69]. La définition positive de la notification de succession est visée à l'article 2.1.g de la CV78 «par rapport à un traité multilatéral, d'une notification, quel que soit son libellé ou sa désignation, faite par un Etat succeseur, exprimant le consentement de cet Etat à être considéré comme étant lié par le traité».

La succession et la notification de la succession indiquent l'acte par lequel un Etat successeur exprime et établit sur le plan international son consentement à être lié par le traité concernant le territoire qui est l'objet de la succession. A la différence des modes d'expression du consentement à être lié par un traité de l'article 11 de CV69 – ratification, adhésion, acceptation et approbation, la notification de la succession n'a pas besoin d'adopter la forme du dépôt d'un instrument. En général, il n'y a pas d'éléments formels nécessaires. Une notification ou communication dans laquelle est énoncée la déclaration de la volonté de l'Etat successeur suffit.

---

interessées à la participation dans la Commission danubienne, qui est reservée aux Etats riverains du Danube. La Russie prétend à se mantenir en tant que continuateur comme partie dans la Convention et dans la Commission. La République Tchèque et la République Slovaque ont accordé la succession de la Slovaquie en tant que pays danubien à la Convention et à la Commission, malgré que la République Tchèque soit interessée par la participation à la Convention sans être un Etat danubien. La Commission a des plans visant à établir un régime européen de navigation, et la République Tchèque, malgré qu'elle ne soit pas riveraine, est interéssée à participer à la Convention – en tant que successeur – parce que son territoire appartient géografiquement au réservoir d'eau du Danube. La Croatie a notifié la succession dans cette convention, mais la RF Yougoslavie se prétend continuateur en tant que dépositaire de la Convention.

[69] J.A. Pastor Ridruejo: *Curso de Derecho Internacional y Organizaciones Internacionales* (1996), p. 172.

Les éléments formels des notifications sont évoqués dans la CV78, aux articles 22 et 38, dans des termes identiques pour les hypothèses d'Etats nouvellement indépendants (régime spécial) et celles qui ont trait à l'unification et à la séparation d'Etats (régime général mais avec un caractère résiduel). Ces éléments les rapprochent – sauf sur le plan formel- des actes unilatéraux, soit: Forme: Dans tous les cas, les notifications de succession doivent être faites par écrit, selon la Convention, mais cet élément formel ne peut pas invalider le consentement d'un Etat à une succession. La Cour Internationale de Justice dans son arrêt dans l'affaire de l'*application de la Convention pour la prévention et la Répression du Crime de Génocide (Bosnie-Herxegovina c. Yugoslavie)* (arrêt du 11 juillet 1996) a confirmé sa jurisprudence précédente en indiquant que «la Cour n'est pas tenue d'attacher à des considérations de forme la même importance que celle qu'elles pourraient avoir dans le droit interne» (paragraphe 24 *in fine*). Capacité: Les notifications doivent être signées ou présentées par une personne compétente. La Convention indique les personnes capables à cet effet: le Chef de l'Etat, le Chef du Gouvernement et le Ministre des Affaires Etrangères. Destinataire: Le dépositaire du traité, ou subsidiairement toutes les Parties ou Etats contractants.

La notification de succession est, sans doute, l'instrument le plus utilisé dans les cas de démembrement ou dissolution d'un Etat. Quant à ses effets, la CV78 les énumère par rapport aux Etats nouvellement indépendants, ce sont des effets rétroactifs, qui impliquent la considération de l'Etat comme partie au traité dès que la succession d'Etats s'est produite, et non dès la notification. Pendant ce temps l'application du Traité est considérée comme suspendue entre l'Etat nouvellement indépendant et les autres parties au traité jusqu'à la date à laquelle la notification de succession est établie (sauf s'il est appliqué à titre provisoire). D'ailleurs on peut réaliser une application analogue de cette réglementation aux hypothèses où la notification est prévue dans la Partie IV de CV78 – arts. 31, 32 et 36, traités qui n'étaient pas en vigueur au moment de la succession.

Le droit de succéder doit s'exercer par quelques mécanismes inutiles dans les cas de succession automatique. S'il y a une *successio ipso iure*, on peut se demander à quoi sert la notification. Le juge yougoslave dans l'affaire de *l'application de la Convention pour la prévention et la répréssion du crime de génocide* (Bosnie-Herzegovine c. Yougoslavie), M. KRECA indiquait en ce sens: «'Automatic succession' and 'notification of succession' are mutually exclusive. The effect of automatic succession would consist of the automatic, ipso iure transfer of treaty rights and obligations from the prédecessor State to the successor State»[70]. La pratique la plus récente ne nous permet pas de soutenir l'application de cette dualité de régimes. Bien au contraire, les Etats apparus récemment ont fait des déclarations ou notifications de succession pour maintenir les liens conventionnels contractés par les Etats prédécesseurs. Et ces déclarations ont été généralement acceptées.

[70] *Vid.* paragraph 119 de son opinion dissidente.

Cependant, tant pour le régime général comme pour quelques domaines spécialement protegés s'impose la succession *ipso iure* ou automatique (aussi pour le régime particulier des Etats nouvellement indépendants) qui vont nous servir pour voir quelle est la nature de la notification. Nous ne prendrons ici qu'un exemple, celui des traités qui établissent une frontière, régis par l'article 11 de la CV78. Si la succession qui est en cause est automatique, dans ces cas-là, il ne faut pas de notification successorale. Ici, on a intèrêt à savoir quel sera l'effet des notifications. Dans les cas de succession automatique ou *ipso iure* M.P. ANDRES SAENZ DE SANTAMARIA établit que la conséquence est de conférer une sécurité juridique à la succession[71]. A notre avis, l'effet de ces notifications dans ce domaine-ci n'est pas celui que signale la Professeur ANDRES, bien au contraire, suivant l'exemple antérieur, il est évident qu'il n'est pas nécessaire de notifier la succession dans le cas des traités qui établissent des frontières même si dans la pratique nous pouvons trouver quelques exemples de ce type de notifications. Par exemple, la RFA confirma le 21 juin 1990 que la ligne Oder-Neisse – établie par un Traité de 6 juillet 1950 entre l'ancienne RDA et la Pologne – est la frontière avec la Pologne. Elle a aussi confirmé l'inviolabilité des frontières existantes pour l'avenir. En plus, les deux parties se sont engagées à respecter mutuellement sans aucune réserve leur integrité territoriale.

Les notifications, lorsqu'elles ne sont pas nécessaires, provoquent la confusion, parce qu'on peut penser par exemple que le fondement de l'inviolabilité d'une frontière est une notification concrète – une expréssion de volonté unilatérale ponctuelle, oubliant que c'est un principe de droit international qui protège l'inviolabilité frontalière. On peut même se demander si cette inviolabilité découle de la notification de succession au traité qui l'établit, et quel sera l'effet de l'absence d'une notification de succession dans les traités de frontières. Ainsi, s'il n'y a pas notification, doit-on interpréter l'absence de notifications comme une opposition à l'inviolabilité frontalière? Nous pouvons essayer de donner d'autres réponses à cette question. Par exemple, on peut interpréter la notification comme une rupture de la succession automatique générale: il n'y aurait pas de domaines spécialement protégés. On doit refuser cette alternative, parce que, comme nous l'avons déjà vu, il y a quelques matières dont la protection ne se dégage pas des règles de la succession d'Etats, mais des principes de droit international. La réponse qui nous semble la plus correcte c'est l'affirmation de la double fonctionnalité de la notification, c'est-à-dire qu'elle aura un effet constitutif pour les traités qui contiennent des normes à caractère dispositif pour l'Etat, mais elle aura aussi un effet déclaratif dans les autres cas. Dans les domaines spécialement protégés par des principes ou valeurs internationaux, parce que «socialement» nécessaires – ceux qui sont de droit international impératif – c'est la *successio ipso iure* ou succession automatique qui s'impose, et cette succession sera effective indépendemment de la notification, qui aura seulement des effets déclaratifs.

En outre, nous pouvons essayer de répondre à la question de savoir quel est le but des nouveaux Etats qui formulent ces notifications. S'ils savent que le régime fronta-

[71] *Vid.* M.P. Andres Saenz de Santamaria: «Problemas actuales...», *op. cit.*, p. 207.

lier – pour poursuivre avec cet exemple – établi par un traité leur sera applicable, pourquoi notifient-ils la succession? D'abord, la pratique nous montre que les notifications de succession aux accords qui établissent une frontière ne sont pas habituelles, bien qu'on en trouve quelques – unes dans les hypothèses, comme celle précitée de l'Allemagne, où l'établissement d'une frontière n'a pas été historiquement accepté. Un autre but des Etats successeurs est de poursuivre l'application de l'ensemble du traité établissant la frontière et pas seulement du régime frontalier. Cela signifie que les dispositions de fond de l'accord – le régime frontalier – lui seront opposables dans tous les cas, mais qu'il accepte que lui soient également opposables toutes les autres règles qui ne lui seraient pas applicables en absence de cette notification, par exemple les procédures de règlement des différends internationaux.

b. Déclaration

Il y a deux types de déclaration. D'abord celle évoquée à l'article 9 de CV78, puis une autre qui ne figure pas dans la CV78, mais qui est un type de notification qualifié par son contenu. La première est une déclaration qui ne produit pas d'effets juridiques par elle-même, par contre, les effets de la seconde sont les mêmes que ceux des notifications. Une «déclaration» au sens de la CV78 est un instrument unilatéral pour exprimer la volonté d'application provisoire des traités conclus par l'Etat prédécesseur qui étaient aplicables au territoire de l'Etat nouvellement indépendant. C'est une pratique qui a été commencée par le Tanganyika. Cet Etat, ancien territoire dépendant du Royaume-Uni ne voulait pas conclure un accord de dévolution avec son ex-métropole, et envoya une déclaration au Secrétaire Général des Nations Unies en ce sens pour l'informer d'une sorte *provisoire* d'application pendant une certaine période de temps après son indépendance nécessaire pour étudier l'opportunité de s'engager définitivement l'égard des traités conclus par son prédécesseur pour son territoire. Le Royaume Uni, demanda aussi au Secrétaire Général de distribuer aux Etats Membres des Nations Unies un intrument formel d'extinction des obligations et droits contractés par lui-même dans les traités qui étaient appliquables par cet Etat au territoire du Tanganyika avant son indépendance[72].

Les déclarations ne sont pas parmi les procédures établies dans la CV69 comme modes d'expression du consentement de l'Etat à être lié par un traité. On peut penser que l'envoi d'une déclaration de ce type au Secrétaire Général des Nations Unies a pour but ce qui est prévu a l'article 102 de la Charte – l'enregistrement – mais cet envoi est fait seulement dans un but de publicité des instruments relatifs aux traités ou comme une procédure diplomatique de distribution des notifications, pour rendre public le fait qu'on se déclare lié.

Le rapporteur spécial, sir H. WALDOCK, après l'étude de la pratique indique que normalement les Etats nouvellement indépendants font une déclaration générale à l'égard de plusieurs traités multilatéraux en général, pour lesquels ils proposent une

[72] Le précédent du Tanganyika a été suivi par d'autres Etats nouvellement indépendants. *Vid.* Deuxième rapport de Sir H. WALDOCK Doc. A/CN.4/214, [dans:] CDI *Annuaire* (1969), vol. II, p. 64-65.

sorte *provisoire* d'application de ces traités entre eux-mêmes et chaque Etat qui accepte leur offre[73]. WALDOCK entend aussi que la notification d'une participation transitoire à l'égard des traités dont le destinataire de la déclaration était dépositaire n'est pas possible, parce que tous les traités multilatéraux ne prévoient pas ce mode de participation limitée. Le but de l'article 9 de la CV78 est de prévoir la possibilité d'application provisoire d'un traité multilatéral, sur un fondement bilatéral, entre l'Etat successeur et les Etats parties à ce traité qui conviennent de cette application limitée[74]. En tant qu'actes unilatéraux, leurs effets juridiques par rapport aux co-contractants aux traités ne peuvent dépendre de la seule volonté de l'Etat déclarant. Ils ne pourraient avoir cet effet que si l'Etat qui a obtenu récemment son indépendance a le droit d'appliquer provisoirement les traités de son prédécesseur pendant une certaine période après son indépendance, par application des règles du droit international général.

La CV78 règle seulement ces déclarations de succession d'un point de vue négatif (art.9.1); elle n'indique pas les effets d'un tel acte: «Les obligations ou les droits découlant de traités en vigueur à l'égard d'un territoire à la date d'une succession d'Etats ne deviennent pas les obligations ou les droits de l'Etat successeur ni d'autres Etats parties à ces traités du seul fait d'une déclaration unilatérale de l'Etat successeur prévoyant le maintient en vigueur des traités à l'égard de son territoire». Ce n'est pas une caractéristique des déclarations de succession, mais une disposition qui découle de la nature unilatérale de ces actes. La déclaration de succession «est un acte unilatéral, dont les effets juridiques pour les autres parties aux traités ne peuvent dépendre du seul Etat auteur de la déclaration»[75]. En fin de compte, les déclarations de succession sont des manifestations d'intentions; l'Etat qui les formule souligne sa volonté de succession générale. En outre, les déclarations ne sont pas vraiment des actes unilatéraux, parce qu'elles ont besoin d'une acceptation pour produire des effets, c'est la conclusion qui s'est dégagée de la pratique suivie par le Secrétaire Général des Nations Unies en tant que dépositaire de nombreux traités internationaux.

Les déclarations du deuxième type indiqué au commencement revêtent aussi ces caractéristiques antérieures en tant que vrais actes unilatéraux et expression de la volonté étatique de succession générale. Mais leur seront applicables les articles relatifs à la notification, et non pas à l'article 9, parce qu'elles ne cherchent l'application provisoire d'aucun traité. Ici, nous parlons de déclaration en nous référant à une noti-

---

[73] *Vid.* 1196 Session, le 5 juillet 1972, [dans:] CDI *Annuaire* (1972), vol. I, p. 280, commentaire à l'article 17 bis, paragraphe 22.

[74] M. Ustor Président du Comité de Rédaction, indique comme réponse M. Castañeda què la procédure prévue dans le paragraphe 1 se fait dépendre de l'intention de l'Etat successeur, qui peut, s'il le veut, indiquer aux autres parties qu'il a besoin d'une période de réflexion et qui se propose d'appliquer le traité provisoirement. Les contre-parties peuvent donner sa réponse expressément ou son consentement d'une façon tacite. *Vid.* CDI *Annuaire* (1972), vol. I, p. 280, commentaire à l'article 17 bis, paragraphe 23.

[75] *Comisión de Derecho Internacional, Anuario* (1974), vol. II, 1 parte. Informe de la Comisión a la Asamblea General, p. 198. Alors, si ce sont des déclarations d'intentions, qui ont besoin d'une réaction des Etats tiers, elles ne sont pas vraiment des actes unilatéraux qui émanent «d'un seul Etat, qui fixe sa position juridique à l'égard d'une situation, d'un acte ou une règle». Notre traduction.

fication spéciale, lorsque l'auteur envoie à un dépositaire un instrument par lequel il se déclare successeur de plusieurs traités. Nous trouvons des exemples de ces catégories juridiques dans les déclarations de sucession réalisées par la République Tchèque, envoyées aux dépositaires des traités multilatéraux auxquels était partie l'ex-Tchécoslovaquie. Le 17 décembre 1992, la République Tchèque faisait la déclaration de principes suivante, dirigée vers tous les Parlements et Nations du Monde «In conformity with valid principles of International Law and to the extent defined by it the Czech Republic will consider itself to be bound, as of January 1, 1993, by multilatéral and bilatéral treaties and agreements to which the Czech and Slovak Federal Republic was a party by that date».

La différence qu'on trouve ici entre les déclarations et les notifications de succession résidait dans leur portée même. Les notifications sont des instruments utilisés par rapport à un traité singulier auquel l'Etat formulant veut devenir successeur. Par contre, les déclarations sont plus génériques. La déclaration envoyée à l'UNESCO par les républiques de l'ex-Tchécoslovaquie, à laquelle une liste de quinze traités était ajoutée, était ainsi rédigée: «In harmony with the valid principles of International Law and to the extent defined by it, the Czech Republic as a successor State created as a result of the dissolution of the Czech and Slovak Federal Republic, considers itself bound, as of 1 January 1993, i.e. the date of the dissolution of the Czechoslovak federation, by multilateral international treaties to which the Czech and Slovak Republic was a party on that date, including reservations and statements to their provisions made earlier by Czechoslovakia. Of the Treaties deposited with UNESCO this applies to the following treaties»[76].

Néanmoins, nous pouvons souligner une autre différence entre les déclarations et les notifications quant à leurs effets. Les déclarations supposent la sécurité juridique pour le maintien des relations conventionnelles, parce qu'une seule déclaration peut avoir pour effet l'acceptation de tous les liens conventionnels de l'Etat prédécesseur. La déclaration de succession est l'expression d'une volonté successorale générale. Par contre, les notifications sont des acceptations concrètes des liens conventionnels qui ne confèrent pas cette sécurité juridique, jusqu'au moment de la réception de toutes les notifications qui expriment la volonté de continuation de l'application des traités dont l'Etat prédécesseur était partie. La réception d'une notification indique seulement la succession aux traités spécifiés, et elle ne peut être élargie aux autres.

c. Accords de dévolution

Les accords de dévolution étaient habituels lors de la décolonisation. Ils étaient conclus entre l'Etat prédécesseur et l'Etat successeur, et leur but était de régler la transmission au successeur des obligations et des droits du prédécesseur par rapport au territoire du nouvel Etat. Il y a plusieurs modèles d'accords de dévolution, mais tous ont un objectif identique: le transfert de toutes les obligations et droits qui tirent

[78] S o u r c e: Pilot Project on documentation concerning State Practice relating to State succession and Recognition. Contribution by the Czech Republic, p. 2.

leur fondement des traités conlus par l'Etat prédécessseur et qui étaient applicables au territoire de l'Etat nouvellement indépendant.

Quand le Tangayinika s'est opposé à la conclusion d'un accord de dévolution avec le Royaume Uni, ce nouvel Etat souligna les effets juridiques de ces accords: (1) Les Etats tiers pourraient lui réclamer l'accomplissement des liens conventionnels, responsabilité dont il serait rélevé sans l'accord, par le même fait de l'acquisition de son indépendance; (2) l'accord ne supose pas un fondement juridique pour que le nouvel Etat puisse réclamer aux Etats tiers l'accomplissement des liens conventionnels établis entre eux et l'ancienne metropole par rapport au territoire du nouvel Etat[77].

L'accord de dévolution est un instrument qui, en tant que traité, ne peut lier que les deux Etats qui en sont parties, limitant nécessairement à eux ses effets juridiques, ne liant pas les Etats tiers, même s'il a été notifié au Secrétaire Géneral des Nations Unies[78]. L'article 102 de la Charte confie au Secrétaire Géneral de l'Organisation le soin d'enregistrer et de publier les traités, et quand il reçoit un accord de dévolution c'est ce qu'il fait. Quel sera l'effet de l'enregistrement de la dévolution? Evidemment ce ne pourra pas être assimilé aux notifications de succession, par lesquelles l'Etat exprime son consentement à devenir partie en son nom à un traité multilatéral conclu par l'Etat prédécesseur pour le territoire de l'Etat qui formule la notification. La pratique ne permet pas de conclure que les accords de dévolution créent par eux-mêmes des liens juridiques entre l'Etat successeur et les Etats tiers parties aux traités, qui sont *res inter alios acta* – art. 34 CV69, ainsi l'exprime aussi l'article 8 de la CV78. Les seules obligations qui peuvent être transmises à l'Etat successeur par rapport aux Etats tiers sont celles qui en tous cas passeraient là 'Etat successeur en tant que normes générales de droit international, indépendamment de l'accord de dévolution. D'un autre côté, parce que les accords de dévolution étaient – parfois – le prix à payer par les Etats nouvellement indépendants pour l'acquisition de leur indépendance, ils n'étaient pas des traités consentis librement.

Ces accords étaient utiles parce qu'ils assuraient la continuité de l'application des traités et pouvaient aussi servir comme preuve des critères des Etats nouvellement indépendants sur le caractère coutumier des règles sur la succession aux traités. E. LAUTERPACHT signala «Malgré le douteux fondement juridique sur lequel reposent ces accords et les difficultés qu'entraîne leur application, les accords de dévolution ne sont pas totalement dépourvus d'objet. Dans les premiers jours de l'indépendance, ils contribuent à centrer l'attention des autorités du nouvel Etat sur le fait qu'il a besoin de préciser le domaine et la portée de ses obligations conventionnelles»[79]. La pratique des accords de dévolution a cessé avec la décolonisation. Mais ils

---

[77] Segundo Informe de Sir H. W a l d o c k Doc. A/CN.4/214, *Anuario de la CDI* (1969), vol. II, p. 63, parágrafo 1.

[78] Sir H. W a l d o c k nous montre l'utilité dégagée de la pratique dans son deuxième rapport sur la succession d'Etats dans les traités – *Vid. ACDI* (1969), vol. II, p. 61, paragraphe 24.

[79] E. L a u t e r p a c h t: «State Succession and Agreements fot the Inheritance Treaties», *ICLQ* (1958), p. 567 et ss. Notre traduction.

nous intéressent parce qu'ils sont une figure juridique semblable aux accords de dissolution qui ont été conclus entre les Etats nés de la dissolution de l'URSS et de la Tchécoslovaquie. Comme les accords de dévolution, ceux-ci sont des traités célébrés entre deux entités – avant d'acquérir le statut d'Etats, dans le cas de l'ex-Tchécoslovaquie – ou plusieurs – pour l'ex-URSS. Mais, au contraire des accords de dévolution, l'Etat prédécesseur n'était pas une des parties à l'accord dans ces nouveaux traités, auxquels sont seulement parties les futurs Etats qui déclarent la fin de l'existence de l'Etat prédécesseur[80]. Comme tous les traités, ils lient en principe seulement les parties -en vertu de la règle *res inter alios acta*. Dans ce cas, le but des accords ne sera pas de régler la transmission au successeur des obligations et des droits du prédécesseur pour le territoire du nouvel Etat, mais de résoudre les différents problèmes relatifs à la sécession – partager les obligations et les droits de l'Etat.

Même si ces accords de sécession ressemblent aux accords de dévolution, ils en sont différents quant à leurs parties et effets. Parce qu'il y a quelques dispositions dans les accords de sécession qui ont eu des effets pour les Etats tiers, par exemple les Etats de la Communaute des Etats Indépendants – CEI – à Alma Ata (Decision by the Council of Heads of State of the Commonwealth of Independent States) «The States of the Commonwealth support Russia'a continuance of the membership of the Union of Soviet Socialist Republics in the United Nations including permanent membership of the Security Council and other international organizations»[81]; ou même l'accord par lequel la République Tchèque et la Slovaquie ont décidé que la République Tchèque continuerait les fonctions de dépositaire des traités multilatéraux dont la Tchécoslovaquie était dépositaire[82]. Dans le mémoire sur la pratique envoyé par la République Tchèque au *Pilot Projet on Documentation Concerning State Practice Relating to State Succession and Recognition*, on souligne l'absence d'objections des autres Etats «The attitude of other treaty parties, nevertheless, seems to suggest their consent with the exercise of the depositary functions by the Czech Republic»[83].

La question sera alors: comment doit-on interpréter l'absence d'objections des autres Etats? Comme un assentiment? L'emphase mise par les nouveaux Etats sur l'absence d'objections des Etats parties aux traités dont l'ex-Tchécoslovaquie était dépositaire est un élément en faveur d'une réponse affirmative aux questions posées. Si les Etats co-contractants pouvaient s'y opposer, l'absence de protestation doit se traduire comme un acquiescement. Finalement, leur consentement ajouté à la volonté des républiques directement intéressées par la succession de l'ex-Tchécoslovaquie a fondé la nouvelle situation.

---

[80] Dans le cas de la Fédération Russe, ni à Minsk ni à Alma Ata la Russie ne possédait pas le statut juridique de continuatrice de l'ex-URSS.

[81] *Vid.* 48 *La Communitá Internazionale* (1993-1).

[82] La Tchécoslovaquie était depositaire de quelques traités. La nouvelle République Tchèque assume *de facto* l'exercice des fonctions de dépositaire des traités multilatéraux.

[83] Par contre, la République Slovaque est héritière des fonctions de dépositaire de l'ex-Tchécoslovaquie pour un seul traité trilatéral. Les deux nouvelles républiques ont partagé les fonctions de dépositaire en utilisant le critère *locus rei situe*. *Vid.* en ce sens V. M i k u l k a: «State Succession in respect of Treaties Czech Republic» (1996), p. 18. Non publié.

On peut argumenter de la même façon pour la décision des deux futures républiques sur la disparition de la Tchécoslovaquie – cette décision fut adoptée par les deux entités formant la Tchécoslovaquie, les futures républiques Tchèque et Slovaque, le 17 décembre 1992, et la dissolution s'est produite le 1er janvier 1993, par accord entre les deux entités. Ce sont des décisions qui ont produit des effets pour les Etats tiers. Mais l'affirmation posée comme prémisse n'est pas tellement certaine, parce que leurs effets juridiques pour la communauté internationale ne sont pas le produit des accords de séparation eux-mêmes, mais de leur coïncidence avec l'assentiment des Etats tiers. Nous trouvons une preuve de cette affirmation dans les déclarations d'Alma Ata, par lesquelles les nouveaux Etats ont convenu que «with the establishment of the Commonwealth of Independent States, the Union of Soviet Socialist Republics ceases to exist»[84].

2. Réaction des Etats parties au traité à la déclaration de succession du nouvel Etat: Le problème de l'opposition des Etats au traité à la notification de succession

La question qu'on va essayer de résoudre dans ce paragraphe est la suivante: s'il y a une déclaration de succession, un Etat co-contractant peut-il s'y opposer?[85] La CV78 ne prévoit cette possibilité que pour des hypothèses concrètes. La conclusionde la CV78 est que les autres parties d'un traité ne peuvent pas s'opposer dans des hypothèses différentes de celle qui vient d'être indiquée. A notre avis, malgré l'absence d'une disposition en ce sens de la CV78, les Etats parties à un traité pourront s'opposer. Une autre réponse suposerait la possibilité d'imposer à un Etat le maintien des relations conventionelles avec un Etat. Est-ce que la protection des nouveaux Etats doit s'aquérir au préjudice de tous les autres Etats? Les réponses à ces deux questions doivent être négatives, parce qu'on peut se demander si ce domaine a une spécificité spéciale pour être une exception au principe d'égalité souveraine des Etats. Mais, par contre, s'il y est reconnu un droit des Etats à la succession ou même une obligation pour les Etats qui ne sont pas nouvellement indépendants au sens de la CV78, l'effet de l'opposition des co-contractants semble limité. Et de la pratique actuelle des Etats on peut «dégager la règle (établie par la voie du droit coutumier) selon laquelle les autres Etats sont obligés de prendre acte de l'expression de la volonté des Etats nouvellement indépendants et de maintenir en vigueur les traités multilatéraux de caractère universel, se rapportant auparavant à leur territoire»[87].

C'était là une hypothèse plus théorique que réelle, parce qu'il n'y avait pas assez de pratique pour pouvoir fonder une solution à la question des effets de l'opposition

---

[84] *Vid. supra* II.B.

[85] Il y a eu un projet d'amendement des Etats-Unis sur la prévision d'une «procédure pour les objections à la succession émanant des Etats successeurs et des parties aux traités» qui n'ayant pas reçu un appui suffisant, fut retiré. *Vid.* Conférence des Nations Unies sur la Succession d'Etats en matière de traités, vol. II, p. 76–78 et 99-102.

[86] Les articles 17.3 et 18.4.

[87] *Vid.* International Law Association «Rapport préliminaire sur la succession d'Etats en matière de traités», [dans:] *Helsinki Conference* (1996). *Aspects of the Law of State Succession*, p. 7. Non publié.

des Etats parties à un traité par rapport à la notification de succession formulée par un nouvel Etat. Mais, récemment la Cour internationale de justice s'est prononcée sur cette question dans son arrêt du 11 juillet 1996 concemant les exceptions préliminaires dans l'*affaire de l'application de la Convention pour la prévention et la répression du crime de génocide* (Bosnia-Herzegovine c. Yougoslavie). La troisième exception préliminaire introduite par la Yougoslavie mettait en doute la qualité de partie de la Bosnie-Herzegovine à la Convention sur le génocide. Même quand le Sécretaire Général des Nations Unies, en sa qualité de dépositaire de cette convention a notifié aux parties la notification de succession qui lui avait été addresée par la Bosnie--Herzégovine, la Yougoslavie n'a pas protesté, mais l'a fait seulement dans son mémoire en réponse à la demande introduite par la Bosnie-Herzégovine. La Cour étudie cette protestation comme une objection à la succession «la Yougoslavie a mis en cause la validité et l'effet juridique de la notification du 29 décembre 1992, en soutenant que la République de Bosnie-Herzégovine avait violé de façon flagrante, par ses actes relatifs à l'accession à l'indépendance, les obligations découlant du principe d'égalité des droits et du droit des peuples de disposer d'eux mêmes. Ainsi, selon la Yougoslavie, la Bosnie-Herzégovine n'avait pas qualité pour être partie à la convention»[88].

La Cour ne se prononce pas expréssément sur le sujet qui nous intéresse: les effets de l'opposition à la notification de la succession. Mais de son argumentation on peut dégager une réponse afirmative sur la possibilité de s'opposer et l'effectivité de cette opposition. Refusant l'objection soulevée par la Yougoslavie, «La Cour constate que la Bosnie-Herzégovine est devenue Membre de l'Organisation des Nations Unies à la suite des décisions prises le 22 mai 1992 par le Conseil de Sécurité et l'Assemblée générale, organes compétents en vertu de la Charte. Or l'article XI de la convention sur le génocide ouvre celle-ci „tout Membre des Nations Unies"; dès son admission au sein de l'Organisation, la Bosnie-Herzégovine pouvait donc devenir partie à la Convention. Peu importent alors les circonstances dans lesquelles elle a accédé à l'indépendance»[89].

La conclusion qu'on peut dégager à ce sujet est qu'on peut s'opposer aux notifications de succession. En tous cas, les Etats peuvent protester contre ces notifications, bien que la question des effets de cette réaction négative reste ouverte. La Cour refuse l'opposition à une déclaration de succession, mais sans se prononcer sur ses effets. A partir de l'argumentation de la Cour dans l'analyse de l'exception préliminaire de la Yougoslavie, nous pouvons répondre en appliquant par analogie les dispositions de la CV78 qui prévoient la possibilité d'opposition des Etats parties – arts. 17.3 et 18.4; ou bien essayer une autre solution, comme l'application d'un régime juridique semblable à celui prévu par la CV69 pour les réserves.

Dans le premier cas, la CV78 établit la possibilité d'opposition dans des traités multilatéraux en vigueur ou non à la date de la succession, mais en limitant considé-

[88] *Vid.* paragraph. 19.
[89] Paragraph 19.2.

rablement les textes conventionnels auxquels les Etats parties peuvent s'opposer. Mais d'un autre côté, les effets juridiques qu'on peut dégager de l'opposition d'un seul des Etats parties au traité consistent en l'impossibilité d'y succéder.

L'autre alternative que nous avons proposée – l'application d'un régime semblable aux réserves – trouve son fondement dans la similarité du fonctionnement pratique des notifications de succession et des réserves. La succession d'Etats est une question qui suscite de nombreuses incertitudes, pouvant se traduire par une insécurité juridique, un effet négatif que l'on doit éviter. On devra alors établir un régime juridique régulateur du fonctionnement des déclarations de succession. Il pourra être utile d'appliquer le régime des réserves pour résoudre les problèmes qui peuvent se poser. Par exemple, si nous acceptons la possibilité de s'opposer à une notification de succession, nous devons répondre aux questions suivantes: l'absence de protestation indique-t-elle une acceptation tacite? A quel moment pourra-t-on objecter ou protester contre une notification de succession? Les déclarations individuelles envoyées par la République Tchèque et Slovaque au Secrétaire Général des Nations Unies se référant à tous les traités auxquels l'ancienne Tchécoslovaquie était partie n'ont pas été contestées; peut-on penser qu'elles ont été par contre acceptées par toute la communauté internationale? Et dès lors peut-on affirmer la condition de successeur d'un Etat à un traité? Nous proposons d'appliquer ici, pour plus de clarté et de sécurité juridique, le régime juridique que la Convention de Vienne de 1969 sur le droit des traités établit pour les réserves, parce que le fonctionnement de cette figure juridique peut être semblable à celle des déclarations de succession.

3. La question des réserves et les traités multilatéraux

Les réserves sont un des instruments pensés pour faciliter la participation effective des Etats aux traités multilatéraux[90]. Une réserve, selon l'article 2.1.j (identique à l'article 2.1.d de la CV69), est une déclaration unilatérale, quel que soit son libellé ou sa désignation, faite par un Etat quand il signe, ratifie, accepte, approuve un traité ou y adhère, par laquelle il vise à exclure ou modifier l'effet juridique de certaines dispositions du traité à son égard. C'est une déclaration doublement dépendante, dans sa formulation par rapport au traité pour lequel elle est faite et, dans sa production des effets juridiques, de l'attitude adoptée par les autres Etats contractants par rapport aux réserves.

Le point de départ de la CV78 par rapport aux réserves est la présomption du maintien des réserves formulées par l'Etat prédécesseur sauf notification contraire de l'Etat nouvellement indépendant ou formulation d'une réserve se rapportant au même sujet que ladite réserve. Cette disposition supose que le consentement de l'Etat est le fondement du maintien des réserves du prédécesseur, parce que la Convention permet aux Etats nouvellement indépendants de décider si ces instruments, formulés par le prédécesseur, seront maintenus, remplacés ou retirés.

---

[90] *Vid.* A. Remiro Brotons: *Derecho Internacional Público. 2. Derecho de los Tratados* (1987), p. 206.

Prévoir le maintien des réserves du prédécesseur est une manifestation de l'idée de substitution d'un Etat à un autre. La Commission décida définitivement de maintenir la présomption indiquée, pour bénéficier de la succession – et aussi de la stabilité des engagements conventionnels – on a voulu assurer la continuité dans l'application du traité. En plus, à l'instance de la Tanzanie, on a introduit dans la convention une présomption de maintien des réserves formulées par le prédécesseur «à moins que, lorsqu'il fait la notification de succession, il n'exprime l'intention contraire ou ne formule une réserve se rapportant au même sujet que ladite réserve» (art. 20.1 CV78). Cette dernière expression est imprécise mais on doit comprendre, à notre avis, que la Convention s'est référée à l'incompatibilité entre les deux réserves, celle introduite par l'Etat prédécesseur et celle de l'Etat nouvellement indépendant. On pourrait avoir retenu une autre possibilité, plus sûre d'un point de vue juridique, celle de la présomption d'abandon des réserves formulées par l'Etat prédécesseur qui n'ont pas été confirmées formellement par l'Etat nouvellement indépendant, mais on a préféré la présomption de continuité des réserves pour des raisons de sécurité juridique.

La CV78 autorise aussi l'ajout de réserves à celles formulées par l'Etat prédécesseur, mais seulement pour les Etats nouvellement indépendants. Cette possibilité semble plus conforme aux modes d'expression du consentement à être lié par un traité prévus à l'article 11 de CV69, qu'avec la succession d'Etats. Cette disposition de l'article 20.2 est introduite pour la pratique du Secrétaire Général de l'ONU en tant que dépositaire de traités internationaux. La Conférence des Nations Unies sur la succession d'Etats dans les traités indique que les deux premiers paragraphes de cet article 20 sont contradictoires. D'une part, la présomption du maintien des réserves de l'Etat prédécesseur est une manifestation de la substitution d'un Etat à un autre, et d'autre part la possibilité d'ajouter des réserves suppose l'affirmation de positions différentes de l'Etat nouvellement indépendant par rapport à l'Etat prédécesseur. L'accumulation de ces deux critères – *a priori* contradictoires – souligne qu'on a poursuivi le but d'offrir tous les bénéfices possibles pour le choix de la succession.

Même si la Convention n'en fait aucune mention, on doit comprendre que la présomption introduite pour les réserves est applicable aux objections. Il n'y a aucune disposition sur la possibilité de formuler des objections aux nouvelles réserves introduites par l'Etat successeur, bien que ce point fut discuté au sein de la Commission du Droit International et de la Conférence des Nations Unies sur la Succession d'Etats aux traités. L'absence d'une règle précise est due au renvoi au régime des réserves de la CV69 qu'on trouve dans l'article 20.3 de la CV78. On pourra alors s'opposer aux nouvelles réserves formulées par l'Etat nouvellement indepéndant. Même si ce renvoi n'existait pas, on pourrait résoudre la question par la règle du fondement consensuel du droit international selon laquelle la succession d'Etats ne peut être considérée comme une exception. La succession d'Etats aux traités, en tant qu'acte unilatéral et volontaire, ne peut pas fonder validement la naissance des obligations et droits pour les Etats Parties au traité duquel se prétend la succession. Ces Etats parties ont en tous cas la possibilité de s'opposer aux réserves de cet Etat par le mécanisme prévu dans la CV69 pour le cas des réserves à caractère général.

Nous venons de voir la règle contenue dans la CV78 pour les réserves et la succession d'Etats pour les cas des Etats nouvellement indépendants. Par contre, ce texte ne dit rien sur la possibilité d'introduire des réserves pour les Etats qui ne sont pas nouvellement indépendants au sens de son article 2.1.(f). De la quatrième partie de la CV78, on peut déduire que l'obligation de succéder n'implique pas la posibilité d'ajouter de nouvelles réserves à celles qui ont été introduites par l'Etat prédécesseur, mais la *successio ipso iure* supose aussi l'obligation de maintenir ses réserves. Il n'y a pas assez de pratique sur ce point concret pour pouvoir l'affirmer ou si, au contraire, on peut appliquer par analogie la disposition de l'article 21 de la CV78. La Cour internationale de Justice a répondu implicitement à cette question, dans l'arrêt du 11 juillet 1996 dans l'affaire de l'*application de la Convention pour la prévention et la sanction du crime de génocide* (Bosnie-Herzégovine c. Serbie-Montenegro): «...les Parties elles-mêmes n'ont formulé aucune réserve à cet effet, ni à la Convention...» [91].

On dégage de cette phrase de la Cour la possibilité d'ajouter des réserves au moment de la notification de succession dans des hypothèses différentes de celle des Etats nouvellement indépendants. Par contre, c'est une conclusion qui est lapidaire et ne nous permet pas de connaître l'argumentation suivie par la Cour pour en arriver là. Toutefois, on peut en suggérer la suivante: si la *tabula rasa* s'est consolidée comme une régle coutumière applicable – en principe – aux hypothèses d'Etats nouvellement indépendants, et si ce régime comprend aussi la possibilité d'ajouter des réserves à celles qui avaient été introduites par l'Etat prédécesseur, il nous reste seulement la posibilité d'application de cette solution au cas de la Bosnie-Herzégovine. Ici, on peut avancer deux solutions: (1) généralisation de la *tabula rasa* à toutes les hypothèses de succession d'Etats; ou (2) la Cour peut avoir compris que les Etats qui sont nés de la rupture violente ou traumatique sont semblables aux cas des Etats nouvellement independants, et en conséquence, le régime appliquable sera celui de la *tabula rasa*. Nous pensons que la Cour peut avoir essayé de développer progressivement le droit par cette dernière alternative.

B. La succession aux traités bilatéraux

La réglementation des traités bilatéraux est prévue par la CV78 dans la troisième section – trois articles – de la troisième partie, qui a trait aux Etats nouvellement indépendants, et aussi à l'article 31.2.c, pour les cas d'unification d'Etats. Mais il n'y a aucune disposition qui régisse la succession aux traités bilatéraux dans les cas de séparation de parties d'un Etat. L'article 24 de la CV78 reprend la pratique internationale dans le domaine de la succession d'Etats aux traités bilatéraux, en consacrant la régle juridique de la continuité automatique de ce type de traités, mais cette règle laisse une certaine place au consentement des deux Etats affectés, parce qu'ils pourront la changer par accord mutuel, exprès ou tacite.

---

[91] *Vid.* dans le paragraphe 34 de l'arrêt.

La CV78 contient une autre disposition régulatrice des effets de la succession d'Etats par rapport aux liens bilatéraux pour les cas de succession des autres Etats différents des Etats nouvellement indépendants, dans l'article 31.2.c, qui a trait seulement aux hypothèses d'unification d'Etats. Il dispose que les traités restent en vigueur à moins «c) que, dans le cas d'un traité bilatéral, l'Etat successeur et l'autre Etat partie n'en conviennent autrement». De cet article, on peut dégager la seule posibilité d'accord exprès, mais on pourra élargir cette possibilité par analogie à celle de l'article 24, aux accords tacites. La conséquence logique de l'absence de règle relative aux traités bilatéraux pour les cas de séparation est que s'impose la règle générale: la succession automatique ou *ipso iure* est élargie aux traités bilatéraux, même si l'identité des parties a un rôle très important dans un traité bilatéral «En général, un traité bilatéral doit réglementer les droits et les obligations des parties dans leurs relations mutuelles. On ne peut pas considérer que les Etats qui ont accepté qu'un traité bilatéral s'applique à un territoire concret soient en position de le maintenir en vigueur par rapport au même territoire quand le territoire est une partie d'un autre souverain»[92], et comme disait Sir Francis VALLAT dans son rapport à l'Assemblée Générale «l'équation personnelle (l'identité de l'autre partie contractante) joue nécessairement un rôle plus grand dans les relations conventionnelles bilatérales; en effet, l'objet même de la plupart des traités bilatéraux est de régir les droits et les obligations mutuels des parties eu égard essentiellement à leurs relations et leurs intérêts particuliers»[93]. C'est une affirmation applicable aux traités bilatéraux en général, et pas seulement aux traités bilatéraux conclus par l'Etat prédécesseur à l'égard du territoire d'un Etat nouvellement indépendant. La conclusion qu'on peut dégager de cette argumentation est celle de la rupture de l'application d'une présomption de continuité aux engagements bilatéraux. La continuité des traités bilatéraux dépendra de l'accord exprès ou tacite des Etats intéressés: le nouvel Etat et l'autre partie. Le consensus apparaît comme le fondement de la succession d'Etats aux traités bilatéraux.

La question semble être, si les traités bilatéraux ont toujours les mêmes caractéristiques -indépendemment de l'origine de la succession d'Etats qui s'est produite-, comment doit-on intérpréter l'absence d'une règle pour les cas de succession d'Etats autres que ceux des Etats nouvellement indépendants? Est-ce que la règle de la *successio ipso iure* conçue pour ces autres cas est aussi applicable aux engagements bilatéraux? Ou, doit-on appliquer d'une façon analogique cette disposition-là de l'article 24 à ces cas? À notre avis, c'est à la dernière alternative qu'on doit répondre par l'affirmative, même si la pratique fait apparaître que si les Etats nouveaux veulent maintenir les engagements conclus par l'Etat prédéceseur, ils notifient leur intention successorale[94].

---

[92] C'est l'opinion du représentant de la RFA au sein de la Conférence des Nations Unies sur la succession d'Etats dans les traités, 40 session, le 2 août 1978. Conferencia de Naciones Unidas sobre la sucesión de Estados en los tratados p. 57. Notre traduction.

[93] *Vid.* dans *Anuario de la Comisión de Derecho Internacional* (1974), vol. II, 1ére. partie, p. 245. Notre traduction.

[94] *Vid.* infra IV.C.1. l'exemple de l'Allemagne en rapport avec le traité conclu par la RDA et la Pologne.

Les co-contractants répondent aux prétentions des nouveaux Etats et, si la réponse est affirmative, le nouvel accord pour le maintien ou pas des accords bilatéraux, même sa renégociation, application provisoire ou suspension, s'instrumentalisent par un échange des notes dont l'application primaire est la notification du nouveau Etat.

Il convient à présent de voir si la pratique est un indice de l'existence d'une règle juridique de droit coutumier général de la continuité des liens bilatéraux ou si simplement cette continuité est un produit de l'accord des volontés étatiques par les intérêts politiques. Mais la pratique nous montre qu'il y a des négotiations bilatérales pour résoudre les relations bilatérales entre l'Etat successeur et les co-contractants dans les traités bilatéraux conclus avec l'Etat prédécesseur[95], cette pratique «semble cependant démontrer que les discussions sont fondées sur l'idée qu'il existe une règle de continuité des traités bilatéraux»[96]. Ce que montre l'absence d'une telle règle coutumière et l'applicabilité de l'article 24 au cas des Etats successeurs qui ne sont pas nouvellement indépendants au sens de l'article 2.1.f de la CV78.

C. L'absence de consentement

Dans les relations successorales nous pouvons poser différentes hypothèses d'opposition à la succession. D'abord, quand un Etat nouveau ne veut pas – pour des raisons politiques – être considéré comme successeur de l'Etat *prédécesseur*. Un autre cas est celui de l'Etat qui s'oppose à ce que ce nouvel Etat-là puisse être considéré comme successeur de l'antérieur.

1. L'opposition du nouvel Etat à succéder

On peut se poser la question de l'opposition à la succession dans deux cas différents: (i) quand un Etat veut être lié par les traités conclus par un autre Etat en son nom, mais non avec le statut de successeur; et, (ii) quand un Etat ne veut être lié par aucun de ces traités.

Dans le premier cas, nous avons la récente pratique des Etats Baltes – *Vid.* II. B – qui on dû adhérer à quelques conventions, mais en aucun cas ne voulaient être considérés comme successeurs de l'ex-URSS. C'est à la fin le consentement à être lié par des traités, mais avec un statut juridique propre, différent et indépendemment du prédécesseur. Dans leurs déclarations d'indépendance, les Etats Baltes se sont présentés comme continuateurs d'eux-mêmes d'avant l'annexion par l'URSS[97]. Mais il y a quelques traités conclus par l'URSS qui devaient être maintenus provisoirement – surtout dans le domaine de la coopération- jusqu' à la conclusion de nouveaux instru-

[95] Ces accords auront des effets rétroactifs à la date de la succession sauf s'il y a un accord contraire des nouvelles parties à ce traité-ci. Cette relation successorale peut conclure avec la modification ou la substitution du traité originaire par un autre adapté aux nouvelles circonstances. *Vid.* en ce sens A.R. B r o t o n s: *Derecho Internacional Público..., op. cit.*, p. 384.

[96] *Vid.* International Law Association. Helsinki Conference (1996) «Rapport préliminaire sur la succession d'Etats en matière de traités», p. 29.

[97] Déclarations de l'Estonie du 16 novembre 1988, de la Lituanie du 26 mai 1989 et de la Lettonie du 28 juillet 1989. Ces déclarations sont suivies par des accords entre toutes les trois nouvelles républiques.

ments. La communauté internationale s'est manifestée avec prudence sur les prétentions baltes avant le coup d'Etat qui s'est produit dans l'URSS le 19 août 1991, donc les Etats tiers ont seulement fait des déclarations sur la *Non-reconnaissance de l'incorporation des Etats Baltes dans l'URSS*. La continuité de l'application a été résolue par la fiction juridique d'une sorte d'application *provisoire*, qui ne l'est pas techniquement au sens de la CV69.

Par rapport à la seconde hypothèse indiquée – nous avons vu que la CV78 prévoit une succession *ipso iure* – la question est si dans le cas d'un Etat qui ne veut pas être successeur à un traité on pourra le considérer lié par des obligations qu'il n'a pas acceptées? Selon la CV69 sur le droit des traités, les normes conventionelles sont *res inter alios acta*, opposables seulement aux Etats qui ont exprimé leur consentement et pas aux autres Etats – les tiers – sauf s'ils l'ont accepté explicitement (art. 35 CV69). Ainsi, peut-on assimiler l'Etat successeur aux Etats tiers qui ne sont pas parties au traité? La réponse est facile pour les *Etats nouvellement indépendants* qui avaient pendant la période où ils étaient les territoires dépendants un statut juridique différent de celui de l'Etat administrateur. Une fois indépendants ils ne sont pas responsables des liens conventionnels conclus par un Etat avec un statut juridique différent, mais quelle est la solution dans les autres cas? La Cour, dans l'affaire relative à *l'application de la Convention pour la prévention et la répression du crime de génocide* pose le problème mais ne le résout pas, seulement indique «Sans préjudice de l'applicabilité ou non du principe de la 'succession automatique' dans le cas de certains types de traités ou conventions internationaux, la Cour ne considère pas nécessaire, pour décider de sa compétence en l'espèce, de se prononcer sur les questions juridiques concernant la succession d'Etats en matière de traités qui ont été soulevées par les Parties»[98].

Evidemment c'est un Etat qui n'a pas exprimé son consentement d'être lié par le traité, mais de cette réponse découlent deux types de dangers: (1) Un Etat pourra se déclarer successeur aux traités d'une façon sélective, seulement par rapport aux traités qui lui donnent des droits et en refusant sa qualité de partie pour les traités sources d'obligations; (2) un Etat pourra nier être successeur aux conventions qui protègent des principes et valeurs fondementaux pour la communauté internationale. Quel sera l'effet de cette négation? La négation de sa qualité de partie dans une convention donnée n'implique pas que les obligations découlant des normes de *ius cogens* ne peuvent pas lui être opposables car ce sont des normes qui n'admettent pas d'accord contraire. Mais cette réponse pose une nouvelle question générale de droit international, celle de l'identification des normes du *ius cogens*. En réalité, *c'est un problème de définition*: quelles sont les conventions qui protègent des valeurs fondamentales, voire quelles sont ces valeurs fondementales?

Pour déterminer les effets de l'opposition à succéder, nous pouvons chercher dans la pratique des exemples de cette seconde situation, que nous offrent de nouveau le cas des Etats Baltes, avec la pratique hollandaise. La Lettonie avait déclaré ne pas vouloir mantenir l'application du traité de double imposition en vigueur entre l'URSS

[98] *Vid.* l'arrêt de 11 juillet 1996, paragraphe 23.

et le Pays-Bas et lui avait notifié son intention d'appliquer ce traité en attendant la conclusion d'un nouvel accord. Dans ces exemples, nous pouvons souligner la fonction de proposition du consentement d'un Etat nouveau qui s'oppose à être considéré successeur et, d'un autre côté, la fonction constitutive – qui est décisive – du consentement des autres Etats – des Etats co-contractants. Cette opinion n'est pas partagée par le Gouvernement Allemand. Dans une déclaration, son Ministre des Affaires Etrangè res se prononçant sur l'extinction d'un traité conclu entre la Pologne et l'ex-République Democratique de l'Allemagne, indiqua «The expiry of an international Treaty due to German reunification does not depend on the consent of the contracting party concerned, which in this case is Poland. Rather, the Treaty expires automatically. According to Art.12 of the Unification Treaty the Federal Republic of Germany has assumed the obligation to enter into consultations with the contracting parties concerned before deciding on the matter. However, the respective decision does neither depend on the consensus to be reached during the consultations nor on a written agreement on the expiry of the Treaty»[99].

L'opinion exprimée par le ministre allemand montre une solution opposée à celle que nous venons de voir pour le Pays-Bas, et même à celle qu'a maintenue la RFA quand elle voulait résoudre ses problèmes successoraux qui a été opposée à sa position quand le phénomè ne successoral a été subi par d'autres Etats.

2. Le consentement tacite ou continuité automatique

De consentement tacite en ce que concerne l'obligation successorale peut être dégage du comportement de l'Etat. La CV78 exclut implicitement cette possibilité pour le cas des Etats nouvellement indépendants sauf pour les traités bilatéraux, mais cette opposition ne se trouve pas – même implicitement – parmi les dispositions applicables aux autres situations prévues dans ce texte. Bien au contraire, la Convention prévoit la notification de succession seulement dans des cas exceptionnels – pour les traités qui ne sont pas en vigueur à la date de la succession; dans toutes les autres hypothèses la réponse – s'il peut y en avoir une – devra être tacite.

La pratique ne peut nous aider à répondre à la question des effets de l'absence du consentement. Nous avons trouvé un seul cas qu'on peut considérer comme une succession tacite et où le comportement de l'Etat a été decisif pour établir la succession au traité, parce que la succession a été admise par un tribunal. Et un autre exemple, plus récent, celui d'une déclaration du gouvernement de la RFA. Le premier exemple est un cas historique, dans lequel la Cour Suprême du Reich Allemand (Reichsgericht) avait jugé – et accepté – la possibilité de la succession sans déclaration successorale au traité de commerce de 1891 et renouvelé en 1905 entre l'Autriche-Hongrie et l'Allemagne. Dans ce traité les deux Parties avaient convenu d'établir leurs postes de

[99] C'est une déclaration formulée le 23 décembre 1991. Le Ministre se référait à l'extinction – avec effets à partir du 3 octobre 1990, ça vaut dire quinze mois avant cette déclaration – du traité conclut le 12 juin 1972 sur la construction ensemble et l'utilisation de filatures de coton dans la Polonie. SOURCE: Pilot Project on documentation concerning State practice relating to State Succession and recognition. RFA. D/95.

douane à la frontière au même endroit, pour un but de simplification des formalités. Les postes ont été maintenus après la fin de la première guerre mondiale, et conséquemment après la disparition de l'Autriche-Hongrie. Dans l'affaire, la personne qui avait été acusée faisait valoir que le traité ne pouvait pas être en vigueur en ce qui concernait la frontière entre la Tchécoslovaquie et l'Allemagne, parce que l'Autriche-Hongrie – une des parties au traité – avait cessé d'exister, et à son avis la conséquence de la dissolution était l'abolition de la situation juridique créée par le traité. Il ne faut pas oublier ici que la Tchécoslovaquie n'était pas successeur de l'Autriche-Hongrie et n'était pas liée par le traité. La Cour Suprême du Reich Allemand *Reichsgericht* «a jugé que, quoiqu'il fût vrai qu' à la suite de la dissolution de l'Autriche-Hongrie l'une des parties au traité avait cessé d'exister et que la Tchécoslovaquie n'avait pas succédé à l'Autriche-Hongrie, rien cependant n'empêchait la Tchécoslovaquie et l'Allemagne de maintenir les rapports conventionnels existants soit par un traité formel, soit par des manifestations tacites de leur volonté. La Cour a statué qu'une telle manifestation de volonté résultait des mesures prises par l'Etat Tchécoslovaque»[100].

Du comportement de la Tchécoslovaquie on pourrait déduire son consentement tacite, «puisque la Tchécoslovaquie avait décidé de ne pas s'opposer à l'activité du poste douanier saxon sur son territoire. Les deux Parties ayant ainsi manifesté leur volonté de ne rien modifier en fait ni en droit, la situation antérieure demeurait inchangée, tant sur le plan du droit international, que sur le plan constitutionnel»[101].

Récemment, le Ministre de l'économie de la République Fédérale d'Allemagne, quant aux traités de double imposition conclus avec l'ancienne URSS et la Yougoslavie, faisait une déclaration dans laquelle il indiquait les critères pour l'application d'une succession tacite aux traités selon le Gouvernement allemand: «The Federal Ministry of Finance further points out that the new independent States of the territory of the former Soviet Union were successor States to the former Soviet Union. As to these States there is a legal presumption that the German Soviet Double Taxation Convention will stay in force as long as none of the parties concerned declares the Treaty to have expired»[102]

En conclusion, la pratique nous permet de parler d'un consentement successoral tacite seulement quand on pourra établir – déduire des comportements de l'Etat – que la volonté de l'Etat était de maintenir le lien conventionnel auquel il a pu formuler sa condition successorale d'une façon formelle.

V. Les effets temporels des déclarations successorales

Il y a différentes questions qui se posent à propos de la date de la succession: en premier lieu, les problèmes dérivés des effets rétroactifs des notifications de succes-

[100] *Vid. ACDI* (1971), vol. II, 2e. partie, p. 180. parag. 118.

[101] *Vid. ACDI* (1963), vol. II, p. 114, parag. 115.

[102] Dans les mêmes termes il se prononce sur le Traité allemand-yougoslave de double imposition. SOURCE: RFA D/78. Déclaration formulée le 3 juillet 1992. *Bundessteuerblatt* (1992-I), p. 114, aussi *RIV* (1992), p. 339–340.

sion (A); en second lieu et par conséquent les questions posées par la suspension de l'application d'un traité dans les situations successorales (B); en troisième lieu, l'application du régime provisoire pendant une période *réfléchissante* (C); et la différence d'effets des *statuts* juridiques que peuvent utiliser les nouveaux Etats: la succession ou adhésion (D).

A. La question de la rétroactivité de la notification de succession

Le problème nous semble être le suivant: la CV78 -art.23- indique que la notification de succession aux traités aura des effets rétroactifs à la date à laquelle la succession s'est produite. La CIJ dans son arrêt du 11 juillet 1996, dans l'*affaire de l'application de la Convention pour la prévention et la répression du crime de génocide* (Bosnie-Hérzegovine c. Yougoslavie) – paragraphe 34 – permet implicitement de modifier cette rétroactivité avec l'introduction d'une réserve *ratione temporis*. En tous cas, la rétroactivité suppose comme règle générale que si un Etat peut être considéré partie rétroactivement à la date à laquelle la succession s'est produite, il sera aussi responsable internationalement – après la notification de succession – de la non observation – qui peut avoir été produite avant sa notification – des règles conventionelles contenues dans un traité auquel était partie l'Etat prédécesseur. Pour résoudre ces problèmes, la CV78 entend appliquer la suspension des traités – art. 72 CV69 – pendant la période temporelle couvrant l'application rétroactive, dès la date où la succession s'est produite jusqu' à la formulation de la notification de la succession.

A la Commission du Droit International les gouvernements polonais, suédois et des Etats-Unis ont proposé de fixer une limite au délai pendant lequel il peut être procédé à une notification de succession. Le gouvernement polonais suggéra une période flexible de sept à dix ans. Par contre, les Etats-Unis proposèrent sa réduction à trois ans[103]. D'ailleurs, USHAKOV suggéra le bénéfice d'introduire une *période raisonnable* au lieu de la fixation d'un temps prévu. Mais cette proposition-ci posait des problèmes du fait de l'indéfinition d'une période raisonnable. Finalement, l'application de la raisonnabilité est également imprécise et, à notre avis, c'est plus avantageux de concrétiser les limites temporelles dans lesquelles on doit formuler la notification de succession. Quant à elle, la Cour internationale de justice dans l'*affaire des activités militaires et paramilitaires au Nicaragua et contre celui-ci*[104] établit la raisonnabilité – dans le cas des déclarations d'acceptation de la juridiction obligatoire de la Cour – à environ six mois. Cette concrétisation temporelle de la raisonnabilité peut sembler adéquate pour réduire au minimum le temps d'insécurité juridique, mais peut être rédite pour l'étude de tous les liens conventionnels multilatéraux qui pourraient être l'objet de l'exercice de ce droit successoral et les conséquences de lesur maintien.

---

[103] P.K. M e n t o n: *The Succession of States in Respect to Treaties, State Property, Archives and Debts* (1991), p. 26.

[104] *Affaire des activités militaires et paramilitaires en Nicaragua et contre celui-ci* (compétence de la Cour et admissibilité de la requête) Nicaragua c. les Etats-Unis.

D'autres réprésentants la Commission du droit international[105] défendirent l'absence de fixation d'une limite parce que, à leur avis, elle rend flexible le processus successoral et peut aider à promouvoir la participation aux traités multilatéraux. A la fin, c'est cette dernière opinion qui a prévalu et la CV78 ne s'applique pas. S'il n'y a pas eu de notification de succession, les conséquences de la suspension des droits et obligations prévus dans le traité, ajoutées à l'effet rétroactif de la notification produisent une période d'incertitude juridique, parce qu'on ne sait pas qui doit remplir les obligations juridiques. Peut-être les tenants de l'opinion qui a prévalu ont raison, mais la science juridique ne doit pas devenir une opération de marketing, de façon qu'on souhaite une participation généralisée aux traités, mais nous ne pouvons pas oublier que le système international doit d'abord protéger la sécurité juridique.

B. La suspension de l'application d'un traité dans les situations successorales

Compte tenu des problèmes qui se posaient par rapport à la rétroactivité des notifications de succession et de l'absence d'une règle pour déterminer le régime juridique des actes produits pendant la période intérimaire suivant la succession jusqu'à sa notification, la Commission du droit international au cours de la vingt-sixième session a essayé d'atténuer ce problème de l'incertitude juridique[106]. Le problème qui avait été posé par quelques membres de la Commission avait trait à l'inégalité de fait entre les Etats nouveaux et les autres parties. Etant donné que l'Etat nouveau peut choisir le moment auquel il notifie la succession au traité, avec des effets rétroactifs, les autres Etats parties passent par une situation d'incertitude juridique, car pendant cette periode, ces Etats ne savent pas s'ils sont ou non tenus d'appliquer le traité à l'égard de l'Etat nouveau. La question est de savoir si cet Etat successeur après sa notification de succession pourra engager la responsabilité internationale des autres Etats parties pour une violation du traité pendant cette période intérimaire. A cet égard, la Commission du droit international a conclu «que la solution la plus satisfaisante serait de considérer que «l'application du traité est suspendue entre la date d'une succession d'Etats et la date à laquelle la notification de la succession est faite»[107], et cette solution a été reprise à l'article 23.2 de la CV78.

Une solution telle que celle qui vient d' être exposée permet de résoudre quelques problèmes mais en pose d'autres[108]. La conclusion qu'on peut dégager de l'article 23.2 de la CV78 est la suspension de l'application d'un traité international, telle qu'elle

---

[105] *Vid.* les opinions d'ELIAS, USHAKOV et BILGE en ce sens dans *International Law Commission* –26. Session, 1269–1270 réunion, 31 mai 1974/4 juin 1974.

[106] *Vid. ACDI* (1974), vol. II, 1ère. partie, p. 243–244.

[107] *Ibid.* p. 244, parag. 11.

[108] La suspension de l'application d'un traité implique de suspendre provisoirement et temporellement l'observance d'un traité – *Vid.* A.R. B r o t o n s: *Derecho Internacional Público..., op. cit.*, p. 509 – n'en suppose pas sa cessation definitive. La suspension peut avoir lieu entre toutes ou quelques parties d'un traité. Et on pourra trouver son fondement parmi les dispositions du traité (art. 57.a CV69), par consentement de tous les Etats parties au traité (art. 57.b CV69), ou par une sorte d'accord implicite: si de l'accord postérieur il ressort que telle était l'intention des parties ou s'il en est par ailleurs établi (art. 59.2).

est prévue à l'art. 72 de la Convention de Vienne de 1969, pendant la periode intérimaire entre la succession et sa notification. La prémisse de cette affirmation est qu'il y aura une notification, mais que se passe-t-il s'il n'y en a pas? Pendant combien de temps peut-on maintenir suspendue l'application de ce traité? Combien de temps est-ce qu'on peut laisser à ce nouvel Etat pour réfléchir? Si nous appliquons la suspension, à quoi sert la rétroactivité de la notification de succession? Enfin, jusqu'à la notification de la succession le traité ne sera pas opposable au nouvel Etat, ni aux autres Etats en relation avec celui-ci, alors on peut se demander que devient l'opposabilité du traité pendant ce temps, voire à quoi sert la succession? Cette règle prétend souligner la fiction de continuité des liens conventionnels dans la succession d'Etats. On peut supposer que l'intérêt de l'Etat nouveau pour la succession sera par exemple de maintenir les droits acquis.

Compte tenu des considérations qui précédent, nous devons souligner un problème ajouté autour de la suspension de l'application des traités, parce que l'application de l'article 72 de la CV69 – les conséquences de la suspension de l'application d'un traité – pose des problèmes conceptuels. D'abord, selon la CV69, les traités peuvent être suspendus, mais quel statut juridique aura pendant ce temps l'Etat qui est en train de décider s'il veut être successeur à ce texte? Nous ne savons pas si l'Etat va être partie ou non. Pourra-t-on parler ici d'une suspension qui peut devenir extinction seulement par l'absence d'une notification successorale? L'opposé de la succession dans les cas où est prévue l'application de la *tabula rasa* sera l'absence de notification, non une notification négative, qui n'est pas prévue dans la convention, bien que la pratique nous montre que quand les Etats ne veulent pas être liés par un engagement international conclu par l'Etat prédécesseur, ils le notifient. En plus, selon l'article 72 de la CV69, la suspension d'un traité a un fondement consensuel (conventionnel – «à moins que le traité n'en dispose...» – ou accordé – «...ou que les parties n'en conviennent autrement...»), mais la suspension telle qu'elle est conçue par la CV78 n'a pas de fondement consensuel, alors, pourra-t-on considérér la succession d'Etats un fondement supplémentaire par rapport aux établis par la CV69? On peut avancer en ce sens l'article 73 de la CV69: «Les dispositions de la présente Convention ne préjugent aucune question qui pourrait se poser à propos d'un traité du fait d'une succession d'Etats...» et on pourra appliquer la suspension des traités aux cas de succession même si toutes les conditions requises ne sont pas remplies, mais ce ne peut pas être une appréciation correcte, car l'absence de fondement consensuel pour la suspension empêche de la considérer techniquement comme telle.

C. L'application provisoire

La CV78 prévoit l'application provisoire[109] pour différents cas dans sa troisième partie, celle qui a trait aux Etat nouvellement indépendants. D'abord, il y a des cas

[109] Sur l'application provisoire il y a une nombreuse bibliographie, dont on peut indiquer comme exemple: S. NERI «Sulla 'applicazione provisoira' dei trattati internazionali non ancora ratificati», en *R. Studi Pol. Int* (1962), p. 588; D. V i g n e s: «Une notion ambiguë: L'application à titre provisoire des traités», *AFDI* (1972),

pour lesquels il faut seulement un consentement réciproque pour appliquer provisoirement un traité multilatéral – qui était en vigueur à la date de la succession ou non encore en vigueur – étant entendu que le nouvel Etat doit «faire part de son intention», mais la réponse des autres parties pourra être expresse ou tacite – arts. 27.1 et 27.3. La même disposition existe pour les traités bilatéraux – art. 28. Il y a une autre catégorie de traités qui ont besoin pour être appliqués provisoirement d'un consentement de tous les Etats parties ou contractants – selon les cas – du traité – art. 27.2 et 27.4. Ce sont les régles de la CV69 traduites et appliquées à la succession d'Etats. La même considération est applicable aux causes d'extinction de l'application provisoire prévues à l'article 29.

Mais dans la CV78 il y a une autre disposition qui prévoit une sorte de notification caracterisée par sa nature provisoire: l'article 9, qui contient les déclarations qui ont pour but d'éviter les conséquences négatives des déclarations prématurées. La CV78 indique seulement qu'une déclaration de succession ne pourra pas par elle-même supposer le transfert des droits et obligations conventionnels de l'Etat prédécesseur. Sa conclusion est claire parce que dans les mêmes déclarations on trouve une offre de continuer à appliquer provisoirement un traité multilatéral sur la base de la réciprocité vis-à-vis de toute partie qui est prête à agir de même. Initialement, cette solution était prévue seulement pour les Etats nouvellement indépendants bien qu'elle soit parmi les dispositions générales. Son but premier c'était la codification d'une pratique habituelle dès 1961 avec la déclaration du Tanganyika[110]. Ces déclarations contenaient une proposition d'application *provisoire* des traités – qui n'est pas une véritable application provisoire au sens de la CV69 – et qui était fondée sur l'accord des parties intéressées – comme l'échange de notes. La Commission du droit international l'a ainsi indiqué «ces déclarations sont des actes unilatéraux dont les effets juridiques pour les autres parties aux traités ne peuvent dépendre de la volonté du seul Etat auteur de la déclaration»[111].

Compte tenu des cas pour lesquels la CV78 prévoit l'application provisoire d'un traité, nous ne pouvons pas affirmer que cette catégorie juridique utilisée par la CV78 soit vraiment une application provisoire au sens de l'article 25 de CV69. L'application provisoire telle qu'elle est techniquement conçue suppose l'application d'un traité avant son entrée en vigueur, soit entre des Etats qui n'ont pas encore la qualité de parties au texte. En outre, le but de cette continuité de l'application prévue dans la CV78 est tout-à-fait différent de celui de l'application provisoire. La CV78 prévoit une application *réfléchissante*, mais dans ce cas-ci le traité s'applique *provisoirement*

---

p. 181; P. P i c o n e: *L'applicazione in via provisoria degli accordi internazionali*, Naples (1973); M.P. A n d r e s S a e n z d e S a n t a m a r i a: «La aplicación provisional de los Tratados internacionales en el Derecho Español», *REDI* (1982), p 31.

[110] C'étaient des déclarations formulées par des Etats qui n'avaient pas conclu des accords de dévolution avec l'Etat colonisateur. R. S z a f a r z «fait observer qu'entre 1961 et 1974, 23 Etats nouvellement indépendants ont formulé des déclarations unilatérales, alors que le dernier accord de dévolution a été conclu en 1965» *Vid.* Conférence des Nations Unies sur la Succession d'Etats en matière de traités, vol. II, p. 94.

[111] (A/CONF.80/4, p. 34) Citation de R. Szafarz dans *Conférence des Nations Unies sur la succession d'Etats en matière de traités*, vol. II, p. 94.

après son entrée en vigueur. Cette application à quels *réfléchissante* a pour but de déterminer à quels liens on veut succéder. La CV78 désigne l'application d'un concept juridiquement déterminé – l'application provisoire – pour une situation spéciale et différente aux présupposés du même terme, mais le régime juridique applicable est celui qui est prévu à l'article 25 de la CV69.

Cette sorte d'application provisoire pose les mêmes questions que l'article 25 de la CV69, des problèmes dégagés du régime juridique provisoire: par exemple quels sont les effets produits pendant l'application provisoire des traités qui ne se maintiennent pas en vigueur? Ce ne sont pas des questions spécifiques à la succession d'Etats mais, au contraire, des problèmes plus généraux.

D. Succession *versus* adhésion. Identités et différences

Comme nous l'avons déjà vu, les Etats nouveaux qui sont apparus récemment à l'Est de l'Europe – sauf les Baltes – ont maintenu les liens juridiques établis par leur prédéceseur et pour plupartla des occassions l'ont fait en qualité de successeurs et non par le mécanisme de l'adhésion[112]. Selon la CV78, il ne sera pas possible d'adhérer aux conventions internationales conclues par l'Etat prédécesseur dans les cas différents des Etats nouvellement indépendants, où la succession est réglée par la *successio ipso iure*, parce que les successeurs sont juridiquement obligés à succéder. Aux cas des faits successoraux qui se sont produits récemment en Europe de l'Est ne sont pas d'application les règles de la troisième partie de la CV78, parce qu'ils ne sont pas des Etats nouvellement indépendants au sens de ce texte, bien qu'ils se soient comportés comme s'ils l'étaient.

Alors pourquoi les Etats préfèrent-ils succéder au lieu d'adhérer à une convention quand cela est possible? D'abord, on doit signaler qu'il y a quelques traités fermés auxquels on ne peut pas adhérer; pour en être partie, on devra les renégocier afin de permettre l'adhésion. Mais la succession semble possible, parce que ce n'est pas un autre Etat en plus qui vient adhérer, mais un Etat qui vient occuper la place d'un autre. La succession suppose la continuité du lien conventionnel, son essence est le maintien du lien juridique établi par l'Etat prédécesseur. Par contre, l'adhésion se traduit par l'acquisition de la condition de partie seulement après avoir rempli les exigences du traité pour cela – quand elle est possible. Elle suppose un engagement nouveau: de cette façon le nouvel Etat partie a seulement les droits et les obligations qui découlent du traité à partir de la date de l'adhésion. C'est une novation. Au contraire, dans la succession sa participation est rétroactive jusqu'au moment où l'Etat prédécesseur aura la condition de Partie à la convention laquelle il a notifiée.

Si la succession a des avantages sur l'adhésion, à vrai dire, l'adhésion a aussi des bénefices par rapport à la succession. D'abord, la possibilité de formuler des réserves

[112] Il y a quelques exceptions à cette affirmation, comme l'adhésion de la Slovénie à la Convention du 25 octobre 1990 sur les aspects civils de l'enlèvement international d'enfants. Aussi, la pratique de quelques nouvelles républiques de l'ex-URSS comme la Moldavie, Ouzbékistan ou Turkménistan qui ont établi leur statut juridique international *ex-novo*, en utilisant comme instrument l'adhésion.

à caractère général est assez claire sauf dans les cas de l'article 19 de CV69 – réserves interdites par le traité exprssément ou tacitement, et celles qui sont contraires à l'objet et au but du traité – qui affecte de la même façon les notifications de succession, dans le sens que si un Etat prétend ajouter une réserve au traité, il devra aussi respecter les limites imposées par l'article 19 de la CV69. Il est vrai qu'on trouve un renvoi à l'article 20 CV78 sur l'application du régime de réserves aux articles 20–23 de la CV69, mais les limites de l'article 19 CV69 sont d'application parce que ce sont des interdictions prévues dans les mêmes traités auxquels on déclare la succession. Par contre, cette possibilité n'est pas prévue dans les cas de succession d'Etats qui ne sont pas nouvellement indépendants, et il n'y a pas assez de pratique sur ce point pour pouvoir résoudre cette question.

D'ailleurs, on doit signaler que les Etats successeurs ne peuvent pas participer en tant que successeurs à tous les traités conclus par les Etats prédécesseurs. Il y a quelques traités – comme ceux localisés – auxquels on ne peut être partie sans remplir certaines conditions. C'est le cas de la participation à la Convention de navigation du Danube de 1948, à laquelle la Fédération Russe et la République Tchèque veulent participer. La Russie prétend même continuer dans la Commission, bien qu'elle ne soit pas riveraine du Danube, condition *sine qua non* pour être partie. Mais dans ce cas-là, ils ne pourront pas être parties au titre d'adhésion, parce qu'ils ne remplissent pas les conditions préalables pour acquérir le statut juridique de partie.

VI. Conclusions

Peut-on déduire de la pratique l'existence d'une obligation successorale, une succession *ipso iure*, automatique ou non? Si elle n'existe pas, nous serions devant un droit successoral. Ce n'est pas une question nouvelle, parce qu'elle apparaît déjà dans le premier rapport de Sir Humphrey WALDOCK sur la succession d'Etats et de gouvernements aux traités. La réponse n'a pas changé: la pratique n'est pas uniforme et on ne peut pas en dégager l'existence d'une obligation de succéder, bien qu'il y ait une tendance soulignée pour la continuité des obligations conventionnelles acquises par l'Etat prédecesseur[113], parce qu'il y a eu plusieurs nouveaux Etats qui ont maintenu en vigueur les traités multilatéraux dont l'Etat prédécesseur était partie, en tant que successeurs. Par contre, il y a eu d'autres cas comme ceux de quelques nouvelles républiques ex-soviétiques, par exemple l'Arménie, qui ont préféré adhérer au lieu de succéder, ou celui de la Slovénie qui a préféré à maintenir quelques liens conventionnels comme successeur et dadhérer aux autres conventions. Nous ne pouvons pas y voir la confirmation de la règle de la *successio ipso iure*, parce que dans tous les cas, les Etats ont notifié leur condition successorale sauf, évidemment, la RFY qui s'était proclamée continuatrice de la RFSY et a agi en accord avec sa proclamation. Malgré l'affirmation de continuité générale, il y a eu quelques exceptions traduites

[113] *Vid.* Troisième rapport de Sir H. Waldock [dans:] Doc. A/CN.4/224, *ACDI* (1970), vol. II, p. 34 et ss.

par une cessation de l'application de traités qui n'étaient pas politiques, comme résultat du fait successoral, par exemple dans le cas de l'Allemagne.

La CV78 établit un régime général applicable à toutes les hypothèses autres que celles des Etats nouvellement indépendants. Le régime général sera la *successio ipso iure*. Comme l'a dit récemment le gouvernement de la Suéde dans une déclaration du 26 février 1992: «C'est important pour la stabilité dans la région que l'Etat successeur remplisse les traités en vigueur à partir de la date à laquelle la succession s'est produite». Malgré l'utilité de la *succesio ipso iure* et bien que la CV78 soit en vigueur dès le 6 novembre 1996, à l'heure actuelle la succession d'Etats est donc réglée par des normes coutumières, dont la CV78 ne peut être qu'un indice, car elle engage seulement les quinze Etats qui en sont parties. Nous devons alors nous demander si on peut déduire de la pratique l'existence d'une norme coutumière qui consacre l'obligation de succéder pour tous les cas différents des Etats nouvellement indépendants au sens de la CV78. C'est la seule façon pour que cette obligation de succéder ou *successio ipso iure* soit opposable à tous les Etats. Ainsi, nous devons étudier la pratique des Etats pour constater si les Etats choisissent leur condition de successeur, et si ils peuvent s'y opposer, ce qui viendrait confirmer l'existence d'un droit successoral; ou s'ils se conforment à une obligation internationale qui les contraint à l'application de la succession automatique.

Dans les projets successifs de la Commission du droit international il y avait un renvoi au régime des Etats nouvellement indépendants. Dans l'article 34 actuel, il y avait un paragraphe 3 qui a disparu par la suite. Ce paragraphe avait été inclus sur proposition de la France et de la Suisse, qui prétendaient assimiler la succession par séparation avec la succession décolonisatrice, du fait de leur ressemblance objective, en oubliant leurs différences d'origine. Ce renvoi avait comme point de départ que l'Etat né d'une sécession est un Etat dépendant parce que l'Etat prédécesseur continue son existence, et ce cas est applicable à la définition d'Etat nouvellement indépendant. Cette proposition reçut une réponse défavorable, parce qu'elle profitait aux Etats qui avaient à l'origine une procédure de séparation[114].

S'il y a une obligation successorale pour tous les cas autres que celui des Etats nouvellement indépendants, la succession est automatique et une notification ne sera pas nécessaire. La notification de la succession a un sens volontariste, sa fonction est celle de communiquer le consentement de l'Etat nouveau à devenir successeur. La CV78 cohérente avec le régime de la *successio ipso iure* établie n'a aucune prévision sur les notifications pour ces cas dans la quatrième partie[115]. La succession automatique et la notification de la succession sont des termes incompatibles. S'il y a une succession automatique la notification perd sa raison d'être qui est – selon l'article

[114] *Vid.* Conférence des Nations Unies sur la succession d'Etats en matière de traités. Documents officiels, vol. III, p. 171, paragraphes 89 et 91.

[115] Les aspects sur lesquels ces Etats non nouvellement indépendants peuvent formuler leur consentement sont réduits aux traités qui ne sont pas en vigueur à la date de la succession et ceux signalés par l'Etat prédécesseur sous réserve de ratification, d'acceptation ou d'approbation, en cas de séparation de parties d'un Etat (arts. 36–37).

2.1.g) de la CV78 – d'exprimer «le consentement de cet Etat à être considéré comme étant lié par le traité». S'il y a une succession *ipso iure*, une obligation de succession, le consentement n'intervient pas, on doit seulement exécuter cette obligation. Comme le disait le juge *ad hoc* nommé par la R.F. Yougoslavie dans l'affaire de l'*application de la Convention pour la prévention et la répression du crime de génocide* «'Notification of succession' has a rational and legal justification only in cases in which the transfer of treaty rights and obligations or the modalities of that transfer depend on the will of the successor since, ex definitione, it represents 'any notification, however phrased or named, made by a successor State expréssing its consent to be considered as bound by the treaty'.[116] In other words, it is applied in cases when the successor State is not bound, by norms of objective international law, to continue to apply the treaties of its prédecessor to its territory after the succession of States but is entitled, according to the relevant norm, to consider itself as a party to the treaties in its own name»[117]

Cette opinion du juge KRECA nous permet d'affirmer que la pratique la plus récente nie l'existence de la dualité de régimes de la CV78, parce qu'elle montre que tous les Etats nouveaux qui viennent de naître et qui ne sont pas *Etats nouvellement indépendants*, au sens de la CV78[118], ont formulé leurs consentements en se déclarant successeurs, et non pas seulement dans un but déclaratif ou informatif mais avec une intention constitutive de succession. D'autre part, si l'Etat peut choisir parmi les trois alternatives: se déclarer successeur – par une notification ou une déclaration, s'opposer à la succession ou ne rien dire – silence qui pourra s'interpréter comme un consentement tacite – c'est bien qu'il n'existe pas une obligation successorale. La possibilité de choisir confirmerait que ce qui a une importance décisive dans la relation successorale, c'est la décision de l'Etat affecté par la succession et consequémment son consentement. La pratique la plus récente vient confirmer cette affirmation, mais il y existe des domaines réservés dans lesquels il y a une obligation de devenir successeur: les régimes de fontière et les autres régimes territoriaux (arts. 11 et 12 de la CV78) qui ne sont pas expressément prévus à la CV78 mais imposés par le droit international général: les conventions internationales qui dégagent des principes ou valeurs fondamentaux pour la communauté internationale. Dans ces deux cas, on n'a pas besoin d'une notification successorale, parce qu'il y existe une succession *ipso iure*.

A propos de la CV78, nous pouvons maintenant nous demander si la succession est une autre forme d'expression du consentement des Etats à être liés par un traité, différente de celles de l'article 11 de la CV69. De la pratique se dégage une réponse affirmative. L'absence d'une mention de la succession d'Etats dans l'article 11 de la

[116] Article 2 (g) of the Convention on Succession of States in respect of Treaties.

[117] *Vid.* dans le paragraphe 115 de l'opinion dissidente du juge *ad hoc* KRECA.

[118] Une autre question sera si les nouveaux Etats de l'Europe de l'Est peuvent être qualifiés comme *Etats nouvellement indépendants*. Si nous étudions la définition de l'article 2.1.f, nous pourrons répondre par l'affirmative, mais avant d'avancer une solution on devra analyser si ce terme a un contenu juridique détérminé ou non. S'il en a un, alors nous ne pourrons pas les qualifier ainsi, mais, si *Etats nouvellement indépendants* n'ont pas un contenu juridique détérminé, nous pourrions appliquer appropriément la seconde partie de la Convention.

CV69 peut être compensée par l'article 73 du même texte, qui prévoit que «Les dispositions de la présente Convention ne préjugent d'aucune question qui pourrait se poser à propos d'un traité du fait d'une succession d'Etats...», et la question suivante sera si cette expression du consentement de l'Etat par rapport aux traités pourra s'exprimer, bien qu'un traité ne prévoit pas la succession à ses effets? La pratique nous offre une réponse affirmative, par exemple même la CV78 prévoit seulement la signature suivie de ratification et adhésion (arts. 46, 47 et 48), mais la Bosnie-Herzégovine et la Croatie ont déposé une notification de succession et on a accepté leur condition de contractantes de la CV78. On pourra alors répondre à la question en disant que même si expréssement la déclaration de succession n'est pas prévue parmi les formes d'expression du consentement à s'engager par un traité, par le jeu de l'article 73 de CV69, implicitement la déclaration de succession sera toujours admise. Cette règle connaît des exceptions, ainsi la déclaration de succession n'aura pas d'effets automatiques dans le cas des traités restreints, ou si de l'objet et du but du traité il doit s'entendre que la participation d'un Etat nouveau doit être accueillie avec le consentement de tous les autres Etats parties. Dans ces derniers cas, on pourra acquérir la condition de partie après avoir reçu le consentement requis.

Dernièrement, est-ce que les notifications de succession doivent être prises en compte pour l'entrée en vigueur du traité? La pratique y apporte une réponse affirmative, avec l'exemple de la CV78, qui est en vigueur pour le depôt des quinze instruments parmi lesquels se trouvent quelques-uns de succession[119]. Même quand l'Etat prédécesseur n'avait pas acquis la condition de partie contractante, c'est le cas de la Slovaquie qui a succédé à la signature par la Tchécoslovaquie. Après, la Slovaquie a ratifié la CV78 et perfectionné sa condition de partie.

[119] Comme ceux de la Bosnie-Herzégovine, la Croatie, la République Tchèque, la Slovénie ou Macédoine.

23 POLISH YEARBOOK
OF INTERNATIONAL LAW
1997–1998
PL ISSN 0554–498X

Le règlement de différends dans la succession d'Etats

NATHALIE MORENO

Introduction

«What you cannot enforce, do not command»
Antigone, Sophocles

Faisant échos aux démantèlements des empires du siècle dernier, l'apparition et la disparition des souverainetés étatiques résultant du phénomène historique de succession d'Etats subordonnent la paix et la stabilité internationale à la réaffirmation du principe du règlement pacifique des différends[1]. La substitution d'un Etat à un autre dans la responsabilité des relations internationales d'un territoire est le fruit de processus démocratiques ou révolutionnaires.

En toute hypothèse, le potentiel de conflictualité inhérent à toute situation successorale mérite une étude approfondie de la question du règlement des différends en matière de succession d'Etats. En effet, nombreux sont les instruments conventionnels à vocation universelle ou régionale établissant des systèmes de règlement des différends mais rares sont ceux qui s'appliquent en particulier aux situations engendrées par la succession des Etats. En effet, un dispositif propre à la succession d'Etats n'a de sens que dans la mesure où les Etats se considèrent liés par un corps de règles communément reconnues applicables à de telles situations. Ainsi, se pose indirectement le problème de l'existence ou au contraire de l'absence du droit de la succession d'Etats[2].

I. L'insaisissable droit de la succession d'Etats

Définie en règle générale par référence aux deux conventions de Vienne sur la succession d'Etats de 1978[3] et 1983[4] en matière respectivement de traités d'une part et de biens, archives et dettes d'Etat d'autre part, la succession d'Etats s'entend de la

[1] D. Bardonnet: *Introduction au colloque sur le Règlement des différends internationaux en Europe: Perspectives d'avenir* (1990), p. 9.

[2] H. Ruiz-Fabri: *Rapport introductif du Colloque sur la Succession d'Etats en Europe de l'Est et avenir de la sécurité en Europe*, Cedin–Paris XIII

[3] UN-DOC. A/CONF. 80/31 du 22 août 1978.

[4] UN-DOC. A/CONF. 117/14 du 7 avril 1983.

substitution d'un Etat à un autre dans la responsabilité des relations internationales d'un territoire[5].

Or, en dépit des transformations radicales que les situations successorales introduisent dans la configuration des relations internationales, le droit de la succession d'Etats demeure un droit virtuel, une «zone grise» du droit international. Dans une société internationale marquée par le double sceau du volontarisme et de l'égalitarisme, les Etats se heurtent à l'émergence de nouveaux droits, droit à l'autodétermination des peuples[6], droit des minorités[7], droit à un Etat démocratique, qui, au nom de la légitimité étatique remettent en cause la conception classique de la souveraineté[8]. Par l'étroitesse de leurs rapports, le développement du droit de la succession d'Etats requiert la consolidation de l'opinio juris et de la pratique autour de ces nouveaux principes.

Dès lors, force est de constater la faiblesse substantielle du droit applicable à la succession d'Etats à l'aune des quelques règles reconnues de droit international coutumier et des deux conventions de Vienne considérées désormais généralement comme l'expression du développement progressif du droit international[9]. En l'Etat, nul chapitre du droit international ne peut prétendre à autant de controverses[10]. .

Caractérisé par une pratique étatique inconstante et contradictoire, rebelle aux tentatives structurantes de la doctrine et de la codification, le droit de la succession d'Etats relève davantage de la *lex ferenda* que de la *lex lata*.[11]

II. La notion de différend en matière de succession d'Etats

Dans une première analyse, il est possible de confondre la question du règlement des différends en matière de succession d'Etats avec la question du règlement proprement dit des situations dites successorales. Or, si la nature des situations créées par le phénomène successoral n'est pas conflictuelle[12] per se, elles peuvent engendrer une pluralité de différends dans les rapports entre l'Etat prédécesseur et l'Etat successeur mais aussi dans les rapports de ces derniers avec les tiers.

---

[5] Une définition identique de la succession d'Etats est donnée dans la sentence arbitrale rendue le 31/5/1989 sur la détermination de la frontière maritime entre la Guinée-Bissau et le Sénégal.

[6] M.-H. S i n k o n d o: «Principe de souveraineté, droit des peuples et sécurité en droit international contemporain (libres réflexions sur des normes non-flexibles)» (1990), p. 7–27.

[7] Cf. le Rapport de la réunion d'experts de la C.S.C.E., sur les minorités nationales, *R.U.D.H.* (1991) et les Décisions d'Helsinki du 10 juilet 1992, *R.U.D.H.* (1992), p. 255–275.

[8] S. S u r: «Sur quelques tribulations de l'Etat dans la société internationale», 97 *RGDIP* (1993).

[9] Cependant, La convention de 1978 est susceptible d'entrer en vigueur si elle recueille la ratification d'un Etat supplémentaire sur les 15 requises, la Slovaquie ayant été le dernier Etat à ratifier la convention le 24 avril 1994.

[10] D.P. O'C o n n e l l: «Recent Problems of State Succession in Relation to New States» 130 *RCADI* (1970), p. 95.

[11] J.F. W e i s s: «Succession of States in Respect of Treaties Concluded by the European Communities», *Sociaal-Economische Wetbeving Tijdchrift voor Europees en economisch recht* (1994).

[12] G. H é r a u d: «Minorités et conflits ethniques en Europe», [dans:] *Le Réglement Pacifique des différends internationaux en Europe* (1990), p. 53.

A cet égard, si le droit international public et le droit international privé possèdent une conception similaire de la succession d'Etats et s'accordent pour admettre que seuls les Etats peuvent être parties à un différend, ils divergent fondamentalement sur la signification même de la notion d'Etat.

Au regard du droit international privé, l'Etat s'entend de tout groupement dont émane un ordre juridique effectivement applicable sur un espace géographique, doté ou non de la personnalité juridique internationale[13]. Ainsi, au regard du droit international privé, une règle de conflit des lois désigne l'ordre juridique applicable à un rapport de droit privé présentant un élément d'extranéité, en fonction de son application effective sur un territoire donné. Cet ordre juridique peut éventuellement émaner d'un mouvement d'insurrection ou de libération nationale.

Par conséquent, la qualité des entités susceptibles d'être parties à un différend reçoit une acception plus large en droit international privé[14].

La complexité des formes et des matières successorales permet difficilement d'effectuer une typologie des différends sauf à reprendre la distinction introduite par les conventions de Vienne: les différends liés à la modification de l'ordre juridique interne tels que les droits des particuliers, les biens, les dettes, les archives et les différends liés à la modification dans l'ordre juridique international à savoir la participation aux traités et aux organisations internationales.

Au sens de la Cour de La Haye, «Un différend est un désaccord sur un point de droit ou de fait, une contradiction, une opposition de thèses juridiques ou d'interêts entre deux personnes... Un différend est juridique lorsque les parties se contestent réciproquement un droit»[15].

L'identification des différends en matière de succession d'Etats met en lumière la dualité de la notion de succession d'Etats[16]. En droit international, l'expression désigne d'une part la substitution d'un sujet de droit à un autre et d'autre part, la transmission effective des droits et obligations entre l'Etat prédécesseur et l'Etat successeur. Par hypothèse, les différends porteront non seulement sur la qualification des Etats parties à l'opération matérielle de succession d'Etats mais aussi sur l'opération juridique de transfert des droits et obligations.

En effet, les récents cas de succession d'Etats ont fait apparaître une nouvelle distinction entre la qualité d'Etat continuateur et la qualité d'Etat successeur auxquelles s'attachent *a priori* des effets juridiques distincts[17]. La qualification de l'Etat intervient au cours du règlement des situations successorales et c'est dans ce contexte que vont surgir indirectement de façon sous-jacente des différends portant sur la qualité de l'Etat en cause.

---

[13] U. Fastenracht, Th. Schweisfurth, C.T. Ebenroth: *Das Recht der Staatensukzession* (1996), p. 35, 340.

[14] C.T. Ebenroth, G. Reiner, R. Boizel: «Succession d'Etats et droit international privé», 123 *JDI* (1996), p. 22.

[15] *CPJI* (1924), *Affaire des Concessions Mavrommatis en Palestine*, Serie A, n° 2.

[16] J. Basdevant: *Définition du Dictionnaire de la terminologie du droit international.*

[17] J. Crawford: *The Creation of States in International Law* (1979), p. 400.

Par le jeu des reconnaissances d'Etats[18], les Etats tiers ainsi que les organisations internationales vont pouvoir participer non seulement à la qualification des situations mais aussi intervenir directement dans la résolution du différend[19].

A première vue, cette double perspective apporte une illustration convaincante de la distinction entre différend politique et différend juridique. Cependant, «les notions de politique et juridique ne forment nullement un couple antithétique»[20]. La nature hybride des problèmes soulevés par la succession d'Etats exclue le cloisement conceptuel de cette classification. Les thèses juridiques qu'opposent les Etats lorsque survient un différend reposent autant sur des considérations de politique juridique extérieure des Etats que sur des fondements juridiques objectifs[21].

III. Le règlement négocié des diffèrends en matière de succession d'Etats

Soumis au principe du règlement pacifique des différends articulé par les articles 2.3 et 33.1 de la Charte des Nations-Unies, les Etats disposent d'une taxonomie de moycns diplomatiques et juridictionnels pour trancher leurs désaccords en matière de succession d'Etats.

L'obligation de règlement pacifique des différends, avatar du principe de non-recours à la force est assortie du principe de libre choix des moyens. Le consentement des parties représente la pierre angulaire sur laquelle repose tout recours à un procédé de solution des différends[22]. Le principe du consentement est enoncé clairement par la Cour permanente internationale de justice dans son avis sur la Carélie Orientale.

«Il est bien établi en droit international qu'aucun Etat ne saurait être obligé de soumettre ses différends avec les autres Etats soit à la médiation, soit à l'arbitrage, soit enfin à n'importe quel procédé de solution pacifique sans son consentement»[23].

Les instruments et mécanismes exclusivement consacrés au règlement des différends relatifs à la succession d'Etats sont inexistants, inoperationnels ou encore à inventer. Les deux conventions de codification en la matière non encore entrées en vigueur font état de dispositions identiques[24] sur le règlement des différends relatifs à l'interprétation et à l'application des conventions[25], et distinctes des dispositions de la convention de Vienne sur le droit des traités de 1969[26].

---

[18] J. Charpentier: «Les délarations des douze sur la reconnaissance des nouveaux Etats», 38 *AFDI* (1992), p. 350.

[19] R. Müllerson: «Law and Politics in Succession of States: International Law on Succession of States, in Dissolution, Continuation et Succession en Europe de l'Est» (1994), p. 25.

[20] H. Morgenthau: *La notion du politique dans la théorie des différends internationaux* (1933), p. 26.

[21] G. de Lacharrère: *La politique juridique extérieure*, Paris, Economica (1983).

[22] J.G. Merrils: *International Dispute Settlement* (1984).

[23] *CPJI, Arrêt sur le statut de la Carélie Orientale* (1923), Serie B, nº 5, p. 25.

[24] Partie VI de la Convention de 1978 et partie V de la convention de 1983.

[25] R. Lavalle: «Dispute Settlement under the Vienna Convention on Succession of States in Respect of Treaties», 73 *AJIL* (1979).

[26] En particulier, les dispositions concernant la consultation à la demande des parties (art. 41, Conv. 1978 et article 42, Conv. 1983).

Or, dans des matières qui touchent aux droits primordiaux, aux intérêts vitaux des Etats[27], les modes de règlement diplomatique emportent l'adhésion des Etats souverains peu désireux de se soumettre à l'autorité d'une juridiction.

Cette imprécision du droit applicable combinée au libre-choix des moyens de règlement confèrent tout naturellement la primauté à la volonté des Etats dans le règlement des différends en matière de succession d'Etats. Le droit de la succession d'Etats ayant un caractère supplétif, il ne s'appliquera qu'à défaut de l'accord des parties. L'impossiblité de parvenir à un accord ou l'importance des enjeux permettront également aux tiers d'intervenir dans la processus du règlement du différend[28]. Ainsi, si l'accord des parties constitue le principe gouvernant le règlement des différends en matière de succession d'Etats (Chapitre Ier), il n'exclue pas l'intervention volontaire ou sollicitée d'un tiers (Chapitre II).

Chapitre 1er
L'accord des parties dans le règlement des différends en matière de succession d'Etats

La substance du droit de la succession d'Etats réside dans la rencontre de la volonté des parties aboutissant à un accord implicite ou formel. Dès lors, la nature supplétive de ce droit induit les problèmes relatifs à son application et à sa sanction. Cette règle cardinale de l'accord des parties (Section 1), expression du consensualisme connaît cependant quelques limitations (Section 2).

Section 1.
La consécration du principe de l'accord des parties

Dans l'affaire des *zones franches de Haute-Savoie et du pays de Gex*, la CPJI établit une hiérarchie entre les models directs et les modes indirects de règlement des différends internationaux[29]. «Le règlement judiciaire ou arbitral des différends n'est qu'un succédané au règlement amiable et direct des parties au conflit». Ainsi, la méthode prioritaire applicable aux litiges successoraux demeure le règlement inter partes des différends dont nous étudierons le fondement (I) et la fonction (II).

I. Le fondement du règlement *inter partes* des différends

Si le droit de la succession d'Etats offre *prima facie* un ensemble de règles applicables aux situations successorales, c'est sur la base du consentement des parties (A) établi lors des négotiations et dont on examinera la portée de l'obligation (B) que se règlent en pratique la plupart des litiges.

---

[27] R. H i g g i n s: «Policy Considerations and International Judicial Process», *ICLQ* (1968).

[28] L. C a f l i s h: «Vers des mécanismes pan-européens de règlémnt pacifique des différends», 96 *RGDIP* (1993), p. 9.

[29] *CPJI* (1932), Serie AB, n° 46.

A. Le fondement subjectif: le consentement

L'existence d'un différend en matière de succession d'Etats se manifeste par l'expression de volontés opposées entre l'Etat prédécesseur et l'Etat successeur. Son existence ne peut être indiscutablement établie que lorsque les parties après un délai raisonnable n'ont pu parvenir à un accord et lorsque les négotiations sur le règlement général ont abouti à une impasse.

Le champ temporel du différend est donc difficile à délimiter tant il peut être simultané ou consécutif au processus du règlement global de la succession. Constatant la cristallisation d'un différend, les parties ont alors la possibilité de faire appel à un ensemble de règles de droit international coutumier ou aux conventions codificatrices de Vienne.

Le droit de la succession d'Etat ayant un caractère supplétif, l'accord des parties prévaut sur toute autre méthode de règlement de contentieux. En effet, l'accord est fondé sur le consentement des parties à engager le processus de négociation, à le poursuivre de bonne foi et à en respecter le résultat[30]. Le choix d'un procedé particulier de règlement pacifique des différends est volontaire. En outre, aucun règlement ne saurait s'imposer à un Etat si celui-ci n'y consent pas lui-même souverainement. Le consentement étatique exprimé après la survenance d'un litige est limité à la solution de ce litige particulier. Le principe de la liberté contractuelle des Etats est ainsi entièrement respecté. Le consensualisme régit également les méthodes de règlement des différends preconisés par les deux conventions de Vienne. A cet égard, la pratique des accords de dévolution échappe à un contrôle conforme au droit par la voie judiciaire ou arbitrale puisque les recours dépendent de l'accord des parties au litige ou de la concordance des déclarations d'opting in émanant des Etats parties à la Convention[31].

Le premier principe applicable en matière de succession d'Etats est que les Etats successeurs doivent se concerter et régir par voie d'accord toutes les questions relatives à la succession[32]. Telle est la position adoptée par la Commission d'arbitrage pour la Yougoslavie dans son avis n° 14. Ce principe de règlement hautement consensualiste fait primer l'accord des parties sur toutes les règles matérielles applicables à la succession d'Etats compte-tenu de la nature dispositive de ces règles[33].

B. Le fondement objectif: Obligation de négocier?

La nature imprévisible du phénomène de la succession d'Etats est telle que les parties bien souvent n'ont pas pu souscrire d'engagement préalable en vue du règlement des différends. Les parties ont alors la possibilité de recourir à un accord ad hoc,

---

[30] J.I. Charney, G. Danilenko: «Consent and the Creation of International Law» [dans:] *Beyond Confrontation, International Law for the Post-Cold War Era* (1995).

[31] J. Monnier: «La convention de Vienne sur la succession d'Etats en matière de biens, archives et dettes d'Etat», 28 *AFDI* (1984), p. 226.

[32] Avis n° 9 de la Commission d'arbitrage pour la Yougoslavie, 4 juillet 1992.

[33] V.D. Degan: «Continuation et succession en matière de biens d'Etat et d'équipements collectifs» [dans:] *Dissolution, Continuation et Succession en Europe de l'Est* (1994), p. 296.

en présence d'un litige déterminé impliquant par exemple l'intervention d'un tiers. Cependant, la pratique montre que les parties vont généralement s'efforcer de parvenir à un accord en commun pour résoudre leurs différends. L'absence de formalisme des modes diplomatiques de règlement des différends va donc favoriser leur mise en oeuvre immédiate par les parties à la différence des modes juridictionnels.

En matière de contentieux archivistiques, la nature patrimoniale des archives en tant que biens d'Etat procédant de la souveraineté même de l'Etat appelle la mise en oeuvre de l'obligation de négocier[34]. Par ailleurs, le Directeur général de l'UNESCO établit dans un rapport les principes et les directives ayant pour objet de fournir à tous les Etats membres un moyen de référence destiné à faciliter les négotiations. Ce même rapport précise que les problèmes relatifs à la propriété et au transfert d'archives d'Etats étant essentiellement de nature juridique, les négotiations entreprises de bonne foi entre l'Etat prédecesseur et l'Etat successeur doivent ainsi aboutir à la conclusion d'accords bilatéraux ou multilatéraux[35].

La méthode du règlement negocié figure parmi les premiers moyens énoncés par les deux conventions de Vienne. Cependant, on peut s'interroger sur l'affirmation selon laquelle l'obligation pour les parties de négocier en vue de parvenir à un accord sous-tend une obligation de moyen voire même une obligation de résultat[36].

L'obligation de négocier est d'abord une obligation de moyen par laquelle les parties vont pouvoir dans le cadre des négotiations confronter leurs[37] interêts réciproques. En effet, toute négotiation postule la reconnaissance préalable d'un interêt mutuel.

Considérer l'obligation de négocier comme une obligation de résultat soulève non seulement des questions quant à son fondement mais aussi quant à la sanction de son inéxecution.

Le contenu de l'obligation de négocier a été fortement discuté aussi bien par la doctrine que par la jurisprudence. Ainsi, cette analyse tendrait à prouver qu'elle n'a pas seulement une valeur incitative mais qu'elle implique l'obligation juridique de rechercher un accord pour régler le différend. Donner un tel contenu à cette obligation rend seul possible le règlement effectif des différends puisque les parties n'y sont tenues que par leur propre volonté.

Dans l'affaire du *Plateau continental de la Mer du Nord*, la Cour a souligné que l'obligation de négocier n'est pas purement formelle[38]. Au sens du droit international, les Etats sont tenus d'engager des négotiations, «qui aient un sens», c'est-à-dire de négocier «de bonne foi et dans l'intention réelle d'aboutir à un résultat positif».

---

[34] C h. K e c s k e m e t i: «Les contentieux archivistiques. Etude primaire sur les principes et les critères à retenir lors des négotiations», UNESCO, doc. PGI-/WS/1, Paris, 30 juin 1977.

[35] UNESCO, cod. 20 C/102 du 24 août 1978, rapport du Directeur général de l'UNESCO sur les problèmes relatifs aux transferts vers les pays d'origine des documents provenant d'archives constituées sur le territoire d'autres pays.

[36] J. C o m b a c a u: «Obligations de comportement et obligations de résultat: quelques questions et pas de réponse», *Mélanges Reuter* (1981), p. 181–204.

[37] P. R e u t e r: «De l'obligation de négocier», 14 *Communicazioni et Stud* (1975), p. 711–773.

[38] *CIJ Recueil* (1969), p. 47 et suiv.

Cependant, le *pactum de negotiando* n'implique pas l'obligation de parvenir à un accord ou «de s'entendre»[39].

Par ailleurs, la Commission d'arbitrage pour la Yougoslavie mentionne l'obligation de négocier et sa finalité. La Commission repète dans ses avis 9, 12 et 14 la «règle fondamentale» selon laquelle «les parties doivent se concerter et régler par voie d'accord» leurs différends et «s'efforcer d'arriver à un résultat équitable». Cette formulation évoque davantage l'incitation que l'injonction. En cas d'échecs des négotiations, les parties sont seul juge de l'opportunité de recourir à un autre mode de règlement des différends.

La sanction à l'inéxécution de l'obligation de négocier n'a guère de contenu si ce n'est la menace virtuelle d'un règlement judiciaire[40].

Dans son avis n° 12, la Commission d'arbitrage pour la Yougoslavie prévoit le refus de coopérer des Etats successeurs et sanctionne ce comportement. «Si l'une ou plusieurs des parties refuse(nt) de coopérer, elle(s) manquent à cette obligation fondamentale et engage(nt) sa ou leur responsabilité internationale avec toutes les conséquences juridiques qui en découlent, en particulier la possibilité pour les Etats lésés de prendre des contre-mesures n'impliquant pas l'emploi de la force armée, conformément au droit international». La Commission[41] a ainsi voulu dotér les Etats successeurs d'un pouvoir de sanction donnant un contenu matériel à l'obligation de négocier. Cependant, cette portée donnée à l'obligation est encore de lege ferenda.

II. La fonction du règlement *inter partes* des différends

La solution d'un différend émanant de la confrontation des volontés est le fruit du compromis réalisé entre les parties (A) qui peuvent décider d'en assurer l'effectivité (B).

A. La réalisation d'un compromis

Dans le cadre des négociations, les parties vont faire valoir des intérêts antagonistes, en particulier en matière de succession aux droits patrimoniaux et à la dette. Le but des négociations de bonne foi comprend au moins le respect mutuel par toutes les parties de leurs droits et intérêts légitimes[42]. En matière de répartition des biens d'Etats et de la dette, le compromis conduit à rechercher un résultat équitable pour les parties. En effet, seul l'intérêt mutuel rend le compromis acceptable.

La notion d'intérêt mutuel bien compris propre au droit international économique peut raisonnablement être invoquée ici dans la mesure ou elle suggère une certaine idée de réciprocité et d'équité.

---

[39] *CPJI*, Affaire du *Traffic ferroviaire entre la Lithuanie et la Pologne*, avis consultatif, Serie A/B, n° 42, p. 116.

[40] A. S a a f: «L'obligation de négocier en droit international public», Thèse de doctorat, Paris II (1979), p. 389.

[41] Avis n° 12, 16 juillet 1996.

[42] V.D. D e g a n: «Continuation et succession...», *op. cit.*, p. 296.

Les réticences et les obstacles à la réalisation d'un compromis sont bien souvent de deux ordres soient qu'ils portent sur la définition de l'objet du différend soit qu'ils masquent des enjeux de tous ordres.

Notamment, le problème de la définition des catégories de biens d'Etats pouvant faire l'objet d'une répartition s'est posé dans le cadre de la succession d'Etats de l'ancienne Fédération yougoslave. Dans l'objet de la succession, ne peuvent être considérés les biens des républiques, provinces ou communes, et la propriété privée, contrairement aux biens d'Etat appartenant à la Fédération avant la date de la succession d'Etats[43]. Quant à la «propriété sociale», suivant qu'elle relève de la compétence exclusive d'une seule République ou qu'elle ait été gérée dans le cadre de la RSFY ou par deux ou même plusieurs Républiques sans qu'il y ait eu exercice de prérogatives de puissance publique, elle échappe à toute répartition dans le cadre de la succession d'Etats[44].

De même, certains différends en matière de répartitions des biens militaires cachent des enjeux territoriaux et sécuritaires majeurs. Ainsi, le contentieux russo-ukrainien relatif à la flotte de la Mer noire s'explique par la grande valeur symbolique et stratégique que représente la presqu'île de Crimée[45].

B. La garantie de l'effectivité

La garantie de l'effectivité des accords conclus prend bien souvent la forme de mécanismes de contrôle ou de pouvoirs de contrôle destinés au maintien des solutions de compromis dans le temps.

Pour administrer la nouvelle frontière internationale née de la partition de la Tchécoslovaquie, les négociations conduisirent à la conclusion d'un traité de délimitation de la frontière commune[46]. Ce traité prévoyait le maintien de la frontière administrative jusqu'au rapport final de la Commission conjointe tchéco-slovaque de démarcation[47]. Il contenait également des dispositions sur la coopération bilatérale entre les autorités de frontière, en cas de passages illégaux, de catastrophes naturelles et de travaux dangereux proches de la frontière[48]. Cette frontière n'occasionna en réalité que quelques point de contention[49].

---

[43] V.D. D e g a n: «Problèmes de répartition des biens militaires de l'ancienne Fédération yougoslave dans le cadre de la sucession d'Etats» [dans:] *Succession d'Etats en Europe de l'Est et avenir de la sécurité en Europe* (1995), p. 71.

[44] Cf. Avis N° de la Commission d'arbitrage pour la Yougoslavie. L'avis base sa définition des biens d'Etats sur l'article 8 de la Convention de Vienne de 1983.

[45] R. Y a k e m t c h o u k: «L'indépendance de l'Ukraine», *Studia Diplomatica*, IRRI, Bruxelles, vol. XLVI, N° 3, 4, 5, Bruxelles (1993), p. 215, 219.

[46] Traité de délimitation de frontière du 29 octobre 1992.

[47] R. Y o u i n g: «The Break-up of Czecho-Slovaquia», N° 32, Queen's University, Ontario (1994), p. 45. J. M a l e n o v s k y: «Etat: Création, Transformation, Frontières», Attitudes à l'égard du droit international, Problèmes juridiques liés à la partifion de la Tchéchoslovaquie 39 *AFDI* (1993), p. 328.

[48] J. P e h e: «Czechs and Slovaks Define Post-Divorce Relations», 13 novembre 1993, REE, RFE/RL *Research Report*.

[49] Cependant, les contestations furent faibles. Seuls subsistaient quatre secteurs mis en cause en 1994.

En matière de succession nucléaire, l'adoption du traité de non-prolifération nucléaire (TNP) a pu donner naissance à un nouveau différend russo-ukrainien.

L'Ukraine soumit trois conditions à la Russie, désignée par le traité START I comme seul successeur de l'arsenal nucléaire de l'Ex-URSS: des garanties pour sa sécurité nationale, des compensations financières à la perte en uranium enrichi et un droit de regard sur l'emploi futur des armes[50]. Afin de vaincre les réticences ukrainiennes à l'adhésion au traité TNP comme puissance non-nucléaire, un accord trilatéral est conclu entre les Etats-Unis, la Russie et l'Ukraine donnant satisfaction à cette dernière. Outre l'obtention d'un pouvoir de contrôle, l'Ukraine reçoit des trois pays dépositaires du TNP la promesse de garanties de sécurités. Le compromis devient effectif et aboutit à la ratification par l'Ukraine du TNP[51].

L'expression de la volonté souveraine des parties connaît cependant quelques limites posées par le droit international.

Section 2
Les limitations au principe de l'accord des parties

Les mutations territoriales affectent-elle les obligations des Etats dans le domaine des droits de l'homme en vertu d'une règle de succession automatique des engagements conventionnels en la matière ou encore ou en vertu du caractère *erga omnes* de ces obligations? (I) Les réponses apportées conditionnent la liberté des Etats de résoudre leurs différends par voie d'accords aux obligations attachées au respect des droits de l'homme. La légimité universelle des droits de l'homme s'oppose à la légitimité particulariste du droit des minorités. Les logiques qui sous-tendent les droits de l'homme et les droits des minorités apparaissent en première analyse contradictoires. Cette problématique est également pertinente dans un contexte de succession d'Etats lorsqu'il s'agit du respect du droit des minorités, domaine dans lequel le droit international impose de nouvelles obligations (II).

I. La protection des droits de l'homme face à la succession d'Etats

Une certaine partie de la doctrine cherche à promouvoir un statut privilégié aux normes de protection des droits de l'homme afin d'en garantir l'application et l'effectivité. Une théorie nouvelle est née inspirée par la menace constituée par certaines situations successorales pour la paix et le respect des droits fondamentaux assimilant ces derniers à la catégorie des droits acquis (A). Par ailleurs, l'interprétation prétorienne semble attacher une valeur d'obligations erga omnes aux normes relatives aux droits de l'homme (B).

A. Les droits de l'homme, catégorie de droits acquis

Le régime de protection des droits de l'homme connaît un régime particulier en droit international. Sans épiloguer sur le contenu de ces droits que d'aucuns ont ca-

[50] T. Delpech: «La succession nucléaire de l'URSS», *Succession d'Etats en Europe de l'Est, op. cit.*, p. 3.
[51] La ratification intervient dans le cadre du 9e sommet de la CSCE à Budapest le 6 décembre 1994.

tégoriser en terme de générations[52], la question se pose de savoir dans quelle mesure ces droits sont affectés par la succession d'Etats et quelles réponses peuvent être apportées en cas de contentieux.

Une partie importante de la doctrine s'accorde à soutenir le principe de la continuité des obligations liées au respect des droits de l'homme. La nature singulière de ces droits dont la dimension éthique est déterminante et dont les titulaires ne sont autres que les individus eux-même expliquent l'analogie faite par certains auteurs avec la théorie récurrente en droit international des «droits acquis».

Le principe de la protection des droits acquis par rapport aux changements territoriaux fut consacré par la pratique internationale et notamment par la Cour permanente de justice internationale dans son avis consultatif du 10 septembre 1923 au sujet de *certaines questions touchant les colons d'origine allemande dans les territoires cédés par l'Allemagne à la Pologne*[53]. La Cour déclare que «Des droits privés, acquis conformément au droit en vigueur ne deviennent point caducs à la suite d'un changement de souveraineté. (...) La Cour est ici en présence de droits privés découlant de dispositions légales ou conventionnelles expresses, et il suffit, aux fins du présent avis, que même ceux qui contestent l'existence en droit international du principe de la succession d'Etats, ne vont pas jusqu'à maintenir que les droits privés (...) ne peuvent être valablement opposés à celui qui succède à la souveraineté».

L'assimilation des droits de l'homme aux droits privés telle que certains auteurs le préconise, sur la base *prima facie* de leur attachement à la personne humaine bien que légitime dans sa finalité protectrice apparaît juridiquement fort contestable.

En effet, les droits ainsi protégés recouvrent tous les droits de propriété corporelle et incorporelle régulièrement dévolus à une personne physique ou morale et susceptibles d'évaluation pécuniaire à savoir les droits personnels d'origine contractuelle et les droits réels proprements dits[54]. L'ensemble de ces droits patrimoniaux sont des droits subjectifs, des droits individuels attachés à l'individu en tant que tel et non à qualité de personne humaine par opposition au caractère collectif et objectif des droits de l'homme.

Par conséquent, la protection des droits de l'homme a une porté plus générale que la protection des droits acquis par les particuliers lors des mutations territoriales[55].

Le droit international exige des Etats parties à un contentieux lié à la succession d'Etats, un règlement respecteux des droits de l'homme en raison du caractère universel de l'identité de la personne humaine.

B. Les droits de l'homme, obligations *erga omnes*

Si on admet le principe général du règlement des différends par l'accord des parties, ce principe connaît néanmoins des limites dans son application. Par exception au

[52] V.K. V a s a k: *Les dimensions internationales des droits de l'homme* (1978), UNESCO, p. 711.

[53] *Colons allemands en Pologne, CPJI, Recueil des avis consultatifs*, Série B, N° 6, 1923.

[54] Cf. CPJI dans l'Affaire des *intérêts allemands* en Haute Silésie polonaise, arrêt du 25 mai 1926, Série A n° 7 et *Usine de Chorzow*, arrêt du 26 juillet 1927, Série A, n° 9.

[55] Cf. Réponse de M.A. Badawi Pacha et de M. Laundans Session de Bath, «Les changements territoriaux et leurs effets sur les droits des particuliers», *AIDI* (1950), vol. I.

principe général du respect de la réciprocité des obligations étatiques, les parties seraient tenues de respecter un ensemble de règles concernant les droits de la personne humaine, en dehors de tout engagement conventionnel. Cette exception au principe de l'effet relatif des traités s'explique par la rémanence de la doctrine du *jus cogens* ou normes impératives de droit international général au contenu imprécis mais dont on admet communément la qualification pour les droits fondamentaux de la personne humaine.

Composantes normatives de l'ordre public international, elles s'imposent à la Communauté internationale dans son ensemble[56]. Cette affirmation a été confirmée par un dictum de la Cour internationale de justice dans l'affaire de la *Barcelona Traction*: Une différence essentielle doit en particulier être établie entre les obligations des Etats envers la communauté internationale dans son ensemble et celles qui naissent vis-à-vis d'un autre Etat dans le cadre de la protection diplomatique. Par leur nature même, les premières concernent tous les Etats. Vu l'importance des droits en cause, tous les Etats peuvent être considérés, comme ayant un intérêt juridique à ce que ces droits soient protégés, les obligations dont il s'agit sont des obligations erga omnes. (...)

Dans la pratique, la question de la succession aux engagements conventionnels en matière de droits de l'homme s'est posée dans l'affaire opposant la Bosnia-Herzégovina à la Yougoslavie sur l'application de la convention pour la prévention et la répression du crime de génocide. La thèse de la succession automatique défendue par la Bosnia a été soutenue par le juge Weeramantry. Dans son opinion individuelle, il affirme le caractère indérogeable des droits et obligations prévues par la convention dans la mesure où ils sont l'expression fondamentale du droit à la vie[57].

Cette conception se justifie également par la fait qu'une succession d'Etats ne saurait intervenir dans un vide légal, et que le droit doit permettre de «pallier l'hiatus crée par l'expulsion d'une souveraineté et l'expansion d'une autre»[58] *a fortiori* dans la catégorie des droits dits «fondamentaux»[59].

Cet intérêt juridique des Etats à la protection des droits de l'homme évoqué par la Cour gagnerait à être étendu de la même manière à la prévention des conflits de minorités. En effet, cet intérêt juridique est d'autant plus fondé lorsqu'un Etat subit de profondes mutations territoriales qui affectent directement des populations en butte à des tensions ou des conflits ethniques.

II. La protection du droit des minorités face à la succession d'Etats

Les logiques qui sous-tendent les droits de l'homme et les droits des minorités apparaissent en première analyse contradictoires. La légimité universelle des droits

---

[56] V.S. M a r k s: «Les principes et normes de droits de l'homme applicables en période d'exception» [dans:] *Les dimensions internationales des droits de l'homme* (1978), UNESCO.

[57] CIJ, Arrêt sur l'*application de la convention pour la prévention et la répression du crime de génocide*, Bosnie-Herzegovine c. Yougoslavie, 11 juillet 1996.

[58] D.P. O'C o n n e l l: «The Law of State Succession» (1956), p. 272–273.

[59] Cf. Préambule de la Charte des Nations-Unies.

de l'homme s'oppose à la légitimité particulariste du droit des minorités. A la suite des démembrements d'Etats intervenus en Europe surtout, le respect de la protection des minorités est devenu un principe de fond gouvernant le règlement général des différends en matière de succession d'Etats. Non seulement, elle constitue une condition à la reconnaissance d'Etats (A) mais elle a également permis de relancer le débat sur le droit à la nationalité (B).

A. La protection du droit des minorités, condition de reconnaissance

La déclaration de la Communauté Européenne sur «les lignes directrices sur la reconnaissance des nouveaux Etats en Europe orientale et en Union Soviétique» comporte l'obligation de «garantie des droits des groupes ethniques et nationaux et des minorités confomément aux engagements souscrits dans le cadre de la CSCE»[60]. L'intérêt légitime communautaire à la sauvegarde de la stabilité régionale européenne a commandé la création d'une politique de reconnaissance à l'égard des nouveaux Etats introduisant une conditionnalité politique[61]. En incluant le respect du droit des minorités au nombre des conditions, elle contribue d'une part au renforcement des principes et mécanismes préexistants de protection des minorités et lie adroitement le règlement des différends relatifs à la question hautement sensible des minorités à la reconnaissance formelle des Etats.

Maintes initiatives englobant la protection des minorités furent adoptées, notamment dans le cadre de l'Organisation pour la Coopération et la Sécurité en Europe (O.S.C.E.). La diplomatie préventive de l'O.S.C.E. en la matière s'appuie principalement sur le Haut Commissariat aux minorités nationales crées à la suite de Helsinki II en 1994. L'originalité de cette institution est de promouvoir «le dialogue, la confiance et la co opération» entre les parties par la médiation d'une «insider third-party»[62].

Lors de la Conférence de Paris du 20 mars 1995, fut signé le Pacte pour la Stabilité en Europe, initiative visant à prévenir les tensions et conflits potentiels liés à la délimitation des frontières et aux minorités nationales[63]. Initiative française à l'origine, l'administration et la gestion du pacte visant plus particulièrement les Etats de l'Europe Centrale et de l'Est ayant vocation à devenir membre de l'Union Européenne a été confiée à l'OSCE[64].

Par la suite, la portée de cette obligation de protection s'est étendue en devenant également une condition d'admission à la CSCE pour les onze Républiques succédant à l'Union Soviétique[65]. La Commission d'arbitrage pour la Yougoslavie a notablement oeuvré pour le développement progressif du droit international l'égard de la

---

[60] 96 *RGDIP* (1992).

[61] J. Charpentier: *Les déclarations...*, *op. cit.*, p. 350.

[62] D. Chigas, E. McClintock, Ch. Kamp: «Preventive Diplomacy and the Organization for Security and Cooperation in Europe: Creating Incentives for Dialogue and Cooperation» [dans:] *Preventing Conflict in the Post-Communist World* (1996).

[63] *Agence Europe, Documents* no. 1927, 29 mars 1995, p. 1–9.

[64] R. Rummel: «The European Union's Politico-Diplomatic Contribution to the Prevention of Ethno-National Conflict» [dans:] *Preventing Conflict [in:] the Post Communist World* (1996).

[65] J. Charpentier: «Les déclarations des douze...», *op. cit.*, p. 353.

reconnaissance du droit des minorités en proclamant dans ses avis 1 et 2 qu' en vertu de normes, maintenant impératives, du droit international général, il appartient aux Etats d'assurer le respect du droit des minorités. Cette exigence s'impose à toutes les Républiques à l'égard des minorités établies sur leur territorie»[66].

B. La protection du droit des minorités et le droit à la nationalité

Le droit à la nationalité figure à l'article 15 de la Déclaration des droits de l'homme adoptée par l'Assemblée générale des Nations-Unies. Le droit à la nationalité et le droit de conserver son établissement trouvent leur origine dans les obligations des Etats émanant du droit international coutumier[67]. Le droit subjectif des individus impliqués dans un changement territorial d'acquérir la nationalité de l'Etat cessionnaire doit être considéré comme formant le minimum de droits accordés aux individus par le droit international coutumier.

La question de la nationalité est l'un des principaux problèmes touchant les minorités ethniques confrontées à une succession d'Etat. Le problème revêt une telle acuité que le Comité des experts en matière de nationalité du Conseil de l'Europe prépare une convention européenne sur la nationalité contenant les principes de base tels que le droit à la nationalité, l'obligation d'éviter l'apatridie, l'inadmissibilité du retrait arbitraire de la nationalité ainsi que des dispositions spécifiques relatives à l'acquisition et à la perte de la nationalité dans des situations de succession d'Etats. De même, la Commission pour la Démocratie du Conseil de l'Europe prépare également la rédaction d'un ensemble de principe pouvant guider la pratique étatique face aux effets de la succession d'Etats sur la nationalité.

De fait, la Commission du Droit International se penche également sur la question de «La succession d'Etats et son impact sur la nationalité des personnes physiques et morales»[68] devant l'ampleur des différends sur le statut des minorités apparus en particulier lors des derniers démembrements en Europe. La Commission entend avaliser le postulat selon lequel dans les situations résultant d'une succession d'Etats, chaque personne susceptible d'être affectée par le changement du statut international d'un territoire se verrait reconnaître le droit à la nationalité et les Etats en cause auraient l'obligation d'empêcher toute situation d'apatridie et d'accorder ou de révoquer la nationalité sans discrimination[69].

En effet, la convention de New York du 30 août 1961 sur la réduction des cas d'apatridie comporte l'obligation étatique *erga omnes* de ne pas créer de cas d'apatridie mais ne prévoit pas le cas spécifique de la succession d'Etats[70].

L'un des premiers principes opérationnels préconisés par la Commission repose sur l'obligation de négocier afin de résoudre par accord les problèmes de nationalité.

---

[66] Avis no. 1 du 29 novembre 1991 et avis no. 2 du 11 javier 1992.

[67] A. M a k a r o v: «Les changements territoriaux et leurs effets sur les droits des particuliers», *AIDI* (1950), vol. I.

[68] Rés. 50/45 de l'Assemblée Générale, Rapport de la DCI sur la scéance de la 47e session.

[69] A/CN.4/47, 17 avril 1996.

[70] Voir J. P e j i c: «Citizenship and Statelessness in the Former Yugoslavia: The Legal Framework», Conference on Citizenship and Nationality in the New Europe, London, 9–10 June 1995.

La portée de l'obligation selon qu'elle soit une obligation de simple moyen ou de résultat conditionne une fois de plus son efficacité.

Bien que l'existence d'un droit d'option en matière de nationalité soit encore faiblement reconnue, la question mérite d'être traitée dans le contexte de la succession d'Etats. La Commission d'arbitrage pour l'Ex-Yougoslavie n'a pas hésitée, dans son avis no. 2, à déclarer en vertu du droit à l'autodétermination proclamé par les deux Pactes internationaux des droits de l'homme, que «chaque être humain peut revendiquer son appartenance à la communauté ethnique, religieuse ou linguistique de son choix»[71].

In fine, le règlement *inter partes* des différends est largement le résultat d'un processus négocié permettant de réaliser un équilibre des intérêts en présence. Les solutions obtenues ne s'imposent qu'aux parties et restent en principe inopposables aux tiers. Cependant, l'intérêt direct ou indirect d'un tiers à la résolution du contentieux va lui permettre d'être associé au processus de règlement.

Protection des droits de l'homme et protection des droits des minorités participent d'une même stratégie d'édification d'un cadre systémique de démocratie libérale en Europe. Elle est le fruit de l'observation empirique de l'absence de guerre entre Etats démocratiques[72]. L'histoire montre que lorsque les démocraties entrent en conflit les unes avec les autres, elles sont plus enclines à accepter la médiation d'un tiers que les Etats à régime autoritaire[73].

Chapitre II
L'intervention d'un tiers dans le règlement des différends en matière de succession d'Etats

L'intervention d'une tierce partie dans le règlement des différends internationaux est un procédé d'autant plus dynamique dans la société relationnelle des Etats que ses formes se déclinent sur une palette constamment renouvelée. Le nuancier de l'article 33 de la Charte des Nations-Unies semble exclure dans l'hypothèse de son application du chapitre VI, tous les différends qui ne représentant pas une menace pour le maintien de la paix et de la sécurité internationale[74]. Or, cette interprétation restrictive n'a plus cours dans la mesure où le concept de menace demeure encore largement indéfini.

Le monde change et l'art du juriste et a fortiori du tiers-médiateur consiste alors à gérer l'imprévisible, l'instantané, l'inconnu.

Apporter des solutions nouvelles à des situations nouvelles relève de la fonction créatrice du droit. La succession d'Etats a inspiré la mise en oeuvre de mécanismes de médiation et de conciliation inédits et a pu même susciter la création d'institution spécifique d'arbitrage.

---

[71] Avis du 11 javier 1992.

[72] J.S. L e v y: «Domestic Politics and War» [dans:] R.I. R o t b e r g, T.K. R a b b (red.): *The Origin and Prevention of Major Wars* (1989).

[73] W.J. D i x o n: «Democracy and the Management of International Conflict», 37 *Journal of Conflict Resolution* (1993), p. 42–68.

[74] V.D. D e g a n: *L'équité et le droit international* (1970).

L'intervention du tiers remplit non seulement une fonction de résolution des différends mais aussi une fonction de clarification en contribuant à la qualification des situations successorales. La reconnaissance ou la non-reconnaissance de la qualité d'Etat continuateur par Etats tiers ou par l'organisation internationale permet de mieux définir les droits et obligations de l'Etat soumis à un contentieux. La qualification des Etats parties à un différend successoral conditionne le cadre et le régime général du règlement. Guidés par la logique de la raison d'Etat et de leurs intérêts vitaux, les Etats confrontés à la succession d'Etats vont tout naturellement recourir de façon prioritaire aux modes politiques de règlement des différends, discrets et peu contraignants et de façon exceptionnelle aux modes juridictionnels.

Section I
Le règlement concerté des differends

La succession d'Etats implique une modification territoriale qui peut porter atteinte à l'identité de l'Etat. Le droit international ne fournissant pas de critère matériel permettant de trancher les différends relatifs à la qualification des Etats, la volonté des tiers y supplée par le biais de la reconnaissance ou de la non-reconnaissance[75]. Alors que les mécanismes de concertation avec les Etats tiers (I) en vue du règlement des différends se caractérise par une absence de formalisme, la concertation au sein des organisations internationales connaît un degré de complexité accrue (II).

I. La concertation avec les Etats-tiers

Suivant le degré de technicité induit par la nature du différend, médiation (A) et conciliation (B) semblent être les méthodes diplomatiques les mieux adaptées au règlement des différends successoraux[76].

A. La médiation comme mode de règlement successoral

Le recours ou bien souvent l'offre de médiation par des Etats tiers semblent particulièrement adaptés au règlement des différends à forte portée politique[77]. La médiation est une méthode diplomatique séculaire faisant intervenir un tiers jouissant de la confiance des parties. Le rôle du médiateur, personnalité ou Etat, consiste à concilier des positions antagonistes. L'autorité politique du médiateur peut permettre d'étendre sa capacité d'initiative à la soumission de propositions de règlement. La médiation, par son absence de formalisme et de contrainte permet la plus grande créativité et adéquation au règlement des différends politiques en matière de succession d'Etats.

Ainsi, dans le cadre du processus de désarmement américano-russe, les Etats-Unis sont intervenus en tant que médiateur pour résoudre le différend opposant la

---

[75] C.T. Ebenroth, G. Reiner, R. Boizri: «Succession d'Etats...», *op. cit.*, p. 11.

[76] N. Politis: «L'avenir de la médiation», 15 *RGDIP* (1910), p. 136–163. Voir aussi, J. Berkovirch: *Mediation in International Relations* (1994).

[77] M. Kleiboer: «Understanding Success and Failure of International Mediation», 40 *Journal of Conflict Resolution* (1996), p. 360–389.

Russie et l'Ukraine sur les modalités d'exécution des obligations contenues dans le Traité TNP en matière de démantèlement des arsenaux nucléaires[78]. En effet, l'application du traité START I nécessitait la ratification préalable du traité TNP par les Etats successeurs de l'Ex-URSS détenant des armes stratégiques sur leur territoire[79]. Le gouvernement américain soutiendra la position de la Russie comme seul Etat continuateur du traité TNP[80].

La contestation ukrainienne consistera à nier ce statut à la Russie en lui interdisant toute utilisation des armes nucléaires basées sur son territoire et à conditionner son adhésions au traité à l'obtention de compensation.

Dans la cadre des négotiations sur le traité START I à Lisbonne, les Etats-Unis vont parvenir à conclure un protocole d'accord avec la Russie, la Biélorussie, l'Ukraine et le Kazakhstan désignant la Russie comme seul Etat nucléaire continuateur du traité TNP et faisant obligation aux autres d'adhérer au traité TNP en tant qu'Etat non-nucléaire[81].

L'enchevêtrement conventionnel soulignant l'interdépendance des rapports en matière de désarmement a permis aux tiers, les Etats-Unis par accord interposé mais aussi à la Communauté Européenne[82] par le biais de la reconnaissance des Etats de peser dans le processus du règlement du différend. En l'espèce, la dichotomie Etat continuateur/Etat successeur n'est pas réellement pertinente dans la mesure où seule la solution de continuité par la Russie était compatible avec l'objet et le but du traité qui est de limiter aux cinq puissances tutélaires le statut d'Etat nucléaire[83].

La médiation américaine s'éloigne quelque peu de l'hypothèse type d'un arbitre neutre, étranger à l'objet du différend mais trouve bien plus sa cohérence et son efficacité dans l'intérêt direct de l'Etat tiers dans la résolution du conflit.

Dans le cadre de la dévolution des dettes d'Etat de l'Ex-Union Soviétique, la même problématique de l'Etat continuateur et de l'Etat successeur a opposé la Russie aux autres Républiques[84]. Tout au long des négotiations, les pays créanciers sont intervenus directement dans le processus en liant le règlement de la succession à la dette entre Etats successeurs au règlement de la crise des liquidités internationales. Le cadre de concertation choisi a donc pu oscillé entre la C.E.I. et le G7.

Il s'agit bien en l'occurrence d'un cas atypique de médiation résultant du parallélisme de deux négotiations dans lesquelles les pays créanciers du G7 et en particulier les Etats-Unis ont pu influer directement sur les parties au différend en favorisant la position de la Russie comme seul Etat continuateur aux dépens des autres Etats suc-

---

[78] T. Delpech: «La succession nucleaire de l'URSS» [dans:] *Succession d'Etats ..., op. cit.*, p. 3.

[79] J.-J. Roche: «Le Traité START», 31 *AFDI* (1991), p. 315–327.

[80] START Treaty Hearings, Before the Senate Commission on Foreign Relations, 102d Cong, 2nd session, 1992, testimony of Undersecretary of State Reginald Bartholomew.

[81] Article 5 du Protocole de Lisbonne signé le 23 mai 1992. G. Bunn, J.B. Rhinelander: «The Arms Control Obligation of the Former Soviet Union», 33 *VJIL* (1993), p. 335.

[82] J. Charpentier: «Les déclarations des douze...», *op. cit.*, p. 343–356.

[83] O. Schachter: «State Succession: The Once and Future Law», 33 *VJIL* (1993), p.258.

[84] Le contentieux sur la dette a une nouvelle fois opposée la Russie à l'Ukraine qui s'est résolu a signe l'accord sur le transfert de la dette de l'Ukraine à la Russie fin novembre 1992.

cesseurs[85]. L'enjeu financier explique l'intérêt et l'interventionnisme des pays créanciers dans la formulation et l'élaboration des solutions retenues dans les déclarations conjointes des pays débiteurs et des pays créanciers du 2 avril 1993.

B. La conciliation comme mode de règlement successoral

En pratique, l'appel à la procédure de conciliation est peu fréquent pour résoudre les problèmes liés à la succession d'Etats. En effet, le recours à une procédure institutionnalisée de conciliation implique la constitution d'une structure indépendante sans autorité politique propre. Cet organe est habilité à soumettre des recommandations susceptibles de créer une entente entre les parties. La commission de conciliation peut avoir un caractère permanent ou faire l'objet d'une désignation ad hoc bien mieux appropriée aux phénomènes circonstanciels de succession d'Etats. Ainsi, par ses objectifs et ses mécanismes, la conciliation apparaît comme un moyen approprié de règlement des différends en matière de succession d'Etats[86]. En privilégiant la réconciliation des intérêts aux dépens de l'application du droit, la conciliation contourne le problème de l'imprécision du droit applicable.

La première fonction du règlement par voie de conciliation est de parvenir à une solution acceptable par les parties[87]. Dans ce contexte, l'équité revêt une importance particulière dans la mesure où elle ne pense le droit qu'à titre de référence et peut également faire usage d'éléments de transaction en dehors du litige à la différence du cadre strictement juridique dans lequel doivent statuer le juge ou l'arbitre[88].

En second lieu, l'exigence de justice et d'équité s'accommode aisément du caractère non-obligatoire des recommandations du conciliateur[89].

En outre, par son approche dialogique[90] associant le droit et le non-droit, la conciliation représente sans doute la méthode de résolution la plus consensuelle, la plus acceptable et conforme aux usages des sociétés confucéennes. En effet, seule la discrétion du médiateur ou du conciliateur trouve grâce auprès de la République Populaire de Chine en ce sens qu'elle évite l'offense d'une extériorisation du conflit hors de la sphère où il est né et exclue sa soumission au règlement obligatoire d'une autorité externe[91].

Suivant l'exemple de nombreuses conventions de codifications conclues sous les auspices des Nations-Unies, les conventions de Vienne en matière de succession d'Etats font une place de choix à la procédure de conciliation[92]. Conditionnée par l'échec

---

[85] P. Juillard: «La dette extérieure de l'ancienne Union Soviétique: succession ou continuation?» [dans:] *Dissolution, Continuation...*, *op. cit.*, p. 201.

[86] V.D. Degan: „L'équité...», *op. cit.*

[87] J.P. Cot: *La conciliation internationale*, Paris (1968), p. 20.

[88] L. Le Fur: *Précis de droit international public*, 3e éd. (1937), p. 475.

[89] M. Mouskhéli: «L'équité en droit international moderne», 37 *RGDIP* (1933), p. 360, 362.

[90] Voir l'usage de ce néologisme par Edgar Morin dans Penser l'Europe (1987).

[91] L. Susskind, E. Babbitt: «Overcoming the Obstacles to Effective Mediation in International disputes» [dans:] *Mediation in International relations: Multiple Approaches to Conflict Management*, edited by J. Bercovitch, J.Z. Rubin, St. Martin's, New York, p. 30–51.

[92] Cependant l'article 42 de la Convention de Vienne en matière de succession aux traités et l'article 43 de la Convention en matière de succession en matière de succession aux biens, dettes et archives sont demeurés sans application, les conventions n'étant pas en vigueur.

préalable des négociations ou des consultations, la mise en oeuvre du mécanisme de conciliation fait l'objet d'une description détaillée contenue en annexe des conventions[93].

Les conventions adoptent le principe de la conciliation obligatoire quant à la saisine et non quant à l'effet juridique des recommandations dispensées par la commission de conciliation[94]. Dans la mesure où le choix des conciliateurs est le fait des parties au travers d'une liste préparée et conservée par le Secrétaire Général des Nations-Unies[95], et bien qu'il ne s'agisse pas d'un mécanisme quasi-juridictionnel, la portée et l'effectivité d'un tel règlement s'en trouvent renforcées[96].

II. La concertation avec les institutions internationales

Les organisations internationales sont libres d'accepter ou de refuser la qualité d'Etat continuateur à un membre ayant subi une modification territoriale. En effet, il n'existe pas de règles ni même de pratique reconnue, garantissant à un Etat issu du démembrement d'un ancien Etat-membre, la continuité de la participation[97]. En conséquence, la réponse des institutions internationales, en particulier, aux démembrements des Etats Est-européens a pu paraître hésitante voire même confuse[98]. C'est principalement en matière de reconnaissance d'Etat et de qualification des situations successorales que les mécanismes de concertation au sein des Nations-Unies (A) et au sein des organisations régionales (B) peuvent être mis en oeuvre.

A. La concertation au sein des Nations-Unies

Par analogie, la partition de l'Inde créa un précédent à l'aune duquel les cas de l'URSS, de la Yougoslavie, et de la Tchécoslovaquie[99] allaient être analysés[100]. L'Inde fut considérée par les Nations-Unies, Etat continuateur de l'Inde britannique alors que le Pakistan dût entreprendre en tant que nouvel Etat indépendant une procédure formelle d'admission[101].

---

[93] Cette annexe commune aux deux conventions est identique à celle contenue dans la Convention sur le droit des traités de 1969.

[94] E. N a t h a n: «The Vienna Convention on Succession of States in Respect of State Property, Archives and Debts» [dans:] *International Law at a Time of Perplexity, Essays in Honour of Shabtaï Rosenne* (1989), p. 489.

[95] E.G. B e l l o: «Reflections on Succession of States in the Light of the Vienna Convention on Succession of States in Respect of Treaties, 1978», 23 *GYBIL* (1980).

[96] R. L a v a l l e: «Dispute Settlement under the Vienna Convention on Succession of States in Respect of Treaties», 73 *AJIL* (1979).

[97] V.D. Degan: «State Succession, Specially in Respect of State Property and Debts», 4 *FinYBIL* (1993), p. 130.

[98] M. W e l l e r: «The International Response to the Dissolution of the Federal Republic of Yugoslavia», 86 *AJIL* (1995), p. 569, 606.

[99] Cf. Agreement on Membership in International Governmental Organizations between the Czech and the Slovak Federal Republic, December 12, 1992. Voir aussi K. M a r h e r n o v a: «Federation that Failed: Reflections on the Disintegration of Czechoslovakia», 1 *New Europe L. Rev.* (1993), p. 477.

[100] M.P. Scharf: «Musical Chairs; The Dissolution of States and Membership in the United Nations», 29 *Cornell Int'L.J.* (1995), p. 42.

[101] D.P. O'C o n n e l l: State *Succession in International Law and Municipal Law* (1967).

L'éclatement de la Yougoslavie a donné lieu à un cas de non reconnaissance de la qualité d'Etat continuateur par la Serbie-Montenegro. Le problème s'est posé dans le cadre de la succession de la qualité de membre aux organisations internationales et en particulier aux Nations-Unies.

La revendication constante et *ab initio* de la République Fédérative de Yougoslavie (RFY)[102] à la continuation automatique de la participation de l'Ex-Yougoslavie s'est heurtée aux résistances du Conseil de Sécurité mais aussi de l'Assemblée générale[103]. Dans le préambule de la résolution 757[104], le Conseil de Sécurité déclare qu'une telle revendication „n'a pas été généralement acceptée".

Cette affirmation a été confortée par trois avis rendus par la Commission d'arbitrage pour la Yougoslavie. L'avis n° 8 confirme la dissolution de la Yougoslavie et constate que la R.S.F.Y. n'existe plus. L'avis n° 9 préconise qu'il soit «mis un terme à la qualité de membre de la R.S.F.Y. dans les organisations internationales» suivi de l'avis n° 10 qui conclue que la R.F.Y. est «un Etat nouveau qui ne saurait etre consideré comme l'unique successeur de la R.S.F.Y.»[105]. La Communauté Européenne dans une déclaration sur la Yougoslavie se prononça en faveur de l'extinction de la participation de la Yougoslavie dans les organisations internationales[106].

Des tempéraments ont été apportés au statut de la RFY au sein des Nations-Unies par la résolution 777[107] qui bien que déniant à la Serbie-Montenegro le droit de participer aux travaux de l'Assemblée générale des Nations-Unies n'est pas allée jusqu'à nier son droit à être admise en tant que nouvel Etat[108]. En pratique, un certain compromis permet a la RFY de maintenir des missions auprès des Nations-Unies offrant ainsi une solution d'intérim à l'admission[109]. La Cour de Justice internationale a pu relever les incertitudes juridiques contenues dans cette résolution[110].

---

[102] Cf. Déclaration du 27 avril 1992: «La République Fédérative de Yougoslavie continue l'Etat, la personnalité juridique et politique de la R.S.F.Y.».

[103] E.D. W i l l a m s o n, J.E. O s b o r n: «A U.S. Perspective on Treaty Succession and Related Issues in the Wake of the Breakup of the USSR and Yugoslavia», 33 *CJI* (1993), p. 270.

[104] CS, Res. 757, U.N. Doc. S/Res/757(1992).

[105] Avis n° 10 du 4 juillet 1992.

[106] Déclaration sur la Yougoslavie de la Communauté Européenne, *CPE*, 20 juillet 1992.

[107] C.S. Res. 47/1, UN. Doc. A/47/456(1992).

[108] M.P. S c h a r f: «Musical Chairs; The Dissolution of States and Membership in the United Nations», 29 *Cornell Int'L.J.* (1995), p. 30.

[109] Cf. Lettre du sous-secrétaire général Carl-August Fleischauer, Sous-secrétaire général aux affaires juridiques à Kenneth Dadzie, UNCTAD, 29 septembre 1992.

[110] Affaire de l'application de la Convention sur la prévention et la répression du crime contre le génocide (Bosnie Herzégovine v. R.F.Y) *CIJRec.* (1993), p. 14.

23 POLISH YEARBOOK
OF INTERNATIONAL LAW
1997–1998
PL ISSN 0554-498X

The International Legal Status of the Republic of China on Taiwan

LECH ANTONOWICZ

The expression "the Republic of China on Taiwan" is untypical and questionable. It refers to the geopolitical entity officially called "the Republic of China" and having authority over both Taiwan and the Pescadores, as well as over a group of the Isles of Matsu and Quemay near the Chinese continent.

From the standpoint of international law, it is by no means clear whether the present Republic of China on Taiwan is a state, part of a state or even something else. There were formulated different opinions on this subject in the international legal literature. This paper will present the most important elements of the issue.

The Problem of Taiwan During and After the Ending of World War II

Since the Treaty of Shimonoseki of 17 April 1895, Taiwan under the name of "Formosa" had been under the authority of Japan. According to the Treaty, China had renounced for ever full sovereignty over the Island and the Pescadores with all fortifications, arsenals and public property, in favour of Japan (art. 11).[1]

However, in the Declaration accepted in Cairo on 26 November 1943, leaders of China, the United States and Great Britain stated that they intended, among others, to return to the Republic of China all territories stolen by Japan from China, especially Manjuria, Formosa and the Pescadores.[2] The Cairo Declaration was later included into the Proclamation issued in Potsdam by the heads of governments of the United States, China and Great Britain on 26 July 1945; the Soviet Union joined afterwards. The Potsdam Proclamation was the act of the Allied Powers defining the terms of the unconditional surrender of Japan, whose sovereignty was to be limited to the Isles of Honsiu, Hakkaido, Kiusiu, Sikoku and some smaller islets identified later by the Powers.[3] These conditions were accepted by Japan in a definite and unreserved manner within the act of capitulation of 2 September 1945.[4]

---

[1] H. C h i n (ed.): *China and the Question of Taiwan. Documents and Analysis* (1973), p. 197–198.
[2] *Ibid.*, p. 207.
[3] *Ibid.*, p. 208–209.
[4] *Ibid.*, p. 209–210.

In the execution of the above act, the Japanese military forces at the territory of China and Taiwan surrendered to Chinese army, according to the decision of the Commander-in-Chief of the Allied forces. In October 1945 Taiwan was under the Chinese administration and soon afterwards was declared a province of China. In relation to this process was the decree of 12 January 1946, on the restoration of Chinese citizenship to Taiwanese people.[5]

This state of affairs had not been questioned by any state and it probably would have been definitively accepted in the Peace Treaty with Japan, were it not for the appearance of two events of great international importance. The first event was the development of civil war in China that led up to the proclamation on 1 October 1949, of the People's Republic of China whose government extended its authority over the whole area of the continental China. The second event was the outbreak of the war in Korea in June 1950, the war joined after a few months by People's Republic of China by means of the so-called Chinese people's volunteers.

It is unquestionable that the above-mentioned occurrences subserved the fact that in the Peace Treaty signed in San Francisco on September 8,1951, Japan had admittedly relinquished all rights, titles and claims for Taiwan and the Pescadores but without indication that this was being done for the benefit of China. However, bilateral Peace Treaty between the Republic of China and Japan of 28 April 1952 is limited in that matter to the recognition of the content of San Francisco Treaty.[6]

In the light of the above acts and events there arises a question, whether China as a state and subject of international law, had taken over authority over Taiwan and the neighbouring islands.[7] There had occurred fundamental differences of opinions on this subject between states, and particularly between the Great Powers.

Great Britain recognized the Central People's Government as the government de iure of China already on 5 January 1950, and withdrew such recognition from the government of the Republic of China which had on this time retreated on Taiwan. This act of the British side was accompanied by the statement that the question of the Taiwan status remained unsettled. The formula of the Peace Treaty of San Francisco was interpreted as the renouncement of Japan addressed to the states – signatories of this treaty, lacking among them China. Thus, Taiwan became condominium of these states and not a part of Chinese state.

The United States, however, before the outbreak of the Korean War, had treated Taiwan as a part of the territory of China. Still, later the U.S.A. had radically changed opinion in this matter and approached the British position that the status of this island was not completely regulated. It is unquestionable that this change was to facilitate

---

[5] *Ibid.*, p. 213.

[6] H. C h i n (ed.): *China and the Question of Taiwan...*, *op. cit.*, p. 245–246.

[7] From the vast literature on this subject it is worth mentioning the following positions: D.P. O'C o n n e l l: "The Status of Formosa and the Chinese Recognition Problem", 50 *AJIL* (1956), p. 405–416; J.P. J a i n: "The Legal Status of Formosa", 57 *AJIL* (1963), p. 25–45; F.P. M o r e l l o: *The International Legal Status of Formosa* (1966).

justification of the entry of the Seventh American Fleet on the waters of Taiwan Straits.

There was no need for the change of opinion on the question of Taiwan status on the side of the U.S.S.R. The Soviet Union considered the matter of the attachment of this territory to China as definitively regulated in the acts relating to the ending of war on the Far East and that the repeated undertaking of this question on the international forum consisted in the ingeration in the internal matters of China whose the only legal government since the autumn of 1949 was the Central People's Government. It has to be stressed that this stand had not been changed even later during the time of huge tensions and controversies between the Soviet government and the government of the People's Republic of China.

The U.S.S.R.'s standpoint, though it may look paradoxically, was consistent with the stand of the both Chinese governments – i.e. the government of the People's Republic of China and the government of the Republic of China. Those governments, in spite of the essentially different origins and political characters were then and officially are up to the present of the opinion that Taiwan is an integral part of China. Is this attitude justifiable on the grounds of international law?

Thesis that Taiwan is a part of the territory of China needs the indication of the international legal basis, as well as the time since when this island together with the neighbouring islands gained such status. There are a few possible answers to this question.

Since Japan, using the language of the Cairo Declaration of 1943, had stolen Taiwan from China, it is reasonable to regard the act of the cessions of territory from the Chinese-Japanese Treaty of 1895 as contrary to international law at that time and that this territory remained de iure a part of China under the occupation of Japan. Nevertheless, such a line of reasoning is sometimes put forward in relation to different territories, still the rule of return of the territories acquired in the past by force has never been transformed into the norm of international law. If this had happened, it would have been a source of never-ending territorial claims.

A more convincing thesis is a conception of the acquisition of sovereignty over Taiwan by China on the basis of the act of unconditional surrender by Japan and the execution of the provisions of this act as to the factual extension of the authority of Chinese state over this territory. The position is supported by the tacit approval of this authority over Taiwan from the side of the practically complete international community in the years 1945–1949, and so meaning the period sufficiently long for raising any objections to this fact. In such a conception, the renouncement by Japan of all rights to Taiwan and the neighbouring islands in the Peace Treaty of 1951 (it had come into force in 1952) has only a declaratory meaning.

Supporting a rigorous viewpoint that only a peace treaty or possibly the other equivalent international agreement is the necessary condition for the passing of authority (sovereignty) over territory between the two states being in the state of war beforehand, one has to study the Peace Treaty with Japan from 8 September 1951. The renouncement by Japan in this treaty of all rights to Taiwan is thoroughly explicit

and unquestionable. Might there be any reasonable doubts on the subject for the benefit of whom this renouncement was made?

It has been mentioned earlier about the reasons of the silence in that matter of the Peace Treaty with Japan. There are far more arguments and more important ones in support of the thesis that the only possible addressee of this renouncement could have been Chinese state. There was a convincing intention formulated explicitly in the Cairo Declaration of 1943 and in the Potsdam Proclamation of 1945. Secondly, China while taking over the authority over Taiwan, was not acting as a war occupant or as a temporary administrator in the name of the United Nations, but was acting in the purpose of the permanent joining of the territory which had belong to China before there was organized Japanese authority. On the contrary – if there had been the intention of a different regulation of Taiwan's status, then there would have been the appropriate rule in the Peace Treaty with Japan.

Concluding, it has to be stated that if not before, then in 1952 at the latest, Taiwan became de iure within the borders of Chinese state. The situation of Chinese state at that time, however, was not normal and stabile and this was not without any influence on the treatment of the Taiwan's status at that time on the international forum.

The Question of China's Representation in the United Nations

China is the oldest state in the world. Its history amounts to over 3,000 years although the entry into modern international community did not happen before the XIXth century. During World War II China was a member of the anti-fascist coalition. On 9 December 1941, the President of the Republic of China announced declaration of war against Japan. The declaration stated that for over four years China had been opposing Japanese aggression aiming not only for the preservation of its independence and freedom but also for the support of international law and justice. Since Japan had attacked the United States and Great Britain, both of them being on friendly terms with China, the Chinese government formally declared war against Japan and at the same time announced that all treaties, conventions and agreements between China and Japan were and would remain invalid.[8]

Afterwards, China became a Party to the United Nations Declaration of 1 January 1941, participated in the preparatory works to the creation of the United Nations Organization, and as a result became the original member of this organization. The U.N. Charter had twice mentioned this country under the name of "the Republic of China" – in art. 23 (1), relating to the composition of the Security Council, and in art. 110 (3), relating to the entry into force of the Charter. China as a Great Power gained a permanent seat in the Security Council and the entry into force of the U.N. Charter depended on its ratification by China. The Chinese ratification document was passed for deposition to the United States government on 28 September 1945.[9]

[8] H. C h i n (ed.): *China and the Question of Taiwan...*, *op. cit.*, p. 204.

[9] *Multilateral Treaties Deposited with the Secretary General. Status as 31 December 1994*, United Nations, New York 1995, p. 3.

In China, already in the interwar period, a civil war had been carried on and continued after 1945 leading to the proclamation of the People's Republic of China on 1 October 1949.[10] The Central People's Government of the People's Republic of China informed about this event the U.N. on 18 October 1949. Naturally, there arose a problem of the appropriate representation of China in the United Nations Organization.[11]

Until 25 October 1971 this function was performed by the government of the Republic of China. Then, the U.N. General Assembly passed the resolution that changed the state of affairs. In this resolution it was decided to return to the People's Republic of China all its rights and to recognize its representatives as the only legitimate representatives of China in the United Nations. At the same time it was decided to exclude immediately the representatives of Chiang Kai-shek from the positions they were holding illegaly in the U.N. and in all other organizations connected with the U.N.[12] The resolution was passed by the majority of 76 votes against 35 votes, with 17 votes of abstention. Thus, the project of the resolution stating that the Chinese People's Republic had a right of representation in the U.N. and should have a seat in the Security Council as one of its five permanent members, and stating at the same time that the Republic of China maintained its right of representation, no longer was taken into consideration.

The above solution of the problem of China's representation in the U.N. was based on the assumption that there is only one Chinese state which is uninterruptedly, since 1945, the original member of the U.N., and which has a permanent seat in the Security Council. At the same time, from the above-mentioned resolution of the General Assembly results that the accepted solution complied with international law which had not been taken into account beforehand.

The question of China's representation in the U.N. is linked on one hand with the rule of state's identity, and on the other with the institution of recognition of governments in international law.

It has to be pointed out that the members of the United Nations Organization – not only the original ones but later, too – are states. A state preserves its identity as a subject of international law irrespectively of the changes of government and inner regime, people and territory, name and even international status, on condition that these changes do not infringe its sovereignty. The relation of international law to the changes of regime – even the most far-reaching – is based on the differentiation between a state as a whole and a government as only one of the elements of this whole.

Recognition of the People's Republic of China as the continuator of Chinese state and subject of international law made it impossible for the simultaneous preservation of Republic of China's membership in the U.N. Putting aside that the proposition leading in this direction was contrary to the position of both Chinese governments at

[10] *Ibid.*, p. 3.

[11] Cf. L. G e l b e r g: "Sprawa reprezentacji Chin w Organizacji Narodów Zjednoczonych" [The Question of China's Representation in the United Nations Organization], *Państwo i Prawo* No. 10 (1951), p. 554–563.

[12] *Yearbook of the United Nations* (1971), p. 136.

that time, it has to be pointed out that it was also contrary to the U.N. practice – not only earlier but later as well, as regards the partition of member states in two or more states (India-Pakistan, Malaysia-Singapore, Pakistan-Bangladesh, and others). In each of these cases it was only one state that continued the U.N. membership, whereas the other state did not gain this membership by means of international legal succession. Not only in 1971, but even later, the question of the possible membership of the Republic of China could have been considered only through the means of joining the organization as a new state (art. 4 of the U.N. Charter). The Republic of China on Taiwan cannot be treated as a legal successor of Chinese state which had gained the original membership in the U.N. already in 1945, even though it is its successor on the constitutional grounds which is expressed in the preservation of the 1947 constitution and the name mentioned in the U.N. Charter. The problem consists in the lack of concordance between identity and continuity on the constitutional and international level. If the Republic of China on Taiwan is an autonomous state, then regardless of its name and constitutional regime, it is only a successor of Chinese state and a new subject of international law.

Thus, the problem of China's representation in the U.N. was not connected with the recognition of a new state but with the recognition of the other government of the same state. It was consistent with the standpoint of both Chinese governments at that time (it was not officially changed up to the present) that there was only one Chinese state. On the international level the difference consisted mainly in the fact that each of these governments treated itself as the only legal representative of the same state, whose territory comprised in their opinion not only continental China but also Taiwan together with the neighbouring islands.

From the standpoint of international law there are two prerequisites that the government aiming at the legitimate representation of the state on the international forum has to fulfill: its power should be effective and the government should have native character.[13]

It seems that the solution of the problem of China's recognition in the U.N. included these considerations. What settles a question is a rule of international law that states should recognize that government between the two, which extends its authority over a larger part of state's territory. The effectiveness of authority of the Chinese People's Republic's government is unquestionable.

Indeed, there were objections raised to the government of the People's Republic of China that it had achieved its authority by means of the help of the Soviet Union; and it has to be stated that these objections were not groundless but the role of the foreign factor in the government's establishment was not so substantial so as to question the native character of the government. The reasons for contemporary critique of the government of the People's Republic of China by the international community, is not for its origins but for the fact of non-observance of human rights and rights of national minorities.

---

[13] Cf. H. L a u t e r p a c h t: *Recognition in International Law*, p. 87–174 (1948).

As far as the government of the Republic of China is concerned, it is by no means meaningless that probably this government remained in power over Taiwan thanks to the threat of the armed intervention of the United States. However, the subsequent development of the situation in the region showed a far-reaching independence of this government. The United States removed its recognition and denounced the common security treaty of 1954. In consequence, it has to be stated that both governments – of the People's Republic of China as well as of the Republic of China are Chinese governments not only by name but also by essence.

China as "Divided State"

The solution of the problem of China's representation in the U.N. and its specialized agencies meant in no way the liquidation of the situation described as "one state – two governments."

This is an abnormal situation from the standpoint of international law which demands the representation of one state by one government. The fulfillment of this norm in case of China is very complicated. The rule stating that states should recognize one of the two governments which extend its power over a larger part of state's territory is based on the assumption that such a situation is temporary. Meanwhile, the situation in China and Taiwan became stabilized to such an extent that it remains essentially unchanged for nearly half a century. China is the evident and perhaps unique example of a "divided state." The term was used at the time also to Germany, Korea and Vietnam, often regardless of the fact that those cases related rather to divided country in a geographical sense or nation in an ethnic sense than to state as one subject of international law.

It has to be stated that even if the phenomenon of "divided states" as a result of the Cold War in international relations was homogeneous in its political essence, then the differences between separate examples of this phenomenon made it impossible to formulate a coherent and uniform construction of legal theory. Thus, J. Caty while defining "divided state" as a state within the borders of which two different states were created, quite rightly excludes from this category the example of China.[14] China is a "divided state" in the sense that within its borders two geopolitical entities were created, the authorities of which recognize in unison the existence of one Chinese state. Thus, even though the conceptions of "two Chinese states" have been long since formulated,[15] but it seems that they are still premature.

International community cannot ignore the standpoint of both Chinese governments, and what is more, this should be a determinant opinion. In spite of the abovementioned objections relating to the lack of the definitive regulation of international legal status of Taiwan expressed beforehand by some states, still some of them do

[14] F.B. S c h i c k: "The Question of China in the United Nations," *ICLQ* (1963), p. 1239–1241; D.B. K i r k h a m: "International Legal Status of Formosa," *CYIL* (1968), p. 144–163. A different opinion on the subject is represented by J. C r a w f o r d: *The Creation of States in International Law* (1979), p. 151.

[15] *Le statut juridiques des Etats divisés* (1969).

officially recognize both Chinese states. The explicit evidence of such a position is the fact that no state maintains diplomatic relations with both Chinese governments at the same time. And diplomatic relations are an unquestionable sign of the international recognition.

The division of states into those which recognized the government of the People's Republic of China and established with it diplomatic relations, and those which recognized and maintained diplomatic relations with the government of the Republic of China, is not constant. Within the past forty-few years the relation had changed usually for the benefit of the People's Republic of China. But in 1989 the government of the Republic of China established official relations with Grenada, and caused in this way the breach in such relations with this country by the government of the People's Republic of China.

The number of states recognizing the government of the People's Republic of China through maintenance of diplomatic relations amounts at present to 30, which is more or less one sixth of all states. For this number consists 16 states of Latin America,[16] 9 states of Africa,[17] 4 states of Oceania[18] and the Holy See. The number of states, diplomatic representatives of which are accredited in the Republic of China, as well as the number of states where diplomatic representatives of the Republic of China are accreditied are evidently smaller; still such proportions sometimes do occur in international relations.

It seems that the long-lasting effectiveness and independence of the government of the Republic of China on Taiwan may lead to the statement that the states maintaining with it diplomatic relations do not behave contrary to international law, and in particular contrary to the rule of non-intervention within internal affairs of other states. Such an exceptional and untypical situation is explained by the fact that the authority of both Chinese governments is effective over different parts of the territory of Chinese state and none of them lack the native character.

The Future of the Republic of China on Taiwan

Since the situation of China as a "divided state" is abnormal, any possibility for its change from the standpoint of international law has to be considered.

The basic rule should be the maintenance of peace, thus the only admissible changes are those that can be carried out by peaceful means. Even though international law prohibits the use of force mainly in relations between states, but it evaluates negatively also the inner-state conflicts, and especially those already internationalized. Any attempt to solve the problem of Taiwan by the use of force would mean a threat of violation or violation of peace and international security within the meaning of the U.N. Charter. This is tantamount with the firm demand for the both Chinese governments to agree on the change of status of Chinese "divided state." From this view-

[16] Bahamas, Belize, Costa Rica, Dominica, Dominican Republic, Grenada, Guatemala, Haiti, Honduras, Nicaragua, Panama, Paraquay, Salvador, St. Kittis and Nevis, St. Lucia and St. Vincent and Grenadines.

[17] Burkina Faso, Gambia, Guinea-Bissau, Liberia, Malawi, Middle Africa, Niger, Senegal and Swaziland.

[18] Nauru, Solomon Islands, Tonga, Tuvalu.

point it has to be very positively evaluated that on 1 May 1991, the government of the Republic of China abrogated the martial law.[19]

Within the peaceful formula of the regulation of China's international legal staus two possible solutions may be considered.[20]

Lately, there are opinions for the use of Hong Kong's experience within the formula "one country – two regimes." However, the analogy is not very exact since Hong Kong is not a party to the British-Chinese agreement, and is rather the object not the subject of the deal. The range of Taiwan's autonomy within Chinese state would also have to have been far greater, comprising also international affairs. Is Taiwan's U.N. membership possible if it remained a part of Chinese state, already a member of this organization?

The possible answer to this question may be explained by various precedents. Already within the League of Nations there was a situation of its members like the British Imperium, British dominions and India alkie. In the United Nations Organization its members were the Soviet Union as well as its parts: Ukraine and Byelorussia. Such a solution to the Chinese "divided state" would have to be based upon the agreement between the government of China as the whole state and the government of Taiwan as its autonomous part.

The second solution would aim at the creation of two equivalent on the international level Chinese states, that in the future could unite. This also would demand the agreement between the two Chinese governments, or if necessary through the means of unilaterla seccession of Taiwan and the tacit acceptance of such a solution by the government of the People's Republic of China. The accomplishment of the situation would have lead to the broad international recognition of Taiwan as a state and the establishment with it of diplomatic relations by many states. There would have been no obstacles for Taiwan to join the U.N. and other interantional organizations memebership, on condition that the government of the People's Republic of China as the international legal contiuator of Chinese state would not use its veto power.

In conclusion of this paper it may be stated that the prerequsites for both solutions increase with time. It is doubtless that for the government of the People's Republic of China the first solution is far more easier to accept. From the side of the Republic of China on Taiwan which supports the rule "one China – two political entities" there are sometimes discernible the symptoms for the position supporting the second solution. In spite of limitations within stricte diplomatic activities, various semi-official contacts are developing.[21] It is possible to observe a gradual retreat from the rigorously interpreted rule of exclusiveness of Chinese state's representation. It is enough to remind that in 1972 the government of the Republic of China broke off diplomatic relations with Japan when it had recognized the government of the People's Republic

---

[19] *The Republic of China Yearbook* (1996), p. 109.

[20] Various scenarios of Taiwan's future are considered, among others, by S. L o n g: *Taiwan: China's Last Frontier* (1991), p. 227–245.

[21] Status and international relations of the Republic of China on Taiwan are characterized by A. M a n i n: "Taiwan: Nouveaux Aspects Juridiques", 26 *Annuaire français de droit international* (1980), p. 141–174.

of China. But in 1989 the same government tolerated the fact that Grenada for a month maintained diplomatic relations with the government of the People's Republic of China until the latter broke them off. The announcement of the Minister of Foreign Affairs of the Republic of China relating to this fact, S. Long interpreted in the way that if other states wanted to try to use diplomacy of "two Chinas," then, the government of the Republic of China would not be opposed even though it itself did not recognize "double recognition."[22]

* * *

The answer to the question put at the beginning of this paper is the following: the Republic of China on Taiwan is not an autonomous state, but a part of Chinese state, but such a part that due to various inner-state and international factors has been formed as a separate geopolitical entity, with the independent realization of the attributes of international legal subjectivity.

[22] S. L o n g: *Taiwan: China's Last Frontier...*, *op. cit.*, p. 151.

23 POLISH YEARBOOK
OF INTERNATIONAL LAW
1997-1998
PL ISSN 0554-498X

The Status of China's Hong Kong Special Administrative Region

AGATA ZIĘTEK

On the night of 30 June 1997 the British and Hong Kong flags went down the mast at the sound of the British national anthem, when the Chinese anthem resounded, the flags of China and of the Special Administrative Region in Hong Kong were raised. Thus, the entire territory of Hong Kong was, in compliance with the previous agreements, handed over under the sovereignty of the People's Republic of China as China's Special Administrative Region.

The former political status of Hong Kong was based on various documents, and, formally, was far from being uniform. After the first and the second Opium Wars (1842 and 1860), Hong Kong Island and a part of Kowloon Peninsula were ceded to Britain. By the Convention of 1898, the New Territories were leased to Britain for 99 years. The Chinese governments never ratified these treaties which, they claimed, were signed under pressure and a threat of a military intervention.

The current status of Hong Kong has been based on such documents as the Chinese-British Joint Declaration of 1984 and the Basic Law of 1989. The former agreement put an end to the speculations concerning the future of the territory and its status after 1 July 1997.

Referred to as a declaration, it was, in fact, an international agreement according to which Hong Kong was to be governed under Chinese sovereignty. The area in question was treated as an entity, without the recognition of factual differences in the existing status, both legal and international in nature. The document defined the status of Hong Kong after 30 June 1997 which was to become China's Special Administrative Region. Pursuant to the declaration, Hong Kong is retain limited power in entering international relations, and the former system is to continue for a period of 50 years. Hong Kong has been allowed to retain a large degree of political autonomy and to maintain the judicial system (except in cases of where the courts of the Special Administrative Region have the prerogative of making decisions in the final instance). Capitalist economy and trade is to be retained as well. The declaration made it clear that the military troops of the People's Liberation Army stationed in Hong Kong after 30 June 1997 would not interfere in internal matters of the Hong Kong Special Administrative Region. It follows that the establishment of the Special Administrative Region (SAR) in Hong Kong is connected with the taking over of its sovereignty by

China – a measure interpreted as an attempt to maintain national unity and territorial integrity of China. Pursuant to the said declaration, the inhabitants of Hong Kong who are citizens of British dependencies shall lose their status as of 1 July 1997 and acquire the status of British Nationals Overseas. This status, however, does not give them the privilege to settle down in the UK but merely provides for consular care in third countries. In addition to that, the status is not subject to inheritance. Finally, the Hong Kong Special Administrative Region shall protect human rights and liberties.

There is no doubt that the agreement offers a very favourable solution to the question of Hong Kong. The guiding principle of the backs Law – the concept of "one country, two systems" – was a highly innovative and flexible solution accepted even by the most sceptically oriented politicians. On the other hand, however, although the declaration is treated as an international agreement, the very term can be liberally interpreted. In his speech delivered in the House of Lords, Lord Derwent said: "The problem with the British-Chinese Joint Declaration is similar to that of the Maastricht Agreement. Although both documents are clearly formulated, it is possible that, given the consent of both parties to every single word used, the question of its implementation and what its meaning really is remains uncertain."[1] Nevertheless, the very statement that two dramatically different systems may coexist side by side in a single state and, provided that adequate conditions are guaranteed, develop and prosper, was undoubtedly a novelty if seen from the point of the time in which it was propounded. It turned out that despite the inherent differences of the two parties involved, it was possible in a relatively short period of time to create a viable solution that was acceptable to the interested parties.

The other document, i.e. the Basic Law (1989) defined the political system for the Hong Kong Special Administrative Region. With the resumption of Chinese sovereignty over the territory, all the constitutional provisions which were binding heretofore such as Letters Patent, Royal Instructions, Acts of Parliament, Orders in Council, Colonial Regulations became null and void. They were replaced by the provisions contained in the Basic Law for the Hong Kong Special Administrative Region of China.

Work on this document commenced a year after the signing of the Joint Declaration of the governments of Chinese People's Republic and of the United Kingdom of Great Britain and Northern Ireland on the question of Hong Kong. In July 1985 the Chinese government began to establish the Basic Law Drafting Committee. The committee, headed by Ji Pengfei – chief officer of the Hong Kong and Macao Bureau at the Chinese government – comprised fifty members from China and twenty three from Hong Kong. As a result of the negotiations it was determined that the Basic Law would define the legal and political status of Hong Kong after 1 July 1997. The committee stipulated that the resumption of the Chinese sovereignty over the territory would be swift and peaceful guaranteeing stability and further development of Hong Kong according to the principles similar to those defined in the Chinese-British Joint Declaration.

---

[1] *Financial Times*, 21 April 1993.

The first draft of the Basic Law, perceived of as "the constitution in miniature" was prepared in April 1988. Its official version appeared in print nearly a year later, on 21 February 1989, upon the approval of the Standing Committee of the National People's Congress.[2]

The preamble to the Basic Law stated that Hong Kong had always been an integral part of China, irrespective of the treaties signed between the government of the Quing dynasty and the government of Great Britain. In order to assure its continuous importance, stability and further development of Hong Kong, the People's Republic of China, upon the resumption of Chinese sovereignty over the territory of Hong Kong, has decided to establish a Special Administrative Region and realise the principle of "one state, two systems," whereby the socialist system shall not be binding in Hong Kong. Instead, the currently operative economic and social system shall be preserved.

Pursuant to the act, China shall guarantee a large degree of political economy, maintain its independent executive, legislative, and judicial authority, and ensure the exercise of human rights and liberties in accordance with the existing law. The maintenance of the system shall be guaranteed for a period of 50 years.

Relations between the Central Bodies of Authority of the People's Republic of China and the Bodies of Authority of the Hong Kong Special Administrative Region

Pursuant to the Basic Law, the Hong Kong Special Administrative Region shall enjoy a large degree of autonomy. Its legal and political status after 1997 has been defined as a status of **China's local administrative region** (Article 12). The Hong Kong Special Administrative Region shall be directly responsible to the People's Central Government with the power to shape and carry out foreign policy of the region. At the same time, the Foreign Ministry of China is to establish in Hong Kong its office whose task will be to provide assistance in carrying out international relations. This measure is strictly connected with the guaranteed autonomy of HKSAR in international activity, particularly relating to business matters.

China's central government shall be responsible for the defence of the region. Therefore, it has been agreed that Chinese military forces are to be stationed in Hong Kong. However, they may not interfere with the region's internal matters unless the government of the Special Administrative Region "so requests" for, what has been defined as, support in keeping law and order or in the event of a disaster (Article 14). Interesting enough, the drafters of the documents have not defined the conditions in which public order is under threat, giving rise to numerous interpretations of this provision. To reduce the anxiety of the Hong Kong population, Jiang Zemin stated explicitly that the "liberation" of Hong Kong would not be the task of the Chinese garrison. Rather, its task would be to safeguard the realisation of the concept of "one

[2] Basic Law of HKSAR, PRC (Draft), *Beijing Review*, vol. 32, No. 11, 13–19 March 1989.

state, two systems."[3] It seems, however, that such an explanation is far from being precise.

The binding law on the territory of the Special Administrative Region is the Basic Law along with the laws which were valid before 1 July 1997 including all the acts passed by the legislative authority of the Region. The law which is binding on the territory of China shall not apply to the Hong Kong Special Administrative Region, subjects to certain exceptions. These comprise as follows:

1. The resolution concerning the capital city, calendar, national anthem and flag of China.
2. The resolution concerning the National Holiday in China.
3. The obligation to use the Chinese national emblem, promulgated by the People's Central Government.
4. The declaration of the People's Republic of China concerning the territorial sea.
5. The existing citizenship law in China.
6. The regulations of the People's Republic of China pertaining to privileges and diplomatic immunities.

The Basic Law states, however, that in certain emergency situations such as war or riots, the law of China may be binding in the Special Administrative Region. Lack of precise definition of such exceptional cases may become a matter of concern.

All Chinese people who inhabit Hong Kong are considered Chinese citizens, which, practically speaking, does not guarantee them any protection of the UK in the region.

Rights and Duties of the Residents of the Hong Kong Special Administrative Region

The Basic Law provides for the rights and duties of the residents of the Hong Kong Special Administrative Region. Pursuant to the act, the following rights are guaranteed:

- all the inhabitants of Hong Kong are equal before the law,
- permanent residents of Hong Kong have the right to vote and the right to participate in elections,
- freedom of the press and freedom of speech are guaranteed,
- the right to assembly,
- the right to demonstrate and manifest and the right to strike,
- the right of the people to be secure in their persons: no person shall be unlawfully arrested; the use of torture is prohibited, security of houses and homes is guaranteed, and hence, no houses or homes can be entered without a warrant,
- freedom and privacy of communication is guaranteed as well as the right to travel freely in the Hong Kong Special Administrative Region; freedom to emigrate to other countries and regions; freedom to travel, freedom to enter and leave the

[3] *South China Morning Post* of 6 February 1996.

region; unless restricted by law, the residents of Hong Kong who have valid travel documents (passports) have the right to leave the Hong Kong Special Administrative Region without any special permission,

– freedom of thought and of religion,

– freedom to carry out scientific research; freedom to choose a job,

– the right of the residents of the Hong Kong Special Administrative Region to obtain legal counsel; the right to select a court of law and a barrister; the right to receive social aid,

– freedom to select a spouse and freedom in educating children,

– all international conventions on civil and political rights, international conventions concerning economic, social, and cultural matters shall also be binding on the territory of the Hong Kong Special Administrative Region.

The afore mentioned rights may not be restricted, unless new legal regulations are enforced. Equally binding and protected are all common laws which apply to the residents of the New Territories.

It is clear that the list of rights and liberties to be guaranteed after 1 July 1997 is substantial, indeed. Nevertheless, certain doubts may be raised in connection with the working of Article 39 of the Basic Law which says that "All rights and freedoms enjoyed by Hong Kong residents shell not be restricted unless prescribed by law."[4] Such a provision can give rise to the feeling of uncertainty, since it offers the possibility to withdraw from the obligation to observe civil liberties upon the integration with the continental China. As a matter of fact, China has ceased to recognise the *Hong Kong Act* which stipulated numerous civil liberties and dealt with the question of human rights on the territory. Equally dubious is the question of interpreting the agreement and the provisions of the Basic Law. There is a discrepancy in interpreting the agreement and the provisions of the Basic Law. There is a discrepancy in interpreting such notions as freedom, autonomy, democracy, political parties, etc., in China and in the UK. In the Chinese Constitution of 1982 citizens are guaranteed similar rights as those which are enumerated in the Chinese-British Joint Declaration and in the Basic Law. Article 35 of the Chinese Constitution says about the rights which Chinese citizens may enjoy, including the freedom of speech, of the press, of assembly or demonstration;[5] the facts, however, seem to prove that the guaranteed rights and liberties are not always respected and fully observed. The reality appears sometimes to be a far cry from the provisions declared loftily in the constitution. The gap in interpreting the values of the western and eastern worlds is so huge that it is easy to foresee that certain notions are bound to be understood in a different way. Although it is true, that Hong Kong is inhabited by the Chinese, it would not do to neglect 150 years of outside influences and different systems of values from the ones cherished by the Chinese. A feeling of doubt and uncertainty is reinforced by the fact that the

[4] Chapter Three of the Basic Law.

[5] *The Constitution of the People's Republic of China of 4 December 1982*, translated and edited by R. Chruściak, Warsaw, 1983.

guiding principle in China is the concept of obedience towards the government in Beijing. In Hong Kong, for that matter, signs of disobedience and opposition are noticeable all too clearly. Pursuant to the Public Order Ordinance, the organisers of demonstrations were obliged to seek relevant permission from the police. Later on, however, this requirement was lifted, and it was sufficient to notify the authorities about the intention to organise a demonstration. Now, a proposal has been made to return after the handover to the previous system which required the permission to organise a demonstration. China considers Hong Kong mainly as an economic rather than political centre. Therefore, there is no doubt that attempts will be made to limit the political activity in the region.[6]

The freedom of speech and the freedom of the press guaranteed in the Basic Law will, in turn, safeguard the observance of other liberties and will, in fact, be a practical test of the "one state, two systems" principle. However, it seems that some pro-Chinese papers which appear in Hong Kong are already attacking those journalists who dare demonstrate a critical approach towards Beijing. No one tries to hide that the freedom of the press will be limited to criticising the government of Hong Kong and paying lip service to the government in Beijing. It is symptomatic to notice that major dailies are now undergoing ownership changes. It is more than likely that the new owners will be far more China-oriented, and, hence, the freedom of the press will remain largely a theoretical concept.[7] The feebleness of the guarantees pertaining to the freedom of speech can be evidenced in the fact that some handbooks have been withdrawn from Honk Kong schools, since, in the opinion of the Chinese government, they are not fully patriotic.[8]

The Political Structure of the Hong Kong Special Administrative Region

Chief Executive

The Basic Law vests executive authority in the Hong Kong Special Administrative Region in a chief executive, who is under the jurisdiction of the central government in Beijing. The chief executive is the head of the government of HKSAR. The main tasks which fall within the terms of reference of the government include:

1) policy formulation and implementation,
2) management of administrative matters,
3) the running of the foreign policy with the approval of the central government of China,
4) construction and presentation of the budget and financial accounts,
5) initiation of bills,
6) nomination of officers, members of the Legislative Council.

---

[6] F. C h i n g: "Misreading Hong Kong", in: *Foreign Affairs*, May–June 1997, p. 62.
[7] *Far Eastern Economic Review* of 23 August 1993.
[8] *Financial Times*, 3–4 December 1996, p. 5–7.

Pursuant to the Basic Law, the chief executive of the Hong Kong Special Administrative Region shall be a Chinese citizen over 40 years of age who is a permanent resident of Hong Kong and who has resided there for 20 years. The chief executive shall be chosen through elections or by way of local consultations. Candidates for the office must win approval of China's central government. Pursuant to the Basic Law universal suffrage of the chief executive is not out of the question. He/she shall serve a five-year term and can be re-elected.

The Basic Law also determines the manner of electing the head of the government of the Hong Kong Special Administrative Region. He/she is to be elected by an 800-member Election Committee followed by the approval of China's central government. The members of the Election Committee are to represent the following sectors (200 members for each of the sector):

a) industry, trade, and finance,
b) independent professions sector,
c) trade unions, special purpose services, religious associations and others,
d) members of the Legislative Council, local organisations, Hong Kong delegates for the National People's Congress of China, and Hong Kong representatives for the National Committee of the Chinese People's Political Consultative Conference.

The number of sectors and the number of members of the Election Committee suggested by individual organisations shall be determined in the Election Law of the Hong Kong Special Administrative Region. Candidates for the post of chief executive shall be nominated jointly by at last 100 members of the Election Committee which, on the basis of the list of candidates, shall elect the chief executive through secret ballot.

The principles of establishing the first government and the first Legislative Council of the Hong Kong Special Administrative Region shall be determined by the decision of the National People's Congress of China. Subsequent heads of the government shall be elected in the manner presented above. At later stage the Legislative Council should establish special methods of making decisions through a referendum. This, however, requires approval of the majority of the Legislative Council, consent of the head of the government and permission of the National People's Congress of China. In order to assure international observers that the principle of "one state, two systems" is adequately exercised, China undertook measures which led to the election of the chief executive on 11 December 1996. A 400-member Selection Committee elected Tung Chee Hwa in a landslide victory with 320 voices supporting his candidature. China, in turn, has repeatedly stressed that this was the first election of the chief executive in Hong Kong. On 16 December 1996 Li Peng, Chinese Prime Minister, signed the decree giving official approval to the new chief executive of the Hong Kong Special Administrative Region. The election was described as a democratic and vital event in the history of Hong Kong.[9]

[9] *Ibid.*, p. 5–7.

However, despite such favourable opinions, there is no doubt that the future leader of Hong Kong is strongly linked to Beijing. In the past he was a representative in the Preliminary Committee for the HRSAR, member of the National Committee for the Eight Chinese People's Political Consultative Conference, adviser in the State. Council for Hong Kong and Macao, and a participant in the work on drafting the Basic Law. It follows that Tung Chee Hwa has been linked to the communist government in Beijing for many year, and his election is by no means accidental. A question that arises is whether this government will, as the theory suggests, the autonomous. His connections with Beijing put this autonomy to doubt, and it can be evidenced in his decreasing popularity among the residents of Hong Kong. Recently it has gone down from 70% to 59%.[10] It is clear that the Chinese government in Beijing has substantial influence on the selection of members of the HKSAR's government. On the other hand, however, the support of the communist government may have some beneficial effects. Given the trust and confidence that Tung Chee Hwa enjoys, he may enjoy a large degree of freedom in his future activity. It needs to be remembered that Tung was for many years one of the closest advisers of Ch. Patten and, at the same time, a member of the Chinese People's Political Consultative Conference Council. Despite strong conservatism and traditionalism which characterise his political stand, it seems that Tung still cherishes the notion of the state of law.

The following tasks are vested in the chief executive:

1) He is head of the government,

2) He is responsible for the observance of the provisions of the "constitution" and of other laws which are applicable in the Hong Kong Special Administrative Region.

3) He signs acts passed by the Legislative Council.

4) He is responsible for the execution of the governmental policy and for the issuance of governmental ordinances.

5) He appoints and seeks approval of the Chinese central government for the candidates for the following posts: deputy secretary, department secretary, office director, commissioner for the prevention of corruption, chief auditor, and police superintendent.

6) He appoints and revokes judges.

7) He appoints and revokes directors of public offices.

8) He executes directives issued by the Chinese central government.

9) He is responsible for the carrying out of external relations on behalf of the HRSAR government.

10) He defines the scope of responsibility of governmental officials before the Legislative Council or its committees with due care for security and vital public interests.

11) He has the right to grant pardon.

12) He examines petitions and grievances.

---

[10] *FEER*, 13 March 1997, p. 25–26.

The chief executive has the right to veto the acts passed by the Legislative Council if, in his opinion, they stand in contradiction to the interests of Hong Kong. He must, within three months, pass the vetoed act back to the Legislative Council for consideration. If overruled by two thirds of the votes, the vetoed act must be signed and promulgated within a month or dissolve the Legislative Council. The latter measure can be used only once during his term of office.

The chief executive ceases to perform his function as a result of a prolonged illness, when after the dissolution of the Legislative Council the newly elected council passes the vetoed act by the two third majority of votes against the explicit disapproval of the chief executive, after the dissolution of the Legislative Council, when the budgetary law or any other important act fails to win endorsement or when the new Legislative Council refuses to endorse the budgetary act.

In the event that the chief executive is temporarily incapacitated to perform his functions, the Administrative Secretary, Finance Secretary of the Secretary of Justice take over his/her duties.

In case of dismissal, a new chief executive must be elected within six months.

Executive Council

The Executive Council (ExCo) shall, in a manner similar to the governor's system, functions as an auxiliary and advisory body to the chief executive. Members of ExCo are appointed and revoked by the chief executive from among important people, members of the Legislative Council and other public people for no longer than the term of his office. Members of ExCo must be Chinese citizens who reside permanently in the region. Besides the people mentioned above, other people may be invited to sit on ExCo if the chief executive so requires. The head of the government should consult with ExCo before making Important decisions and prior to the submission of bills to the Legislative Council.

Legislative Power

As in the past, legislative power shall be vested in the Legislative Council. Pursuant to the Basic Law, the Legislative Council shall be established by way of election. The manner of its formulation will, however, depend on the current situation in HRSAR. The Basic Law provides for gradual and systematic transformations which eventually will lead to the general elections for the Legislative Council.

It seems, therefore, that the Basic Law provides for the development of democratic structures in a controlled and gradual way. It is no wonder then that China was outraged by the democratic elections held in August 1995 and their nullification as of 1 July 1997. The fact remains that the British had no right to call up the elections until an agreement with China was arrived at and until Christopher Patten obtained permission from Beijing to introduce changes in the nature of the Election Committee responsible for electing 10 of the 60 members.[11] This behaviour can be attributed to

[11] F. C h i n g, *op. cit.*, p. 59.

the fact that China is not ready yet to integrate fully with an entirely different structure under the "one state, two systems" principle. The Chinese treated the activities of the British as a certain type of sabotage designed to hinder the process of resuming sovereignty. Indeed, the British had, for years, demonstrated unwillingness towards democratisation of life on the territory. Thus, the process of liberalisation was very slow and gradual. During the British rule which lasted over a century there was only one attempt to introduce the principles of a representational system, namely, soon after World War II. The idea, however, did not find support of Great Britain or the governing elite in Hong Kong. No wonder than that democratic measures undertaken by the British were viewed as breeding confusion and upheaval.[12] Some went as far as to compare Hong Kong to the Trojan horse which would lead to the dissolution of the entire China.

The manner of establishing the Legislative Council was outlined in Anex Two to the Basic Law.

The first Legislative Council should be established on the basis of the decision of the National People's Congress of China in a manner used to establish the first government and the first Legislative Council of the HRSAR. The document stipulates that during its operations the Legislative Council should aim towards working out a manner of formulating the council through general election. The results of the election are to be submitted to the National People's Congress of China for approval. The results of the election will come into effect upon the approval granted by the Legislative Council, the chief executive and China, and provided that 30% of those eligible to vote will take part in the election.

The term of the Legislative Council is four years. President of the Council, selected from its members, shall be a person who has Chinese citizenship, is over 40 years old and has resided permanently in the region for at least 20 years.

The powers of the Legislative Council outlined in the Basic Law (Article 72) include:

1. issuing ordinances, introducing amendments and nullifying laws on the basis of the existing procedures,
2. examining and endorsing the budget,
3. granting approval to taxes and any public expenditure,
4. taking part in a debate concerning the policy executed by the Chief Executive,
5. addressing questions to the government in relation to its work,
6. holding a debate on social issues,
7. supporting, appointing and revoking judges in the Court of Final Appeal and the chief judge of the High Court,
8. responding to grievances addressed by the residents of the Hong Kong Special Administrative Region,
9. using the procedure of impeachment at the approval of the two thirds of the Legislative Council,

[12] *Beijing Review*, 25–31 October 1993.

10. calling up a person, if the needs so dictate, to come forward with evidence against the Chief Executive.

Members of the Council do not bear responsibility for the speeches delivered during the meetings of the Council. The Basic Law indicates that during sessions and on the way to them, members of the Legislative Council are given parliamentary privilege. It follows that this privilege is invalid outside the Legislative Council.

The election for the Provisional Legislative Council for the HRSAR held on 25 December 1996 was a clear evidence that the Legislative Council established in 1995 was not properly recognised.[13] The authorities in Beijing were of the opinion that the establishment of the Provisional Legislative Council was a necessary step to initiate a peaceful resumption of sovereignty. As expected, this measure was condemned by the British government. The Provisional Legislative Council comprised 33 members of the existing council. As dictated by the authorities in Beijing, the Democratic Party was eliminated from the Hong Kong parliament, the act on demonstrations was substantially curbed, and the Bill of Rights, which made local law subject to international conventions on human rights and civil liberties, was abolished. Electoral regulations were changed so as to minimise the participation of democratic parties in the forthcoming parliamentary elections in 1998.[14] According to the new regulations, 30 council members, i.e. half of the new Legislative Council, would be selected from the so called "functional constituencies," established in the 80s by the British. The system, in fact, boiled down to selecting representatives by local business and professional circles. The Chinese reduced the number of those eligible to vote in these constituencies from approximately 2 million people to about 200 thousand. A third, i.e. 20 council members shall be elected in a direct and proportional suffrage. The remaining 10 shall be elected by an 800-member Election Committee, largely made up of the representatives of pro-Chinese pressure groups. Under the British administration, these seats were filled by the British governor. Despite critical opinions, the democrats have announced their participation in the parliamentary elections of 1998. Tung Chee Hwa, in turn, has announced that "soon there will be more democracy in Hong Kong than in the past when the region was a colony."[15]

Judicial Power

The Basic Law guarantees independence of the judiciary (Article 84). The highest court in the judiciary is the Court of Final Appeal, headed by a chief justice. This is followed by the High Court and by district, magistrate, and special courts. The existing manner of court procedure is to be maintained. The chief executive appoints all judges at the request of an independent commission made up of local judges, professionals (advocates) and distinguished people. Judges may be dismissed from their offices in the event of incapacitation or improper behaviour. This procedure is

[13] *Beijing Review*, 13–19 January 1997, p. 8.
[14] *Rzeczpospolita*, 1 July 1997.
[15] *Gazeta Wyborcza*, 29 September 1997.

carried out by the chief executive at the request of the Tribunal established by the chief justice of the Court of Final Appeal. Chief justices must have Chinese citizenship and they must reside in the region on a permanent basis. The criteria used for their selection are those of professional qualifications and legal education.

The maintenance of the system which operated in the past is certainly a guarantee of stabilisation in Hong Kong. However, it is already clear that the legal system after 1 July 1997 will differ from the previous one. Martin Lee from the Democratic Party has said that after 1997 the common law in Hong Kong "will be Chinese-specific common law."[16] It seems that the judiciary will not be fully independent as the Basic Law or the British-Chinese Joint Declaration indicate because court decisions may, in future, be impaired as the court shall not lodge a claim against the government.[17] English was the language used in the Hong Kong common. Great Britain and China agreed that no changes would be introduced in the legal system. This applies to the language used if Hong Kong is to play an important role on an international scale. It is, however, difficult to foresee how this assertion will be realised in practice. At the moment the laws of Hong Kong are being translated into Chinese and interpreted accordingly.[18] A question arises as to which version of the common law will become prevalent after 1997. At the Eight Plenary Session of the HKSAR Preparatory Committee held on 1 February 1997 three important documents were adopted. Among other things they contained suggestions concerning the maintenance of the existing legal system in Hong Kong.[19]

Economic Issues

Hong Kong's economy remains its most important asset and potential which shape its international reputation. The future of this region and its place on the global market depends on the way Hong Kong is to develop further.

The Basic Law for the Hong Kong Special Administrative Region guarantees that after the integration with China private property and the right of compensation in case of its loss will continue to be binding. Pursuant to Article 104, all entrepreneurs and investors are duly protected by the law.

Moreover, the document guarantees financial independence of Hong Kong. It means that the government of HKSAR will make decisions concerning its own financial resources. An independent tax system is also guaranteed. Pursuant to Article 108, Hong Kong is to maintain, through certain measures, the status of an international centre of finance. The Hong Kong dollar is to remain a legal tender with guaranteed convertibility. Free flow of capital to and from Hong Kong is also guaranteed.

Hong Kong is to retain the status of a free port which means that no tariffs can be imposed unless sanctioned by the law. These provisions suggest that Hong Kong will

[16] *Financial Times*, 12 June 1995.
[17] *Ibidem*.
[18] *FEER*, 8 June 1993.
[19] *Beijing Review*, 3–9 March 1997, p. 5.

also retain its duty free zone. In addition to that, the Basic Law makes provisions for the maintenance of the existing management and regulations of shipping. Hong Kong shall be open to all vessels except for the navy (Articles 123–126).

The Special Administrative Region, referred to now as "Hong Kong – China" may continue to participate in international organisations and in trading agreements such as, for instance, the WTO.

The Basic Law provides for the maintenance of all leases after 30 June 1997; these, however, will lose their validity after 30 June 2047.

The status of an international and regional centre of aviation is to be preserved (Article 127). All agreements concerning aviation services may be concluded upon the acceptance granted by the People's Central Government. The representatives of the HKSAR government may participate in consultations with other governments concerning aviation services as members of the Chinese delegation. Exceptions to this are listed in Articles 132 and 133 which stipulate that the government of HKSAR may undertake certain activities independently.

The afore mentioned regulations indicate that the present economic status of Hong Kong will be maintained and further developed. This is strictly connected with the pragmatic approach demonstrated by the Chinese leaders and epitomised in the statement of Lu Ping, head of the National Council for Hong Kong and Macao. While in Bonn on 17 March 1997 he said that the stability and further development of Hong Kong is in the most vital interest of China. Carrying out the policy of openness, China needs a capitalist enclave such as Hong Kong to function as a bridge between the People's Republic of China and the Western world. Similarly, Hong Kong will continue to be "a springboard" from which to jump into undiscovered markets of the continent."[20] Hong Kong may become a booster of economic development for the entire China, and the appearance of the largest Chinese companies on the Hong Kong stock exchange may in fact lead Hong Kong to become the financial centre for Asia in the 21st century.

It is difficult to imagine a different scenario. After all, as Frank Chieng (a long time corespondent for *Far Eastern Economic Review*) contends that China could not have spent two years negotiating the British-Chinese deal and five years drafting the Basic Law only to shatter it all after 1 July 1997.[21]

On the other hand, however, from a more pessimistic point of view one may foresee that after the unification with China, the living standard will substantially decrease in the former British colony. Such a situation could even be seen as beneficial for China in view of the existing gaps in the development of Chinese provinces. These discrepancies may, in fact, lead to internal turmoil. Adopting a long term view of thing and given the will to minimise the existing differences between Hong Kong and the rest of the continent, China has created favourable conditions for economic development in special economic zones. Although the discrepancies continue to ex-

[20] *Beijing Review*, 7–13 April 1997, p. 4.
[21] *Time*, 3 June 1997.

ist, the problem is no longer associated with Hong Kong. There are striking differences between Southern China, known as the "Golden Coast" and other provinces, particularly in the North. This situation has fostered migration from poor areas leading directly to the growth of unemployment, prostitution, crime, etc. These negative consequences are already well noticeable in the southern part of China. Re-unification may in future also lead to the lowering of the living standard. Hong Kong may suffer an economic bust. Even if one accepts that for the next ten years or so the fully charged engine of Hong Kong will keep it rolling on, it is inevitable to stop when forgotten or taken over by other cities such as Shanghai, Dalian or Shenzhen.

One cannot, however, fail to notice that China has recently demonstrated its good will towards Hong Kong. During the crash on the Hong Kong stock exchange – the second largest capital market in Asia, preceeded in October 1997 by the feeling of euphoria among investors resultant from the integration with China, the authorities in Beijing withdrew from intervention.

Powers of the Hong Kong Special Administrative Region in the Sphere of International Relations

The powers in the sphere of international relations define the status of the Hong Kong Special Administrative Region as a subject of international politics. The Basic Law guarantees a certain degree of autonomy in matters relating to foreign policy. Pursuant to the provisions of the Basic Law, Hong Kong shall be a subject of international relations after 1 July 1997.

The delegates of the government of HKSAR will have the right to take part in negotiations concerning the region and conducted by China as diplomatic talks in the capacity of the delegates of the People's Republic of China.

The Hong Kong Special Administrative Region, known as "Hong Kong–China" will be entitled to maintain and develop relations, conclude and implement agreements with other countries, regions, and international organisations in strictly defined business areas such as: trade, finance, shipping, communications, tourism, culture and in sport. These powers are borne out by the guarantees offered by the government of China to maintain the status of an international centre of finance, trade, shipping, and communications.

As a member of the governmental delegation of the People's Republic of China, the HKSAR may exercise the right to participate in conferences and/or international organisations whose scope of activity is connected with the region, restricted, however, to states. When using the official name of "Hong Kong–China", the HKSAR may participate in conferences and international organisations individually without any restrictions to states.

Pursuant to the Basic Law, the central government of China is obliged to undertake such activities which would ensure, after the unification with China, the maintenance of Hong Kong's international status and its proper place in all international organisations irrespective of Chinese membership therein or not.

The Basic Law also guarantees that all international agreements to which China is not a party shall continue to be binding on the HKSAR. Its government shall have the right to issue passports to all Chinese citizens who are holders of permanent identification cards and travel documents as well as to other legal residents in the region.

The central government of China will have the power to authorise the government of the HKSAR to conclude an agreement concerning visa free travelling.

The government of HKSAR will have the right to establish official and semi-official business and trade missions, subject to the approval of the Chinese Central Government. All bona-fine missions existing in Hong Kong, state missions with which China has official diplomatic relations shall be preserved after the integration with China. In the case of countries which do not have diplomatic relations with China, such contacts shall be restricted or transformed into semi-official missions. The countries which are not recognised by China will have the right to maintain only non-governmental institutions in the Hong Kong Special Administrative Region. Studies confirm that after the unification with China Hong Kong will continue to enjoy a fair degree of autonomy in the sphere of international relations, particularly in business related matters. This can be attributed to the fact that China intends to maintain the current position on the world arena which Hong Kong truly enjoys.

The Standing Committee of the National People's Congress has the exclusive power to interpret the above mentioned provisions of the Basic Law (Article 157). According to the Constitution of China of 1982, this committee has a wide scope of authority. This, in turn, may cause some concern about a China-oriented interpretation of the provisions of the law and a threat that the Chinese government may in future wish to reject them on the grounds of apparent incompatibility with the law of the Special Administrative Region. As the saying goes, "What is good for Hong Kong must also be good for China, and what is good for China is even better for Hong Kong."[22] The Basic Law abounds with provisions which allow certain interpretative liberty, and this fact alone may in future become a bone of contention. In fact, it is easy to notice certain conflicts between the provisions of the Basic Law and those contained in the British-Chinese Joint Declaration of 1984. The latter document guarantees the maintenance of independent executive, legislative and judicial power. The fact remains, however, that the judicial power will not be that important if it is deprived of the power of judicial review by which to interpret the law.[23]

Whether the Chinese government is to respect the provisions of the Basic Law in this respect or not remains a moot point. Many people seem to opt for a pessimistic view of things. China, they say, has, on numerous occasions, demonstrated its neglect for the law, both internal and international. This is clearly evidence in the provisions of the Chinese Constitution which grants many civil liberties in Article 35 and which in practice are not adequately observed. Why should it be different with the Basic

---

[22] G. J a s z u ń s k i: *Hongkong dla Chin?*, Warsaw 1997, p. 68.

[23] D.R. F u n g: "The Basic Law of the Hong Kong Special Administrative Region of the PRC: Problems of Interpretation,", *International and Comparative Law Quarterly*, 1988, vol. 37, part 3, p. 707.

Law? Will China respect public opinion and will it listen to the existing political parties? Will freedom of the press and of speech be enforceable? What will the reaction of China be in the case of public unrest? Will China want to make use of the military troops stationed in Hong Kong? After all, these troops are entitled to keep law and order. Will Hong Kong be treated in a most favoured way? At this point, it seems impossible to give answers to these questions.

Conclusions

The Chinese-British Joint Declaration on the question of Hong Kong signed in 1984 put an end to speculations concerning the future of the entire region. It not only concerned the question of the New Territories, the lease of which was to terminate on 30 June 1997, but also to the island of Hong Kong and a part of Kowloon Peninsula. The document defined the future of Hong Kong under the sovereignty of China. The present status of Hong Kong is that of an autonomous region of China.

Theoretically speaking, the internal status of the region has not changed substantially. The region still enjoys a large degree of autonomy in internal matters. The Hong Kong Special Administrative Region also maintains a certain degree of independence in international relations to which it is a subject although the fact remains that it does not have the status of a body subject to international law.

The People's Republic of China maintains that its main aim is to preserve the existing position of Hong Kong on the international arena. It is in the vital interest of China to do so, since the resolution of the question of Hong Kong may become a precedent on which the future solution of the question of Taiwan may be based. The maintenance of the status quo will certainly ensure continuos foreign investments in China and the implementation of its policy of openness. Such an approach would surely be beneficial to all interested parties. There is no doubt that Chinese leaders are aware of the fact that the incredible prosperity of Hong Kong was possible because, firstly, it was not administered by communists, and, secondly, because the communist neighbour was just across the border.[24] Therefore, it seems that they will do their utmost to maintain the role that Hong Kong played before the handover.

Li Ruihaun, member of the Standing Committee of the National People's Congress, compared Hong Kong to a fragile tea pot which, if mishandled, can easily be broken.[25] As an English proverb says, "hell is paved with good intentions". Therefore, Hong Kong will be the ultimate test whether China fully comprehends what it does.

There is no absolute guarantee that the provisions of the Joint Declaration or of the Basic Law will be observed. The question arises as to how easy it will be for China to break the promised word. The principle of "one state, two systems" is, in fact, a political concept with no legal basis whatsoever.

On the other hand, however, Hong Kong proved to be an exception in comparison to other British colonies, since the task of Britain was to prepare it for incorpora-

[24] G. Jaszuński, *op. cit.*, p. 56.

[25] Li Ruihuan: "Hong Kong's Return Will Test China,", *Financial Times*, 24 March 1995.

tion into China rather than for independent existence. Time will show whether the task was carried out successfully or not. What is certain is that Britain will cease to have any effect on the future of Hong Kong. It is now China which will bear full responsibility for the organism which was called into being on 1 July 1997. When the British flag was lowered down a new and exciting adventure began to all those who remained in Hong Kong.

23 POLISH YEARBOOK
OF INTERNATIONAL LAW
1997–1998
PL ISSN 0554–498X

The Prescription in International Law – Some Remarks

PIOTR ŁASKI

1. The Notion of a State Territory Changes

From the standpoint of international law, a time lapse – combination with other premises – may bring about changes in the sphere of territorial sovereignty. The changes of a state territory, such that will not cause a state to cease to exist as a subject of an international law, may be rendered either based on common international law or on grounds of an international agreements. The methods and forms of effecting such changes of territory are regulated not by common international law but by the practise of states, and are systematized by the science of international law.[1]

Thus, while understanding the state territory change to mean an acquisition of or a loss of a part of territory by a state, which, however, do not lead to a decline of its legal international subjectivity, it needs to be remembered that largely an acquisition of a territory by one state is associated with a loss on the part of another, albeit circumstances may also arise wherein such an interrelation is absent.

2. The Primary Method of Acquiring a Territory

Methods of acquiring a territory are classified in the science of international law according to several criteria, with the division into primary and derivative titles being at the same time most prevalent.[2] The primary acquisition of a territory means a unilateral act of a state which takes possession over no man's territory (*terra nullius*), thus hitherto not subordinated to sovereignty of any other state.

A derivative acquisition of a territory in turn means a bilateral legal act based on which a state extends territorial control over the part of a territory hitherto subordinated to the sovereignty of another state.

The primary method of acquiring a territory is through, firstly – a specified unilateral acts by the acquiring state and, secondly – an extension of territorial control (i.e. through such a unilateral acts) by the acquiring state over a territory hitherto not subordinated to any sovereignty.

---

[1] A. K l a f k o w s k i: *Prawo międzynarodowe publiczne* [Public International Law] (1979), p. 243.

[2] R. B i e r z a n e k, J. S y m o n i d e s: *Prawo międzynarodowe publiczne* [Public International Law] (1994), p. 195–196; W. G ó r a l c z y k: *Prawo międzynarodowe publiczne w zarysie* [Public International Law – an Outline] (1995), p. 181–182.

One of the five basic methods of acquiring a title to the territory is prescription (*usucapio*).[3]

3. Legal Grounds and the Nature of Prescription in an International Law

An acceptance of the admissibility of prescription in the international law is one of the more frequently debates issues within the international law.[4]

Generally, the international law experts justify the existence of such a method of acquiring a title to the territory citing either necessity, or the interest of international community, for whom the preservation of a certain order in the international relations likewise the aim to peacefully resolve conflicts is of an essential importance. Such a statement of the fact, however, is too vague to form a basis for admissibility of prescription. Therefore, the legal basis for this title needs to be made more precise. Regarding the matter at issue, there are many theories in international law, often contradicting each other.

Some of the experts – who recognize the prescription as being the primary form of acquiring a territory – deduce this method from the supposed fact of the abandonment of the territory by a previous sovereign. If, however, the abandonment would in fact take place, than the abandoned territory should be viewed as *res nullius*, over which is acquired territorial sovereignty by occupation. By this assumption the prescription is not far removed from the effective occupation.[5]

Other exponents in turn, refer to grounds derived from an internal law, a prescription institution at that, the essence of which boils down to a change of legal relationship due to non-execution within a specified period of rights inuring thereto, resulting in a loss of ability to invoke the rights after lapse of legally provided period of time.[6]

---

[3] L. Oppenheim, H. Lauterpacht: *International Law*, ed. 8th (1995), vol. 1, p. 576; W.L. Gould: *An Introduction to International Law* (1957), p. 357; J. Symonides: *Terytorium państwowe w świetle zasady efektywności* [State Territory in the Light of the Effectiveness Principle] (1971), p. 101; A. Klafkowski, *op. cit.*, p. 243–246. To the other titles in the science of international law we add the following titles: effective occupation, cession, conquest and accretion.

[4] See for example: A. Klafkowski, *op. cit.*, p. 243; J. Symonides, *op. cit.*, p. 136; K. Kocot in: *Zarys prawa międzynarodowego* [Outline of International Law] (1956–1957), p. 229; B. Wiewióra: *Uznanie nabytków terytorialnych w prawie międzynarodowym* [Recognition of Territorial Acquisitions in International Law] (1961), p. 34; J.L. Brierly: *The Law of Nations* (1963), p .167–171; J. Charpantier: *La reconaissance internationale et l'évolution du droit des gens* (1956), p. 153–158; G. Dahm: *Völkerrecht* (1958), vol. 1, p. 593; L. Delbez: *Les principes généraux du droit international public* (1964), p. 269–270; P. Guggenheim: *Traité de droit international public* (1959), vol. 1, p. 40; R.Y. Jennings: *The Acquisition of Territory in International Law* (1963), p. 20–28; D.H.N. Johnson: "Acquisitive Prescription in International Law", *BYIL* (1950), p. 332–354; H. Kelsen: *Principles of International Law* (1950), p. 214; R. Pinto: "La prescription en droit", 87 *RCADI* (1955), p. 367; H. Sibert: *Traité du droit international public* (1951), vol. 1, p. 888–891; A. Verdros: *Völkerrecht* (1959), p. 224.

[5] J. Symonides, *op. cit.*, p. 140.

[6] J. Ignatowicz: *Prawo rzeczowe* [Material Law] (1994), p. 107.

This is so, since as in as much as in the case of a prescription in an internal law a weakening of value of a trial evidence due to lapse of time or the intention to penalize negligence manifested by pursuing a claim after excessive delay is of essential significance as much this sort of argument is entirely alien to the international law. The territory being the case it is difficult to envisage that evidence should disappear or be weakened, or similary, in no way can it be admitted that a country acquires territorial control over a territory solely on grounds that it long held it in possession following e.g. contribution incurred to maintain and improve the occupied territory. Admitting such an assumption would, as a result, lead to cancelling proof of ownership on the side of a previous sovereign.

Without, however, going into any further detailed considerations regarding prescription and interrelation between the latter and prescription, it should only be stressed, that in international law – as opposed to domestic law – no norm exists, that would indicate a time necessary to constitute prescription which could serve as a basis for the title to the territory. In other words – acquisition of a title to the territory is not dependent on the lapse of a certain specified period of time.

At times, the admissibility of prescription is arrived at from either explicit or presumed recognition or approval by the state under whose authority a given territory has been previously. This, however, leads to identifying prescription with recognition. However, states which have lost a part of their territory, protest against this, which does not prevent its purchase by means of right of prescription. Thus, prescription is something different and distinct from recognition. Even though situations may arise wherein we encounter no mention (termed in law as a concealment), or an absence of clear protest on the part of any State, both often resulting from existing disproportion of strength between the countries involved or perhaps from the desire to avoid a conflict situation, as an expression of assent or recognition,[7] it does not appear that this kind of thinking is based on any sound general principle.

For, it is by no means that one could agree with an assertion that an absence of protest is tantamount to an assent or recognition on the part of a previous sovereign, thereby constituting a basis for prescription in international law. Consequently prescription may not serve as a legal basis for the ownership title to the territory.

If from a juridical viewpoint the essence of prescription designates an effective possession of something, then one must add that the principle of effective possession constitutes grounds for prescription in international law.[8] The said principle – also present in domestic law – fulfills a special role in international law by being the requisite of its effectiveness. The latter, on the other hand, being ensured at the very minimum at least, by remaining adequately in step with the facts, and by legalizing, on the basis of law-forming consequences, a practice in the specific disputable cases, had they proved effective.

---

[7] E. A u d i n e t: "De la prescription acqusitive en droit international public", I *RGDIP* (1896), p. 322.

[8] H. K e l s e n, *op. cit.*, p. 214; R. P i n t o, *op. cit.*, p. 403; J. S t o n e: "What Price of Effectiveness", *PASIL* (1956), p. 198; K. M a r e k: *Identity and Continuity of States in Public International Law* (1954), p. 580.

It can thus be admitted that "from the principle of effectiveness it follows that the only fact which may prove the acquisition of a territory is an effective taking possession for the duration of time."[9] Effectiveness of possession with respect to prescription is also determined by the position taken by the international community. Its protest, either in the form of non-recognition or the support of the claims of a state which has lost the territory, renders the instituting of prescription doubtful. On the other hand, however, considering the fact that international law in the extent much larger than domestic law, grants the legal consequence to the effective possession – it may be assumed that, if the possession is characterized by stability and finality and nothing points that the situation would be subject to any change in the future, then the effective and therefore effectual possession brings a sovereign title. Prescription may commence – like prescription in a domestic law – in a manner contrary to international law, or possibly in a situation wherein the other titles are contested. "If – as J. Symonides commented – in the first instance its role is controversial, in as much as in the second case, such manner of acquiring the title to a territory plays a positive role and is not in the least a manifestation of a principle *ex iniuria ius oritur* at play,[10] this being so, since the fiction that a sovereignty over disputed territory belongs to a country which does not exercise any sovereign rights over it, cannot be upheld indefinitely. "In fact – as is stressed by J.L. Briely – many territorial titles (...) have been accepted nowadays by an international law (...) in consideration of the fact that they de facto existed for a long time; they are illustrative of the maxim that *ex facto oritur ius*, laid at the foundation of prescription in all legal systems."[11] Prior to World War I the admissibility of prescription was in reality clearly underscored just once; in a bilateral agreement of 2 February 1897 between Venezuela and Great Britain concerning a territorial dispute between Venezuela and then British Guyana.[12]

One can, however, point to a number of international treaties wherein the prescription is recognized implicitly. Generally, these are treaties dealing with the issue of occupation of disputable territories, containing provisions which preclude either side from acquisition of a title to such territories following an uninterrupted possession. Therefore, they recognize *a contrario* the existence of prescription in international law.[13]

The possibility of acquiring a title to a territory has also been recognized – though indirectly – in some arbitration agreements concluded between South American states,[14] in Anglo-American practice and, finally in the U.S. and British jurisdiction

---

[9] A. R o s s: *A Textbook of International Law* (1947), p. 145.

[10] J. S y m o n i d e s, *op. cit.*, p. 142.

[11] J.L. B r i e r l y, *op. cit.*, p. 167.

[12] J.B. M o o r e, *History and Digest of the International Arbitrations to which the United States has been a Party* (1898), vol. 5, p. 5018.

[13] J.B. M o o r e, *op. cit.*, p. 5018.

[14] For example: arbitration agreement of 16 February 1930 negotiated between Guatemala and Honduras, or Ecuador and Peru in 1936. *AD* 1933–1934, (1940), p. 115–127; F.C. F i s c h e r: "The Arbitration of the Guatemalan-Honduran Boundry Dispute", 27 *AJIL* (1933), p. 403–427; L.H. W o o l s e y: "The Ecuador-Peru Boundary Controversy", 31 *AJIL* (1937), p. 100.

we encounter verdicts wherein the existence of prescription is recognized as a basis for acquiring title to a territory.[15]

None of the international arbitration or judicial tribunals on the other hand, have decided in a manner decisively unequivocal in favour of the admissibility of prescription in an international law as being to the territory.

In their several verdicts nevertheless, a *de facto* existence of the latter has been corroborated. And in the United States concerning the borderline agreed in 1852 between tsarist Russia and England, and separating Alaska from the United States, the Arbitration Tribunal emphasized the significance of a factual possession by recognizing the possibility of acquiring territorial sovereignty through prescription.[16]

Also in a dispute over Morskie Oko Lake between Austria and Hungary in 1902, the arbitrators of those days found that the undisturbed and immemorial possession brings a title to a territory.[17] Similary in the case of a dispute over sea borderline between Sweden and Norway in 1909. A Permanent Arbitration Tribunal while granting Sweden sovereignty over disputed maritime area as the result of performing by the same of a certain state functions such as regulating marine traffic or placing light vessels on the sea route, admitted that Sweden had created a specific factual situation existing even before the dispute arose, which, if it were to be changed, it would have to be in the smallest possible extent.[18]

Prescription was quite vividly brought into prominence and at once its existence was recognized in a dispute between the United States and Mexico in 1911 over Chamizal, following claims of both countries to the area located between the initial and the later river-bed of the Rio Grande River,[19] which since 1848 served as a border between the two states. Adjudging arbitrators rejected American claims originating from an undisturbed possession by the U.S.A. of the disputed territory, holding that the American assertion of an undisturbed possession was untrue, as in reality it was being disturbed by exceedingly frequent Mexican protests.

Whereas in this particular case the arbitrators rejected prescription as being applicable, they have in principle spoken in favour of the admissibility of the existence of prescription in international law. Most vivid expression of a view favouring admissibility of prescription is presented in a dispute over Palmas Island (Miangas) between the United States and The Netherlands,[20] wherein in 1928 the arbitrator M. Huber was to decide whether the sovereignty over the island question would go to The Netherlands or the United States, both basing their claims on the premise that they are the successors of Spain to which discovery of the island is credited.

---

[15] G.G. W i l s o n: *International Law* (1935), p. 114; O. S v a r l i e n: *An Introduction to the Law of Nations* (1955), p. 181.

[16] J.B. M o o r e: *A Digest of International Law* (1906), vol. 1, p. 297.

[17] V. K o r n: "Arbitrage dans le différend international entre l'Autriche et la Hongrie au sujet de la frontiére prés du lac 'l'Oeil de la Mer' au Tatra", *Revue de Droit International et la Législation comparé* (1906), vol. 8, p. 207.

[18] J.B. S c o t t: *The Hague Court Reports* (1916), p. 122.

[19] 5 *AJIL* (1911), p. 782.

[20] 2 *RIAA*, p. 831.

The said arbitrator in a verdict passed on 4 April 1928 ascertained that:

"Though a domestic law, owing to its closed judicial system, is able to recognize the abstract property right as existing separately from any material exercise thereof, it has nevertheless limited their efficacy through the principle of prescription and a protection possessing. An international law, the structure of which is not based on any suprastate organization, may not reduce a right such as the right to a territorial sovereignty which practically all the international relations are linking with, to a category of an abstract right, without it being specifically manifested. The principle, that a permanent and peaceful exercise of a state jurisdiction constitutes a constructive element of territorial sovereignty, is not only widely accepted in the international science and doctrine; it has been recognized in a numerous states of the Union, where the tribunals that apply norms of the international law to settle disputes between the member states have been established. This is all the more significant since in the states of the Union, where the judicial system is more complete than the one that exist in the field of international relations, it is considered natural that as regards the territorial matters the principle of a legally acquired material right being precedent to the factual possession should be applied."[21]

The said arbitrator recognized as a result of this that the sovereignty over disputed island is to be awarded to The Netherlands in consideration of the fact that the same exercised an uninterrupted and peaceful territorial sovereignty throughout the time span of two hundred years (1700–1900), which he termed the so-called prescription.

After the World War II, on the other hand, the issue of admissibility of prescription appeared in two cases: in the Anglo-Norwegian dispute of 1951 over fishing,[22] and in an Anglo-French dispute of 1953 over the Minquier and Ecrehos Islands.[23] In the first, as in the second case the parties were basing their contention on prescription.

Concerning the first dispute, with its beginning dating back to the 18th century and the essence of which resolves itself into whether a coastal country (Norway in this case) could win sole sovereignty over sea areas viewed in the light of an international law to be an open sea – the International Court of Justice where the dispute was refereed to for settlement in its judgement of 18 December 1951 ruled in the affirmative. It based its verdict – though indirectly – on the applicability of prescription in favour of Norway the position and behaviour of which towards England – in the opinion of the International Court of Justice – remained in no contradiction with the international law.[24]

In the Anglo-French dispute in turn, over the small islands and rocks of Minquiers and Ecrehos the same Court in the judgment of 17 November 1953 specifically stressed the significance of possession, holding that for the Court the deciding issue is not an indirect presumption on the basis of events from the Middle Ages, but the obviousness which is directly connected with the possession of these rock formations. As an

[21] *ICJ Rep.* (1951), p. 132.
[22] *ICJ Rep.* (1953), p. 57.
[23] *ICJ Rep.* (1951), p. 116.
[24] *ICJ Rep.* (1953), p. 47.

evidence of such a possession the Court admitted the acts of exercising jurisdiction, local administration and legislation.[25]

The issue of prescription is also encountered in an independent opinion of Judge Moreno Quintano, attached to the ruling of an International Court of Justice of 20 June 1959 in a case of sovereign authority over certain sections close to the border between Belgium and The Netherlands.[26]

Quoted as an example, the rulings of a various courts from various periods, being the result of a specific practice followed by states despite the fact that they address territorial disputes of lesser importance, in fact the ones respecting which a state could – somehow in advance – allow the eventuality of a ruling against itself, are those that indicate (as does the practice of states) that the prescription can be recognized as a customary norm in international law.

4. Requirements to Institute the Prescription

Seeking the conditions that should be fulfilled for the prescription to be deemed effective, a majority of international law experts dealing with the issue of a widely construed territory, stress that for the effective acquisition of a title to a territory through prescription a continuous (uninterrupted) and peaceful exercising of a sovereign rights is indispensable.[27]

The two elements mentioned positively dominate amongst the requirements postulated by various authors. This at once remains in agreement with the principle of effectiveness which grants the legal consequence only those factual situations which at the same time are appropriately permanent and stable.

In the case of prescription the permanence (continuity, absence of interruption) means that the situation that arose exists incessantly throughout the period necessary to form a conviction of its finality. The issue of how long the duration of a continuos and uninterrupted possession should be remains disputable. Therefore, it is postulated that it should be determined individually each time either by courts or an international arbitration. This is being dictated by the absence of a positive norm concerning this issue, as well as by the diversity of cases.

Stability in turn, is understood to be an undisturbed and peaceful exercising of a state jurisdiction. It can be disturbed by either a previous sovereign, or by an international community acting in solidarity, and finally – by the population of the territory concerned, whose resistance brings on the use of power, to mean at the same time, that the exercising of sovereign rights ceased to be peaceful.

In the latter case, one can cite the example of Poland under partition (1795–1919), whose population, through a numerous uprisings of the 18th, 19th, and the beginning

---

[25] *ICJ Rep.* (1959), p. 255.

[26] E. A u d i e n t, *op. cit.*, p. 322; J.H. R a l s t o n: "Prescription", 5 *AJIL* (1910), p. 143; Ch.Ch. H y d e: *International Law, Chiefly as Interpreted and Applied by the United States* (1945), vol. 1, p. 386; R.Y. J e n n i n g s, *op. cit.*, p. 23; A. A l v a r e z: *Le droit international nouveau* (1959), p. 523.

[27] D.H.N. J o h n s o n, *op. cit.*, p. 347; L. C a v a r é: *Le droit international public positif* (1961), p. 602.

of 20th century – which brought about the use of military power on the part of invaders against her – have caused that with respect to the territories divided between the invaders no prescription took place. Nor could it have taken place, as the territories of the divided 18th-century Poland were kept be the invaders by force, which was in contradiction with the *status quo* that was final and consistent with the international law of those days. A possession, in the sense of a factual situation, may also be disturbed by – other than the factors mentioned above – the matter being directed before the International Court of Justice in the Hague or for examination by the United Nations Organization, this being so since a country by accepting that a disputable matter is to be considered by either the International Court of Justice or the United Nations, is also accepting a settlement possibly unfavourable to itself, which fact would automatically violate the finality of the existing situation.

When specifying the conditions necessary to institute prescription one must also mention still two other criteria:

1) exercising of sovereign right in own behalf and,

2) publicness of possesion.

The first requirement seems obvious, as much as the second one is taken from domestic law, where its existence has justifiable basis. For considering the fact that in the contemporary international relations a possibility of non-public exercise of a state jurisdiction over any territory is very hypothetical, it has to be assumed that a criterion of publicness being a separate formulating of such requirement is needless.

5. Conclusion

In summing up the presented considerations it needs to be underscored that at the origins of prescription the doctrine singles out an effective exercising of sovereign rights, or the former are arrived at from the institution of prescription.

In the first instance, the prescription is understood to be an acquisition of territorial sovereignty through an effective exercise of a state jurisdiction in the manner which forms the conviction in the international community, that the existing situation is conferment with international law. We thus emphasize that it is not just any exercise of sovereign rights that leads to acquisition of a title, but only such that is sufficiently effectual as to have formed the conviction that a change of existing circumstances – considering a threat to the stability of international relations – would be contradictory to the interest of an international law points at a time to the circumstances wherein, even the effective exercise of sovereign rights does not bring the title to the territory.

Such is the case concurring for example: a military occupation following the result of an armed conflict in violation of the provisions of the United Nations Chapter, mandate territories, circumstances resulting from a lease agreements or military bases agreements.

In the last two cases, while the permission is granted to allow the exercise of a sovereign right by other states, a clear indication is made that it constitutes no basis

of any kind for a transfer of sovereignty, and thus acquiring rights through prescription.

Also general rules of an international law, most importantly a right of all people to self-determination, limit the operation of prescription. The approval of the population of a certain territory is one of the basic criteria marking the effectiveness of exercising the sovereign rights. In case of its protest the principle *ius postlimini*, a correlate to prescription applies.

In the second instance, in turn – the prescription is understood to be a form of an acquisitive prescription resulting from the lapse of a certain specified period of time, which institution, however, – as was stressed – does not exist in international law. Indeed, the existence of this institution may be admitted to manifest the operation of effectiveness since the real and effectual exercise of sovereign rights is not only *conditio sine qua non* for the title to a territory but also in itself, in the circumstances provided by an international law, creates such a title. Nevertheless, acting on the assumption that *tempus ex natura sua vim nullam effectricem habet*, it needs to be ascertained that there is no norm of international law that would indicate the time lapse necessary to give rise to prescription, an institution in a terminological aspect borrowed from the domestic law, with respect to which, due to the international community not being organized and centralized in the extent that characterize a state internal system, *implicite* criteria found in domestic law cannot be applied. Prescription becomes an effectual title to a territory following an effective exercising of state jurisdiction or – we stress once again – exercising of sovereign rights in own behalf in a permanent and undisturbed manner.

23 POLISH YEARBOOK
OF INTERNATIONAL LAW
1997–1998
PL ISSN 0554-498X

The Standard of Review of Article 17.6 of the Anti-Dumping Agreement and the Problem of its Extension to Other WTO Agreements[1]

JOANNA GOMUŁA

I. Introduction

Like many areas of the multilateral trade regime established by the Uruguay Round, the dispute settlement mechanism of the World Trade Organization ("WTO") has attracted much attention. This is not surprising in light of the significant activity of WTO panels and the Appellate Body,[2] with the first cases constituting a promising beginning for the new system. The system's most striking features, when compared to the regime under GATT 1947, are the rule of "negative consensus" governing the adoption of dispute settlement reports and the establishment of the Appellate Body, a permanent judicial authority charged with ensuring the correctness of legal interpretations of the WTO agreements.

The functioning of the general WTO dispute settlement system is regulated by the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU").[3] Its provisions apply, in principle, to all WTO agreements (except for the Trade Review Mechanism and subject to a decision of the parties in the case of the Plurilateral Trade Agreements), which are referred to jointly as the "covered agreements". With the DSU setting out a general framework for disputes within the WTO, there are special or additional rules on dispute settlement in several of the covered agreements. These provisions, which have been listed in Appendix 2 to the DSU, prevail in case of conflict with the general rules and procedures of the DSU (Art. 1.2 of the DSU).

The provisions enumerated in Appendix 2 include paragraphs 4 through 7 of Art. 17 of the Agreement on Implementation of Article VI of GATT 1994 (commonly known as the "Anti-Dumping Agreement").[4] As will be discussed in more detail below, anti-dumping matters have been subject to special dispute settlement procedures since the

[1] This paper was prepared under the direction of Prof. Paolo Mengozzi, at the 1997 Session (18 August–12 September) of the Centre for Studies and Research of The Hague Academy of International Law.

[2] As of 15 August 1997, 6 Appellate Body reports had been adopted, 1 panel report appealed and 2 panel reports issued. Moreover, there were 10 active panels and 33 pending consultations. *Dispute Settlement Overview Prepared by the WTO Secretariat*, August 21, 1997, http://www.wto.org/dispute/bulletin.htm.

[3] For its text see *The WTO Dispute Settlement Procedures. A Collection of Legal Texts*, WTO 1995.

[4] Text in: *The Results of the Uruguay Round of Multilateral Trade Negotiations. The Legal Texts*, WTO 1995, p. 168–196.

Tokyo Round and, considering the nature of anti-dumping disputes, it is not surprising that the current procedures also derogate from the general rules. However, one provision, paragraph 6 of Art. 17, has introduced a new quality in this respect. It contains a number of directives for panels to follow when reviewing anti-dumping matters, relevant both for the assessment of facts and for the evaluation of legal determinations of national authorities, thus spelling out the "standard of review" for anti-dumping matters. It provides that when a panel examines such matters:

(i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of those facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;

(ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that arelevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if its rests upon one of those permissible interpretations.

To this date, no anti-dumping case has been reviewed by a WTO panel and as such Art. 17.6 has not yet been tested against practice.[5] However, its importance cannot be underestimated, for at least two reasons. The first is the Decision on Review of Article 17.6 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, adopted during the Uruguay Round (the "Ministerial Decision"), according to which "the standard of review in paragraph 6 of Article 17 (...) shall be reviewed after a period of three years with a view to considering the question of whether it is capable of general application".[6] As a consequence, the standard could in the near future be extended to other WTO agreements and become integrated into the Organization's general dispute settlement regime. The second reason relates to two disputes recently filtered through the complete (panel and Appellate Body) WTO procedure, which revealed that the standard of review is already a serious issue in the application of other WTO agreements. Both matters were brought under the Agreement on Textiles and Clothing in reaction to the imposition by the United States of transitional safeguards concerning imports from, respectively, Costa Rica (the *Underwear* case) and India (the *Wool Shirts* case).[7]

---

[5] However, as of 15 August 1997 four anti-dumping disputes were pending: complaint by Mexico against Guatemala in respect of an anti-dumping investigation with regard to imports of Portland cement from Mexico (panel established), complaint by the E.C. against the United States in respect of anti-dumping duties imposed on imports of solid urea from the former German Democratic Republic (consultations) and two complaints by Korea against the United States: in respect of anti-dumping duties imposed on imports of color television receivers and in respect of a decision of the U.S. authorities not to revoke an anti-dumping duty on dynamic random access memory semi-conductors (both disputes are in the consultations phase).

[6] *The Results...*, *op. cit.*, p. 453.

[7] *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*, WT/DS24/R (11 November 1996), WT/DS24/AB/R (10 February 1996) (both adopted 25 February 1997) and *United States –*

The object of this paper is to provide an analysis of the standard of review of Art. 17.6, in an attempt to determine its most appropriate meaning and possible mode of future application, and to examine the prospects of the standard's extension to other WTO agreements, taking into account the findings of the above mentioned panels. The analysis will involve the situation of Art. 17.6 against other provisions on dispute settlement in the Anti-Dumping Agreement and the DSU. It will be preeceded by a few general remarks on the notion of standard of review and the historical background of Art. 17.6, with an overview of respective GATT regulations and the approach adopted by some of the past GATT anti-dumping panels.

II. General Issues

1. Notion of Standard of Review

In most general terms, the problem of the standard of review[8] concerns the degree of deference that an international body should afford to the determinations of national authorities. It has been characterized as the specific question to what extent, when assessing governmental action, an international body should approach "the issues involved (including factual determinations) *de novo*, without any deference to national government".[9] In this sense, it is a coin's other side of the scope of discretion exercised by national authorities.

However, the standard of review can also be attributed a broader meaning. In the latter meaning, it concerns the criteria (including rules and principles of interpretation) that should be applied and taken into account by an international body when reviewing and evaluating national determinations. Deference to such determinations is but one element of the standard of review so understood. This meaning more adequately reflects the phenomenon covered by Art. 17.6 of the Anti-Dumping Agreement, its important consequence being that the standard of review should be viewed against the objectives of dispute settlement, not only those resulting from the Anti-Dumping Agreement, but also the general objectives of the DSU.

The concept of standard of review is not alien to other legal regimes, domestic or international. In fact, the standard adopted by Art. 17.6 was inspired by the so-called *Chevron* doctrine, which applies to the review of agency determinations by U.S. courts. According to this doctrine, introduced in 1984, courts should defer to an interpreta-

Measure Affecting Imports of Woven Wool Shirts and Blouses from India, WT/DS33/R (6 January 1997), WT/DS33/AB/R (25 April 1997) (both adopted 23 May 1997).

[8] Some authors use the plural form ("standards"), e.g., P. W a e r, E. V e r m u l s t: "EC Anti-Dumping Law and Practice after the Uruguay Round. A New Lease of Life?", 28 *Journal of World Trade* (1994), p. 8. However, the single form is more common and has been used in the Ministerial Decision, and in both of the quoted panel reports.

[9] S.P. C r o l e y, J.H. J a c k s o n: "WTO Dispute Procedures, Standard of Review, and Deference to National Governments", 90 *AJIL* (1996), p. 194. According to the authors, another aspect of the problem is "how to reconcile competing views about the allocation of power between national governments and international institutions", *ibid.*, p. 194–195. See also E.U. P e t e r s m a n n: *The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement* (1997), p. 226–227.

tion of an agency and refrain from substituting it with their own, even if they believe their interpretation to be preferable.[10] Similar restrictions exist in other countries with respect to the review of administrative acts by superior authorities.

On the international plane, worth noting is the doctrine of the "margin of appreciation" developed by the European Court for Human Rights, according to which Member States are allowed a measure of discretion in the implementation of the European Convention for Human Rights. This has been characterized as the Court's dilemma of "how to remain true to its responsibility to develop a reasonably comprehensive set of review principles appropriate for application across the entire Convention, while at the same time recognizing the diversity of political, economic, cultural and social situations in the societies of the Contracting Parties".[11] However, not much analogy can really be drawn to the GATT/WTO system in this case, because the application of the Convention is not so much about interpretation in the traditional sense, but rather about the saturation of its provisions with contents to develop common European standards, in circumstances where divergent economic and social policies must be taken into account.

A better analogy is provided by the North American Free Trade Aagreement, which, like the WTO, covers a broad range of trade-related issues. Under Chapter 19 of the NAFTA, binational panels may be established to review anti-dumping and countervailing disputes arising out of the respective country's laws. The panels are required to apply the same standard of review as that applied by courts of the importing country. The mechanism according to which experts with different legal backgrounds are called upon to evaluate national decisions using standards not necessarily familiar to them has raised serious concerns among commentators of the NAFTA system.[12] Because of the obvious drawbacks of this model, at least in view of hitherto practice, it is definitely not one that can be recommended for the WTO.[13]

The European Court of Justice has not developed a clear standard of review for anti-dumping matters, unless considerable deference shown until recently to determinations of EC authorities is said to constitute such standard.[14] However,

---

[10] However, the deference is not absolute, for courts are required to defer to agency interpretations only if the statute is ambiguous and if the agency's interpretation is reasonable. For a presentation of the *Chevron* doctrine see S.P. Croley, J.H. J a c k s o n, *op. cit.*, p. 202–206.

[11] R.St.J. M a c d o n a l d: *The Margin of Appreciation* in: *The European System for the Protection of Human Rights*, R.St.J. M a c d o n a l d, F. M a t s c h e r, H. P e t z o l d (ed.) (1993), p. 83. See also H.Ch. Y o u r o w: *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (1997)

[12] See R.E. B u r k e, B.F. W a l s h: "NAFTA Binational Panel Review: Should It Be Continued, Eliminated or Substantially Changed", 20 *Brooklyn Journal of International Law* (1993–1995), p. 535–559. The problems became acute in the *Softwood Lumber* case, where the panel and the extraordinary challenge committee established in this matter divided along national lines. See, e.g., Ch.M. G a s t l e, J.G. C a s t e l: "Should the North American Free Trade Agreement Dispute Settlement Mechanism in Antidumping and Countervailing Duty Cases be Reformed in Light of the Softwood Lumber III?", 26 *Law and Policy in International Business* (1995), p. 823 ff.

[13] In this context see the conclusions of Judge Wilkey (who served on one of the extraordinary challenge committees established under NAFTA) in: M.R. W i l k e y: "Introduction to Dispute Settlement in International Trade and Foreign Direct Investment", *Law and Policy a.a.*, p. 631.

[14] See, e.g., E. V e r m u l s t, P. W a e r: *E.C. Anti-Dumping Law and Practice* (1996), p. 59–162.

a principle has been distinguished relating to the evaluation by the Court of complex economic facts and circumstances in proceedings under Art. 173 of the EC Treaty. In such cases, the Court will limit its review to examining whether the evaluation of such facts by the relevant authorities carried a manifest error or misuse of powers.[15]

2. Historical Background

2.1. Regulations

There were no counterparts of Art. 17.6 in the previous GATT anti-dumping agreements. The Agreement on Implementation of Article VI of GATT of 30 June 1967 did not contain any dispute settlement provisions. This changed with the conclusion of the Agreement of 12 April 1979, which introduced special dispute settlement procedures. Their major feature was the mandatory referral of anti-dumping disputes to conciliation carried out by the Committee on Anti-Dumping Practices. Conciliation was also a prerequisite for the establishment of a panel to review a matter. However, the parties were not precluded from resorting to general GATT dispute settlement under Art. XXIII.

Initial Uruguay Round drafts of the new anti-dumping agreement did not substantially modify the 1979 rules, except for the elimination of the inefficient mandatory conciliation. However, later negotiations were influenced by an unexpected increase, as of the end of the 1980s, of anti-dumping actions. Within the framework of the GATT, out of 11 panel reports involving anti-dumping matters, as many as 8 were issued in 1990–95. Of these, 4 complaints were brought against the United States, which lost in 3 cases (these reports, as well as another in which the EC was defendant remain unadopted).[16] These defeats led the United States to strongly criticize "the perceived willingness of certain panels to overturn the actions of investigating authorities that were reasonable".[17] This state's efforts to place an express limit on the review by panels were supported, in particular, by the European Communities.

At one point during the Uruguay Round a single standard for the review by panels of national decisions was also contemplated, but the proposal was abandoned in

---

[15] See E. C r e a l l y: *Judicial Review of Anti-dumping and other Safeguard Measures in the European Community* (1992), p. 228, 280–290.

[16] For a list of adopted and unadopted antidumping panel reports see E. V e r m u l s t, N. K o m u r o: "Anti-Dumping Disputes in the GATT/WTO. Navigating Dire Straits", 31 *Journal of World Trade* (1997), p. 44. Negotiations of new anti-dumping regulations at the Uruguay Round are presented by T.P. S t e w a r t, S.G. M a r k e l, M.J. K e r w i n: *Antidumping. The GATT Uruguay Round: A Negotiating History (1986–1992)* (1993), p. 258–260. The history of the Uruguay Round negotiations (including post-1992) in this area is also presented by J. C r o o m e: *Reshaping the World Trading System. A History of the Uruguay Round*, WTO (1995), p. 80–85, 208–213, 304–307.

[17] T.P. S t e w a r t, S.G. M a r k e l, M.J. K e r w i n, *op. cit.*, p. 302. As noted by D. Palmeter, the limitation of the ability of panels to overturn domestic antidumping determinations became "a major negotiating goal" of the United States. D. P a l m e t e r: "United States Implementation of the Uruguay Round Antidumping Code", 29 *Journal of World Trad* (1995), p. 76. See also P.A. A k a k w a m: "The Standard of Review in the 1994 Antidumping Code: Circumscribing the Role of GATT Panels in Reviewing National Antidumping Determinations", 5 *Minnesota Journal of Global Trade* (1996), p. 277, 283–285.

view of strong opposition from the US intellectual property circles.[18] The most advanced suggestions of the standard's extension concerned the Agreement on Subsidies and Countervailing Measures (the "Subsidies Agreement"),[19] which was partly justified by the many common problems of anti-dumping and countervailing duty investigations. In the end, the Subsidies Agreement went its own way, governed by other dispute settlement procedures of a special nature.[20] However, the Ministers issued a Declaration, which emphasized, with respect to dispute settlement pursuant to the Anti-Dumping Agreement and Part V of the Subsidies Agreement, "the need for the consistent resolution of disputes arising from anti-dumping and countervailing duty measures".[21] It is too much to say that this Declaration "extended" the standard of review of Art. 17.6 to countervailing duty cases. Rather, it can be interpreted as an encouragement of a uniform approach to problems common to the two areas (which for a long period had been treated jointly, both in GATT and in domestic regulations), such as the concepts of like products, domestic industry, material injury and causality. Paradoxically, the emphasis on consistency of dispute resolution suggests the strengthening, rather than limiting, of the role of panels in reviewing matters covered by the Declaration.

2.2. GATT Panels

It has been asserted that the special provisions of Art. 17.6 "codify GATT anti-dumping panel practice".[22] This may be an over-statement, in particular with respect to the review of legal issues, though the practice has been characterized by a certain degree of consistency. Over the period from the adoption of the GATT 1947 to the entry into force of the WTO Agreement, the panels' strategy in reviewing anti-dumping matters seems to have undergone an evolution, from a somewhat cautious approach of the first panel to bolder, much more sophisticated methods of review applied by recent panels.[23]

---

[18] See G.N. Horlick, E.C. Shea: "The World Trade Organization Antidumping Agreement", 29 *Journal of World Trade* (1995), p. 31.

[19] See P.J. McDonough: *Subsidies. The GATT Uruguay Round: A Negotiating History (1986–1992)* (1993), p .141.

[20] For an overview see, e.g., J.R. Cannon, Jr.: *Dispute Settlement in Antidumping and Countervailing Duty Cases* in: *The World Trade Organization. The Multilateral Trade Framework of the 21st Century and U.S. Implementing Legislation*, T.P. Stewart (ed.), ABA (1996), p. 387 *et seq.*. The author also discusses in detail various proposals regarding dispute settlement during the Uruguay Round.

[21] *Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 or Part V of the Agreement on Subsidies and Countervailing Measures* in: *The Results...*, *op. cit.*, p. 453. The Declaration uses "softer" language than the Ministerial Decision, stating only that the Ministers "recognize" (as opposed to "decide") the need for consistency.

[22] E. Vermulst, N. Komuro, *op. cit.*, p. 32.

[23] For example, the first panel (which reviewed a complaint by Italy in respect of the Swedish system of minimum prices on imported stockings) stated, among others, "that it was not competent to deal with the legal rules which may exist in Sweden regarding procedures before customs authorities or the courts". In another place, it deferred to Sweden's assertion that no GATT provision could limit "in any way" the rights of the national authorities to decide whether dumping had taken place. *Swedish Antidumping Duties* (adopted 26 February 1955), BISD 3S/81, para. 15 and 23. However, this did not prevent the panel from concluding that

There is no room to discuss in detail the past GATT panel reports, especially since these reports (adopted and unadopted) have been extensively presented elsewhere.[24] Therefore, this review will be limited to only some determinations of adopted panel reports. The first report worth particular notice is that in the *Transformers* dispute, which was initiated by Finland as a result of the levying by New Zealand of anti-dumping duties on electrical transformers.[25] In this case, in response to New Zealand's argument that a determination of material injury was a matter "specifically and expressly" reserved for the decision of a contracting party, the panel stressed that although such determination was the "responsibility" of the national authorities, the affected party could not be deprived of the possibility to challenge and scrutinize the authorities' action. According to the panel, "to conclude otherwise would give governments complete freedom and unrestricted discretion in deciding anti-dumping cases without any possibility to review the action taken in the GATT. This would lead to an unacceptable situation under the aspect of law and order in international trade relations as governed by the GATT".[26]

Similarly, in a later dispute concerning Korean anti-dumping duties on polyacetal resins imported from the Untied States,[27] Korea raised the argument, among others, that "the Panel's job was not to conduct a *de novo* investigation nor to attach its own weights to the different factors" (relevant for the finding of injury).[28] The panel acknowledged that its judgment could not be substituted for that of national authorities as to the relative weight to be accorded to certain facts, nor that it was entitled to make its own independent evaluation of the facts before the authorities. It viewed its task as the review of the authorities' determination for consistency with the Anti-Dumping Agreement, "bearing in mind that in a given case reasonable minds could differ as to the significance to be attached to certain facts". However, the panel emphasized that a proper review of the determination of positive evidence for the purposes of the finding of injury required an examination "whether the factual basis of the findings articulated in the determination was discernible from the text of the de-

a contracting party was obliged to establish certain facts prior to the imposition of anti-dumping duties. The panel also proceeded to what appears to be an attempt of a *de novo* review on the basis of the data provided by the parties, which, however, only resulted in the recommendation that the parties "try and clarify the facts on which the determination of dumping was based". *Ibid.*, para. 31–32.

[24] See, e.g., E. Vermulst, N. Komuro, *op. cit.*, p. 15–19; E.U. Petersmann: *Settlement of International and National Trade Disputes through the GATT: The Case of Antidumping Law* in: *Adjudication of International Trade Disputes in International and National Economic Law*, G. Jaenicke (ed.) (1992), p. 96–118.

[25] *New Zealand – Imports of Electrical Transformers from Finland* (adopted 18 July 1985), BISD 32S/55.

[26] *Ibid.*, para. 4.4. The panel in the *Underwear* case commented on this paragraph as follows: "We see great force in this argument. We do not, however, see our review as a substitute for the proceedings conducted by national investigating authorities or by the Textile Monitoring Body. Rather, in our view, the Panel's function should be to assess objectively the review conducted by the national investigating authority", WT/DS24/R, *op. cit.*, para. 7.12. However, it is difficult to agree with the panel's implicit assertion that the *Transformers* panel advocated "substitution" for national proceedings.

[27] *Korea – Anti-Dumping Duties on Imports of Polyacetal Resins from the United States* (adopted 27 April 1993), BISD 40S/205.

[28] *Ibid.*, para. 57. The United States, too, had requested the panel not to "reweigh the evidence", but to examine the reasons offered in the Korean determination. *Ibid.*, par. 60.

termination and whether it reasonably supported those findings. This entailed the need for the Panel to satisfy itself that there was sufficient reasoning in the determination as to the connection between this factual basis and these findings, and that the Korean authorities had not relied upon incorrect factual information".[29]

The criterion of reasonableness, touched upon in the above case, was much relied on by the panel in the *Salmon* dispute.[30] For example, when examining whether the authorities of the United States had properly determined majority support of the domestic industry for initiation of proceedings, the panel focused on whether the authorities had taken "such steps as could *reasonably* be considered sufficient", whether they could "*reasonably* have relied on the statements" of the petitioners and whether they could "*reasonably* treat the request" as being brought on behalf of the industry.[31] The panel upheld most of the national determinations challenged by Norway. Among the exceptions was the improper consideration by the US authorities of the differences in weight of salmon in the comparison of normal value and export prices. The panel put an emphasis on the authorities' *awareness* that these differences could have affected price comparability.[32]

In the *Salmon* case the panel also set out the criteria for the review of facts, in the context of its examination whether the authorities' determination of material injury had been objective. The panel stated that such review "necessitated an examination whether the authorities had examined all relevant facts before them (including facts which might detract from an affirmative determination) and whether a reasonable explanation had been provided **and** how the facts as a whole supported the determination made by the investigating authorities".[33] This approach was much relied on by the *Underwear* panel (see below).

The panel also addressed the problem of differing interpretations of the provisions of the 1979 Anti-Dumping Agreement. Norway had claimed that the method applied by the United States for comparison of normal value and export price was inconsistent with Art. 2.6. This provision, while requiring that the comparison must be "fair", did not specify any particular method which should be followed by the national authorities. The United States, therefore, asserted that the method used by its authorities, consisting in the comparison of average normal values to individual export prices, fell within the bounds of Art. 2.6. The panel accepted the latter position, though it took care to stress that the method's consistency with the relevant provisions should be evaluated on a case-by-case basis. The panel also pointed out that Norway had failed to satisfy the burden of proof in this respect.[34]

---

[29] *Ibid.*, para. 227.

[30] *United States – Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway* (adopted 26 April 1994) ADP/87. Findings published in *Handbook of GATT/WTO Dispute Settlement*, P. Pescatore, W.J. Davey, A.F. Lowenfeld (ed.) (1991), vol. 2.

[31] *Ibid.*, para. 361–2 (emphasis added).

[32] *Ibid.*, para. 472.

[33] *Ibid.*, para. 492.

[34] *Ibid.*, para. 481. The panel also deferred to the U.S. interpretation of Art. 3.4 of the 1979 Anti-Dumping Agreement with respect to the degree in which the authorities were required to take into account possible causes of injury other than dumping.

As can be seen from the above overview, panels dealing with anti-dumping disputes in the past have been careful to emphasize that they are not expected to perform a *de novo* examination of the matter. However, their review has often, in particular in response to challenges brought by the complaining party, taken the form of an acute scrutiny of the determinations of national authorities. In carrying out such review past panels have increasingly relied on the criterion of reasonableness, which seems to be fulfilled, with respect to facts, if the panel determines that the authorities have considered all relevant factors and have provided sufficient justification as to why some of those factors, and not others, have been used to support a determination.

Panels have not expressly distinguished issues of law from issues of fact. However, from the few instances of "purely legal" examination, it appears that an interpretation in support of a particular action will be accepted, if the relevant provisions do not explicitly prohibit such action and if the complaining party does not bring forward sufficient evidence to the contrary.

III. Article 17.6 and Other Dispute Settlement Provisions

Article 17.6 is not an independent provision and must be viewed in the context of at least two sets of rules. First, it forms part of the Anti-Dumping Agreement, in particular its Art. 17, which contains provisions on consultations and dispute settlement applicable specifically to anti-dumping matters. Second, it is part of the general dispute settlement regime set out by the DSU.

1. Article 17.6 as an Element of Dispute Settlement under the Anti-Dumping Agreement

The first three paragraphs of Art. 17 do not deviate from the provisions of the DSU and have not been listed as "special or additional rules" in Appendix 2.

The first of the special provisions, para. 4, specifies the conditions under which an anti-dumping matter may be referred to the Dispute Settlement Body ("DSB"). Referral may take place if the Member that requested consultations considers that they have failed to achieve a mutually agreed solution (thus, emphasis has been placed on the assessment of the situation by the complaining Member) and, more importantly, only if final action has been taken by the administering authorities of the importing Member to levy definitive anti-dumping duties or to accept price undertakings.[35] There is no requirement of prior domestic judicial review of the authorities' action,[36] but it should be noted that pursuant to Art. 13 of the Anti-Dumping Agree-

[35] A matter may exceptionally be referred to the DSB after the imposition of only a provisional measure, subject to certain conditions.

[36] This seems to be a confirmation of the non-applicability of the exhaustion of local remedies rule to WTO matters. See, e.g., P. Mengozzi: *The Marrakesh DSU and its Implications on the International and European Level* in: *The Uruguay Round Results. A European Lawyers' Perspective*, J.H.J. Bourgeois, F. Berrod, E.G. Fournier (eds.) (1995), p. 121–124 and R.S.J. Martha: "World Trade Disputes Settlement and the Exhaustion of Local Remedies Rule", 13 *Journal of World Trade Law* (1996), p. 107. A different view is expressed by P.J. Kuyper: "The Law of GATT as a Special Field of International Law", *NethYBIL* (1994), p. 233–238.

ment the Members are required to maintain judicial, arbitral or administrative tribunals or procedures for the purpose, among others, of the prompt review of administrative actions relating to final determinations.

Pursuant to para. 5, a panel shall examine the matter based upon two categories of sources of information. The first is a written statement of the complaining Member indicating how a benefit accruing to it, directly or indirectly, has been nullified or impaired, or that the achievement of the objectives of the Agreement is being impeded. The second includes the facts made available in conformity with the appropriate domestic procedures to the authorities of the importing Member. The specification of the latter category, in particular, may be regarded as a limitation on the factual scope of a panel's examination, for it seems to preclude the introduction of new evidence, despite the parties being different and even if such evidence could have a bearing on the result of the review.[37] However, if one of the panel's task is to determine whether the *authorities'* establishment of facts was proper, there is little justification for bringing in new facts (often intentionally withheld from national authorities), which could lead to the need of a *de novo* review by the panel.

On the other hand, Art. 17.5 does not seem to impede the parties from raising new legal arguments. To argue otherwise would be to ignore, above all, the different legal basis of the review: the Anti-Dumping Agreement, not domestic rules.[38]

The last of the special provisions, paragraph 7, deals with the important issue of confidentiality in anti-dumping proceedings, but does not have much bearing on the problem under consideration.

2. Article 17.6 as an Element of General WTO Dispute Settlement

Article 17 of the Anti-Dumping Agreement should not be viewed in separation from the general dispute settlement rules of the WTO. This systemic link is emphasized by Art. 17.1 which confirms that, subject to the exceptions in Art. 17, the DSU will be applicable to consultations and the settlement of disputes under the Anti-Dumping Agreement. This provision, as well as the already mentioned Art. 1.2 of the DSU, clearly indicate that settlement of anti-dumping disputes is within the frame-

[37] However, the two-point list must not be regarded as exhaustive or limiting the panel's right to seek information, as set forth in Art. 13 of the DSU. In particular, it is obvious that the panel's examination of the matter must also be based on documentation issued by the authorities of the importing Member relating to the imposition of the anti-dumping measure. See J.R. C a n n o n, *op. cit.*, p. 384–385.

[38] See D. P a l m e t e r, G.J. S p a k: "Resolving Antidumping and Countervailing Duty Disputes: Defining GATT's Role in an Era of Increasing Conflict", 24 *Law and Policy in International Business* (1992–1993), p. 1158–1160. In the *Salmon* case the United States invoked the "principle" of preclusion of arguments not raised before the administering authorities (referred to by the United States as the concept of "exhaustion of administrative remedies"). However, the panel found no basis for the refusal to consider a claim merely because its subject matter had not been raised before the authorities, although it made clear that this conclusion was limited to the question of admissibility of the claim and, with respect to the review of its merits, the panel reserved the right to take account of whether or not the relevant issues had been raised before the authorities. ADP/87, *op. cit.*, para. 349–350.

work of general dispute settlement. Therefore, just like the other provisions of the Anti-Dumping Agreement, so those of the DSU, form the context of Art. 17.6.

At first glance, the DSU itself provides almost no guidance as to what standard of review should be applied by WTO panels and there is no counterpart of Art. 17.6. However, upon more detailed analysis, a number of directives emerge from some of its provisions. One is Art. 3.2, which defines the WTO dispute settlement system as "a central element in providing security and predictability to the multilateral trading system". The system's general objectives are: to preserve the rights and obligations of the Members under the covered agreements and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.[39] Article 3.2 further stipulates, in perhaps not very fortunate wording, that recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.[40] Of some relevance is also Art. 3.5 which provides that all solutions under the dispute settlement procedure shall be consistent with the covered agreements and shall not nullify or impair benefits accruing to any Member under those agreements, nor impede the attainment of any objective of those agreements.

According to the panel in the *Underwear* case, the "main relevant provision of the DSU" in respect of the standard of review to be applied to the Agreement on Textiles and Clothing[41] is Art. 11, which stipulates in part:

> The function of panels is to assist the DSB in discharging its responsibilities under this understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.

Article 11 places an emphasis on the objectivity of the review, which applies to the assessment of facts, the determination of the applicability of the relevant covered agreement to the matter, and the determination of whether or not the disputed measure is in conformity with such agreement. These criteria of review, formulated in most general terms, do not depart from what could be expected of any international

---

[39] Pursuant to point (ii) of Art. 17.6 of the Anti-Dumping Agreement, these rules are also the basis of a panel's review of measures in anti-dumping matters (see below).

[40] This provision has a two-fold image. On one hand, it states the obvious. On the other hand, it appears to be a limitation. S.P. Croley and J.H. Jackson believe that it may be interpreted as a "constraint on the standard of review" in the general dispute settlement system, "but possibly not to the extent of Article 17.6 of the Anti-Dumping Agreement", *op. cit.*, p. 200. It is difficult to imagine how this provision may prove a useful guideline in the future review of disputes. Instead, it is likely to be used as a political tool, with a losing party asserting, for example, that it has been deprived of its rights. Fortunately, to this date disputing parties have refrained from invoking it.

[41] WT/DS24/R, *op. cit.*, para. 7.9. Article 11 was also invoked by the panel in the *Wool Shirts* case, WT/DS24/R, *op. cit.*, para. 7.16.

judicial body. Nor do they conflict with the criteria contained in Art. 17.6 of the Anti-Dumping Agreement.

Upon comparison of the DSU and the Anti-Dumping Agreement one must conclude that there is nothing to indicate that dispute settlement under both instruments may have divergent objectives or that anti-dumping panels have significantly different functions from those attributed to panels in other matters. A subtle discrepancy in wording should, however, be noted between Art. 17.6(ii), first sentence, of the Anti-Dumping Agreement and the relevant provision of Art. 3.2 of the DSU. While the latter speaks about the *clarification* of provisions in accordance with customary rules of interpretation of public international law, the former refers to their *interpretation*. However, it does not seem that the parties to the Anti-Dumping Agreement intended to give a special meaning to this term (Art. 31.4 of the Vienna Convention). It is more likely that this nuance is a result of drafting imperfection rather than weighed consideration.[42]

IV. Analysis of Article 17.6

Article 17.6 is divided into two points, each of which deals with a different aspect of a panel's examination of a matter. Point (i) concerns the assessment of the facts of a matter. Point (ii) sets out rules for interpreting the relevant provisions of the Anti-Dumping Agreement. Accordingly, when discussing the standard of review, two groups of problems should be distinguished: the standard applicable to the evaluation of facts and the standard applicable to the evaluation of legal determinations. It is, of course, not always easy to distinguish questions of law from questions of law, as is amply demonstrated in past panel practice. However, this distinction is not unusual and appears in other WTO provisions. For example, pursuant to Art. 17.6 of the DSU, a Member's appeal in any WTO dispute should be limited to issues of law covered in the panel report and legal interpretations developed by the panel. In other words, the Appellate Body has no basis for reviewing the assessment of facts by panels, its deference in this respect being absolute.

The discussion below will adhere to the structure of Art. 17.6.

1. Assessment of Facts

According to Art. 17.6(i), when assessing the facts of the matter a panel should determine whether the national authorities' establishment of the facts was proper and whether the authorities evaluated these facts in an unbiased and objective manner. The panel is precluded from overturning the evaluation of the authorities if it finds

[42] The use of the term "clarify" rather than "interpret" in Art. 3.2 of the DSU is justified in light of the mechanism of authoritative interpretation, to which only the Ministerial Conference and the General Council are entitled (Art. IX of the WTO Agreement, Art. 3.9 of the DSU). It is difficult to imagine that the parties had intended to assign broader powers in this respect to anti-dumping panels.

that the above requirements have been fulfilled, even though the panel might have reached a different conclusion.

The focus is thus on the panel's examination of the authorities' approach to the establishment and evaluation of the facts, not on the examination of the facts *per se*. However, although it is obviously a discouragement of a *de novo* review by the panel, it does not totally preclude the panel from an independent consideration of the facts. After all, the panel is required to carry out an "assessment of the facts", and it may even "reach a conclusion" of its own.

The principle of "factual deference" to the conclusions of national authorities (provided that the conditions of point (i) are met) finds justification in the nature of the provisions of the Anti-Dumping Agreement, and in the nature of anti-dumping matters as such. Complicated calculations and analysis are required to determine the existence of dumping, the dumping margin, injury and causality. National authorities have access to data, knowledge and expertise, which should, at least in theory, permit them to collect sufficient information and make a proper evaluation of the facts.[43] A WTO panel is not the appropriate forum to conduct such detailed examinations. Rather, its function is to investigate whether any errors have been made by the authorities in the process of evaluating the facts.[44]

The criteria articulated in point (i) should not raise serious problems for anti-dumping panels. For example, it may be presumed that the authorities' establishment of facts is "proper", if the authorities have taken care to collect sufficient information to determine the state of facts of the matter, in compliance with the procedures and requirements set forth in the Anti-Dumping Agreement.[45]

However, some doubts are cast by the condition that the evaluation be "unbiased and objective". Evidence to the contrary is not likely to be found in official documentation and it may be very difficult for the complaining party to demonstrate that the authorities' evaluation has been flawed by these factors.[46] It may happen, however, that panels will find bias and subjectivity "inherent in any unconvincing evaluation of the facts which *de facto* results in favoring the importing country's domestic industries".[47]

---

[43] In the *Underwear* case, the United States argued that "the Panel should take into account that domestic authorities were uniquely well-placed to scrutinize and evaluate the situation in a domestic industry", WT/DS24/R, para. 5.41.

[44] M. Hilf believes that "panels are designed to act as an appellate body and thus not exercise a second full investigation of the factual situation". In the author's opinion because of time constraints panels will be unlikely to often call experts under Art. 13 of the DSU. M. H i l f: "The Role of National Courts in International Trade Relations", 18 *Michigan JIJL* (1997), p. 323.

[45] In Costa Rica's view expressed in the *Underwear* case, to determine the proper establishment of facts "the Panel should confirm that, on the basis of the specific and relevant information submitted, a detailed examination has been carried out (...) There must be a reliable and logical correlation between the information in question and its examination, on one hand, and between the latter and the establishment of the facts, on the other", WT/DS24/R, *op. cit.*, para. 5.65.

[46] The problem of burden of proof is a separate matter, especially in view of the principle recently approved by the Appellate Body in the *Woven Shirts* case, which may be characterized as "re-burdening with proof". See WT/DS33/AB/R, p. 16–17.

[47] P. W a e r, E. V e r m u l s t, *op. cit.* (1994), p. 9.

There is another problem with the criteria of point (i). Assuming that the evaluation was unbiased and objective, there is no explicit basis for overturning such evaluation if the panel finds, for example, that it was carried out in an incompetent way. In other words, although Art. 17.6 provides for the proper *establishment* of facts, there is no explicit requirement of their proper *evaluation*. The "missing link" seems to be the criterion of proper or adequate *evaluation*, of a content similar to the criterion of reasonableness employed by panels in the past. There is some force in the argument that this criterion may be "couched" within the requirements of lack of bias and objectivity.[48] Were it otherwise, panels would be precluded from properly exercising their function and responsibility of assessment of the facts of the matter. This function and responsibility must be viewed in the context of other WTO provisions, including those of the DSU, whose Art. 11, as we have seen, requires a panel to make "an objective assessment of the facts of the case". Special procedures notwithstanding, any WTO panel is, above all, an element of the dispute settlement system created by the DSU.

2. Assessment of Legal Issues

Point (ii) of Art. 17.6 deals with a panel's examination of legal issues. It addresses two important problems: first, what may be referred to as the standard of interpretation of the Anti-Dumping Agreement and, second, the standard of review of consistency of national measures with the Agreement. A panel is required to interpret the relevant provisions of the Anti-Dumping Agreement in accordance with customary rules of interpretation of public international law. Where it finds that a relevant provision of the Agreement admits more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

2.1. Interpretation of the Anti-Dumping Agreement

The requirement of interpretation in accordance with customary rules of interpretation of public international law conforms to the general principle stipulated in Art. 3.2 of the DSU. It is generally accepted, and has been confirmed by the first WTO panel and Appellate Body reports, that such rules include the rules of treaty interpretation of the Vienna Convention on the Law of Treaties.

More problematic is the second part of point (ii) contemplating a situation where more than one (that is, two or more) permissible interpretations are discovered. It has been argued that this provision conflicts with the first sentence of point (ii), because the Vienna Convention on the Law of Treaties precludes multiple interpretations.[49] However, in reality there are as many interpretations as there are lawyers and the

[48] See D. Palmeter, *op. cit.*, p. 77.

[49] See G.N. Horlick, E.C. Shea, *op. cit.*, p. 30. Skepticism is also expressed by S.P. Croley and J.H. Jackson, *op. cit.*, p. 200. In the opinion of E. Vermulst and P. Waer the second sentence of point (i) may be an exception to the rule expressed in the first sentence, *op. cit.* 1996, p. 5.

relevant provisions of the Vienna Convention seem to be a confirmation, rather than a contradiction, of this truth. Perhaps, therefore, there is after all no striking conflict between the first and second sentences of point (ii). Perhaps the acknowledgement of multiple permissible interpretations is not incorrect *per se*, and not even an exception to the rule laid down in the first sentence.

This should in no way be regarded as an invitation to legal frivolity in the process of construction of the Anti-Dumping Agreement. There are sufficient safeguards to prevent this, some of which are provided by the Vienna Convention itself. If the two sentences of point (ii) are read jointly, an interpretation will be unacceptable if, among others, any of the following have occurred: the interpretation was not in good faith, the terms were not given their ordinary meaning, the context of the terms or the object and purpose of the treaty were ignored, a special meaning was given to a term despite the intention of the parties, the resulting meaning is ambiguous or obscure, or the result is manifestly absurd or unreasonable. Moreover, in line with general rules of interpretation, anti-dumping panels will have to take into account other relevant provisions of the WTO agreements, as well as, at least to some extent, the GATT *acquis*.

Therefore, the notion of multiple permissible interpretations may prove not to be such an obstacle to good legal judgement as it appears at first sight. However, as will be further discussed below, the real impact of the discussed provisions of point (ii) will ultimately depend on the approach taken by panels, because "it will be up to the panels to ensure that this wording does not result in overly loose interpretations of WTO rules and diverging rules and practices of WTO Members".[50]

2.2. Standard of Review of Legality of National Measures

It follows from point (ii) that in situations where more than one permissible interpretation is found, a panel must declare a measure to be in conformity with the Anti-Dumping Agreement if it rests upon one of those interpretations, irrespective of whether in the panel's opinion it is the preferred one. If the panel finds only one permissible interpretation, a measure will be in violation of the Anti-Dumping Agreement if it rests upon any other interpretation.

As has been mentioned above, the standard of review articulated in Art. 17.6 has been based on the *Chevron* doctrine, applicable in the review of agency determinations by the U.S. courts. There are of course some similarities between the review of anti-dumping measures by panels and the scrutiny of administrative decisions by domestic courts. However, the analogy ends where structural and systemic differences come into play. D. Palmeter has rightly characterized the analogy as "false", for the primary reason that "the U.S. courts review agency decisions for conformity with the law applied by the agency", while panels "review decisions for conformity with the [Anti-dumping] Code, not for conformity with the national law applied in the action".[51]

---

[50] E. Vermulst, P. Waer, *ibid.*

[51] D. Palmeter, *op. cit.*, p. 76. The author notes that there is more analogy to the tasks of WTO panels in the U.S. federal courts reviewing the federal constitutionality of decisions of state courts construing a state

E.U. Petersmann points out that "the objectives, applicable law and procedures of intergovernmental GATT dispute settlement proceedings over the rights and obligations of governments under GATT law differ very much from those of domestic anti-dumping investigations, which are based on national administrative law and involve private traders whose interests (...) might differ very much from those of the export countries".[52] When analyzing a measure, the panel and the national authorities are interpreting different provisions (the Anti-Dumping Agreement and domestic regulations, respectively) and applying different rules of interpretation (customary rules of public international law and domestic rules, respectively).[53] Disregard of this qualitative divergence in favor of an uncritical analogy to the *Chevron* doctrine may lead to extreme conclusions.

For example, it has led some authors to suggest the following steps for a panel's review of an anti-dumping matter: first, the panel must determine whether there exists more than one permissible interpretation; then, if the panel's determination is negative, the panel must present the only permissible interpretation; if, however, the determination is positive, the panel must analyze whether the national interpretation is within the scope of "permissibility".[54] It is difficult to imagine how a panel would go about this tremendous interpretational task. Rather, a panel will first examine whether the provisions of the Anti-Dumping Agreement contain any explicit prohibitions for the measure. In the absence of such prohibitions, the measure will be presumed to be in conformity with the Agreement. Second, if in the course of subsequent interpretation no unequivocal support is found for the measure, it will be nevertheless upheld if it rests on an acceptable, even though not a "preferable", interpretation. Panels may also be encouraged to present the "most correct" interpretation, but in view of the "judicial self-restraint" exercised by WTO panels, this may not become practice. Instead, panels are likely to reserve their position by invoking the need for a case-by-case approach.

It should be emphasized that the panel's role is not to review the *interpretation* applied by the national authorities; rather, it is to determine whether the *measure* rests upon a permissible interpretation arrived at by the panel (as required by the first sentence) through the application of customary rules of interpretation.[55] Just like national authorities are not expected to excel at international trade law, so panel members are not required to have extensive knowledge of particular domestic legislation. Just like national courts should be concerned with the legality of administrative deci-

law, where federal constitutional standards are relevant at the time of their application by the federal court (not at the time of application of state law by a state court). *Ibid.* See also D. Palmeter, G. Spak, *op. cit.*, p. 1149.

[52] E.U. Petersmann, *op. cit.* 1997, p. 226.

[53] "Whereas in national procedure the court is reviewing a national administrative action or determination under the national law, such as a statute, the international body has the task of ascertaining the meaning and application of an international norm." S.P. Croley, J.H. Jackson, *op. cit.*, p. 209.

[54] *Ibid.*, p. 200.

[55] Point (ii) stipulates that "the panel shall find the authorities' measure to be in conformity with the Agreement if *it* rests upon one of those permissible interpretations" (emphasis added). "It" concerns the *measure*, and not the *interpretation* applied by the national authorities.

sions, so panels should stand on guard of the proper application of WTO law. Should it be otherwise, some absurd conclusions would follow, including the expectation that panels scrutinize national measures from the point of view of the respective domestic law or that a measure, objectively conforming to the Agreement, must be declared inconsistent with the Agreement because the national authorities have not applied the proper interpretation. In the *Underwear* case it was stressed that "the task of the Panel is to examine the consistency of the U.S. action with the international obligations of the United States, and not the consistency of the U.S. action with the U.S. domestic statute implementing the international obligations of the United States".[56] This should fully apply also to panels reviewing anti-dumping matters.

What, then, is the meaning of the second sentence of point (ii)? The essence of the controversial language seems to be for panels to exercise more leniency when dealing with anti-dumping measures. Many provisions of the Anti-Dumping Agreement allow for a certain degree of discretion on the part of the national authorities. Many do not provide decisive guidance as to what should be their ultimate interpretation, are ambiguous or silent about certain issues. So long as the contested measure has a sound basis in the provisions of the Anti-Dumping Agreement and remains within the bounds of the customary rules of interpretation of public international law, it should be upheld.

There is, of course, a danger that panels will be under pressure, especially from importing Members whose actions are challenged, to slavishly defer to the determinations of national authorities.[57] An earnest of this was displayed by the United States' approach in the *Underwear* and *Wool Shirts* disputes. This attitude could lead to what many authors fear: that Art. 17.6 will become a mechanism of approving inconsistent interpretations,[58] with panels becoming "mere figureheads for rubber-stamping protectionist determinations of national agencies".[59] It could result in a discouragement for Members to seek to improve anti-dumping regulations, by creating a temptation to settle at the "lowest common denominator" of legal interpretation, in favor of short-term interests of the importing country. But today's advocates of imposing strict constraints on panels should beware that tomorrow the result could well work against them.

However, and fortunately for panels, anti-dumping laws are becoming more detailed, as they regulate with more specificity not only complex technical issues, but

---

[56] WT/DS24/R, *op. cit.*, para. 7.12.

[57] For example, R. Hudec stipulates that "an AD/CVD measure is the result of a highly judicialized administrative proceeding, in which the remedy, once issued, becomes legally binding on executive officials as a matter of national law. Consequently, governments usually have little room to negotiate, even when the AD/CVD measure violates GATT obligations". R. H u d e c: *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* (1993), p. 344. But the above reasons do not provide sufficient justification for deference to national determinations.

[58] See D. P a l m e t e r, *op. cit.*, p. 76 and E.U. P e t e r s m a n n, *op. cit.* (1997), p. 227. Both authors assert that this could lead to a legal "tower of Babel". Petersmann also notes that there are "no precedents in international adjudication that the parties to a multilateral agreement may construe their treaty obligations in a divergent and mutually conflicting manner". *Ibid.*, p. 228.

[59] P.A. A k a k w a m, *op. cit.*, p. 295.

also procedural matters.[60] Irrespective of the criticism deserved by the Anti-Dumping Agreement, it is overall a positive development, which has limited, rather than broadened, the discretion of national authorities. The more detailed and unequivocal the provisions of the Anti-Dumping Agreement, the easier it will be for panels to determine the limits of "permissibility" of their interpretations.

In cases of doubt, the objectives and interests of the WTO trading system should always prevail.[61] One of the goals of the WTO dispute settlement system is to provide security and predictability to the multilateral trading system, and one of its essential functions is to preserve the rights and obligations of Members (Art. 3.2 of the DSU). This can only be achieved if priority is given to ensuring uniformity, to the largest extent possible, of the interpretation and application of WTO law, including anti-dumping regulations. No authority is better suited for this task than a panel, supported by the Appellate Body. The importance of the latter should be emphasized here, for it is precisely this organ that "could become the ultimate guardian of the consistent and uniform application of anti-dumping laws".[62] Moreover, its existence should provide sufficient assurance that panels will not be allowed to interpret the Anti-Dumping Agreement in an arbitrary manner.

V. Extension of the Standard of Review

The "extension" of the standard of review to other WTO agreements is not necessarily tantamount to its "general application", as stipulated in the Ministerial Decision. Each of the WTO agreements may require a different standard of review. This seems to have been the panels' understanding in the *Underwear* and *Wool Shirts* disputes, both of which refused to treat the transitional safeguards regimes under the Agreement on Textile and Clothing (the "ATC") as a safeguard regime under Art. XIX of GATT, as had been suggested by the United States, and, in consequence, to apply the standard of review assumedly appropriate for the latter regime.[63] However, the panels relied on Art. 11 of the DSU, though in no way was it suggested that the standard articulated by each of them was to apply generally, to other agreements covered by the DSU.

---

[60] See D. Palmeter, G. Spak, *op. cit.*, p. 1152.

[61] P. Waer, E. Vermulst note that Art. 17.6 contains "some escape language which potentially could result in less stringent evaluations of anti-dumping measures under the WTO" and hope that despite such language panels will "stand up to their responsibility of ensuring a consistent, fair and uniform application of the WTO anti-dumping law", *op. cit.* 1997, p. 5. Other authors point out that the provisions of Art. 17.6 are "obviously designed to cabin the discretion of dispute settlement panels and reduce the likelihood that they will overturn specific administrative decisions or find national rules to be incompatible with GATT rules", but believe that because the provisions are worded in general terms, they may not have much practical effect, *The Handbook...*, p. 73.

[62] P.A. Akakwam, *op. cit.*, p. 308.

[63] The *Underwear* panel made clear that it was examining the problem "in the context" of the ATC, while the *Wool Shirts* panel stated outright that the ATC had instituted a new regime for textile products and proceeded to examine its role on the basis of this assumption. WT/DS33/R, *op. cit.*, para. 7.15 and WT/DS24/R, *op. cit.*, para. 7.12.

Both panels took note of the existence of Art. 17.6 of the Anti-Dumping Agreement, but considered it inapplicable to the respective disputes. However, the *Underwear* panel was clearly inspired by the analogy of its task to the review carried out by past panels dealing with anti-dumping or countervailing duty matters, and it invoked several GATT panel reports in these fields.

Also the parties to the proceedings did not insist on the use of the standard of Art. 17.6 to the disputes. The United States, which was the defendant in both matters, favored what it described as a "standard of reasonableness" (or "standard of reasonableness and good faith examination of the data"). It relied mainly on a 1951 report of a working group established to examine the consistency with Art. XIX of GATT of certain U.S. restrictions relating to the importation of fur felt hats from Czechoslovakia (the *Fur Felt Hat* case).[64] The working group had not required the United States to prove conclusively that the imports had caused serious injury, arguing that "since the question under consideration is whether or not the United States are in breach of Article XIX, they are entitled to the benefit of any reasonable doubt". It had concluded that the authorities "had investigated the matter thoroughly on the basis of the data available to them at the time of their enquiry and had reached in good faith the conclusion that the matter fell within the terms of Article XIX as in their view it should be interpreted".

Opposing the United States, Costa Rica, the complaining party in the *Underwear* case, proposed a very elaborate five-step standard of review. It was to include an examination by the panel of whether the authorities had: complied with the procedural rules, properly established the facts, made an impartial and objective evaluation of the facts, properly exercised their discretion in the interpretation of the rules and complied with the rules in general.[65]

The *Underwear* panel made an attempt to find the "golden middle": it rejected total deference to the findings of the national authorities, but at the same time declined to consider its role as a substitute for the national proceedings. The standard selected by it consisted in "an examination whether the authority had examined all relevant facts before it (including facts which might detract from an affirmative determination of injury), whether adequate explanation had been provided of how the facts as a whole supported the determination made, and, consequently, whether the determination made was consistent with the international obligations of the United States".[66] This standard bears much resemblance to the approach advocated by the *Salmon* panel.[67] Two differences can be noted: first, use of the criterion of "adequate explanation" in place of "reasonable explanation" and, second, emphasis on the consistency of the authorities' determination with international obligations.

---

[64] The case is presented in WT/DS24/R, *op. cit.*, para. 5.32–5.37.

[65] WT/DS/24/R, *op. cit.*, para. 7.7. Upon comparison, all the elements of the standard of review proposed by Costa Rica could be said to be reflected in Art. 17.6.

[66] WT/DS24/R, *op. cit.*, para. 7.13.

[67] In a footnote to para. 7.13 the panel admitted that this approach was largely consistent with the approach adopted by the anti-dumping and subsidies panel reports to which it had referred in its report.

The *Wool Shirts* panel took a wholly different approach, defining its function strictly in the terms of Art. 11 of the DSU as "limited to making an objective assessment of the facts surrounding the application of the specific restraint (...) and of the conformity of such restraint with the relevant WTO agreements".[68] The panel did not expound further on the standard of review, rejecting as irrelevant previous GATT panel reports and leaving an impression that its task was confined by narrow, rather than more flexible, boundaries. However, both the *Underwear* and the *Wool Shirts* panel reports should be assessed positively for their attitude towards the most crucial element of panel review: the panel's authority to examine a measure's consistency with WTO regulations, irrespective of national determinations.

Of some relevance, because it shows how the standard of review may vary depending on the nature of the case, is also the *Hormones* case, which concerned a complaint against a ban imposed by the European Communities on importation of meat from cattle treated with certain types of hormones.[69] Having applied a strict interpretation of the relevant provisions of the Agreement on the Application of Sanitary and Phytosanitary Measures (the "SPS Agreement"), the panel did not allow much discretion in the assessment of risk by a Member and rejected, for lack of adequate scientific justification, the propriety of the prohibition enacted by the EC authorities. Worth noting is that the panel took full advantage of the provisions of both the SPS Agreement and the DSU to request the opinions of experts on certain complex scientific and technical issues relating to the ban.[70] In consequence, it carried out an independent examination of the facts.

While the *Hormones* case is an example of a panel's extensive review of facts, another recent case is crucial for the legal aspect of the standard of review. The *Coconut* case concerned countervailing duties imposed by Brazil on imports of coconut from the Philippines, which took effect after the entry into force of the WTO Agreement, but as a result of proceedings initiated under the GATT 1947.[71] Transitional provisions prevented the application of the WTO Subsidies Agreement to the contested measures. The Philippines, therefore, based its claim on Art. VI of GATT 1994, arguing for its independent application and interpretation. The panel rejected this contention. It noted that the WTO Subsidies Agreement and its Tokyo Round predecessor "were developed in part to lend greater precision and predictability to the rights and obligations under Article VI", which could have a different meaning "if read in isolation than if read in conjunction" with the Subsidies Agreement.[72] While

---

[68] WT/DS33/R, *op. cit.*, para. 7.17.

[69] *EC-Measures Concerning Meat and Meat Products*, WT/DS26/R (18 August 1997). Two reports were issued, addressing separate complaints brought by the United States and Canada.

[70] The panel did not establish an expert review group, as envisaged by the DSU, but chose instead to address a list of questions to individual experts, on the basis that it had the "right to seek information from individual experts". The panel considered it more useful to be given a full range of opinions from individuals, rather than a consensus view of an expert review group. *Ibid.*, Findings, Point B.1.

[71] *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/R (17 October 1996), WT/DS22/AB/R (21 February 1997) (both adopted 20 March 1997).

[72] WT/DS22/R, *op. cit.*, para. 238.

under the GATT a separate application of Art. VI had been possible, the WTO Agreement had introduced a new quality in the relations among the Members. The panel drew attention to the object and purpose of the WTO Agreement, in particular, that provided for in the Preamble, which is to "develop an integrated, more viable and durable multilateral trading system". It stressed that the new regime was a "single undertaking" and one of an "integrated nature", with an "integrated dispute settlement system which avoids the legal and procedural fragmentation" of the previous regime. In the panel's opinion "to revert to a situation where Article VI of GATT 1994 could have different meanings (...) would perpetuate in part the legal fragmentation that the integrated WTO system was intended to avoid".[73]

The above reasoning equally applies to the Anti-Dumping Agreement, for which, like in the case of the Subsidies Agreement, Art. VI is the general basis.[74] The object of the Subsidies Agreement, to give "greater precision and predictability to the rights and obligations under Article VI", is also viable for the Anti-Dumping Agreement. An anti-dumping panel must respect the "integrated nature" of the WTO system, must avoid its "legal and procedural fragmentation", and must take into account the general function of dispute settlement specified in Art. 3.2 of the DSU: that of providing security and predictability to the system. These are considerations that may not be overridden in the application and interpretation of Art. 17.6 of the Anti-Dumping Agreement.

VI. Conclusion

As can be seen from the above, there has been no willingness on the part of WTO panels to extend the standard of Art. 17.6 to the review of matters covered by other WTO agreements, even where the nature of the matter could justify such application. This reluctance, caused without doubt by the ambiguity of the solution adopted in the Anti-Dumping Agreement, may be expected to continue so long as the precise meaning of the relevant provisions remains unclear. In particular, the legal aspect of the standard does not seem to appropriately reflect and secure the fundamental objectives of the new dispute settlement system. This does not mean, especially bearing in mind the different approaches adopted by panels in the *Underwear* and *Wool Shirts* disputes, that it would not be advantageous for the system if a uniform standard of review were adopted for matters involving a panel's evaluation of the determinations of national authorities.

However, when the question of one "general" standard is considered, the broad range of problems potentially covered by the WTO system may speak against advocating its introduction. The scope of necessary panel scrutiny may vary from case to case, depending on the nature of the matter. Panels should have some degree of flex-

---

[73] *Ibid.*, par. 242. See also WT/DS22/AB/R, *op. cit.*, p. 18.

[74] The similarities of the situation and solutions of the two Agreements were noted by the panel, e.g. WT/DS22/R, *op. cit.* note 70, and by the Appellate Body, WT/DS22/AB/R, *op. cit.*, note 23.

ibility in this respect, at least in the first formative years of the functioning of the system.

To close these remarks, one reflection is appropriate: in discussions about the standard of Art. 17.6 one should not only consider whether it is suitable for extension or general application, but also whether this provision, in its present form, is really adequate also for anti-dumping matters.

23 POLISH YEARBOOK
OF INTERNATIONAL LAW
1957-1932
PL ISSN 0554-498X

"To Extradite or Not to Extradite" (a National): Old Dilemma in a New Setting

MICHAŁ PŁACHTA

1. Introduction

There is little exaggeration in asserting that the problems surrounding the (non-) extradition of nationals are as old as the extradition itself.

Its origin can be traced to ancient times. Whether consistently or not, the practice of refusing to surrender own nationals has been maintained by many countries for centuries and all the convincing arguments against it as well as proposals to modify the states' policy with respect to this form of international cooperation in criminal matters notwithstanding, there is nothing to indicate that it will soon be abandoned. Most states seem to be unmoved by the compelling reasons demonstrated by writers and leading authorities in international criminal law arguing in favour of the relaxation of the strict prohibition of the extradition of nationals by allowing a "conditional surrender," or even the total departure from this practice.

The controversies around the nationality of the requested person as a ground lot-refusal stretch from the scope of its application *ratione personae*, that is whether it is the formal civil status of the *extraditurits* that is deciding, or rather it should be based on a substantive link between him and the requested state which, in turn, should be established on other grounds, such as domicile, to the validity of justification of the non-extradition of nationals, up to the status of this rule in international law. As for the latter, some authors argue that the non-extradition of nationals is not a universally recognized principle of international law,[1] while others believe that, at least in civil law jurisdictions, this restrictions has been elevated to a rule of international law.[1 2 3] The latter view was endorsed by the Austrian Supreme Court in 1961:

"It may also be observed that in criminal matters there is a generally recognized rule of international law (Article 9 of the Austrian Constitution) that a State's own nationals must never be extradited to another state in whose territory they have committed a criminal offence."[3]

---

[1] D. P o n c e t, P. G u l l y - H a r t: "Extradition: The European Model", in: M. Ch. B a s s i o u n i (ed.): 2 *International Criminal Law* (1986). p. 468. These authors also negate the status of the non-extradition of nationals as a rule of customary international law. *Ibid.*, p. 489.

[2] G. G i b e r t; Aspects *of Extradition law* (1991). p. 96; *Encyclopédie Dalloz: Penal III* (1968), para. 151.

[3] *Service of Sammons in Criminal Proceedings (Austria Case). 21* February 1961, *38 I.L.R*, p. 133; OJZ (1961), p. 95.

Interestingly, each and every question pertaining to this problem is extremely sensitive and controversial no matter whether it is one of those just mentioned or it concerns the character of the refusal based on this ground (mandatory or optional), the treaty stipulation and legislative pronouncements in which this rule appears, or finally the date on which the nationality of the fugitive offender is being assessed by the competent authorities of the requested slate from the point of view of its legal relevance as a possible bar to extradition.[4] Truly, the principle has evolved since the nineteenth century from a mere rule of custom to an emotionally charged conviction despite strong opposition originating mainly, although not exclusively,[5] from the common law legal system where it is perceived as a "creature of national distrust, a relic of a more primitive order of civilization."[6]

On many occasions in the past, the countries opposing the extradition of their nationals were called upon to reevaluate the justification behind this rule, to reexamine its validity, and to reconsider their further adherence to this system.[7] However, even if not publicly rejected outright, such demands have been almost completel)' ignored by the governments for reasons having much to do so with their domestic policy, political considerations and sovereignty; their nationals interests clearly outweigh any inter- or supranational ones.[8] Therefore, in a sharp contrast to almost all forms of international cooperation in criminal matters, including extradition itself, which have undergone considerable evolution over the last few decades, the gap between the two approaches to the problem of the surrender of nationals has not been closed. Any

---

[4] Given Lhc possibility of the change in the national stains of the requested person between the commission of an offense and his surrender, one of the three following points in lime may be relevant and decisive in making such an assessment: (I) lime of the commission of an offense; (2) date on which the extradition request was received by the competent authorities of requested state; and (3) date on which the executive makes the final decision regarding the surrender of that person. Sometimes, for the sake of simplicity, only two criteria arc being distinguished as ruling in this matter: time of the commission of an offence and lime of mating decision on the request (civis novus) See e.g. A. B a l t a t z i s: "La non-extradition des nationaux", 13 Rev. hell, *de droit int,* (1960), p. 190.

[5] There is evidence of criticism also by civilian writers. See e.g. J.C. L o b o i s: *Droit penal internacional* (1971), p. 458: H. S c h u l t z: "The Principles of the Traditional Law of Extradition", in: *Council of Europe: Legal Aspects of Extradition Anton" European Stales* (1970), p. 19-20.

[6] M.T. M. auto 11: Extradition of Nationals, 10 *TEO* (1936), p. 12,

[7] Such proposals date as far back as ISSO. See Resolution 6 adopted by the Institute of international Lav. at its Oxford session, 9 September 1880, V *A.I.D.I.* (ISSO), p. 127. See also H. S c h u l t z: "General Report: Les problèmes de l'extradition", R.*I.D.P.* (1968), p. 811.

[8] A prominent example that supports this thesis is Colombia where tremendous social and political tension caused by treaty and domestic legal provisions allowing extradition of Colombians to the United States eventually generated very strong pressure on the government to halt this practice by amending tire domestic legislation. A bloody confrontation with the drug traffickers (the *"Extraditables")* who rightly fearing their surrender to the American authorities stood behind this movement, ensued which culminated in lite 1985 storm and seizure of the Palace of Justice during which half of the Supreme Court judges were killed. The devastating consequences of terror were socially unacceptable. In 1991, Columbia adopted a new constitution that explicitly prohibited extradition of its nationals, Article 34. See M.A. S h e r m n a n: "United States International Drug Control Policy, Extradition, and tile Rule of Law in Colombia", 15 *Nova ER.* (1991), p. 661-701; S.Y. O t e r a: "International Extradition and the Medellin Cocaine Cartel: Surgical Removal of Colombian Cocaine Traflfckers for Trial in the United States", 13 *Loy. LA. Intl&Coiiip. L.J.* (1991), p. 995-999.

global trend in attitudes toward the non-extradition of nationals is difficult to discern. The traditional stance against giving them up has prevailed.

Given the recent developments in both international relationships and international criminal law. most notably the establishment of two international criminal tribunals, one for the Yugoslavia the other for Rwanda, followed by the work in progress on the creation of a permanent international criminal court, the question arises as to whether the rule of non-extradition of nationals should be confronted and challenged again Should it be abandoned altogether or merely a concession to the opposite principle would be sufficient? This article seeks to answer these and relevant questions through the examination of the origin and development of this rule (part 2) as well as the validity of its justification (part 3). Two dominant approaches (along with their variants.) to this problem will be considered in part 4. In addition, the non-extradition of nationals will be analyzed in the context of human and constitutional rights (part 5). Finally, an inquiry will be made into the status of an international criminal court, and specifically the International Criminal Tribunal for the Former Yugoslavia, in the context of the surrender of nationals (part 6). This article concludes by suggesting that instead of the rigid rule of non-extradition of nationals, a new ground for refusal could be developed which might be not less attractive to the governments.

2. Origin and Development

Although there is an ample evidence of the practice of non-extradition of nationals in ancient times" an examination of the pertinent documents warrants caution or even reserve due to a diametrically different ideas of statehood, sovereignty, law, and a relationship between the government and its subjects. These concepts, in turn, had contributed to shaping of extradition as it was understood at that time. Specifically, extradition was more a matter of grace than of obligation. Moreover, given the hostility between nations and tribes as well as the disparity in the level of the civilization, the surrender of a subject to a foreign state was in many situations tantamount to permanent exile, if not death.[9] [10] [11] [12] Therefore, any conclusions drawn from such cases for the justification of the rule of non-extradition of nationals have to lake into account this specificity.

In ancient Greece, instead of surrendering its own citizens, the competent authorities exercised the jurisdiction *forum partiae* over the offender.[11] In the ancient Rome, its purely national law precluded its citizens from being extradited to foreign stales,[12] although based on a treaty, it was possible under very exceptional circumstances.[13] Among the Italian cites-states the practice varied but to the extent that it

---

[9] See e.g. H. L a m m a s c h: *Auslietferungspflicht und Asylrecht* (1887), p. 380; G. F i o r e *Truité de droit penal international et de l'extrndition* (ISSO), p. 413.

[10] Thai explains why. under most tribal laws, the banishment was the most severe, and in fact sufficient, punishment.

[11] D. d e V a b r e s: *Introduction à l'élude da droit penal international* (1922), p. 17.

[12] H. M o m m s e n ; *Kölnisches Strafrecht* (1S99), p. 108.

[13] W. N u s s b a u m: *Geschichte iles Vlilkerrechts* (1960), p. 13.

was based on the statutory interpretation elaborated by post-glossators, the extradition of nationals was allowed and, as a matter of fact, encouraged due to the exclusive jurisdiction of t*he Jorum loci delicti commissi.*[14] The practice of mutual surrender of offenders, including the transfer of prisoners, was facilitated not only by geographic proximity but also cultural, economic, social and legal similarities - a tenet that is reflected in the contemporary practice between some closely-linked countries, such as the Nordic states.

The modern practice of non-extradition of nationals goes back to the medieval times, and is rooted in the relationship between the feudal ruler and his subjects. While the former owed protection to his *"subditos"* for their allegiance, work and contribution to his wealth and power, the latter were entitled to the *"ius de non evocando",* the right not to be withdrawn from the jurisdiction of their local courts. Thus the *"Treupflichl"* was a corollary of the *ius de non evocando.* The latter was formulated as a privilege which was given by the ruler in a special decree, called bull. Probably the first such document was issued in 1290 by the German Kaiser for the Inhabitants of Mühlhausen.[15] However, the best known *privilégiant de non evocando* was granted in the Golden Brabantine Bull to the Lothars residing in Brabant and Limburg in 1349.[16] Unfortunately, through reprisals and excessive fines, that privilege was gradually being abused.[17]

The continental practice was developed under a predominant influence of France. In 1736, France and the Netherlands adopted reciprocal arrangements which were in fact the extension of the provisions of the Brabantine Bull.[18] However, between 1765 and 1834, French treaty practice demonstrated a flexible approach to the question of the extradition of nationals which reflected a wide variety of political and practical considerations.[19] For example, while in 1765 France concluded an extradition treaty with Spain which specifically applied to nationals, in 1777 France and the Helvetic League agreed that each party would not deliver up its own citizens except for a crime *"grave el public".*[20] Even though France is looked upon as the "cradle" of the rule of non-extradition of nationals, its policy in this area was extremely unsettled until about 1830s or even 1840s. In addition to an unclear legal stance in this respect, there was also some disparity between the official pronouncements and the practice. In 1803, Mr. Jollivet declared in the Council of State that the non-extradition of nationals was established in the universal usage of nations.[21] In 1811, Napoleon issued his famous

---

[14] F. M e i l i: *Lehrbuch des internationalen Strafrechts und Strafprozessrechts (1910),* p. 45; J. K o h l e r: "Beitrage zum intemalionalen Strafrecht", 5 *ZSt IPS* (1893), p. 232.

[15] D. O e h l e r; *Internationales Strafrecht* (1983), p. 88.

[16] This Bull has been erroneously dated at 1355 by some authors; see e.g. R.W. R a f u s e: *The Extradition of Nationals* (1939), p. 75; 1. S h e a r e r *Extradition in International Law* (1971), p. 95. In fact it was issued by Charles IV on 25 July 1349.

[17] D. 1 e h 1 e r, *op. cit.,* p. 89.

[18] J.B. M o o r e: 4 *Treatise on Extradition and Interstate Rendition* (1891), p. 153.

[19] S h e a r e r, opt. *cit.*, p. 103.

[20] A. B i l l o t: *Traite de Texlradilion* (1874), p. 58.

[21] L. B e a u c h e r: *Traite de l'extradition* (1855), p. 58.

decree permitting then extradition of nationals. This decree was supposed to have been abrogated by the Constitutional Charter of 1814, but in 1820, J. Machon, a Frenchman, was delivered up for trial in Switzerland."

It was not before 1834 that a French extradition treaty clearly stated that nationality is a bar to surrender.[23] Since that date, however, branch policy has been consistent. The only deviation from strict adherence to the rule of non-extradition of nationals after 1834 occurred in 1842 and 1843 when treaties concluded with Great Britain and the United States, respectively, provided for the extradition of "all persons" without exceptions. The deviation is more apparent than real since no French national was ever surrendered under these treaties.[24] Well established in French public law, the rule of non-extradition of nationals was purely a customary norm until 1927 when the Extradition Law was adopted which, in Article 3, paragraph 1, provides that extradition cannot be granted when the requested person is a French *ressortissant,* that is, anyone who, as a national, *protégé,* or inhabitant of a territory under mandate, is subject to French sovereignly.

Some variants and modifications notwithstanding, the rule of non-extradition of nationals has developed along similar lines in other European countries. By the middle of the nineteenth century this rule was generally adopted on the European continent, whether slates acted under treaties or on the basis of reciprocity, where it has persisted and has largely spread to Latin America.[25] With the exception of the Netherlands and a specific situation between the Nordic stales, no other country has abandoned this doctrine. Two more slates should be mentioned in this context: Switzerland and Italy. While the old Swiss Extradition Law of 1892 contained an absolute, prohibition of the extradition of Swiss nationals (Article 2), the 1981 Law International Cooperation in Criminal Matters (IRSG) has made the surrender possible, on condition that that person gives his consent in writing (Article 7).[26] In 1947. the Italian Constitution was amended to the effect that the surrender of an Italian national is now generally possible: "Extradition of a national shall be granted only where it is expressly provided for in an international treaty" (Article 26).[27]

3. Rationale: A Thorny Issue

Justification of the rule of non-extradition of nationals presents a few problems. First and foremost, the arguments advanced in its favour were elaborated in the nine-

---

[22] M. T r a v e r s: 4 *Le. droit pencil international* (1922), p, 23.

[23] Such a clause was included in [he treaty on extradition with Belgium of 22 November 1834. M a r t e n s: *Nouveau Recueil de Traités,* XI, p. 732.

[24] B i l l o t, o*p. cit,,* p. 73.

[25] J.B. M o o r e: *Report an Extradition* (1890), p 153.

[26] Gesetz über die Auslieferung und die Rechtshilfe in Strafsachen, *BGBI* (1979), No. 529.

[27] It is noteworthy that a similar provision was adopted in the Italian Criminal Code in 1930, Article 13, paragraph 4. This pronouncement not only was a breakthrough in the henceforth rigid policy of excluding nationals from extradition but soon bore its first practical fruits. In 1931, Italy signed an extradition treaty with Brazil which provided that the requested slate may refuse to surrender its nationals only where it itself is competent to prosecute them (Article 3 and 7).

leenlh century, and **at** least some of them are based on even earlier reality. In contemporary writing, nobody has come up with a new rationale; the same is true with respect to the domestic legislative practice in the last half of the twentieth century. Its today's purported justification may be based, at best, on the recapitulation of old arguments.[28] This rule is very often formulated in a somewhat dogmatic style, without any satisfactory basis of reasoning other than its mere existence.[29] Sometimes it is stated as a political axiom hardly open to discussion.[30] Since modern legislators refrain from specifying reasons for maintaining this rule, those who vehemently oppose it look much like Don Quixote fighting with a phantom; it is difficult to argue against something that has not been spelled out expressly and clearly and what may, or may not, be tacitly accepted by the opposite party. Typically, in order to make a case for the extradition of nationals, an author has to, somewhat arbitrarily, pul up reasons which were advanced on favour of non-extradition way back in the past, and which presumably might have been still considered valid if ever admitted by the governments, and then proceed by demonstrating that they are ill-founded, inadequate, or out-dated.[31]

Worse still, given that arguments pro and *con* are rooted in political, practical and legal interests of a stale,[32] including the considerations of its domestic policy, there is no guarantee that both parties of the dispute follow the same methodological regime. As a result, while the arguments most frequently raised against this rule operate on an international level and derive from the notions of world legal order and fundamental justice combined with the need to strengthen the international solidarity and spirit of cooperation in the suppression of criminality, the counterarguments point almost exclusively to the domestic matters of a stale. An interesting question arises as to whether the paucity, or lack, of arguments on one level can be compensated by arguments from the. other. Finally, it may also be that the authority of the doctrine which exempts a national from extradition resides less in the force of arguments employed to justify it than in the unanimity of international treaties which have accepted it.[33]

In Great Britain, a Royal Commission was appointed in 1878 to inquire into all aspects of the law of extradition. Lord Cockburn C.J., who in the previous year had declared in court that the exception of nationals from the treaty with Switzerland was a "blot upon the law,"[34] was chairman of the Commission. The arguments in favour of exempting nationals from surrender were summarized as follows:[35]

---

[28] See e.g. M.Ch. B a s s i o u n i: *International Extradition: United Slates Law and Practice (1996),* p, 593.

[29] The tille of a book written by W. Mettgenberg is instructive: *Eilt Deutscher darf nicht ansgeliefer*l *werden!* (1925).

[30] See c.g. H. K l u b e r: *I Droit des gens moderne de I'Europe* (1831), § 66; G. B l u n t s e h l i: *Le droit international codifie* (1970). p. 399.

[31] See e.g, O c h l e r, *op. cit.,* p. 181-186.

[32] Possibly, also "irrational feelings" play a significant role in keeping alive the rule of non-extradition of nationals. Cf, G. D a h m : *Wilkerrcchl* (195S), p. 391.

[33] T. B e r n a r d: 2 *Traite llteorelique et pratique de l'extradition* (1890), p. 98.

[34] R. v. *Wilson* (1877), 3 Q.B.D. p. 42, 44.

[35] *Report of the Royal Commission on Extradition,* Parliamentary Papers (1878), vol. 24, p. 907-917.

1. A subject ought not lo be withdrawn from his natural judges (ius de non *evocando).*

2. The slate, owes its citizens the protection of its laws *(Treupflicht).*

3. It is impossible lo place entire confidence, in the justice of a foreign country.

4. It is a serious disadvantage to a many to be tried in a foreign language, and where he is separated from is friends and his resources, and from those who could bear witness to his previous life and character.

The Commission rejected these arguments and concluded that a person residing: abroad owes obedience to the laws of his country of residence - a consideration which overrides the arguments mentioned above. This opinion was later reflected in the ruling of the United States Supreme Court where Mr. Justice Harlan speaking for the majority of the Court stated authoritatively that the American citizenship of the relator grants him neither an immunity for offences committed abroad, nor a right to demand all procedural guarantees existing under the law of the United States:

"When an American citizen commits a crime in a foreign country he cannot complain if required lo submit to such modes of trial and to such modes of punishment as the laws of that country may prescribe for its own people, unless a different mode be provided for by treaty stipulations between that country and the United Stales."[36]

The rationale for the exemption of nationals from extradition rests on the notion that the relator is likely to receive ill treatment or an unfair trial in the requesting state.[37] To that extent it is a discriminatory treatment which differentiates between nationals and non-nationals. [38] The justification of the rule of non-extradition of nationals largely derives from a jealously guarded conception of national sovereignly and presupposes the existence of sharp contrasts in the administration of criminal justice between states resulting in potentially unfair treatment. However, as the Harvard Research pointed out: "If justice as administered in other States is not to be trusted, then there should be no extradition at all."[39] Other arguments advanced against the surrender of nationals are the following:

---

[36] Neely it *Henkel,* 180 U.S. 109, 123 (1900). In the 1980s, some appellate courts appeared lo be more iceeplive lo Ihe humanitarian and human rights considérations by allowing, in exceptional situations, an inquiry into the criminal procedure and punishment awaiting the extradite in the requesting slate. Sc e.g. *In the Matterof the Extradition of Burt,* 737 F 2d 1477 (7th Cir. 1984).

[37] This rationale was expressly formulated by the Supreme Court of Columbia: "The reason for prohibiting the extradition of nationals on the request of another state is i...) the risk of possible grave dangers in (he trial abroad." *In re Arevalo,* 10 Ann. Dig. (S.C. 1942), p. 329.

[38] See the criticism of this practice by M.Ch. B a s s i o u n i: "Two Models of Extradition in Law and Practice", in: *idem* (ed.), 2 *Treatise on International Criminal Law* (1973), p. 365-367. To avoid possible misunderstanding, il has lo be made clear in this context that even where we have an absolute prohibition against extradition of nationals it does not follow that, as a corollary, there is an equally absolute obligation to surrender each and every non-national by die requested state. Each ease has to be examined on its merits and die decision must take due account of both the pertinent treaty stipulations and the domestic legislation. Cf. O. L a g o d n a: *Die Rechtsstellung des Auszuliefcrenden in der Hnndesrepublik Deutschaind* (1987). p. 52.

[39] Harvard Research in International Law. Drall Convention on Exlradilion. 29 *A.J.R.I.* (1935 Supp.), p. 128.

1. fundamental right of asylum;
2. popular instinct of society;
3. disparity in domestic legal systems with respect to both substantive law and procedure;
4. potential of bias and prejudice against the surrendered person based solely on his foreign origin and nationality.[40]

The modern formulation of the *ins de non evocando* has origin in France, and was there based on the declaration in Article 62 of the French Constitutional Charter of 1814 that *"nul ne pouvra etre disirait de ses juges naturels"*.[41] Its interpretation among scholars and writers was not unanimous.[42] Specifically, it was unclear whether *"juge naturel"* should be understood as *"juge national."* A powerful argument favouring this interpretation can be found in an even earlier treaty stipulation adopted in the 1781 convention between the King of France and the Prince of Basel concerning offences committed on the frontiers of the respective countries. Its Article 2, paragraph 2, provided: "In the case of a crime calling for corporal punishment [or capital punishment - M.P.], the court of the place of the crime [court exercising jurisdiction *ratione inateriae* - M.P.], after carrying the procedure to the point of definitive judgement, will transfer the case to the **natural judges** of the accused who will pronounce the sentence **according to the laws and ordinances of their country"** (emphasis added - M.P.).[43] Today it is viewed more as a rule of good politics than a rule of law.[44]

There is a considerable confusion regarding the role and significance of the "natural judge" as a motive for the refusal of the extradition of nationals, It seems that the misunderstanding has been caused by the failure to make a clear distinction between the jurisdiction to enforce in the sense of a competence of courts of a given state to hold trial and the venue as a much narrower concept of a territorial competence within the territory of that state. Chronologically, first it has to be established whether the domestic courts have jurisdiction over the case before a specific court can claim competence. Il is a universally recognized rule of the criminal procedure that the jurisdiction belongs to the court *loci delicti commissi.* It is submitted that the notion of the "natural judge" points to the venue rather than the national jurisdiction and in this sense it is close to the origin of a jury of neighbours of the accused in early English practice. They were both witnesses and representatives of the community.[45] Therefore, it is more than doubtful whether an extrapolation of this concept to notion of a national judge is valid and can be justified. From the point of view of the administration of justice the juge *naturel* is not the *juge national.* Allowing the accused to

---

[40] Sec S h e a r e r op. *cit.,* 120; D. P o n n e t, P. N e y r i u d: *L'extradition et l'asile polUit/uc en Suisse* (1976), p. 45.

[41] This provision was repeated in Article 53 of the Charter of 1830 and Article 4 of the French Constitution of 1848.

[42] For example, Travers was of die opinion that the "natural judge" referred to the place where the offence was committed rather than to the nationality of the accused. M. T r a v e r s . *op. eit.,* p. 23.

[43] M a r t e n s. *Nouveau Recueil de Traites,* III, p. 376.

[44] N. K a s i r e r : "Defenses, Exceptions and Exemptions to Extradition", 62 *R.I.D.P.* (1991), p. 91,95.

[45] G. H o 1 d s w o r t h:A *History of English Law* (1956), p. 317.

invoke a nationality exception to be judged in his or her home country, rather than the *forum delicti,* might lead to "unnatural" results where the determination of the truth is made most difficult.[46] To sum up, the "natural judge" of the accused is he who has jurisdiction of the *raiione materiae.*

If it is agreed that the very reason for not surrendering nationals is a special relationship between them and their home country, it is where the *Treupflicht* comes into play. This theory was developed and advanced by German writers although its meaning remains unclear.[47] Recently it has been criticized for being devoid of any practical significance.[48] This concept was not completely unknown in the common law countries. For example, in an English case, the counsel for the extradite argued: "As a British subject the prisoner owes allegiance to the Queen, in return for which he is entitled to her protection, for nationality involves a *'duples ligainen"'.*[49] On the other hand, the rule of non-extradition of nationals may be perceived as a manifestation of *"solidarité mal pracée"* between the state and its citizens.[50]

If there is a grain of truth in the assertion that the link between the requested state and its national may justify the non-extradilion then it will be difficult to agree upon the criterion, especially since the basis of such a link has changed dramatically in the course of history. The problem is that both the formal criterion (a paper or document stating nationality) and the material or substantive one (domicile, work, business, family ties, etc.)[51] lead to unacceptable consequences. The use of the latter would mean that the same "protection" has to be granted to persons other than nationals if they have genuine and longstanding ties with the requested state, while the former might produce an obvious absurdity which the following hypothetical will illustrate. Suppose that X acquired double nationality: state A by *ius soli* and State B *ius sanguinis.* He has lived in the territory of state A for some 40 years, and never even put his foot on the soil of state B. However, after having committed a fraud (together with several other persons, and based on a very sophisticated and complicated scheme), he fled to state B whose passport he legally obtained. His extradition was refused on the grounds that he is the national of stale B which does not recognize multiple nationality; for its authorities X was their national. Due to the nature of the offence and evidentiary considerations, the trial in state B was not feasible despite the fact that the competent authorities of that country have jurisdiction, the rule of mandatory prosecution was in place, and they were eager to carry out criminal proceedings.

---

[46] *United States v. Cotroni* (1986) I S.C.R., p. 1469.

[47] H. M e y e r: *Die Einlicfcmng* (1953), p. 73.

[48] O c h l e r, *op. cit.*, p. 181

[49] *In re Galwey* (1896) 1 Q.B., p. 230, 233.

[50] A. H e u t, R. K o e r i n g - J u l i n : *Droit penal international* (1994), p. 357.

[51] This "subjective criterion" was advocated in the European context by W. D u k: "Principles Underlying (lie European Convention on Extradition", in: *Council of Europe, Legal Aspects of Extradition Among European States* (1970), p. 33, and more recently by B. S w a r t: "Human Rights and the Abolition of Traditional Principles", in: A. E s e r, O. L a g o d n y (eds.): *Principles and Procedures fora New Transnational Criminal Law* (1992), p. 533.

This case may also illustrate that the rigidity of the traditional concept of non-extradition of nationals could produce further undesirable effects. Assume that after some time X decided that he would like to return to his true home country and that, consequently, he would not only not raise any objection against his surrender to state A, but more importantly, he in fact requests his extradition. It turns out that he has no standing in such a case and his request cannot be even taken into account by the executive. Consequently, as a national of the requested stale he cannot be delivered up - whether with his consent or without it - unless, of course, state B happens to be Switzerland whose 1981 Law on Extradition and International Cooperation in Criminal Matters allows surrender of nationals with their consent in writing (Article 7, paragraph 1). This flexible solution warrants serious consideration by other countries.

4. Approaches: An Irreconcilable Disparity?

The role of nationality in extradition is one of the issues which illustrate an almost bottomless precipice between common law and civil law countries. Moreover, while the international community and the international legal order have changed so radically over the last century, the content of this debate has not changed markedly. Suffice to compare the proceedings of the meeting of the Institute of International Law at Oxford in 1880[52] with the documentation of the 1989 International Conference oni Extradition in Siracusa.[53] The bottom line and starting point for the participants of both gatherings was the states' practice where two unequal groups of countries could be distinguished: the vast majority of them refusing to surrender their nationals and a relatively small number of states practicing the extradition of their nationals.[54] At both meetings the rule of non-extradition was challenged and criticized for being incompatible with the fundamental premises justice and extradition. At both of them one could sense some reticence which was founded on an unenthusiastic acceptance of the *status quo.* Nevertheless, Resolution VIII adopted at the Oxford meeting called upon states to abandon their policy of non-extradition, while the participants of the Siracusa conference showed an inclination to give a restrictive reading to the nationality exception.

An attitude towards the role of a national dignity in the context of extradition well demonstrates how far apart these two approaches are to the question of the surrender of nationals. In the nineteenth century Europe, an argument was advanced that such a surrender constitutes an indignity to the slate. In 1881, the commission appointed by the Italian government to report on extradition concluded that the rule against the

[52] *Annuaire de l'Institut de Droit International (1882).*

[53] 62 *R.I.D.P.* (1991).

[54] A survey of international treaties published in the League of Nations Treaty Series and the first 550 volumes of the U.N. Treaty Series brought interesting results: out of total 163 extradition treaties, 98 except the nationals of the requested stale absolutely. 57 give that stale the discretionary right to refuse extradition, while only S provide for extradition regardless of the nationality of the fugitive. See S h e a r e r. o*p. cit.*. p. 96.

surrender of nationals is required in the grounds that Italy "owes protection to its sons, and cannot abandon them to their lot, if charged with crime, to the mercy of foreign law and judges. The national dignity cannot consent that a citizen, a member of the. slate, should be compelled to bow his had in obedience to the commands of a foreign authority."[55] A direct response to this statement can be found in the opinion handed down by Chief Justice Cockburn who addressed this issue from the perspective of common law:

"I do not see any loss of dignity, of national greatness, or character, where crimes are committed by our own subjects in a foreign state, if we give them up when that state requires the surrender of them for the purpose of justice, because it can be better done there than here."[56]

It is only by the most tenuous and artificial process of reasoning that anyone can reach the conclusion that the surrender of an offending national for trial in the proper foreign tribunal amounts to a national indignity.[57]

The way the person sought is being looked upon in the requested slate is also instructive lo explain the disparity between the common law and civil law countries. In the latter, the national whose surrender is demanded by a foreign country is considered by the competent authorities, with reference to the *Treupflichl* theory, first of all as their compatriot. In the former, the opposite seems to be true, as evidenced by the declaration made by the Chairman of the English House of Commons in 1868: "We don't feel outraged honour at the thought of delivering an Englishman into the hands of foreign judges. He is first of all a criminal and only after that an Englishman.[58]

Two features of the general extradition practice in common law countries have bearing on the policy of surrender of nationals: (1) reciprocity and (2) the treaty requirement. That explains why the treaty stipulations have such profound influence on their practice also in this respect. The problem is relatively easy and straightforward when the treaty does not refer to nationality specifically, but provides for the. extradition of "all persons."[59] Judicial construction and executive interpretation of Such clauses have consistently held that the word "persons" includes nationals, and therefore refusal to surrender a fugitive because he is a national cannot be justified under such treaty provisions. The opinion of the United States Supreme Court in *Chaihc.ni* r. *Kelly* is instructive:

"There is no principle of international law by which citizens are excepted out of an agreement treaty itself. Upon the contrary, the word 'persons' includes all persons when not quali-

[55] *Atti della Commissione ministrale per lo studio e la compilazione di an pregetto di legge sulla extraditione,* Decreto 15 Oct. I SS I.

[56] *In re Tivan* 5 Best & Smith (1864), p. 645, 679.

[57] This kind of sentiment was voiced also in France when in IS43 the Minister of Justice said: "It is repugnant lo die national sentiment to deliver Frenchmen to foreign justice.'' R a f u s e, *op. cit.,* p. 79.

[58] A.L. M e l a i: "Les Conventions européennes et le Traite Benelux d'entraide judiciaire en matière pénale et d'extradition", in: *Le droit penal International* (1965), p. 103.

[59] Such formula was included in the very first extradition treaty between the United States and Great Britain concluded in 1794.

fied as it is in some of the treaties between this and other nations. That this country has made such an exception in some of its conventions and not in others, demonstrates that the contracting parties were fully aware of the consequences unless there was a clause qualifying the word 'person'."[60]

The problem arose in the relationships between common law and civil law countries when the latter refused to include in a treaty a provision obligating them to surrender all requested offenders (or persons), including their own nationals. One way to proceed in the negotiations was to reach a compromise formula along the following lines: (1) both signatory stales undertake to extradite all persons requested subject to the conditions stipulated in the treaty; (2) neither party shall be bound to surrender their own nationals (a variant: nationals of one signatory state shall not be delivered up to the other signatory state). Interestingly, the same or very similar wording generated differing interpretations in the United States and Great Britain.

Based on the extradition treaty between Great Britain and Switzerland of 1874, the court held in the *Wilson* case that, regrettably, "no British subject in this country could be surrendered to the Swiss government."[61] Since British courts had no jurisdiction over offences committed by Wilson that ruling set him free, and was tantamount to his immunity. The situation was untenable. In 1896, the court in *In re Galwey* distinguished the ruling in *Wilson* and held that under the treaty with Belgium of 1876 it is perfectly legal to surrender the British subjects.[62] The court went on to explain that the treaty stipulation was introduced not to create a prohibition against the surrender of a British national, but to vest in the executive a discretion with respect to such surrender.

The question of the interpretation of substantially the same treaty stipulation took on a different course in the United States. The reasons may be found in two principal reservations against extraditing U.S. citizens which existed in that country.[63] The executive opinion was that since there was no general power to extradite apart from a treaty obligation, a treaty provision which expressly denied an obligation to extradite United States subjects deprived that country of any constitutional power to do so.[64] In *United States* v. *Valentine ex rel. Neidecker,* the Supreme Court affirmed that opinion.[65] It held that the treaty with France, properly interpreted, did not provide any power at all to surrender nationals. Although the question was not directly before the court, the justice were clearly also of the opinion that the expanded version of the clause which explicitly gave to the parties in other treaties a discretionary power to

[60] *Charlton* v. *Kelly,* 229 U.S. (1913), p. 447, 467.

[61] *The Queen* v. *Wilson* (1877) 3 Q.B.D., p. 42.

[62] *In re Galwey* (1896) I Q.B., p. 230.

[63] See E.A. N a d e l m a n n: "The Evolution of United States Involvement in the International Rendition of Fugitive Criminals", 25 *N.Y.U.J.1.L.&P.* (1993), p. 813, 848.

[64] Report of Mr. F r e 1 i n g h u y s e n Secretary of State, to the President, 18 February 1934, J. M o o r e: *1 Digest,* p. 166.

[65] *United Slates v. Valentine ex rel. Ncidecker* (1936), p. 299 U.S. 5.

surrender nationals would effectively give power to the executive to surrender United States nationals.[66]

In November 1990, Congress finally corrected the problem with an extradition reform bill. The following provision was adopted:

"If the applicable treaty or convention does not obligate the United States to extradite its citizens to a foreign country, the Secretary of State may, nevertheless, order the surrender to that country of a United States citizen whose extradition has been requested by that country if the other requirements of that treaty or convention arc met."[67]

The United States courts repeatedly stated that "United States citizenship does not bar extradition by the United States,"[68] and rejected constitutional and treaty objections to extradition of U.S. nationals.[69] Similarly, the Department of State is of the opinion that "the United States has the authority, frequently exercised in the interests of justice, to extradite its nationals."[70] In negotiating new extradition treaties, the State Department has been seeking clauses specifically calling for the extradition of nationals, or at least allowing discretion to do so.[71]

In the 1996 extradition treaty between the United States and Hong Kong, a different formula has been adopted to define its scope of application *ratioiie personae*.[72] According to its Article 1, the treaty applies to "any person." Consequently, Article 3, paragraph 1, states that the surrender shall not be refused on grounds relating to the nationality of the person sought. However, two exceptions have been included in this article. First, the United States reserves the right to refuse the surrender of its nationals in cases in which the requested surrender relates to the defence, foreign affairs or essential public interest or policy of the United States (paragraph 2). The Government of Hong Kong has reserved a similar right, adding the second case in which the extradition request will be denied based on the nationality of the relator:

"The person sought neither has the right of abode in Hong Kong nor has entered Hong Kong for the purpose of settlement, and the State whose government is responsible for the foreign affairs relating to Hong Kong has jurisdiction over the offence relating to the requested surrender and has commenced or completed proceedings for the prosecution of that person" (paragraph 3).[73]

---

[66] For a sharp criticism of this decision, see J.W. G a r n e r: "Non-extradition of American Citizens - The Neidecker Case", 30 *A..I.I.L.* (1936), p. 480; A.K. K u h n: "Extradition from the United States of American Citizens Under Existing Treaties", 31 *A..I.I.L.* (1937), p. 476.

[67] IS U.S.C. § 3196: *Extradition of United States Citizens*, added 21 November 1990, P.L. 101-623, 11(a), 104 Stat. 3356.

[68] *Quinn* T. *Robinson*, 783 F. 2d 776, 782 (9th Cir. 1986).

[69] *Escobedo V. United States*, 623 F. 2d. 1098 (5th Cir. 1980).

[70] E. M c D o w e l l: *Digest of United Stales Practice in International Law* (1976), p. 11 S.

[71] Ch. B l a k e s l e y: *Terrorism, Drugs, International Law, and the Protection of Human Rights* (1992), p. 206-207.

[72] Agreement for the Surrender of Fugitive Offenders, Hong Kong - United States, 20 December 1996, 3*6 I.L.M.* (1997), p. 842.

[73] Tile delegations expressed their shared intention that Article 3 would rarely be invoked. See Letter of Submittal, Department of State, 4 February 1997, reprinted in 36 *I.L.M.* (1997), p. 344.

The Commonwealth system of extradition is based on reciprocal legislation. Therefore, even if the United Kingdom itself refrains from exempting its nationals from surrender it is conceivable that its extradition request will be denied in one of the member states under the domestic legislation. The Commonwealth Extradition Scheme allows a discretion to be exercised in respect of the return of a fugitive offender "who is a national or permanent resident of the part of the Commonwealth in which he is found," provided he is not also a national of the requesting Commonwealth country.[74] In such a case, the surrender may be precluded by law or may be refused by the competent executive authority. So far it appears that, by virtue of its Constitution (Article 11.2f), only Cyprus prohibits the extradition of its citizens absolutely.[75]

Given that the underlying theme in the rationale for the rule of non-extradition of nationals is the mistrust between states and a fear that a compatriot might be subjected to some kind of "barbaric" treatment in the requesting stale, it could be expected that at least among countries which share the same culture, tradition, religion, as well as social and economic values, and whose legal and political systems are very much similar, as based on the same fundamental principles, the need to invoke such ground for refusal should disappear. However, this is not always the case. Out of three examples below, in only one this expectation has been fulfilled, that is, among the Nordic countries. Interestingly, the states of that region have adopted a "double standard" with respect to the extradition of nationals: the prohibition applies in their external relations with non-Nordic countries,[76] while at the same lime, it has been generally removed (with some restrictions) in their internal relations. Under parallel domestic laws relating to extradition of offenders to other Nordic countries a national of the requested state may be delivered up to the requesting Nordic state usually when he has either a permanent residence in that country,[77] or had his residence there for two years before prior to the commission of an offence.[78] Extradition will be also granted even if this requirement is not met, with respect to serious crimes (for example, an offence punishable by the deprivation of liberty in the excess of four years). Moreover, while making reservations to Article 6 of the European Convention on Extradition, the Nordic countries adopted an extended definition of a "national" so that it covers both its citizens and residents. Finally, they declared that the term "national" shall include both nationals and residents of both the requested state and other Nordic slates.[79]

---

[74] *Commonwealth Scheme for the Rendition of Fugitive Offenders* as amended in 1990, LMM 90(32). Annex 2, paragraph 2(1).

[75] S h e a r e r, op. c*it.*, p. 102.

[76] See e.g. the Finnish Extradition Law of 1970, No, 456. Article 2; die Norwegian Extradilion Law of 1975, No. 39, 5 2; the Swedish Extradition Law of 1957, as amended in 1975, No. 668, Section 2.

[77] See the Finnish Nordic Extradition Law of 1960, Section 2(1).

[78] See the Norwegian Law relating to Extradition of Offenders to Denmark, Finland, Iceland and Sweden of 1961, § 2(1).

[79] Similar provisions have been included in recent bilateral treaties concluded by the Nordic countries with the non-Nordic states.

It should be recalled that the processes of cooperation and harmonization among the Nordic countries have ancient roots. Even the first regional statutes from the 12th and 13lh centuries demonstrated striking homogeneity in both legal concepts and adopted solutions.[80] Admittedly, the most important factor contributing to smooth cooperation in this region are both mutual confidence in, and respect for, the social and legal order as well as the criminal justice system existing in other Nordic states.

.Apparently, the three neighbouring Benelux countries to not present the same case. Article 5 of the Benelux Convention on Extradition and Mutual Assistance in Criminal Matters of 1962 fin force since 1967) provides an absolute prohibition of extradition of nationals. Oddly enough, the Convention does not provide for a corresponding duty of the requested slate to bring the case to its competent authorities for prosecution, although transfer of criminal proceedings has been included in it (Article 42). The rigid solution adopted in the Convention sharply contrasts with the overwhelming desire and longstanding efforts to promote cooperation, harmonization and confidence among these three countries. Since one of the underlying ideas behind the common policy within Benelux was the equal legal status of all its citizens, irrespective of their national origin and passport, it should logically follow that they have equal status in the extradition process.[81] Although it was suggested that an exception should be made to nationals who are domiciled in the requesting state, and possibly even to abandon this idea altogether, the Legislative Commission rejected all proposals and adopted the ban on extradition of nationals based on arguments pertaining to constitutional, practical and technical considerations.[82]

Although the former communist countries allegedly had the same ideological, political, social and economic foundations (not to mention geographic proximity), they all adhered to the traditional rule of non-extradition nationals, even in their mutual relations. Among them, bilateral treaties conformed to a uniform pattern in the absolute exemption of citizens of the requested state, subject to an obligation to prosecute in the home country.[83] The removal of this exception was never seriously considered despite a proposal based on the division of the criminal process in two stages, trial on the one hand, and sentencing and enforcement, on the other, of which the former could be carried out in the *loci delicti commissi* (where the national might be temporarily and under exceptional circumstances surrendered), while the latter in the offender's home country.[84]

One more development warrants a closer look. It is intriguing whether in the process of constructing of the "common European home" it will be possible to get rid

---

[80] R. L a h t i, P.O. T r a s k m a n: 'The Regionalization of International Criminal Law and the Protection of Human Rights in Internationa] Cooperation in Criminal Proceedings", 65 *R.I.D.P.* (1994), p. 256.

[81] *Annales du Conseil Interparlementaire Consultatif de Benelux* Session 1961, Doc. No. 36. p. 5.

[82] Cons tan l: "Le Traité Benelux d'extradition et d'entraide judiciaire en matière pénale", 43 *R.D.P.C.* (1962), p. 91-94.

[83] M. P ł a c h t a: "Development and Main Tendencies of the Polish Bilateral Treaties on Extradition: 1925-1989", 62 *R.I.D.P.* (1991), p. 635-668.

[84] H. F r i t z s c h e: "Die Auslieferungsstraftaten im Verkehr der Deutschen Demokratischen Republik mit den anderen Slaalcn des Sozialismus", 10 *Staat und Recht (1961),* p. 1314, 1321.

of the rule of non-extradition of nationals. So far, it turned out that this task is impossible to fulfil. Maybe, the drafters and designers of the political and legal foundations of this structure underestimated how deeply rooted this rule has been in the whole continental legal tradition, thought and philosophy. Or maybe, it is still too early to expect success in overcoming henceforth existing barriers, differences, prejudices, and mistrust among the member states of the European Union. Or maybe, the traditional way of thinking based on stale's sovereignty and old principles still takes precedence over the more pragmatic approach to the extradition of nationals. In any case, the Schengen Convention of 1990 (Title III, Chapter IV) has not changed anything in this area. Then it came the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, Relating to Extradition Between the Member States of tire European Union.[85]

Its drafters were determined to root out what in the common law parlance is called "an illegitimate relic of nationalist sentiments"[86] and what certainly constitutes an obstacle in the efficient functioning of extradition. Their desire is slated in an unequivocal language in Article 7, paragraph 1, which provides that extradition may not be refused on the ground that the person claimed is a national of the requested Member States within the meaning of Article 6 of the European Convention on Extradition. Good intentions notwithstanding, strong political will itself cannot compensate for "ugly realities" in Europe A.D. 1996, even among the actual member stales of the European Union. The drafters of the Convention decided to face them rather than ignore them by including, in paragraph 2, the right of every member state to refuse surrender of its nationals.

However, there are two noteworthy differences between reservations based on Article 6, paragraph 1(a), of the European Convention of 1957 and the reservation granted the member states by Article 7 of the 1996 Convention. First, while the former are limited to the definition of the term "national", the drafters of the 1996 Convention clearly suggested in paragraph 2 that in their declarations, the member states may stipulate that they will authorize the surrender of their own nationals "under certain specified conditions." Second, unlike the 1957 European Convention, the 1996 Convention has imposed specific time-limit (five years) on the validity of the reservations made under Article 7. Ils paragraph 3 contains detailed provisions regarding the period of validity as well as its renewal, expiry and notification. There can be no doubt as to the drafters' intentions behind this solution. It was their hope that, with time, the progress in consolidating the European Union will (or at least may) encourage the governments to take steps towards abandoning the rule of non-extradition of nationals and thereby removing a "thorn" from their mutual relationships. Arguably, if applied by all civil law states in Europe, such a policy would result in a substantial improvement in the free-flow of fugitive offenders to face trial and would still pro-

[85] The Convention was signed on 27 September 1996, O.J. No. C 313/12. See also Council Act drawing up the Convention Relating to Extradition Between the Member States of the European Union, 27 September 1996, 96/C 313/02.

[86] N a d e 1 m a n n, o*p. cit,,* p. 847.

vide them with the best opportunity for rehabilitation and maintenance of family contacts, especially when combined with another form of international cooperation in criminal matters, i.e. the transfer of sentenced persons back to their home countries to serve their imprisonment there?[87]

5. Non-extradition of Nationals: A Human/Constitutional Right?

The question arises as to whether the sacrosanct rule of non-extradition of nationals confers a substantive, or personal, right on the state's own subject, and grants him standing to claim it before the court. This assertion might be supported by the contextual interpretation of the domestic pronouncements in which the relevant provision has been adopted, especially where it has been placed in the constitution. Typically, it can be found in one part together with human rights and freedoms. For example, in the new Polish Constitution of 1997, the provision prohibiting the extradition of a Polish national has been placed in Chapter II: The Freedoms, Rights and Obligations of Persons and Citizens, Section 2: Personal Freedoms and Rights, Article 55, paragraph l.[88]

It could be argued that since he is the beneficiary of this mechanism it follows, logically, that he should be empowered not only to trigger it but also to waive it. Such a concept would be substantially the same as the system upon which the transfer of prisoners has been based: normally, this operation cannot be accomplished but only with the explicit consent of the sentenced offender.[89] However, unlike the transfer of prisoners, there are insurmountable difficulties in identifying and discerning the rationale for the ban on the surrender of nationals. In the process, the following would have to be established:

a) Whose interests are protected by the rule of non-extradition of nationals: the relator's or the state's?

b) What is the role of humanitarian and human rights considerations in maintaining this rule?

c) Assuming that the extradite is the beneficiary of this concept but has no standing in the extradition process, we would have to conclude that it is the requested stale that claims this "privilege" on his behalf without, however, making any inquiry into an opinion of his national in this matter.

d) Given the growing tendency towards treating the extradite as a subject, and not merely an object, of extradition, would it be proper to make the surrender conditional and dependant on his consent only because he happens to possess the passport of the requested slate? Would this be in keeping with the purpose of extradition? If adopted generally, wouldn't this system eventually paralyze the system of international extradition?

---

[87] M. P ł a c h t a: *Transfer of Prisoners Under International Instruments and Domestic Legislation. A Comparative Study* (1993). p. 187-193.

[88] Constitution of the Republic of Poland, 2 April 1997, in force since 17 October 1997, Dz.U. (Official Journal) of 1997, No. 78, Item 483.

[89] P ł a c h t a: *Transfer.... op. cit.*, p. 354-385.

Not before these matter are clarified can the main question be answered satisfactorily. Some attempts are noteworthy.

Chronologically first is a theory developed in the German legal and political doctrine asserting that every citizen has the right to live and remain in the territory of his home country. Some authors hold that this "right" is meaningless[90] mainly because, even if mentioned by the commentators Lo the German Basic Law *(Grundgesetz)* in the context of context of Article 16(11) prohibiting the extradition of nationals,[91] there is no stipulation in the German Constitution expressly conferring such a privilege on the German nationals.[92] Given the realities of contemporary life and international relations, this concept seems to have lost touch with the modern world.

Other effort involved interpretation of international treaty stipulations pertaining to the movement rights as well as the expulsion and deportation. One of them is the 1957 Treaty of Rome setting up the European Economic Community. Its Article 48(3) grants the "right to remain in the territory of a Member States." In *R.* v. *Governor oj Holloway Prison, ex parle Kimber,* the extradite challenged the order for committal on the grounds that the surrender would deprive her of the freedom of movement guaranteed by Article 48. The court rejected the submission:

"If this submission is right, it will impose a formidable fetter upon extradition. 1 cannot believe that it was the intention of those who drew the Treaty of Rome that it should have the effect so emasculating the process of extradition."[93]

Another international instrument with some relevance here is the European Convention on Human Rights. Paradoxically, even though the Convention contains vital safeguards aimed at the protection of human rights which have been found to be directly applicable Lo extradition,[94] there is no specific protection against extradition itself as of right. The question arose as lo whether such a protection can be found in Article 3, paragraph 1, of the Fourth Additional Protocol to this Convention which provides: "No one shall be expelled, b y means either of an individual or of a collective measure from the territory of the State of which he is a national." This provision gave rise to two conflicting interpretations aimed at explaining whether or not the "means of individual expulsion" designates, in fact, extradition. Interestingly, they both start from the same point, that is, the explanatory report on this Protocol which says that "It was understood that extradition was outside the scope of this paragraph."[95] One view hold that such understandings are not an adequate basis for drafting a legal text. Moreover, the wording of Article 3(1) of this Protocol is clear and unambiguous and as such precludes the use of this explanatory report to interpret it.[96] The accepted principles of treaty interpretation does not allow to invoke the *travaux préparatoires*

---

[90] O c h l e r, *op, cit,* p. 182.

[91] N e u m a n, N i p p e r d e y, S c h e u n e r: *2 Die Grundrechte* (1954), p. 588.

[92] Cf. T. V o g l e r, P. W o l k i t z k i: *IRG - Kommentar* (1992), note 17 to § 2.

[93] *R.* v. *Governor of Holloway Prison, ex parte Kimber* (19S) I W.L.R. 1110, 1127, Griffith, J, Similarly, *Re Habeas Corpus Application of Carthage Healy* (1984), 3 C.M.L.R., p. 575.

[94] See e.g. *Soering. United Kingdom,* E.C.H.R., 7 July 1989, Ser. A, No. 161.

[95] *Explanatory Reports on the Second to Fifth Protocols to the Convention,* Strasbourg (1971), p. 47.

[96] F.G. J a c o b s, R.C.A. W h i t e: *The European Convention on Human Rights* (1996), p. 280.

in such a case. Consequently, signatories of the Fourth Protocol are bound by its Article 3(1) to refuse extradition of its nationals the same way as stales which adhere to the rule non-extradition of its citizens by virtue of their domestic legislation - unless they refrain from this policy by making an explicit reservation to the contrary.

Other authors, after having admitted that the language of Article 3(1) raises doubts as to the true meaning of the term "expulsion" in the context of extradition, rely on the Explanatory Report and consider its contents as controlling in the interpretation of this provision.[97] This reading of Article 3(1) lends a conclusion that the Fourth Protocol alone does not five its signatories the right to refuse extradition of their nationals.

The latter opinion is shared by the European Commission of Human Rights. In X v. *Federal Republic of Germany,* the Commission defined expulsion as a procedure under which "a person is obliged permanently to leave the territory of the Slate without being left the possibility of returning later."[98]The words "permanently" and "without being left the possibility of returning later" in this definition evidently serve to support the decision of the Commission that extradition does not fall under the concept of expulsion, and consequently not under the prohibition of Article 3 either. Similarly, in *Briickmann* v. *Federal Republic of Germany,* by reference to international law the Commission made another attempt to distinguish between expulsion and extradition: "Expulsion is the execution of an order to leave the country, while extradition means the transfer of a person from one jurisdiction to another for the purpose of his standing trial or for the execution of a sentence imposed upon him."[99]

Il is submitted that the distinction between expulsion and extradition based solely on the criterion used by the Commission, that is, whether or not the person leaves his home country permanently, is not always as clear-cut as the Commission wished it to be, and the line between these procedures may be sometimes blurred. Suffice to consider a situation where the offence in respect of which the surrender was demanded, carries death penalty, and the requested slate did not make a reservation that this penalty not be imposed or carried out, or a situation where the convicted offender is sought to serve life imprisonment with no release on parole or probation. Therefore, it is submitted that, under exceptional circumstances, the requested person may seek protection under Article 3, paragraph 1, of the Fourth Protocol to the European Convention on Human Rights. Such a possibility is precluded under the International Covenant on Civil and Political Rights which does not refer to the right to "remain" in the home country, or to the right of a national not to be "expelled". Instead, its Article 9(1) guarantees everyone the right to liberty and security and non-deprivation of liberty "except on such grounds and in accordance with such procedure as are established by law." Article 12 grants the right to liberty of movement and freedom to choose residence, including freedom to leave any country. Finally, in Article 13 the

---

[97] A. Robertson, J. Merrits: *Human Rights in Europe* (1993), p. 233; P. van Dijk, G. van Hoo 1: *Theory und Practica of the European Convention on Human Rights* (1990), p. 495.

[98] X. v. *Federal Republic of Germany,* App. 6189/73, 13 May 1974.

[99] Briickmann v. *Federal Republic of Germany,* App, 6242/73, 14 July 1976.

right not to be expelled has been explicitly limited to "aliens lawfully on the territory of a slate."

The rule of non-extradition of nationals also has two constitutional aspects. The first manifests itself in the stipulation prohibiting the surrender of nationals as adopted in the constitutions of some countries.[100] Usually, once the prohibition has been elevated to the rank of the country's "supreme law," it becomes very "durable" and long lasting in the sense that, given a special procedure that has to be followed in order to amend the constitution, such a stipulation is difficult to remove or modify. This, however, as the story of the International Criminal Tribunal for the Former Yugoslavia demonstrates, is not entirely impossible. In their domestic legislation on the cooperation with this Tribunal, some states specifically declared that they relinquish the rule of non-extradition of their nationals if, and only if, the request for surrender is submitted by the Tribunal. In one case, that step was tantamount to an amendment to the constitution (Croatia).

Another constitutional aspect of this rule cam be framed in the following question: can the requested offender, in claiming his nationality-based protection against the surrender, rely on the constitutional stipulation providing for non-extradilion-related rights and freedoms? An illustration of this problem can be found in the Canadian legal system. Until 1982, Canada had extradited its nationals where either the extradition treaty was silent on this matter ors where a discretion existed whether or not to extradite nationals and it was normally exercised in favour of extradition by the Minister of Justice. The Canadian Charter of Rights and Freedoms which was enacted in 1982 as being Part I of the Constitution Act, in section 6(1) provides that "Every citizen has the right to enter, remain in and leave Canada." One of the many questions that arise in the context of this stipulation is whether or not the citizen's "right to remain in" may be so interpreted as to include his "right not to be extradited"? In other words, does the surrender of a Canadian citizen to a foreign slate constitute an infringement of his right to remain in Canada as set out in section 6(1) of the Charter? The *travaux préparatoires* of the Charter indicate that the intent of the drafters of section 6(1) was to provide for the right of citizens to enter and leave Canada and be protected from expulsion. The debate in the Joint Committee on the Constitution centered on expulsion and deportation.[101] It could be inferred that this provision seeks to prevent expulsion of certain groups of Canadian citizens as well as their deportation. On the other hand, it is difficult to dismiss an assertion that had it

[100] This group of states include: in Europe: Germany, Article 16(11); Portugal, Article 23; Poland. Article 55(1); Croatia, Article 9. and other countries which emerged front the former Yugoslavia, whose constitution also included the ban on extradition of nationals (Article 54); in Latin America: Brazil, Article 5(LI); Ecuador, Article 48; Honduras. Article 102; Panama, Article 4: Peru, Article 109; Colombia, Article 34; in Asia: Afghanistan. Article 28; Iraq, Article 26; Jordan, Article 21: in Africa: Ethiopia, Article 50; Libya, Article 189. See M. P ł a c h t a: "Extradition and Asylum in the New Polish Constitution of 1997" (in Polish), 5 Sr. *Nauk. U.G.* (1998).

[101] Proceedings of the Joint Committe on the Constitution of Canada. *Hansard,* 27 January 1981, at 46: 117.

been the intention that section 6(1) address only a citizen's right not to be exiled or banished, the secLion would have been framed in more specific terms.

When section 6(1) was challenged in the courts two lines of interpretation emerged. The chronologically earlier one held that extradition *prima facie* infringes upon a Canadian citizen's right to remain in Canada. However, in *Federal Republic of Germany* r. *Raima,* the Court of Appeal added that such an infringement was a reasonable limitation of that right pursuant to section 1 of the Charter in that it was "a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society."[102] Later courts have followed this approach[103] in which the jurisdiction of the Canadian courts over the alleged offences was not raised as an issue.

When the Supreme Court of Canada dealt with this problem in the *Cotroni* case in 1989 it turned out that a more subtle distinction has to be made. Cotroni and El Zein, both Canadian citizens, argued that their extradition to the United States was inadmissible on the following grounds: (1) their conduct with respect to the alleged crime took place entirely in Canada; (2) they could be charged with the offence under Canadian as well as United Slates law.[104] Therefore, they argued that their cases could be distinguished on the facts. Their proposition was accepted by Wilson, J., in his dissenting opinion in this case.[105] He opined that the locus of the wrongdoing is very relevant when extradition to a foreign country is sought to be justified as a reasonable limit on a Canadian citizen's right to remain in Canada. The majority of the Court disagreed, and pointed out that:

> ''Modern communication means the territoriality of wrongdoing is no longer the determining factor for criminal law jurisdiction over international crime. Why should the territoriality of the wrongdoing be so important under constitutional law? Indeed the locus of the wrongdoing scents irrelevant to the s. 6(1) Charter right which purports to allow Canadian citizens to remain physically in Canada."[106]

The Quebec Court of Appeal held that while the overall objectives of extradition with respect to the maintenance of law and order, as well as the suppression of international crime was sufficient to warrant interference with the Charter right, in the circumstances of this case the objectives could be met without an infringement of section 6(1). The potential for prosecution in Canada made extradition unreasonable and disproportionate. The Supreme Court disagreed and held that extradition is essential to the continuance of a stable and democratic society and that the objectives of extradition warrant the limited interference with the right to remain in Canada.[107]

---

[102] *Federal Republic of Germany v. Rauca,* 41 O.R. (2d) 225 (nt, C.A. 1983).

[103] See e.g. *He Defter und United States of America* (1983), 14S D.L.R. (3d) 496; *Re Voss and the Queen* (1984), 12 C.C.C. (3d), p. 538.

[104] *United States* v. *Catroni* (1930), 48 C.C.C. (3d) 193, 221 (S.C.C.).

[105] Ibid., p. 203.

[106] *Ibid.,* p. 221 (La Forest J,).

[107] *Ibid.,* p. 194. See also A.W. L a F o r e s t : *Extradition to and from Canada* (1991), p. 98—102; S.A.W i l l i a m s: "Human Rights Safeguards and International Cooperation in Extradition - Striking the Balance", in; A. E s e r, O. L a g o d n y (eds.): *Principles and Procedure Jura blew Transnational Criminal Law* (1992), p. 550.

Justice La Forest added that there is "nothing irrational in surrendering criminals to another country, even when could be prosecuted for the same acts in Canada. It is often better that a crime be prosecuted where its harmful impact is fell and where the witnesses and the persons most interested in bringing the criminal to justice reside".[108] The Court stated in general germs that the decision whether or not to surrender a national should be based upon the prosecutorial discretion of the requested state,[109] giving due consideration to individual constitutional rights.[110] Specifically, the competent authorities have to assess whether prosecution would be equally effective in the territory of that country, or on the contrary, the evidentiary or other considerations would seriously undermine their efforts to carry out the criminal proceedings in the case and to establish the truth. Both the domestic legislation of the requested stale and its arrangements pertaining to various forms of international cooperation in criminal matters are relevant in this context.

Some authors went even further in the interpretation of section 6(1) by submitting that this provision does not apply to extradition at all whether or not the fugitive can be. prosecuted and that there is no right to resist extradition carried out in accordance with Canadian extradition law and treaties.[111]

6. An International Criminal Tribunal: A Special Case?

Due to the general dissatisfaction with the low level of effectiveness of extradition which for a whole host of reasons is a very cumbersome, lengthy and difficult process, on the one hand, and the restrictions and limitations inherent in each of the solutions discussed so far, on the other hand, the resort to and use of other measures of rendition have increased over the last decades.[112] The question arises as to whether an international criminal court might help to resolve some of the difficulties that have emerged within the framework of extradition, and especially the policy of non-extradition of nationals.[113] It is noteworthy that a number of Caribbean and Latin American countries have indicated that that they would like to have a third option to trial in domestic courts or extradition, as indicated in the principle *aut dedere aut judicare.*[114] The reluctance of such countries to extradite their nationals to the United Slates is due not only to the fear of attack from criminal organizations. It also reflects sentiment in these countries that their citizens should not be extradited to and tried in the

[108] *Ibid.,* p. 217.

[109] The factors that are relevant to the decision whether to prosecute or to extradite have been elaborated in *Swystun* v. *United Slates of America* (19SS), 40 C.C.C. (3d) 222, 227 (Man. Q.B.).

[110] *Cotroni. ibid.,* p. 225.

[111] J.G. C a s t e l l, S.A. W i l l i a m s : "The Extradition of Canadian Citizens and Sections 1 and 6(1) of the Canadian Charier of Rights and Freedoms'', 25 *C.Y.I.L* (1987), p. 236, 299.

[112] See e.g. A. L o w e n v e l d, "U.S. Law Enforcement Abroad: The Constitution and International Law Continued", 84 *A.J.I.L. (*1990), p. 444.

[113] See M.P. S c h a r f: "The Jury Is Still Out on the Need for an International Criminal Court", 1 *Duke J. Comp. & Inl'lL.* (1991), p. 135, 149-156.

[114] F. P a t e l. "Crime Without Frontiers: A Proposal for an International Narcotics Court", 22 *N.Y.U.J.Int'lL. & Politics* (1990), p. 709.

United States, a country whose culture and legal traditions differ substantially from their own. Therefore, a neutral forum might well be attractive to these countries.

Even when the idea of an international criminal court has been agreed upon in principle,[115] there are some questions that have to be answered. For example, should such a court have authority to compel stales to arrest, detain, and transfer suspected criminals notwithstanding that stale's obligations under domestic law or with regard to extradition treaties? Or, to the extent that an international criminal court may override some traditional limitations on extradition, what issues, if any, may the requested state raise as a basis for not surrendering the person sought? Last but not least, what is the position of that person, especially if he is a national of the requested stale, in the new and substantially changed system of rendition of offenders?

An opportunity to address at least some of these issues presented itself in 1993 when the International Criminal Tribunal for the Former Yugoslavia was established by the Security Council under Chapter VII of the U.N. Charter.[116] Although extradition is a universally recognized and accepted means for transferring criminal defendants from the jurisdiction of one sovereign state to another sovereign state,[117] the word "extradition" does not, however, appear either in the constitutive documents of that Tribunal - Security Council Resolution 827[118] and the Statute of the Tribunal[119] - or in the Report of the Secretary-General.[120] Instead, they refer to "surrender" and "transfer" of the alleged international criminals at the request of the Tribunal. This change in terminology reflects important conceptual and operative differences between transfer or surrender under the Statute and under traditional extradition.

In order to determine the consequences of this change for the states, an inquiry is necessary into the underlying ideas behind the new solution as well as the lines along which these mechanisms have been shaped. The Security Council has obligated all stales to "cooperate fully" with the International Tribunal and its organs in accordance with its Resolution S27 and the statute of the Tribunal.[121] The consequences of this decision are twofold: first, all states have to take any measures necessary under their domestic law to implement the Resolution and the Statute; second, the states are under an explicit obligation to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 of the Statute. Paragraph 1 of Article 29 provides: "States shall cooperate with the International Tribunal in the investigation and prosecution of persons accused o committing serious violations of international humanitarian law." Paragraph 2 specifies that such assistance requires compliance with

---

[115] See e.g. M.C. B a s s i o u n i, C. B l a k s l e y: "The Need lor an International Criminal Court in the New International World Order", 25 *Vand. J. Transnat'll.* (1992), p. 131; J. C r a w f o r d: "Prospects for an International Criminal Court", 4S *Current L. Problems* (1995), p. 303.

[116] S.C. Res. S27, U.N. SCOR, 48[lh] Year, 3217"' Mtg. At I, U.N. Due. S/Rcs./S27 (1993).

[119] U.N., *International Tribunal fur the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 199I,* 13[th] Sess., The Hague, IT/32/Rev. 11, 25 July 1997.

[120] *Report of the Secretary-General pursuant to Paragraph* 2 *of Security Council Resolution SOS (1993),* U.N. Doc. S/25704 & Add. 1 (1993).

[121] S.C. Res.827, *op. cit.,* para. 4.

orders of the Tribunal's trial chambers, including, but not limited to, the arrest or detention of persons and the surrender or transfer of defendants to the Tribunal. In its Report, Secretary-General states that such an order "shall be considered to be the application of an enforcement measure under Chapter VII of the Charter of the United Nations."[122] In view of the wording of the Security Council Resolution 827 and Article 29 of the Statute of the Tribunal as well as the explanation contained in the Secretary-General's Report it could be held that, from the perspective of international law, an acL of surrender or transfer of an offender by a state to the Tribunal constitutes, in substance, granting an extradition request under a treaty. The only question is whether or not the obligation that was imposed on all stales is superior to the domestic law in the sense that it makes any conceivable grounds for refusal not applicable in individual cases.[123] An argument in favour of a broad meaning of this obligation can be found in the Rules of procedure and Evidence: "The obligation laid down in Article 29 of the Statute shall prevail over any legal impediment to the surrender or transfer of the accused or of a witness to the Tribunal which may exist under the national law or extradition treaties of the State concerned."[124] Similarly, Secretary-General points to an international obligation based on Chapter VII of the U.N. Charter.[125] If we accept that the documents pertaining to the Yugoslavia Tribunal have in fact removed all possible grounds for refusal, then we would have to conclude that the authorities of the requested state, being unable to invoke any bar to "surrender" or "transfer", are placed in an awkward position of either violating their domestic law or violating their international obligation. That would also mean that the principle aut *dedere aut judicare* has been replaced with by a mandatory requirement of transfer *(dedere).*[126] It is submitted that in interpreting the pertinent stipulations, a balance should be struck between the need for the Tribunal to transcend traditional extradition-treaty limitations while at the same time providing states with some assurance that they will not be compelled to depart from what they consider to be the fundamental principles of their domestic legal systems. Consequently, the reasons to deny the request submitted by the Tribunal should not be based on non-constitutional, non-fundamental or discretionary grounds for refusal of extradition, such as the nationality, domicile or humanitarian considerations.

Unfortunately, since these matters have not been clarified stales taken it upon themselves to determine the extent of their obligations to cooperate with the Tribunal. As could have been expected, this has led to inconsistent results with respect to the question of surrender/transfer of their nationals. This problem is exacerbated where

---

[122] See *Secretary-General Report. op. cit,,* para. 126.

[123] Some authors argue for the broadest possible meaning of this obligation. See e.g. K.S. G a l l a n t: "Securing the Presence of Defendants Before the International Tribunal for the Former Yugoslavia: Breaking with Extradition", 5 *Crim. L. Forum* (1994), p. 557, 562.

[124] Rules of Procedure and Evidence, *op. cit.,* Rule 58.

[125] *Secretary-General's Report, op. cit.*, para. 125.

[126] G a l l a n t, *op. cit.,* p. 569.

the prohibition against extradition of nationals has been incorporated into a constitution. The following three countries well illustrate a diverging practice in this respects:

1. Croatia

Article 9 of the Constitution of 1990 provides: "No citizens of the Republic of Croatia shall be expelled from the Republic or be deprived of citizenship, and may not be. extradited to another slate." Based on the Constitutional Act on the Cooperation of the Republic of Croatia with the International Criminal Tribunal of 19 April 1996, the legislature has transferred a portion of state's sovereignly to this supranational body. As a consequence, there is no more need to maintain the rule of non-extradition of nationals in relations with the Tribunal.

2. Germany

In Germany, the prohibition against the extradition of nationals is included in Article 16(11) of the Basic Law. The Law on the Cooperation with the International Tribunal for the former Yugoslavia of 10 April 1995,[127] confirmed e*xpressis verbis* that that constitutional stipulation fully applies to the dealings with the Tribunal.[128] In the debate on that Law, the Upper Chamber *(Bundesrat)* expressed its regret that German nationals cannot be surrendered to the Tribunal, and requested the Government to promptly prepare the necessary legislation to amend Article 16(11) of the Basic Law.[129] Without this change Germany will not be able to fulfil its international obligation.

3. Poland

For the first time ever in a long history of Poland, the prohibition against the extradition of nationals has been included in the Constitution of 1997 (Article 55, paragraph 1). The Polish government has not submitted any proposed legislation on the cooperation with the Yugoslavia Tribunal. Instead, the new Code of Criminal Procedure of 1997 specifically states that provisions of Part XIII of the Code, including Chapters 64 and 65 on extradition, shall be applied *mutatis mutandis* in relations between Poland and international tribunals and their organs which have been established on the basis of international treaties or conventions ratified by Poland (Article 615, paragraph 3). It follows that the requests submitted by the Yugoslavia Tribunal have neither "special status" nor "preferential treatment," and more importantly, all domestic regulations are fully applicable to them, including the rule of non-extradition of nationals.

---

[127] *Gesetz liber die Zusammenarbeit mil dem Internationalen Strafgerichtshof flir das ehemalige, Jugoslavien (Jugoslavien-Strafgerichtshof-Gesetz),* 10 April 1995, BGBl. 1995 I, p. 485.

[128] *Jugoslavien-Strafgerichtshof-Gesetz,* § 3(5).

[129] Deutscher Bundestag, Drucksache 13/207.

7. Proposed Solution: A New Ground for Refusal of Extradition?

It is submitted that the solution to the problem posed by the rule of non-extradition of nationals should be based on the replacement of this rule by the new ground for refusal of the surrender: possible violation of procedural safeguards in the criminal proceedings carried out against the requested offender in the territory of the requesting state. This solution is more flexible than the old and rigid rule, while at the same time offers full protection to the nationals of the requested state - provided, naturally, that the concern about the well-being of its nationals is the underlying reason for the requested state, to refuse their surrender. Although the ruling of the European Court of Human Rights in the Soering case was limited to the protection of the extradite against torture or inhuman or degrading treatment or punishment (Article 3 of the European Convention on Human Rights), the Court did not exclude that an issue might exceptionally be raised under Article 6 of the Convention by an extradition decision in circumstances where the fugitive has suffered or risks suffering a "flagrant denial of a fair trial in the requesting country"[130] This way the integrity and effectiveness of extradition would be saved, while at the same time the requested stale would not have to be compelled to give up its *Treupflidil* towards its citizen sought for trial in a foreign country.[131]

[130] *Soering* v. *United Kingdom* E.C.H.R., 7 July 1989, Ser. A, No. 161.

[131] Some states have already adopted such a clause in their domestic legislation. See e.g. Article 2 of die Swiss Law on International Cooperation in Criminal Matters which provides that the extradition request shall not he granted "if there are reasons to believe that the foreign proceeding: fa) docs not meet the procedural requirements of the European Convention" on Human Rights. Article 19(1) of the Austrian Law on Extradition and Mutual Assistance in Criminal Matters likewise obligates the Austrian authorities to refuse extradition if they have grounds to fear that the criminal proceedings in lire requesting state would not comply or has not complied with the provisions embodied in Articles 3 and 6 of the European Human Rights Convention. See *Bundesgeselz über die Auslieferung und die Rechtshilfe in Strafsachen (ARHG)* BGBl. No. 529/1979.

23 POLISH YEARBOOK
OF INTERNATIONAL LAW
1997–1998
PL ISSN 0554–498X

Foreigner Crime in Poland

IRENA RZEPLIŃSKA

Introduction

Foreigners – that is, people without Polish citizenship[1] – come to Poland for a variety of reasons. Till the end of the eighties, most were tourists, businessmen and students; a small category of people (a total of 17,300 in 1981–1990) also came to become permanent residents, mainly for family reasons.[2] After 1989, other categories of foreigners appeared: refugees who may apply for the refugee status in the Republic of Poland under the 1951 Geneva Convention pertaining to the status of refugees;[3] economic migrants; illegal migrants; as well as migrants in transit to other countries. Early in 1995 it was discovered that illegal migrants were smuggled from the East to the West across Poland. The smugglers' routes run from Asia and Africa to the former U.S.S.R. and next, usually through Russia and Lithuania or Ukraine, to Poland and farther on to Germany.

Crossing the frontiers of the Republic of Poland (entering and leaving) are the total of about 170 million foreigners a year.[4] The most crowded frontier is the western Polish-German one which accounts for two-thirds of the entire foreigner traffic. Among the group are tourists, people coming to Poland on business or to work, but also foreigners handed over to and from Poland within the readmission procedure. Readmission is most frequent on the Polish–German frontier; concerned here are people sent back to Poland by German frontier authorities. The number of foreigners thus readmitted was 4,477 in 1996. The largest proportions were citizens of Moldova followed by those of Armenia, Afghanistan, Sri Lanka, Iraq, Ukraine, India, Russia, Pakistan, Bangladesh, and Belarus.[5]

In the nineties, Poland became an open country. Both Polish citizens and Europeans are free to both enter and leave Poland without a visa.

---

[1] Article 2 of Aliens Act of 25 June 1997, *Dziennik Ustaw* [Official Journal] No. 114, item 739.

[2] After: *Mały Rocznik Statystyczny* 1997 [Small Statistical Yearbook 1997], GUS, Warsaw, p. 74.

[3] At the end of 1991, Poland joined the 1951 Geneva Convention pertaining to the status of refugees and the 1967 New York Protocol pertaining to refugees (Dz.U. 1991 No. 119, items 515 and 517). Since then, Poland is a country where the refugee status may be applied for and where it is granted.

[4] Data obtained from the Headquarters of Border Guards.

[5] *Ibid.*

An "impediment" – the need to obtain a visa – is still valid with respect to citizens of non-European countries.

The nineties are also the years of arrival in Poland of foreigners who never came in such big numbers and for such diversity of reasons in preceding decades. They can be divided into the following categories:

- tourists – those who visited Poland also in preceding decades;
- economic migrants:
  - foreigners legally employed in Poland (in 1996, a total of 11,915 foreigners were granted individual work permits),[6]
  - foreigners working in Poland illegally and those into unofficial trade, illegally residing in Poland on a temporary basis (without the required visa and registration);
- migrants residing in Poland on a permanent basis:
  - foreigners with a permanent resident's permit, that is a total of 58,000 people in 1981–1996;[7] foreigners permanently residing in the Republic of Poland constitute a mere 0.14% of the country's population which means there are 14 foreigners with the permanent resident's permit per 10,000 of the population,
  - refugees: in 1996, 3,200 people applied for the refugee status in the Republic of Poland and the status was granted in 124 cases;
- migrants in transit: people who come to Poland through either legal or illegal channels (illegally brought, i.e. smuggled across the frontier), who intend to stay for a short time only. Their destination is the West of Europe.

The smuggling of foreigners into Poland has been going on since 1995. The extent of that phenomenon is difficult to estimate, groups of foreigners smuggled across Poland are being caught accidentally.

One of the effects of foreigner presence in Poland is foreigner crime. It is among the phenomena that throughout the nineties accompany what is called the transformation process in Central and Eastern Europe.

In police statistics, foreigners can be found among people suspected of offenses in Poland, i.e. those in whose cases the prosecutor has decided to inform the suspect of the charges (Article 61 of code of criminal procedure).[9]

Throughout the eighties (1984–1990 which is the period for which data are available), the proportions of foreigners among people suspected of offenses were very much the same, showing but a slight upward trend from 0.1% in 1984 to 0,5% in 1988. Starting from 1991, there has been an explicit increase in both the absolute figures and the proportions of foreigners suspected of offenses: from 0.8% to 1.8% in 1996. Among the total of suspected people (381,911), there were 6,956 foreigners

---

[6] Data obtained from National Employment Office, Department of Statistics, Analyses and Forecasts.

[7] Maly Rocznik Statystyczny, *op. cit.*, p. 74.

[8] Data obtained from the Department for Migration and Refugees, Ministry of Interior and Administration.

[9] The following analysis of foreigner crime bases on data from police crime statistics obtained from the Statistics Department of the Information Office of the National Headquarters of the Police; the author wishes to thank the Department for its co-operation.

(1.8%). From 1984 till 1996, the number of suspected foreigners went up 18 times, the dynamics of that increase gaining pace definitely starting from 1991.

The Structure of Foreigner Crime

A half of suspected foreigners (the largest group) are suspected **of offenses under the Law of 1993 on marking products with fiscal marks of excise.**[10] Offenses against that law, specified in its Articles 20–24, consist first of all in trading in articles without excise. Over one-third of people suspected of offenses under that regulation are foreigners.

Traffic offenses (Articles 136–137, 145–147, and 160 of penal code) constitute the second group where the proportion of foreigners among suspected people has been significant.

In the eighties, people suspected of traffic offenses were the largest group among all foreigners suspected of offenses in Poland. This trend changed in the nineties: alleged traffic offenders now constitute a mere one-fifth to one-sixth of all suspected foreigners and 2.5% of all people suspected of traffic offenses.

Suspected foreigners charged with **offenses against property** commit thefts of private property, burglaries, audacious thefts and receiving of stolen property. Foreigners suspected of such acts constituted from 25% to 20% of all suspected foreigners (a downward trend could be observed), and 1.3% of all people suspected of such offenses.

Foreigners suspected of **offenses against life and health** constituted 7% to 8% of all suspected foreigners, the largest group being those suspected of robbery and extortion (6%). Foreigners suspected of such acts constitute about 3% of all people suspected of robbery and extortion. Very much the same – 2.8% – is the proportion of foreigners among people suspected of murder.

Taking the latter two categories into account, the proportion of suspected foreigners is bigger among those suspected of offenses against life and health.

An offense typically committed by foreigners is the illegal crossing of the frontier. Rather dim in police statistics, the relevant figures can be found in Frontier Guard statistics under the heading "people arrested for offenses against frontier regulations," that is for illegal crossing of the frontier. After 1990 when the proportions of Polish and foreign citizens among such people were still balanced, there was a rapid growth in the number of arrested foreigners. The peak year was 1992 with the total of 33,581 arrests and a prevalence of citizens of Rumania. In subsequent years, the number became stable: as regards foreigners, it oscillates at the level of about 10,000 arrests a year. Prevalent among foreigners arrested in 1996 were citizens of Rumania, Moldova, Armenia, Afghanistan, Czech Republic, Ukraine and Iraq.[11]

---

[10] Law of 2 December 1993 on marking products with fiscal marks of excise (Dz.U. No. 127, item 584).

[11] Data obtained from the National Headquarters of Border Guards, Information Department. The author wishes to thank the Department for all the data from its statistics.

Geographical Distribution of Foreigner Crime in Poland

As follows from data for 1996, the proportions of suspected foreigners were bigger in provinces situated near the eastern frontier of Poland and in the Warsaw province.

This trend was different from 1993 when suspected foreigners prevailed in western provinces with the second largest group found in some of the eastern provinces only. The dynamics of 1993–1996 change as regards suspected foreigners was the highest in the following provinces: Warsaw, Zamość, Suwałki (eight times increase), Przemyśl, Olsztyn, Białystok (eight times increase), Biała Podlaska (seven times increase), and Lublin (six times increase). Prevalent here are the eastern frontier provinces. What accounts for this dynamics is intensified registration of foreigners suspected of trading in articles without excise.

Foreigners registered as suspected of offenses are citizens of a great variety of States; prevalent among them are, however, people from Poland's immediate neighbours. Foreigners coming from different directions commit specific offenses: in the case of Germans, these are traffic offenses; people from Belarus, Lithuania and Russia – offenses under so-called excise law of 1993; Rumanians – thefts of private property and audacious thefts.

The Citizens of Which States are Suspected of Offenses in Poland?

Throughout the eighties (when the totals of foreigners suspected of offenses ranged from several hundred a year to 1,220 in 1988), the biggest groups were citizens of:

- former Yugoslavia: the peak year was 1988 when 296 people were suspected, followed by a considerable drop to twenty-odd cases a year;
- Germany: a persistent significant proportion with an explicit upward trend after 1989;
- Hungary: an increase from several cases to the peak year of 1988 (269 registered suspects), followed by an explicit drop in the nineties (20 cases in 1996 – people suspected of traffic offenses, receiving stolen property, rape);
- Russia: from several dozen cases to 252 in 1988, followed by an explicit upward trend which persists till the present day; there has, however, been a slight drop after 1992, the peak years being 1991–1992.

In 1988, one-fourth of all foreigners registered as suspected of offenses were citizens of Yugoslavia, one-fifth each – of Hungary and Russia, and one-seventh – of Germany. The rest were mainly citizens of the Czech Republic, Austria, Denmark, Sweden, as well as African and Asian countries.

The situation changed after 1990. Proportions of citizens of some States among foreigners registered as suspected of offenses went down while proportions of citizens of some other States increased; furthermore, citizens of States previously not represented in the group appeared.

* * *

There has been a marked drop in the proportion of citizens of former Yugoslavia, to a mere 28 cases registered in 1996. Most citizens of former Yugoslavia came to Poland in 1992–19993: over a thousand people from war-affected regions were admitted. Most have already left Poland by now, heading for Germany and Scandinavia through legal or illegal channels.

After 1990, it was citizens of the former U.S.S.R. who started to range first among foreigners registered as suspected of offenses: they were citizens of Russia, Ukraine and Belarus since 1992, joined by citizens of Lithuania, Latvia and Estonia since 1993.

Starting from 1992, there has been a decided growth in the number of registered suspects from Ukraine, Byelarus, Russia and Lithuania: citizens of Ukraine constitute one-third of all registered foreigners, those of Byelarus – one-sixth, those of Russia – one-ninth, and those of Lithuania – one-eleventh. **On the whole, citizens of Poland's eastern neighbours constitute 65.5% of all foreigners registered as suspects.**

As regards citizens of Rumania, Bulgaria and the Czech Republic, there has also been an increase in their absolute numbers; here, however, the scale is much smaller, Rumanians constituting 4.8% and the remaining two nations – 1.4%.

An important group – 7% in 1996 – are citizens of Asian countries other than Vietnam.

Represented among those registered are citizens of nearly all European countries. The proportions of registered suspects by continents are as follows: Europe – 85%, Asia – about 8%, Africa and two Americas – about 10%, stateless people and citizens of other States – 1.6%.

Definitely prevailing among the Europeans are Poland's neighbours: those from the east range first and the western ones range second.

Most Germans commit traffic offenses. A half of Germans suspected of offenses in Poland are suspected of so-called traffic offenses, while the other half – of offenses against property, those under the excise law, and those against life and health (the proportion being smaller in this latter case).

Poland's neighbours from across the eastern frontier – Lithuanians, Byelarussians and Ukrainians, as well as Russians from across the north-eastern frontier – mostly commit offences under the excise law of 2 December 1993 (introduction into the market of articles without the excise marks; forgery or alteration of excise marks; possession of business quantities of articles without the excise marks; alienation of articles without the excise marks).

Citizens of the other countries mentioned commit the following offenses:

Citizens of **Ukraine** which ranges first among Poland's eastern neighbours as regards the extent of crime committed in this country seriously contribute to cases of robbery and extortion – one-third of all suspected foreigners – and of theft of private property – nearly a half of all suspected foreigners.

In the case of **every third murder** committed by a foreigner, the suspect is a citizen of **Ukraine**.

Citizens of **Belarus** which ranges second after Ukraine are suspected of two--thirds of offenses under the excise law; other offenses include robbery, extertion, receiving of stolen property, and traffic offenses.

Citizens of **Russia** are suspected of traffic offenses followed by receiving of stolen property and robbery; these acts, however, are much less frequent than prevalent offenses under the excise law.

Beside prevalent offenses under the excise law, citizens of **Lithuania** are suspected of traffic offenses which range second in this group.

Citizens of Rumania whose proportion among all suspected foreigners is rather low constitute nearly a half of people suspected of thefts of private property (most of them audacious). Two-thirds of Rumanians suspected of offenses in Poland are those suspected of thefts of private property.

Every second citizen of Asian States (except Vietnam) was suspected of an offense under the excise law. Citizens of Vietnam constitute but a small proportion of foreigners suspected of offenses.

Foreigners as Victims

Foreigners not only commit offenses in Poland: they can also be found among the victims or injured people. Available police statistics provide data for 1994 (starting from July), 1995 and 1996.[12] During the latter half of 1994, 6,986 foreigners were registered as victims; in 1995, there was an increase to 10,197 people, followed by a drop to 7,919 in 1996. In 19995, injured foreigners constituted a mere 1.3% of all victims.

Police statistics do not contain separate data on foreigners injured by offenses committed also by foreigners.

The largest group among injured foreigners are **Germans**: nearly a half of all foreign victims.

The other half is accounted for, in order of frequency, by Russians, Ukrainians, Byelarussians, the Dutch, Austrians, the French, citizens of North and South America (treated as one category in police statistics), and citizens of Asian countries.

Most foreigners fall victim to car theft, burglary, and robbery/extortion. The three types prevail among offenses in which foreigners were injured.

Most foreigners fall victim to crime in the Warsaw province, followed by the Gdańsk and Szczecin, Gorzów and Jelenia Góra, as well as the Olsztyn provinces. This means that a foreigner is most threatened in Warsaw, in two western frontier provinces (Gorzów and Jelenia Góra), two coastal provinces or in fact big port cities, and in the Olsztyn province visited mainly by tourists from Germany.

The second biggest intensity of crime against foreigners is found in the Katowice, Cracow, Opole, Wrocław and Zielona Góra provinces, that is in western and southern

[12] All data quoted in this passage have been borrowed from statistics of the Statistics Department of the Information Office at the National Headquarters of the Police.

Poland. Offenses against foreigners are registered much less often in eastern provinces.

The question seems justified here about the dark number of foreigners injured by crime, related to that about the dark number of foreigner crime. There are grounds to state, basing on press reports, that not all foreigners tend to report an offense to the police, especially if the offender is another foreigner.

Transgressions Committed by Foreigners

In 1991–1996, the number of tickets given to foreigners as a penalty for transgressions went up over seven times (7.6 times to be exact).

In 1990, nearly 100% of tickets given to foreigners in Poland were penalties for transgressions against traffic safety and order. This situation changed over the years: **transgressions against the traffic regulations** constituted a "mere" 91.3% of all transgressions punished with tickets in 1996. The remaining proportion were tickets for **transgressions against the duty to register at the place of one's residence and against provisions on personal identity cards** (3.4%); **transgressions against railways orderly regulations** (1.4%), and **against public peace and order** (1.5%). A growth, though smaller as compared to the above, could also be noted in the number of tickets for transgressions against consumer interests, against public morals, and against public health.

Punished with tickets for transgressions committed in Poland in 1996 were mainly citizens of Germany, Ukraine, Belarus and Russia. Nearly all were punished for transgressions against traffic regulations (that is, against traffic safety). As regards the geographical distribution of tickets, the largest proportions were imposed in the Zielona Góra province, followed by the Przemyśl, Białystok, Biała Podlaska, Jelenia Góra and Zamość provinces, that is clearly in western Poland close to the frontier and in eastern Poland also in "frontier" provinces.

The second most frequent transgression – against the duty to register at one's place of residence – is the domain of citizens of Armenia, Bulgaria, Ukraine and Russia. Most tickets for this transgression were given in the Gorzów, Jelenia Góra and Białystok provinces, followed by Krosno, Łódź and Zielona Góra. This is a typical transgression of foreigners coming to Poland for profit, finding a job (illegally in most cases), and extending their stay.

Is Polish Society Afraid of Foreigners? The Attitude of Poles to Other Nations

As follows from a survey carried out in May 1996 by the Center for Opinion Surveys, the proportion of Poles declaring hostility to other nations was smaller compared to preceding years. Thus, the presence in Poland of foreigners and migrants did not result in hostility towards them. Poles tend to like the Western nations and to dislike Rumanians and Gypsies. As regards the attitude to Poland's neighbours,

a bigger proportion of Poles dislike Belarussians, Russians and Ukrainians and a smaller proportion declare their liking of those nations. The liking of Germans is growing.[13]

Conclusions and Appraisals

What is foreigner crime like? Analyzed on the grounds of police statistics, the actual situation seems to depart from the stereotype, created by the media, of a dangerous bandit from across the eastern frontier. Nor have the forecasts of 1991–1992 proved correct which spoke of great migration tides "from the East" and of an import of criminal groups from that area. This is not so to say that no such groups have arrived in Poland – the scale, however, hardly seems "horrible."

The foreign offenders in Poland of the nineties are mostly traffic offenders and those who violate the excise regulations, usually trading in articles without the excise marks. This latter offense, characteristic of the frontier area, is typically committed by citizens of Poland's eastern neighbours. Criminologically, such acts are "offenses without a victim." Trading in articles without excise is profitable; this way, money can be earned in Poland as a significant supplement to the eastern neighbours' family budgets. This reflects the situation which many Poles still remember from their own past experience: not too long ago, Polish citizens would go to the West of Europe for this same reason. Beside "retailers," there are also large-scale excise offenders who trade in considerable quantities of goods.

Traffic offenses include dangerous driving; here, the guilty are mainly foreigners from the West and first of all from Germany.

Dangerous organized crime in which foreigners participate is hardly reflected in crime statistics. The knowledge about this type of crime can be derived from the operational and investigative work of the police.

Organized crime is defined as a criminal organization to commit both common offenses and those against the economy.[14]

Organized crime includes drug offenses, violent offenses to settle accounts between criminal groups, offenses against property, forgery of money, illegal trade in firearms, offenses against the economy, offenses related to prostitution which is not an offense itself in Poland: procuring, pandering, and living on a prostitute's earnings. Organized criminal groups use the procedure called "laundering of dirty money."[15]

---

[13] Centrum Badania Opinii Społecznej (CBOS), "Omnibus" Survey of 17–21 May 1996: "The attitude of Poles to other nations, representative random sample of adult inhabitants of Poland" (N = 1,165).

[14] W. Pływaczewski, L. Sklepkowski: "Tendencje rozwojowe zorganizowanej przestępczości gospodarczej w Polsce" [Trends of Organized Economic Crime in Poland], in: S. Lelental, M. Zajder (eds.): *Kryminalistyczne i prawne problemy współczesnej przestępczości* [Criminological and Legal Problems of Modern Crime] (1995), p. 68.

[15] E. Pływaczewski: "Przestępczość zorganizowana w Polsce. Przejawy i uwarunkowania [Organized Crime in Poland: Manifestations and Conditions], in: *Policja Polska wobec przestępczości zorganizowanej* [The Polish Police and Organized Crime] (1994), p. 81.

What is the foreigners' contribution to this phenomenon?

Organized criminal groups steal cars and illegally transport old vehicles, avoid payment of duties for imported vehicles, obtain damages under false pretences, forge documents and receive stolen goods. As appraised by the Interpol, active in this area in Poland as well as internationally is a Polish-Russian-German criminal organization.[16] Poland is the transit country across which cars stolen in Western Europe are transported east. As follows from data gathered by the police in Poland, organized Russian-speaking groups rob citizens of the former U.S.S.R. on Polish roads, raiding trucks with valuable load, buses transporting traders or tourists from that area, as well as passenger cars.[17]

The victims – citizens of former U.S.S.R. – never report the offense or make no mention of their suspicions as to the identity of offenders, or take back their previous depositions.

Police statistics contain data on foreigners suspected of organized drugs-related offenses (24 people in 1996) and of forgery of money within organized crime (18 persons in 1996).

Organized economic crime and participation in it of foreign criminal groups has only recently been noted. Basing on their operational activities, the police speak of participation of such groups in the smuggling of alcohol, cigarettes, and firearms, and in trade in fissile materials.[18] So-called Russian-speaking organized crime tends to become stable in Poland. The groups share funds; victims and witnesses are intimidated; leaders and organizers operate; the first symptoms are present of elimination through physical terror; there are closed groups camouflaging information; also misinformation is used; and Polish criminals are prevented from getting close to the groups' leaders and organizers.[19]

Offenses committed to settle accounts between criminal groups are a specific group of acts related to the activity of organized criminal groups composed of foreigners or with foreigner participation. The motives include personal grudges, threats to a group's operation, executions of liabilities. Concerned here are the following types of acts: murder, kidnapping, terrorist assault of criminal nature, extortion and assault to execute a debt.[20] As follows from data of the Operation and Investigation Office of the National Police Headquarters, 26 such acts were registered in 1991, 182 in 1992, and 91 during the first six months of 1993. Out of a total of 155 perpetrators, 11 were Russian-speaking.[21] Detection rate of offenses to settle accounts is much lower than that of similar but differently motivated offenses. This results from the

[16] *Ibid.*, p. 85–86.

[17] *Ibid.*, p. 92.

[18] *Ibid.*, p. 89–90.

[19] Data presented at the International Conference of Criminal Police at Legionowo, 17–19 November 1992. After E. P ł y w a c z e w s k i, *op. cit.*, p. 94; see also W. P ł y w a c z e w s k i, L. S k l e p k o w s k i, *op. cit.*, p. 78.

[20] J. G a j e r s k i: "Przestępczość motywowana porachunkami. Analiza zjawiska" [Offenses Committed to Settle Accounts. Analysis of Phenomenon], in: S. L e l e n t a l, M. Z a j d e r (eds.), *op. cit.*, p. 130–133.

[21] *Ibid.*, p. 134–135.

fact that the victims and their associates prefer to conceal the offense or its real motives. The dark number of such offenses is probably very large.[22]

Assuming that every day 1,000,000 foreigners stay in Poland, they amount to 5% approximately of the country's adult population (22,000,000). Foreigners suspected of offenses constitute 1.8% of all suspects; thus the proportion of foreigners in the population of suspects is lower than their proportion among the adult population of Poland.

Most foreigners suspected of offenses in Poland are guests who come and go: they travel across Poland or come for some time only to earn money selling and buying things or working (illegally in most cases). Such foreigners also include those who come to Poland as tourists. This situation is different as compared e.g. to Germany where the largest group of foreigners suspected of offenses are those who apply for asylum (31.7%) followed by foreigners employed in Germany, those staying illegally, tourists and people travelling across the country, and foreign students.[23]

Foreigner crime is a new phenomenon which poses new problems for the administration of justice.

The new phenomena have been noticed by penal law: Article 264 of the 1997 penal code provides for the penalization of the smuggling of other people across the Polish frontier. Organizing the smuggling of people across frontiers will be an offense subject to prosecution from 1 September 1998.

New large-scale problems are related to criminal and judicial proceedings with foreigners as suspects and defendants. At both stages, the foreigner must be provided with an interpreter, and in cases specified by legal provisions, also with a counsel appointed by the court.

Another new problem are foreigners serving prison terms in Poland. In 1997, remand jails and prisons had 1,262 foreigners among their inmates (2.2% of the entire prison population of 57,382 people confined to Polish remand jails and prisons at the end of December 1997). Two-thirds were inmates of remand jails and one-third – of prisons. They were citizens of 58 States; citizens of Ukraine, Belarus, Russia, Armenia, and Rumania prevailed.

German criminological literature warns against using the category of "foreigner crime" as stigmatizing. Once separated, this category draws the people's attention, in the negative sense, to aliens. Just one more step and those aliens are made "guilty" of various events, and the climate of xenophobia is developed in society.[24]

The task of criminologists is to observe changes taking place in the area of crime and to analyze them: to define new features and new phenomena in that area. One of such phenomena characteristic of crime in Poland of the nineties are offenses committed by foreigners coming to Poland for various reasons. A separate description of this phenomenon aims not at a stigmatization of foreigners but at reporting on the

[22] Thus J. Grajewski, *op. cit.*, p. 137.

[23] H.J. Schneider: "Foreigners as Perpetrators and Victims", *Eurocriminology* (1995), vol. 8–9, p. 97–98.

[24] *Ibid.*

actual state of affairs. What does stigmatize foreigners are the media which report only the serious and drastic offenses and show the foreign offender as a dangerous "bandit" from the east who usually violates provisions regulating the trade in specific articles and is, therefore, guilty of "no-victim" offenses. Dangerous and serious foreigner crime does take place in Poland of the nineties but is by no means prevalent.

POLISH PRACTICE IN INTERNATIONAL LAW

23 POLISH YEARBOOK
OF INTERNATIONAL LAW
1997-1998
PL ISSN 0554-498X

Selected Jurisprudence of the Polish Supreme Court and Constitutional Court Involving Questions of Public and Private International Law

I. The Decision of the Criminal and Military Chamber of the Polish Supreme Court of 24 January 1997 (V KO 12/97), published in the Jurisprudence of the Supreme Court, Criminal and Military Chamber, Official Collection, No 3–4/1997, Item 29

1. The interpretation and application of art. 222 § 2–4 of the Code of Criminal Procedure (further quoted as k.p.k.) must be harmonized with the rule resulting from art. 5 al. 3 of the Convention on the Protection of Human Rights and Fundamental Liberties (Official Journal: further quoted as Dz.U. No 61/1993, item 284) providing for the limitation of the period of the temporary arrest in order to adapt it to the limits required by the absolute necessity within the frames of the circumstances of the given case.

2. "Extending the scope of the application of the temporary arrest" provided for in art. 222 § 4 of the k.p.k. can take place either when it concerns "further application" (the continuation of the temporary arrest already in course) or when it concerns the "repeated application" (that is applied after certain break in the course of the temporary arrest) of this preventive measure.

*
* *

Commentary:

For the purpose of this selection it is more interesting to comment just the first part of this decision of the Supreme Court since the stance of the Supreme Court in this matter is of more general character and it is still important after entering into force of the new Code of Criminal Procedure on 1 January 1998. The position of the Supreme Court is important after entry into force of the new Polish Constitution as well.

In the presented decision the Supreme Court states that the implementation of the international standards included in the Convention on Human Rights of 1950 into the Polish law should be made when taking into consideration the whole context of its provisions embodied in the jurisprudence of the International Tribunal of Human

Rights in Strasbourg. The case law of the Court in Strasbourg adapts the provisions of the Convention to the new environment developed 48 years from its birth. The rule imposing the obligation of the limitation of the temporary arrest to the absolute necessity taking into account the circumstances of the given case does not result directly from the exact wording of art. 5 al. 3 of the Convention. This rule is the effect of the interpretation by the Court of articles 5 al. 3 and art. 6 of the Convention.

According to the jurisprudence of the Court of Human Rights, the courts should make all the necessary efforts in order to make the criminal proceedings as quick and effective as possible. On the other hand one of the criteria serving to evaluate if the extention of the temporary arrest was well founded, should be the research developed in order to establish if the proceedings are being realised effectively and quickly, and in particular – if the court is not responsible for the eventual protracted duration of the procedure.

With regards to art. 6 of the Convention it is accepted by the jurisprudence of the Court that: the complexity of the case, the behaviour of the prosecuted person as well as the manner of treating the case by the court and the difficulties arising during the proceedings for the prosecuted person should be taken into consideration. It accepted also that the term of the temporary arrest should be regarded by the court as proportional to the severity of the crime committed and the court should take into consideration the consequences brought to the prosecuted person by the fact of isolation.

Kepping in mind the above mentioned rules of the jurisprudence of the Tribunal of Human Rights the commented ruling of the Supreme Court should be regarded as implementing to the Polish legal system the standards of the European Convention of Human Rights in the form given to it by the Strasbourg Court. It should be, however, stressed that the rights provided for by the European Convention represent the minimal standards of the protection of human rights and in consequence when the national law is more favourable for the prosecuted person it cannot be interpreted in a more restrictive way by the application of the European standards in this matter.

The position of the Criminal and Military Chamber of the Polish Supreme Court in this case proves that the position of the international law within the Polish legal system as described by the art. 87 and art. 91 of the new Polish Constitution has been recognized by the Polish courts even before the entering into force of this act.

II. The Decision of the Criminal and Military Chamber of the Polish Supreme Court, of 29 July 1997 (II KKN 313/97), published in the Jurisprudence of the Supreme Court, Criminal and Military Chamber Official Collection, No. 9–10/1997.

1. The Legislator has given to the Court the freedom of decision when treating the application of the foreign state concerning the extradition of the person pursued by justice in his home country in a sense that the court has the right to decide if from the law in force, including binding bilateral or multilateral conventions there results *in*

concreto the possibility to submit or not to submit this person to the extradition to the applying state.

2. The extradition of the person pursued in justice is legally inadmissible, when there exists the possibility that this person will be submitted in the applying state to torture or to inhuman and humiliating treatment or punishment, in the meaning of art. 3 of the Convention on the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (Dz.U. no. 61/1993, item 284).

*
* *

Commentary:

The standpoint of the Supreme Court expressed in point 1 of the sentence gives the answer to the very important question about the role of the court in the proceedings concerning the extradition. This opinion of the court is of the same value after the entering into force of the law modifying the Code of Criminal Procedure of 1969. The modification of the Code is effective since 1 September 1998.

It is generally accepted that the proceedings concerning the extradition are governed by the national law of each state. The scope of the application of the national law covers not only the problems related to the procedure of extradition but also regulates the question concerning the competences of the respective organs. This results from art. 22 of the European Convention on Extradition of 1957.

In the domestic legal systems of the modern states we can observe the tendency to increase the importance of the court within the frames of the proceedings concerning extradition. The traditional concept of extradition giving the full power to the executive authority of the state is now replaced by the new mode characterized by the introduction of the court so that the opinion given by it as to the admissibility of an extradition in a given case is necessary. The new concept of extradition is much more concerned about the person to be extradited. This person is no longer treated as a simple object of an extradition but as a subject. Therefore, the rights of this person during the extradition proceedings should be guaranteed.

It should be mentioned that the reform of the Polish Code of Criminal Procedure clarified the role of the court in the extradition proceeding. According to art. 603 (1) the court gives its decision concerning the application for an extradition. Para. 4 of the same art. 603 rules that when a court has given its negative opinion as to the admissibility of an extradition this extradition cannot take place. The catalogue of the obstacles to the extradition is given in art. 604 but the reasons for the obligatory rejection of the application are enumerated in para. 1 and this list is exhaustive, while the facultative reasons for the negative decision concerning extradition are given only as an example and their list in para. 2 is not exhaustive.

According to the new code (art. 604 (1) (5)) the extradition is inadmissible when it is contrary to the Polish law in force. It should be stressed, however, that the final decision in this matter still belongs to the executive state organs while the court plays the role of a consultative organ. The courts protecting the rule of law within the

national legal systems pronounce themselves within the extradition proceeding only as to the problem of the conformity of the extradition with the law in force.

In the second part of the sentence the Supreme Court has expressed its opinion regarding the very special problem of the evaluation of the extradition proceeding from the point of view of the international standards of the protection of human rights. The presented sentence of the Supreme Court follows the path opened by the ruling of the Polish Constitutional Tribunal and Polish Supreme Court in 1991 and 1992 founded on the recognition that the provisions of the international treaties regarding human rights are of self-executing character. This standpoint has been strengthened by the decision of the Supreme Court given in 1995 (Decision of 11 January 1995, III ARN 75/95) adopting the opinion that from the moment of the accession of Poland to the Council of Europe the jurisdiction of the European Court of Human Rights in Strasbourg should be taken into consideration when interpreting the provisions of Polish law.

After the acceptance of international law to be directly applied in Polish courts when its norms are of self-executing character, the Supreme Court has stated that art. 3 and 6 of the International Convention on Human Rights and Fundamental Freedoms of 1950 belong to this category of international norms. Consequently, the Supreme Court has analysed the jurisdiction of the Court of Human Rights in respect of extradition.

The jurisdiction of the Strasbourg Court is founded on the decision in the *Soering* case where the Court considered as inadmissible every extradition leading to the risk of a violation of the human rights of the extradited person in the home country. This constatation is true even if all the conditions of extradition resulting both from national or international law are fulfilled.

The last question examined by the Supreme Court in the commented sentence regards the scope of the norms on the protection of human rights that should be applied by the court involved in the extradition proceedings. The jurisdiction of the Strasbourg Court accepts the evaluation of the extradition proceeding through art. 3 of the European Convention on Human Rights as in *Soering* case. The Supreme Court recalls not only art. 3 but also art. 6 of the Convention. This standpoint of the Court is not fully correct. Firstly, because the jurisdiction of the European Court limits itself to art. 3 (ban on tortures and unhuman and humiliating treatment). Secondly, since the application of art. 6 of the European Convention (right to fair process) in the extradition proceedings could lead to the obligation of the court involved in extradition proceedings to examine the criminal procedure of the applying state in order to establish if human rights are protected in this state within the frames of the process and at the stage of the execution of penalty. Consequently, the court would be obliged to refuse its consent to the extradition every time when it found that the criminal procedure of the given state does not conform with the international standards of human rights. The third reason against the application of art. 6 of the Convention to extradition proceedings is the difficulty in evaluating whether art. 6 can be directly applicable because of its complicated legal construction. Fortunately, the Supreme

Court has not included the reference to art. 6 of the Convention into the sentence itself satisfying itself with recalling art. 3 and referring to art. 6 only in the reasoning of the sentence.

We cannot exclude the possibility that in future the evolution of the jurisprudence of the Strasbourg Court will adopt the position that other standards of the European Convention of 1950 should be applied by the state agencies in the extradition proceedings, but for the time being even the direct application of international standards by the Supreme Court does not authorise it to go so far.

EWA SKRZYDŁO-TEFELSKA

23 POLISH YEARBOOK
OF INTERNATIONAL LAW
1997–1998
PL ISSN 0554-498X

A Conspectus of International Agreements Concluded by the Republic of Poland, 1996–1997

Commentary[1]

The following bilateral agreements were concluded by Poland in 1996–1997.

1. Between Poland and neighbouring States

In 1996 and 1997, Poland concluded several bilateral agreements with its neighbours[2] – Russia, Lithuania, Ukraine, the Czech Republic, the Slovak Republic, and the Federal Republic of Germany. The majority of these agreements, as in previous years, are in general concerned with trans-border co-operation and mutual customs assistance – although there are also some agreements focusing on co-operation in the field of defence, protection of secret military information, etc.

List of agreements:

Poland – Czech Republic

1. Protocol between the government of the Republic of Poland and the government of the Czech Republic on succession of bilateral agreements and review of the treaty system between the Republic of Poland and the Czech Republic; Warsaw 29 March 1996, came into force 23 August 1996.

2. Agreement in the form of exchange of the notes between the government of the Republic of Poland and the government of the Czech Republic on the opening of the border crossing at Paczków – Bily Potok; 29 April 1996, came into force 3 July 1996.

3. Agreement between the Republic of Poland and the Czech Republic regarding customs co-operation; Warsaw 15 May 1996, came into force 20 November 1997.

4. Agreement between the government of the Republic of Poland and the government of the Czech Republic regarding border crossings, border crossings located on the tourism routes; Warsaw 22 November 1996, came into force 2 July 1997.

5. Protocol between the Ministry of Defence of the Republic of Poland and the Ministry of Defence of the Czech Republic on co-operation in the field of defence and development; Kielce 12 September 1997.

---

[1] This commentary is necessarily brief, since prepared solely on the basis of the titles of the agreements.

[2] The only neighbour Poland did not conclude any agreements with was Belarus.

Poland – Lithuania

1. Joint Declaration of the President of the Republic of Poland and the President of the Republic of Lithuania on intensification of co-operation between the Republic of Poland and the Republic of Lithuania; Vilnius 5 March 1996.

2. Statute of the Polish–Lithuanian Governmental Commission on trans-border co-operation; Wigry 22 June 1996, came into force 10 February 1997.

3. Free-trade agreement between the Republic of Poland and the Republic of Lithuania; Warsaw 27 June 1996, came into force 1 January 1997.

4. Agreement between the government of the Republic of Poland and the government of the Republic of Lithuania on exchange and co-operation of youth; Olita 14 February 1997, came into force 1 December 1997.

5. Agreement between the government of the Republic of Poland and the government of the Republic of Lithuania on protection of the exchanged secret military information; Olita 14 February 1997, came into force 24 September 1997.

6. Agreement on establishment of the Consultant Committee of the Presidents of the Republic of Poland and the Republic of Lithuania; Warsaw 19 June 1997, came into force at the same time.

7. Agreement between the government of the Republic of Poland and the government of the Republic of Lithuania on establishment of a joint military unit for maintenance of international peace and security; Troki 25 June 1997, came into force 3 December 1997.

Poland – Ukraine

1. Agreement between the government of the Republic of Poland and the government of Ukraine on co-operation and mutual customs assistance; Warsaw 18 December 1995, came into force 22 April 1996.

2. Agreement between the government of the Republic of Poland and the government of Ukraine on co-operation in the field of protection and return of cultural heritage lost or illegally taken during the Second World War; Warsaw 25 June 1996, came into force at the same time.

3. Agreement between the government of the Republic of Poland and the government of Ukraine on non-visa traffic; Warsaw 25 June 1996, came into force 17 August 1997.

Poland – Slovak Republic

1. Agreement between the Republic of Poland and the Slovak Republic on amendments and facilitating the execution of the European Convention on extradition of 13 December 1957; Jaworzyna Tatrzańska 23 August 1996, came into force 1 July 1997.

2. Statute of the Polish–Slovak Governmental Commission on trans-border co-operation; Rytra 6 September 1996, came into force 8 April 1997.

3. Agreement between the government of the Republic of Poland and the government of the Slovak Republic on early notice of nuclear accidents, exchange of information and co-operation in the field of nuclear security radiological protection; Bratislava 17 September 1996, came into force 13 December 1996.

4. Agreement between the Republic of Poland and the Slovak Republic on small (localised) border traffic; Zakopane 6 December 1996, came into force 20 September 1997.

5. Agreement between the Finance Ministry of the Republic of Poland and the Finance Ministry of the Slovak Republic on exemption from customs, taxes and other fees imposed on goods transported by persons crossing the mutual border; Bratislava 26 March 1997, came into force 20 September 1997.

Poland – Russian Federation

1. Agreement in the form of exchange of the notes between the Republic of Poland and the Russian Federation on termination of military agreements concluded between the Republic of Poland and the Russian Federation on 20 and 22 May 1992; Warsaw 5 April 1996, came into force at the same time.

2. Agreement between the government of the Republic of Poland and the government of the Russian Federation on youth co-operation; Moscow 9 April 1996, came into force 6 September 1996.

Poland – Federal Republic of Germany

1. Agreement between the Ministry of the Interior of the Republic of Poland and the Federal Ministry of the Federal Republic of Germany on equipment assistance in 1995–1998; Warsaw 1 March 1996, came into force at the same time.

The government of Poland also signed a range of agreements with countries other than its neighbours, and on a range of topics. Many are in general concerned with co-operation in the field of education and science:

1. with the government of the Republic of Romania; Bucharest 14 May 1996, came into force 2 December 1996.

2. with the government of the Republic of Slovenia; Warsaw 23 May 1996, came into force 8 September 1997.

An agreement on co-operation in the field of economics, science and education was concluded with the government of Malaysia, Kuala Lumpur 22 March 1996, came into force at the same time. The following agreement on co-operation in the field of education and culture was concluded with the government of the Federal Republic of Yugoslavia in 1996, 1997 and 1998, Belgrade 3 September 1996, came into force at the same time.

The majority of the remaining agreements are in general concerned with commercial co-operation, customs and agreements which relate to the support and mutual protection of investments:

Support and mutual protection of investments:

1. with the government of the Republic of Yugoslavia; Belgrade 3 September 1996, came into force 23 January 1997.

2. with the government of the Republic of India; Warsaw 7 October 1996, came into force 31 December 1997.

3. with the government of Macedonia; Skopje 28 November 1996, came into force 22 April 1997.

Customs:

1 with the government of the Kingdom of Norway on mutual customs assistance, Oslo 15 July 1996, came into force 22 July 1996.

Transport:

1. with the government of Vietnam on co-operation in maritime transport; Hanoi 6 December 1995, came into force 27 November 1996.

2. with the government of Chile on co-operation in maritime transport, Warsaw 22 October 1996, came into force 18 April 1997.

3. with the government of Croatia on civil air communication, Warsaw 19 June 1996, came into force 12 December 1996.

Tourism:

1. with the government of the Republic of Croatia on co-operation in the field of tourism, Zagreb 18 May 1996, came into force 12 September 1997.

2. with the government of the Republic of Turkey on co-operation in the field of tourism, Warsaw 7 May 1997, came into force 19 September 1997.

Miscellaneous:

1. with the government of the Republic of Croatia on veterinary co-operation, Warsaw 7 December 1995, came into force 1 September 1997.

2. with the government of the Republic of Croatia on co-operation in the field of plant protection, Warsaw 7 December 1995, came into force 5 September 1997.

3. with the government of Romania on veterinary co-operation, Bucharest 14 May 1996, came into force 6 January 1997.

4. with the government of Macedonia on veterinary co-operation, Skopje 1 August 1996, came into force 1 July 1997.

5. with the government of Macedonia on co-operation in the field of plant protection, Skopje 1 August 1996, came into force 22 October 1997.

Many agreements were concluded between the particular ministries in Poland and in other countries.

The Foreign Ministry of the Republic of Poland concluded a number of co-operation agreements:

1. with the Foreign Ministry of the Kingdom of Morocco; Warsaw 15 January 1996, came into force at the same time.

2. with the Foreign Ministry of the Republic of Lithuania; Vilnius 5 March 1996, came into force 5 1996 March

3. with the Foreign Ministry of Croatia; Zagreb 5 April 1996, came into force at the same time.

4. with the Foreign Ministry of the Republic of Latvia; Warsaw 19 June 1996, came into force at the same time.

5. with the Foreign Ministry of the Federal Republic of Yugoslavia; Belgrade 3 September 1996, came into force at the same time.

6. with the Foreign Ministry of the Republic of Greece; Warsaw 21 October 1996, came into force at the same time.

7. with the Foreign Ministry of the Republic of Tunisia; Tunis 26 November 1996, came into force at the same time.

8. with the Foreign Ministry of the Arab Republic of Egypt; Cairo 7 December 1996, came into force at the same time.

9. with the Foreign Ministry of the Republic of Portugal, Lisbon 13 January 1997, came into force at the same time.

10. with the Foreign Ministry of the Republic of Yemen, Warsaw 24 February 1997, came into force at the same time.

11. with the Foreign Ministry of the Slovak Republic, Stary Smokowiec 28 February 1997, came into force at the same time

12. with the Foreign Ministry of the Republic of Korea, Seoul 24 March 1997, came into force at the same time.

13. with the Foreign Ministry of the Socialist Republic of Vietnam; Warsaw 21 May 1997, came into force at the same time.

14. with the Foreign Ministry of the Republic of Azerbaijan; Warsaw 26 August 1997, came into force at the same time.

The Foreign Ministry of the Republic of Poland also signed a number of agreements on consultation:

1. with the Foreign Ministry of the Republic of Kyrgisia; Warsaw 12 February 1996, came into force at the same time.

2. with the Foreign Ministry of the People's Democratic Republic of Algeria; Warsaw 7 March 1996, came into force at the same time.

3. with the Foreign Ministry of the Republic of India; Warsaw 7 of October 1996, came into force at the same time.

The Ministry of Defence of the Republic of Poland concluded agreements on military co-operation:

1. with the Ministry of Defence of Macedonia, Warsaw 5 September 1996, came into force at the same time.

2. with the Ministry of Defence of the Republic of Albania, Warsaw 13 November 1996, came into force at the same time.

Selected instances of Polish accession to multi-lateral agreements:

1. European Convention on terrorism prevention, Strasbourg 27 January 1977, came into force in Poland 1 May 1996.

2. European Social Charter signed Turin 18 October 1961, came into force in Poland 25 July 1997.

3. International Convention on plant protection, Rome 6 December 1951, came into force in Poland 29 May 1996.

4. Convention on nuclear security Vienna 20 September 1994, came into force in Poland 24 October 1996.

KATARZYNA MYSZONA*

* Ph. D., The Institute of International Law, University of Warsaw.

BOOK REVIEWS

23 POLISH YEARBOOK
OF INTERNATIONAL LAW
1997
PL ISSN 0554-498X

U. BEYERLIN, M. BOTHE, R. HOFMANN, E.-U. PETERSMANN (Ed.), ***Recht zwischen Umbruch und Bewahrung. Festschrift für Rudolf Bernhardt***, Springer Verlag, Berlin–Heidelberg–New York 1995, pp. 1397

The German tradition of honouring eminent scientists by publishing selected essays written for them by their colleagues has been adopted in numerous countries; however, the number of *Festschrifts* published in Germany itself is still the most outstanding. A little late we have received a collection of essays published to celebrate the 70th anniversary of Professor Rudolf Bernhardt, distinguished scholar in the field of public international law, former judge at the European Court of Human Rights, member of the Institut de droit international. Professor Bernhardt belongs to those German lawyers who contributed greatly in the establishing of the Polish–German relations. It seems to us important to present the volume offered to him.

All the essays have been regrouped in seven categories corresponding with the main fields of the research interest of Professor Bernhardt: sources of international law, human rights, dispute settlement, constitutional law and international relations, international environmental law, international economic law, and European integration. It is difficult to present all the papers published in the volume, so that we shall limit to the most interesting ones (of course according to our subjective opinion).

We start with J.A. Barberis who has presented an article concerning resolutions of international organisations as a source of international law. He defined the basic features of acts of international organisations: they must be passed by an authority competent according to the statute, they must be independent of any other international subject (except acts adopted according to the procedure known as contracting out; in such a case, however, one could suggest that it amounts to a specific way of conclusion of international treaties) , they must be aimed towards creating as norm of international law (i.e. towards modifying the existing state of international law – this is not necessarily true if one takes into account that resolutions of international organisations can modify mostly customary law, i.e. they constitute simply an element of international practice), and they must be governed by public international law (which is right in the sense that the law of specific international organisation is certainly part of international law).

The following paper by P.M. Dupuy discusses the issues of collective security and construction of peace under the contemporary practice of the U.N. Security Council. He draws an interesting distinction between two dimensions of peace construction by the U.N. agencies: structural, which is aimed at the constructing of peaceful international community, and repressive composed of actions undertaken under Chapter VII of the Charter. Subsequently he shows the new policy of the Security Council in the field of defining violations of international peace and security (in this context we must state that certain actions exceed the traditional limits of

the competence of this organ – let us consider e.g. the decisions concerning sanctions against Libya) and – in particular – new dimensions of peace-keeping consisting in the supporting of the democratisation of the political life of particular states and actions on an international plane, including the establishing of criminal courts for the former Yugoslavia and Rwanda. Let us stress that the interpretation by the Security Council of its competence was dealt with in the same volume by M. Herdegen.

D.Schindler presents a new optics of international humanitarian law as effective *erga omnes*. He shows a development of this branch of law – evolution from treaty law to customary law as formulated and confirmed by different resolutions of the Security Council concerning Iraq, Yugoslavia and Somali. The author rightly states that these resolutions say nothing about the possible consequences of the *erga omnes* status of these obligations. It is unclear whether third states can claim violations of humanitarian law before an international judicial organ. In our opinion, as *actio popularis* is not generally accepted, such a claim would be admissible exclusively under treaty regime, while the notion of obligations *erga omnes* corresponds mostly with opposability of a specific regime towards third parties under customary law. On the other hand, we agree with the author that third states which are not directly injured from the point of view of law of state responsibility can undertake countermeasures against the perpetrator of international delict (or crime? – this is another issue requiring certain elucidation). Finally, we could ask whether the factual tolerance of the international community towards numerous grave violations of humanitarian law does not put the *erga omnes* nature of these obligations in question.

Th. Schweisfurth compared the status of the CSCE (at the time of writing of his paper, i.e. in 1995) with international organisations in the first stage of their development, in particular with the OAS. He considers numerous similarities and expected further transformation into "classical" international organisation. In fact, the subsequent developments confirmed the correctness of this approach.

The presentation by R.B. Lillich deals formally with a harmonisation of human rights, but in reality it examines an important and difficult issue of universalism in the human rights law. It postulates a creation of new institutions (like a human rights observer or international court for human rights) and/or other measures aimed at promoting human rights (including the publishing of an international encyclopaedia of human rights). Although some steps in expanding human rights have been made (e.g. by the establishing of the International Criminal Court – the article *de lege ferenda* on this topic by K. Oellers-Frahm can also be found in the book), the present state of the international community does not allow optimistic conclusions.

It is obvious that the volume in honour of R.Bernhardt must include an essay concerning the so-called German question, even if the most difficult issues have been resolved with the unification of Germany. G. Ress analysed guarantee functions and duties of four superpowers in respect of the final settlement concerning Germany. We agree that the 2+4 Treaty is opposable to all former allied powers, as well as with the view that some questions have not been yet regulated (some states claimed war reparations, and no information on the outcome of negotiation is obtainable). It is also obvious that the Treaty together with the boundary treaty between Poland and Germany constitutes a final solution of a frontier dispute between the two states concerned; the author also does not give answers to questions on the date and basis (mood) of transfer of sovereignty. In fact, German international lawyers are confused as regards this issue, and the federal government avoids any clear statement on this topic, notwithstanding constant pressures by different circles and lobbies. Finally, we cannot agree with the statements on the constitutive nature of the boundary provisions of the 2 + 4 Treaty, as they expressly refer to a confirmation of the boundary established by earlier international agreements.

The artificial construction of partial identity of the FRG with the German Reich adopted by German politicians, jurisprudence and scholars manifestly causes problems for the adaptation of this doctrine to the Final Settlement Agreement.

It is certainly interesting to emphasise the presence of Polish authors in the presented volume. Z. Kędzia devoted his study to the position of the U.N. High Commissioner for Human Rights, while K. Skubiszewski wrote a paper on the relationship between Poland and Germany in the new Europe after 1989.

The value of volumes published in order to honour eminent scholars varies from very high ranking to relatively uninteresting. We are happy to emphasise that the present book should be counted among the former.

Władysław Czapliński

V.D. DEGAN, *Sources of International Law*, Martinus Nijhoff Publishers, The Hague–Boston–London 1997, pp. 564

Vladimir Degan is one of the outstanding contemporary scholars originating from Central and Eastern Europe. His research concentrated upon different aspects of sources of international law, so that the recent book published by Kluwer can be treated as a synthesis of the activities by the author in this field. Degan concentrated upon four sources of international law : general principles of law, customary law, unilateral acts of states, and treaties. It is, however, visible that he adhered in a way similar to those authors who divide international instruments into sources of international law and sources of international obligations but who – on the other hand – recognize a homogeneity of international law.

It is notorious that the position of general principles of international law in the international legal order is unclear. Degan finds the special position of these principles in their historical development, showing certain elements introduced by the most important authors starting from Grotius and Vattel, but also references to general principles which can be found in different international legal instruments prior to the Statute of the PCIJ. He is convinced that general principles are still present in the life of the international community, even though the Hague Court does not refer to them directly. In fact the author seems to distinguish among three meanings of "general principles": fundamental principles of international law as formulated in the UNGA Resolution 2625(XXV) and in the Helsinki Act of the CSCE; fundamental rules common to all legal systems, and rules of legal reasoning and legal principles. We agree that fundamental principles bind the States independently of their will.

As to customary law, Degan refers to a traditional concept combining practice and *opinio iuris* as constitutive elements. He analyses different forms of state practice and emphasises that contemporary conditions of formation of custom are to a large extent more liberal than even some years ago (in particular important new elements can be found in respect of the time element and influence of treaties – including non-ratified multilateral conventions of law-creating nature – as factors accelerating the formation of customary rules). We fully agree with the author in his discussion of the hierarchy of acts playing a role in establishing of customary rules – certainly states while undertaking their actions in international relations do not take into account the custom-creating effect. We would greet one more aspect of the creation of

customary law which has not been treated by the author in a detailed way: the role of state practice in the creation of customary rules based upon abstention. It seems to us that the existence of such rules could be ascertained exclusively through a reaction of states in cases of their violation. Finally, we should stress also an importance of extra-juridical aspects – in particular of political factors – in customary law-making; some states are more equal than the others in respect of this question. Furthermore, V. Degan made an interesting analysis of the possible proof of *opinio iuris* without, however, presenting his own ideas as to either the existence or the necessity of ascertaining this factor.

In his presentation of general customary law Degan devoted special consideration to the issue of peremptory norms of international law. He presented it on the basis of the Vienna Convention on the Law of Treaties, the jurisprudence of the Hague Court (which is – in our opinion – not very convincing), and of the ILC draft articles on state responsibility. He seems to identify *jus cogens* with international crimes as he classifies as peremptory norms: genocide, crimes against humanity, grave breaches of humanitarian law, and fundamental rights of individuals – we agree that there are numerous international legal norms which are not peremptory within the meaning of the Vienna Convention of 1969 although the derogation from them would hardly be acceptable. In fact, as we have suggested in the article published in the present volume, we are not partisan of the concept of *jus cogens* and we do not think that this concept is really generally accepted in international legal practice.

The following chapter of the presented book is devoted to the role of unilateral acts as a source of particular international law. This problem has not found a thorough analysis in recent international legal writing. We do not intend to discuss this problem; however, we must agree with the author that unilateral acts could rarely lead to a formation of universal customary law, as they should be treated rather as a form of international obligations of states instead of being a source of universal international law. In this context the author dealt with the problem of opposability in international law (being in fact one of his favourite issues) emphasising that not all unilateral acts of states and other subjects of the international law are opposable to other members of the international community (Degan referred to a contradiction between recognition and protest as the most important acts involving the question of opposability in international law).

Finally, the last part of the book is devoted to international treaties as a source of particular international law (the formula used suggests that Degan supports an opinion that customary rules constitute a unique source of universal international law, as no multilateral treaty is really general). The author gives in fact a systematic guide to the Vienna Convention on the Law of Treaties on the basis of rich state practice and of the jurisprudence of international courts.

Summing up, we must state clearly that the monograph by V. Degan certainly belongs to the most important international legal books published during the recent period; it should become a useful tool in the hands of everyone interested in the formation and functioning of law within the international community.

Władysław Czapliński

W. GRAF VITZTHUM (Ed.), ***Völkerrecht***, Walter de Gruyter Verlag 1997, pp. 687

Every generation of international lawyers finds it necessary to prepare and to publish new manuals. Such a trend is understandable taking into account a rapid development of international law, new elements in international practice including jurisprudence of different international judicial bodies, new trends in teaching, and availability of information including the publishing of documents from public archives. This time the task of writing a new handbook was undertaken by six renowned German professors who divided the whole scope of international law into seven principal areas. W. Graf Vitzthum (Tübingen) wrote about sources of international law, space, environment and economic law; Ph. Kunig (Berlin) was responsible for describing the relationship between international law and domestic law; K. Hailbronner (Konstanz) occupied himself with subjects of international law including the position of individuals; E. Klein (Potsdam) presented international and supranational organisations as subjects of international law; M. Schröder (Trier) devoted his study to the responsibility of States and international criminal law including the whole system of dispute settlement; finally M. Bothe (Frankfurt/M.) discussed issues of the law of peace and war. The structure of the manual is therefore relatively traditional – usually authors pretending to be more progressive start with sources of international law and pass to its subjects, while conservative or traditional ones – *vice versa* – start with subjects of law and continue with sources of law.

W. Graf Vitzthum started his study with a short presentation of the history and specific features of international law, drawing a distinction between it and other branches of law. He accentuates, i.a. that EC law stems from public international law and still has much in common with it, even if Community secondary law certainly constitutes a separate legal system. The author considered subsequently a notion of fundamental principles of international law (including sovereignty and equality of States, ban on the use of force, non-intervention, peaceful settlement of disputes, self-determination, and co-operation between States). The analysis of sources of international law starts with the law of treaties, presented in a short outline (but containing basic information necessary for students – one could only suggest that the text should contain more examples from state practice and not exclusively theoretical observations. It seems to us also that the selection of international legal writing quoted is not exhaustive, even if this has not been the principal task of the author). As far as customary law is concerned, Vitzthum emphasises mostly the importance of practice in the process of its formation; he notices also that a concept of custom seems to be very close to a notion of *pactum tacitum*. He does not give examples of general principles of law recognised by civilised nations, but rightly emphasises that the importance of this source of law diminishes simultaneously with the codification of international law. On the other hand, he remarks that new sources of international law have developed outside the scope of Art. 38 of the Statute of the ICJ. We share the author's doubt as to the nature of consensus a as separate source, but he is certainly right including unilateral acts and – if the founding treaty of a specific international organisation so provides – acts of international organisations which can constitute sources of international law (in particular if we reject a distinction between treaties-laws and treaties-contracts).

The second part of the manual was written by Ph. Kunig being – like numerous other German law professors – a specialist in both public international law and German municipal public law. The relationship between German law and international law has always constituted the object of interest for many authors, and the writing concerning this issue is relatively rich. The presentation by Kunig covers both theoretical issues of monism and dualism, and different

problems relating to the application of international law in Germany including conclusion and implementation of treaties, application of Community law in the FRG and rank of customary law and general principles of international law. The considerations of the author are supported by jurisprudence of the highest German judicial organs.

K. Hailbronner presented a general theory of subjects of international law. The structure of his chapter is a little surprising, as it begins with a short presentation of all possible or potential subjects, then passes to their organs acting in international relations, and continues with the position of states and individuals. Hailbronner does not give any firm answer as to the status of individuals under international law; this is characteristic for Western scholars who formerly seemed to accept a certain scope of the rights of a person under international law as a premise of their subjectivity, although such a thesis was in a way illogical. It is obvious that even if a certain system grants rights to individuals, this does not amount to a recognition of their subjectivity under that system of norms. Individuals are still deprived of any direct influence upon the formation of international law, and they can claim responsibility of States exclusively under particular circumstances, if such a right has been expressly recognised by States. While writing on the role of States in international law Hailbronner includes also parastatal organisms like supranational organisations, but also different kinds of state unions and international organisations. Finally, we must mention that in connection with state succession the author refers to the status of Germany. Although the author objectively discusses the developments on German soil after 1945, he states that the transfer of sovereignty in respect of the Polish Western and Northern territories took place with the entry into force of the Polish–German boundary treaty of 1990 which does not necessarily correspond with opinions of Polish – but also some French and British – authors. The subchapter dealing with the position of individuals covers issues of the protection of human rights, the status of aliens in international law and refugee issues.

E. Klein with his usual competence wrote an outline of law of international organisations. He discussed general theoretical issues of the creation and dissolution of international organisations, membership, rights and duties under international law. More detailed remarks have been devoted to the U.N. and its specialised organisations because of their role in contemporary international relations; in fact, only two further organisations were treated separately – the Council of Europe and the European Union. Some other ones were presented by W. Graf Vitzthum in the following chapter concerning international economic relations.

The task of M. Schröder was particularly difficult. The law of state responsibility is still regulated by customary norms. The activities of the ILC in this field resulted in preparing draft articles in 1996, but subsequently the ILC decided to continue its work on new premises. Also in the field of international criminal law new developments took place, to mention only the establishing of the International Criminal Court. Finally, the status of state liability under present state practice is highly disputable, as the draft elaborated by the ILC does not fully correspond with activities and claims of States. One could expect more detailed treatment e.g. of connections between international crimes of States and *jus cogens*, conditions of applying countermeasures – in particular their relations to sanctions imposed by international organisations. In fact this chapter corresponds closely with a presentation by M. Bothe. The former author concentrated upon the ban on the use of force (his opinion as to the justification of the use of force in any way except in self-defence or upon authorisation by the Security Council is very firm, although he limits the competence of the Council and seems to suggest the necessity of certain form of a control of the legality of its acts) and substantive law of armed conflicts. Interestingly, he treated jointly the Hague and Geneva law.

The language of the book is clear and simple – the authors made a successful effort to avoid introducing theoretical considerations which might bring too much confusion to stu-

dents; finally, international law is sometimes confusing in itself, taking into account political conditions of its application, relatively high degree of flexibility and uncertainty, and lack of central control authority. The authors succeeded in avoiding any doubt as to legal nature of rules of international law, even if they ask questions without giving clear answers. The division of labour brought one important consequence: every author treated his part of the book as a separate unit which resulted in a lack of references to parts written by the others – respective chapters are therefore exhaustive (in the framework of little space available to the author not allowing for detailed presentation). All chapters of the book contain references to basic literature of respective topics, fundamental sources (legal and political instruments), and jurisprudence of international and domestic courts relating to the specific issues.

Władysław Czapliński

P. MALANCZUK, *Akehurst's Modern Introduction to International Law*, 7th Edition, Routledge London 1997, pp. 449

The first edition of the manual by the late Professor M.Akehurst was published in 1970, and since that time it attracted numerous readers not only in the English-speaking countries but it was also translated into several languages including Japanese and Chinese. The present edition was revised and updated by Professor Malanczuk from the University of Rotterdam.

The structure of the textbook is a little unusual: it starts with history and essence of international law, then passes to a general information on sources, changes to subjects of international law, but after presenting states and international organisations it turns back to the law of treaties (as acts of subjects?) and comes again to the issues of the position of States in international law (i.e. modes of acquisition of territory and state succession). Following chapters are devoted to international economic law and environmental law; finally, the author turns to enforcement of international law presenting problems of state responsibility, peaceful settlement of disputes, and laws of war including *ius ad bellum* and *ius in bello*. Last part of the book presents fundamental questions of the law of United Nations concentrating mostly upon activities of the Organisation in the field of collective security and peacekeeping.

The textbook by Akehurst used to be highly popular for presenting in a clear and easily accessible way the most important issues of international law in its relationship with international policy, giving perfect guidance for students of international law and international relations. Numerous examples quoted by the author show to what extent international law is strictly connected with political decisions. In fact, recent developments including in particular issues of state identity and state succession, activities of the United Nations, etc. give many arguments to the opponents of the "legal" nature of international law. Discrepancies between law and international practice of States often cause frustration among scholars but are inevitable.

The present textbook has been modified in comparison to the former editions: it includes several new chapters including that on human rights, it refers to the recent state practice including the practice of international courts and tribunals (the decisions of the U.S.–Iran Claims Tribunal constitute the best example of an underestimated source of modern practice in inter-

national law), finally it contains numerous references to international legal writing not only in English but also in other languages giving therefore supplementary guidance for those who wish to improve their knowledge of international law. It seems that the recent edition of the Akehurst handbook will make the same career as the preceding issues.

Władysław Czapliński

S. BLAY, R. PIOTROWICZ, B.M. TSAMENYI (eds.), ***Public International Law. An Australian Perspective***, Oxford University Press, Melbourne 1997, pp. 436

The new textbook for law students is a collective work consisting of sixteen chapters, each written by a different author. The three editors lecture international law at Australian universities (in Sydney, Hobart and Wollongong, respectively) and they invited other Australian experts in the field – academicians lecturing at the universities as well as practitioners acting as legal advisers to the Australian Government, to international governmental and non-governmental organisations or as Australian barristers and solicitors – to write individual chapters.

The following topics are discussed in the book: the nature of international law, the structure of the international legal system, sources of international law, the law of treaties international law and domestic law, pacific settlement of disputes in international law, jurisdiction, the creation and recognition of states, state responsibility, the use of force, human rights, refugees, the law of the sea, international environmental law, Antarctica and international law, and finally current trends in international legal theory. Every chapter of the book has the same structure: introduction, merits, questions enabling students to evaluate their knowledge of problems dealt with in the chapter and further reading which sometimes comprises also websites on the Internet. There are no footnotes in the text. Instead, there is an extensive (15 pages) table of cases – both from national and international practice – referred to in the text only by a short title.

"The object of the book is to present and overview of the applicability of international law to Australia" – the three editors declare in the Preface. This explains why such issues as Antarctica, environmental law or refugees are so extensively analysed in the book. While in European textbooks (Polish included) they are presented in a rather summary way, in Australian book the whole chapters deal with them, apparently due to their importance in the Australian contexts. Within particular chapters, examples taken from Australian case law and practice are provided in order to demonstrate the operation and application of the law. This feature is particularly strong throughout the whole chapter 5 ("International Law and Domestic Law"), but actually the interaction between Australia and international law is devoted great attention in every chapter (e.g., Australian treaty practice – p. 111; self-determination and Aboriginal People – p. 201; human rights in Australia – p. 290; Australia's maritime boundaries – p. 342 etc.).

There are also some other peculiarities of this book which, however, can not be explained by "an Australian perspective" even if the editors explain in the Preface that they have purposefully omitted certain topics which can be found in any classic international law text in

order to make their book sufficiently relevant to Australia. Definitely relevant to Australia is the question of judicial settlement of disputes as Australia has recently been involved to different extent in quite a few cases before the International Court of Justice (e.g. the *Nauru* case, the *East Timor* case, the *Nuclear Tests* case). This problem occupies however only eight pages spitted half-by-half between chapters. The chapter on the use of force has ben prepared by the Australian Red Cross Professor of International Humanitarian Law, yet *ius in bello* is dealt with only on five pages and mostly in the context of the ICJ advisory opinion of 1996 on the legality of nuclear weapons. Many readers would be certainly interested in subjects touched upon in chapter 16 entitles "Current Trends in International Legal Theory" where new theories of international law are presented with special focus on feminist theories. Although there exists already a considerable literature of feminist analysis in diverse areas of international law (e.g., on ways in which statehood presently institutionalises patriarchy), this problem is rather unknown to many international lawyers, including the Polish ones.

As the book reviewed is intended for Australian students, there is no sense in recommending it to students outside Australia. But certainly reading it shall have considerable value for everyone who, having already certain knowledge of international law, would like to learn about the extent to which other countries can be affected, and other domestic legal systems can be influenced, by international legal principles.

Elżbieta Mikos-Skuza
Rudolf Ostrihansky

WŁADYSŁAW CZAPLIŃSKI: *Territorial Changes in Central and Eastern Europe and their International Law Effects (1990–1992)*, Fundacja Promocji Prawa Europejskiego (Foundation for the Promotion of the European Law), Wydawnictwo Naukowe "Scholar", Warsaw 1997

The author examines the problem of territorial changes, basing his explorations on a solid theoretical background and taking into consideration previous practice connected with different aspects of state succession. In effect the book is not only a valuable analysis of territorial changes in Central and Eastern Europe in the beginning of the 1990s from the perspective of international law but presents several interesting remarks devoted to the present developments in international law. It gives a picture of changes and at the same time it encourages reflection and discussion.

For several tens of years the political and territorial situation in Europe seemed to be stable and the *status quo* in this field was solemnly confirmed by the Final Act of the Conference for Co-operation and Security in Europe. Surprises were held to be possible only in Yugoslavia. In the years 1990–1992 discussed by Mr. Czapliński – radical changes in Central and Eastern Europe took place. The whole of these events are discussed by the author. This means: the secession of the Baltic republics, the collapse of the Soviet Union, Yugoslavia and Czecho-Slovakia and the unification of Germany. From the perspective of historical experiences of the region it may be surprising that Poland happened to be a stable point within the centre of rapid

changes. Poland was perhaps the only state in the world which changed all its neighbours without changing its frontiers. Instead of the former neighbours: the U.S.S.R., Czechoslovakia and the German Democratic Republic Poland has at present as its neighbours: Russia (through Kaliningrad), Lithuania, Belarus, Ukraine, Slovakia, the Czech Republic and the Federal Republic of Germany. It is quite obvious that for a Polish scholar dealing with state identity, continuity and succession (in general or with respect to treaties) those matters are in no case academic questions. All of them must be matched to individual situations. The author is looking for several criteria of assessment of these situations, referring to examples from the previous state practice and to views presented in the international law doctrine – very often controversial ones.

In the light of analysis of these criteria Mr. Czapliński evaluates the recent examples of state succession in Central and Eastern Europe. He presents also several general principles on territorial changes or state succession that were shaped or are being shaped in the present international law. In this context he refers to the codification of the law on state succession.

This part of the book (6 chapters) gives a complete picture of legal aspects and effects of territorial changes and theoretical aspects of state succession. Upon these solid foundation Mr. Czapliński presents subsequently (6 chapters) individual problems of succession of the states from Central and Eastern Europe. They are as follows: succession with respect to international agreements, state property, archives and state debts, membership of international organisations, citizenship and state responsibility. This is a full and in-depth survey of the practice of states of the region with respect to succession resulting from the 1990–1992 changes. The survey is of a great informative value, it presents also certain new tendencies in the practice of succession.

The author identifies several problems and situations in which the practice are not uniform and presented views differ seriously from one another. I will refer to a problem specially interesting for me, though the others may themselves pay attention to the same aspect. I mean the tendency to diminish the importance of the concept of effectiveness (traditional in the field of international law) in favour of a more subjective evaluation of the situation, the tendency indicated by Mr. Czapliński. The problem is first of all connected with recognition of states or governments, but it is present also in the other fields.

According to a deeply-rooted definitions, a state comprises territory, population and effective government. Such an approach made it easier for changes of international community and its law to take place towards universalism. Present states behave in several situations as if the word "effective" in the traditional definitions of state turned into the word "democratic". This tendency was present in the process of changes in Central and Eastern Europe analysed by Mr. Czapliński.

The Author rightly remarks that it means a return to a constitutive concept of recognition.

What we can see (specially in Europe, but also in the Western hemisphere) is a formation of a kind of (as I call it) a principle of democratic legitimism. The tendency itself is very interesting and may have a positive impact upon the behaviour of governments and protection of human rights. At the same time we can observe some dangers, especially in the light of the cultural and civilisation differentiation of the present world. Each legitimism – even democratic – has at least something to do with arbitrary decisions and interventionism. A dilemma emerges – whether international law should deal first of all with peace and security or perhaps strive increasingly for the transformation of states and social and economic relationships in states according to a certain common model.

As can be seen, the book by Mr. Czapliński gives rise to reflections far exceeding the analysis of territorial changes in Europe in 1990–1992, the analysis being of course of the utmost value. This is still another success of the author.

Andrzej Wasilkowski

M. RAGAZZI, *The Concept of International Obligations "erga omnes"*, Clarendon Press, Oxford 1997, pp. 264

Problems of peremptory norms of international law, obligations *erga omnes* and international crimes attract the interest of researchers from different countries not only since the respective provisions have been included into international legal instruments or introduced into decisions of international courts, but even before – as it became clear that the international community is interested in introducing moral elements into international law and politics and in protecting basic values of common interest. This interest grew together with the expansion of concepts of human rights and with the democratic changes in the world allowing the domination of Western concepts of liberalism and the role of individuals. This interest can be clearly seen also in the present volume of the Polish Yearbook; however, the papers published here do not exhaust the issue. We present therefore two other important publications in this domain.

M. Ragazzi starts his discussion of the topic with a presentation of prefigurations of the concept of obligations *erga omnes* in international law: state servitudes, permanent dedication, international status of certain territories and objective regimes. We agree that all these institutions of international law invented in the period preceding the Second World War show certain distinction compared to traditional (classical) multilateral treaties – they are not based upon the mutual obligations of the parties amounting to a bilateralisation of treaty relations, but they are due to a larger circle of international legal subjects. Then the author passes to *travaux preparatoires* for the Vienna Convention on the Law of Treaties and to Articles 53 and 64 of the Convention itself. He discusses all preconditions for the formation of international peremptory norms as required under Art.53, emphasising in particular those aspects of *jus cogens* which are important from the perspective of their possible effect *erga omnes*: an opposability of these norms, a possible influence of the principle of the persistent objector. It seems clear that general customary rules can be applicable *erga omnes* (or, correctly speaking, opposable *erga omnes*) but states can derogate from them either by agreement or by unilateral practice if it is not subject to protests from third states. This would mean that the test of admissibility of reservations as a criterion of the customary nature of particular norms is not correct. On the other hand, Ragazzi is right in stating that any form of derogation from *jus cogens* (including the persistent objector rule) is not permitted – the ban on apartheid by the international community notwithstanding the opposition by the Republic of South Africa is the best example. We could discuss only the view by the author that States can only establish peremptory norms in international law; there is no reason why international organisations could not contribute to the establishing and development of these norms, and in fact activities of the U.N. or the European Union are the best examples thereof.

Ragazzi continues presenting different kinds of international legal norms which posses the nature both of *jus cogens* and of obligations *erga omnes*. We agree with the conclusions as to

such a nature of the ban of aggression and of genocide (in fact, the fundamental character of these obligations was confirmed recently by the ILC draft articles on crimes of individuals under international law and by the Statute of International Criminal Court). Certain doubts could arise in respect of slavery: whether it does constitute an exception compared to other fundamental (core) human rights or whether the same conclusion remains topical also in respect of the other ones (right to life, ban on torture etc.). We would suggest that the so-called natural rights should be granted a status superior to other human rights. As to self-determination, recent developments (like the decision of the ICJ in the *East Timor* case or opinions of the Badinter Committee subordinating self-determination to territorial integrity) seem to indicate that it cannot be included into the catalogue of *jus cogens* notwithstanding opinions of different scholars.

The final part of the book is the most interesting. The author discusses the particular aspects of relations between the concepts of *jus cogens*, obligations *erga omnes* and *actio popularis*. He does not exclude a possibility of establishing a regional peremptory norm of international law, but – to the contrary – excludes it in respect of regional obligations *erga omnes*. In our opinion, such a distinction is in practice impossible. On the other hand, we agree with another distinction made by Ragazzi between conventional norms effective *erga omnes* (in fact, their application is limited to the parties of specific instruments, and any action in case of the violation of such norms is limited to the other parties) and obligations *erga omnes* as formulated in the *Barcelona Traction* case (where the legitimation of all states to bring international claims under the law of state responsibility should be presumed). It is manifest that as long as *actio popularis* is unknown under international law, the existence of obligations *erga omnes* will be disputable.

The monograph by M.Ragazzi is relatively traditional in the conclusions reached, but international law in general is conservative as to granting new obligations upon States contrary to their will. As long as new developments will not be expressly accepted by the international community, and in particular by the international judicial practice, concepts of *jus cogens* and obligations *erga omnes* will remain the expression of craving for minimum morality in international relations.

Władysław Czapliński

A. DE HOOGH, ***Obligations "erga omnes" and International Crimes. A Theoretical Inquiry into the Implementation and Enforcement of the International Responsibility of States***, Kluwer Law International, The Hague 1996, pp. 465

A book by André de Hoogh, Dutch scholar of young generation, marks another important step in the theoretical research on peremptory norms of international law. M.Ragazzi in his monograph concentrated upon the relationship between the notions of *jus cogens* and obligations *erga omnes*, while Hoogh compared obligations *erga omnes* with international crimes of States which is another related issue.

The work by Hoogh consists of six chapters. The first one defines the most important notions connected with the topic: theory of obligations under international law, different kinds of interests including legal interest of States, and finally – the notions of *jus cogens*, obligations *erga omnes* and international crimes. The starting point of the study is clear: States can

make claims under public international law exclusively if their interests have been infringed. We agree with the author that such interests cannot be ascertained in an abstract way but exclusively after having been violated – if international delict is present, one can define material and legal damage in respect of particular States (directly or indirectly affected by these acts). After having quoted definition of *jus cogens* as formulated in Art. 53 of the Vienna Convention the author suggests that from the very nature of *jus cogens* conclusion can be drawn that all States should be granted a right to claim the inconsistency of a specific treaty concluded between the third parties with peremptory norms of international law. Although logical, the present state of international law excludes such a possibility. Treaties concluded between states are opposable to third parties who are not entitled to challenge them on the international scene (which is still deprived of a centralised law-making and law-applying agency) . The best example of such a situation is the peace treaty of Camp David which was declared null and void by the General Assembly of the U.N. because of non-conformity with the right to self-determination; the treaty remained valid and remained a basis of relations between Israel and Egypt. The dictum of the ICJ in the *Barcelona Traction* case has been analysed by the author exactly from the same perspective: he is willing to grant to all states (not only to directly affected by the infringed obligation) a right to have their interests guaranteed by the obligations *erga omnes* protected; they must therefore be in possession of a tool allowing such a protection. We agree that the obligations indicated by the ICJ correspond in substance with the peremptory norms of international law. Finally, de Hoogh declares that a rationale of the distinction between international crimes and international delicts lies in different consequences of both categories of violations of international law. The conclusions drawn by him seem to suggest that all States have legal interest in observing an obligation laid down by a peremptory norm, and that there may exist obligations under peremptory norms which do not amount to international crimes.

The measures at the disposal of the international community to combat the violations of fundamental norms of international law have been analysed in the following chapters of the book. The second part is devoted to the reactions of the United Nations to violations of international law. The reaction by the U.N. would be possible, however, not only if the Organisation were simply bound by a specific norm infringed, but also when it has special interest in the performance of obligations. The ICJ seems to accept a possibility of intervention of the U.N. in respect of the non-member States (in the *Reparation for Injuries* case); the formal possibilities of action remain however limited to cases provided for in Chapter VII of the Charter and provisions concerning the competence of the U.N. According to the author, such competencies can be presumed in cases of aggression, denial of right to self-determination (we are not totally convinced on this point, as the U.N. is not a unique body competent to recognise or to grant the right to self-determination) and fundamental human rights.

The subsequent chapter of the book is devoted to the scope of the right to claim reparation in cases of the violation of peremptory norms of international law. According to the classical theory of international responsibility, exclusively directly affected States can claim restitution and/or compensation for the violation of international law. This established practice has been challenged by the decisions of the Security Council in respect of consequences of the invasion of Kuwait by Iraq; however, the situation seems to be exceptional and does not allow the conclusion proposed by the author that the absence of directly injured State empowers all States to claim (pecuniary?) reparation. Such a right can be proposed only in respect of the Security Council acting on behalf of a directly injured State. Other States can claim only cessation of violations of international law, restitution and satisfaction (including the punishing of perpetrators of illegal acts).

As to non-military countermeasures, the competence of the U.N. is limited to situations provided for in Art.39 of the Charter. We fully share the view that in all other situations the States are free in taking countermeasures. However, the activities of the ILC have modified conditions of applying countermeasures as laid down in the study by de Hoogh; in particular it is suggested that countermeasures should be preceded by negotiations (or at least by a claim of cessation of violations of international law) or another form of dispute settlement. Armed force can be used exclusively upon prior authorisation by the Security Council, except the right to self-defence. The author declares that the provisions of the U.N. Charter have replaced former rules on the use of force; we agree in principle with such a conclusion with one important modification: it is unclear what is the scope of customary legal obligations of states as to the use of force. We would like to support the author's view that no rule of international law allows humanitarian intervention; it seems however that States recognise such a right even in cases of the absence of authorisation by the Security Council. Of course it is also clear that this right has often been abused.

The future of the concept of international crimes is unclear – in particular in the light of the decision of the ILC to redraft the articles on state responsibility. The reactions of the international community to violations of the fundamental international obligations of States are in fact inconsistent, and they are influenced by political considerations. It is hard to foresee the future developments. This does not impair the value of scholarly analyses by A. de Hoogh whose monograph will certainly be an important achievement in the theory of international obligations and international responsibility.

Władysław Czapliński

J.A. FROWEIN, R. HOFMANN, S. OETER (Ed.), ***Das Minderheitenrecht europäischer Staaten***, Teil 2, Springer Verlag Berlin–Heidelberg–NewYork 1994, pp. 544

The present volume contains reports prepared in the framework of a research programme led under the auspices of the Max-Planck-Institute for Public and International Comparative Law in Heidelberg and presented during the seminar held there in October 1993. The first part of reports was reviewed in PolYB 20(1993); it concerned the position of minorities in i.a. Western European states and Poland. This volume contains the rest of national reports concerning the states of Eastern Europe and conclusions of reports in the selected fields.

We do not intend to refer here to all national reports which are based mostly upon an analysis of legislation of respective States but we shall concentrate upon the general conclusions. However, we cannot agree with some issues dealing with the reports on specific States. E.g. an opinion that members of the Polish minority in Lithuania should have lived in this country in the pre-war period is certainly false: this minority came into existence as a result of territorial changes in Eastern Europe connected with the Second World War and was formed of former Polish nationals; on the other hand, there used to be a Polish minority in the region of Kaunas before the war but it was subjected to an intensive assimilation policy. Furthermore it would be interesting not only to report on nationality legislation in Lithuania but also to show

its implications for the situation of minorities and conflicts originating thereof. After the publishing of the report new developments occurred: on the one hand a treaty on friendship between Poland and Lithuania was concluded. It contained detailed provisions concerning minorities in the two countries (a difference between respective minorities lies mostly in the origin of minorities; the Lithuanian minority in Poland is settled in the north-eastern part of Poland and is less numerous compared to the Polish minority in Lithuania settled in and around the capital which is not a frontier region) and was drafted in a way similar to the Polish–German treaty of 1991. On the other hand, even though the position of the Polish minority in Lithuania is relatively better than before, it is not fully satisfactory and certain steps undertaken by the Lithuanian minorities are contrary to international law (e.g. a reform of administrative structure in the Vilna area in fact leads to an elimination of regions where Poles constituted a majority and would be able to win local elections). Also the practice concerning the use of minority languages and topographical names is far from satisfactory.

General conclusions of the research project were formulated in four papers. K. Oellers-Frahm presented the use of minority languages in proceedings before state agencies and courts of respective States. An interesting study of Th.Marauhn concerns sensitive issues of education and access to media. D. Richter discussed questions of political activities of minorities including freedoms of assembly and the right to form political parties. Finally, an article by S. Oeter corresponded with the latter and deals with the specific position of minorities in administrative structures of States. Conclusions by the authors are not very optimistic. Minority languages are accepted as official languages mostly in the mixed areas, i.e. inhabited by the members of particular minorities and persons belonging to the majority. On the other hand, it is difficult to suppose that the members of minorities do not speak a majority language, so that introducing a presumption that they should be allowed to do so on an individual basis seems to be exaggerated. There is no reason, however, why the right to an interpreter should not be guaranteed to persons not speaking an official language but should be guaranteed to everyone as a minimum standard. In the field of education the development of minority rights is sufficient – at least minority languages are taught as a foreign language, although there are some difficulties in mandatory teaching these languages; there exist some problems with state financial support for private schools and educational institutions offering education in a minority languages. It might be interesting to investigate whether there really is an interest for frequenting schools where all subjects are taught in a minority language, as such an education in fact limits possibilities of further professional career. It seems also that the access of minorities to the press is sufficient, and the access to electronic media including TV is not. As regards political activities, regulations in European states have a common denominator: political parties and associations are not allowed if they are aimed against the fundamental interests of the State, in particular its constitutional system and territorial integrity (the latter factor seems to play an important role in all matters concerning minorities). Finally, in respect of right to autonomy, solutions leading to full and complete autonomy of areas inhabited by minorities are scarce. The basic requirement for such a regulation is that the specific area should be dominated by the minority. In fact minorities enjoy mostly a communal autonomy, aimed at specific domains. It is clear that States are not very willing to grant autonomy to minorities because they fear that the autonomy could cause further claims towards sovereignty (self-determination).

The problem of minorities and international and municipal legal regulations in this field was very popular at the beginning of the 90s, together with the emergence of new states in Europe. At present it ceased to be acute, in particular since so-called new democracies were much more liberal in their approach to minorities than their "elderly brothers in democracy".

This trend is clearly visible in the two volumes published by the Max-Planck-Institute which constitute a modern encyclopaedia of minority issues in Europe at the end of the 20th century – it would be fascinating to confront the legal regulations with the practice of the states concerned.

Władysław Czapliński

S. BREITENMOSER, *Praxis des Europarechts*, Schulthess Verlag Zürich 1996, pp. 860 + xvii

The growing importance of European Union and European Community law in the world economy, the expansion of European integration which covers new territories and new field of activity, and – on the other hand – the increasing interest among scientists, law practitioners and laymen for issues of EC law have brought a number of publications presenting in a comprehensive way the most fundamental issues of this legal system. The recent publication by an eminent Swiss international lawyer of the younger generation brings a complete panorama of European law, both institutional and substantive. The author starts with the presentation of institutions and their functioning (including sources of law, judicial system and competencies of basic organs of the Union, finances and budget), continues with the status of the Union and Communities under public international law (in particular the relations between the Union and WTO), treaty-making power including association and accession to the Union and EEA Agreement. The second part of the book is devoted to the four freedoms of the Communities, the following one to the selected policies of the Communities and the Union; finally the author deals with three legal systems belonging to the system of European public international law: the Council of Europe including the European Convention on Human Rights and Fundamental Freedoms (1950), OESCE and OECD. Such a structure is to a certain extent surprising as traditional collections of cases and materials of European law are mostly limited to instruments of Community (EU) law – a new approach allows the reader to get acquainted also with other fields of European law and therefore helps to understand fundamental differences between respective systems. On the other hand, this structure is somehow surprising, as the second and third pillars of the Union (common foreign and security policy, co-operation in justice and home affairs) and issues relating to the protection of human rights by the Union are presented on equal footing with economic policies of the Communities – the basic distinction between the intergovernmental and supranational nature of the pillars is therefore blurred. The respective parts of the book start with an extensive bibliography and short introduction containing basic information on the topic. Then the author indicates all legal instruments dealing with respective issues including primary law and secondary acts (provisions of Treaties are not quoted, and require constant references to the texts – the advantage of such an approach is that students must consult the texts; on the other hand, certain acts of secondary law are quoted in full extent); these provisions are followed by (political) documents edited by different agencies of the EC: in particular reports of the Commission, answers to questions posed to the Commission and to

the Council by the members of the European Parliament, etc. Documents are followed by selected jurisprudence of the European Court of Justice (the author selected only the most important highlights, so that we must trust that no important parts of judgments have been omitted – such a solution causes an uncertainty as to the real context of the decision). As to the part of the book devoted to the European Convention on Human Rights, the author presented the former and present systems of judicial protection of human rights; however, because of the shortage of space he concentrated upon showing several judgments of the Court. Such a selection could certainly be criticised as insufficient (if one should select five judgments out of hundreds passed by the Strasbourg organs, the decision as to which should be included must be disputable). Summing up, we cannot but recommend the book by S. Breitenmoser to everyone interested in European legal space, in particular as long as the documents of the European integration organisations are not easily obtainable in Central European countries. We can only regret that the publication is hardly accessible to Polish students because the elevated price and the language of the original edition (German is still less popular than English).

Władysław Czapliński

A. ZIMMERMANN, ***Das neue Grundrecht auf Asyl***,
Springer Verlag Berlin–Heidelberg–New York 1994, pp. 437

Problems of refugees and asylum seekers belonged to the most acute and difficult issues in the Member States of the European Union. Numerous international instruments including acts adopted by different agencies of the Council of Europe and conventions concluded in the framework of the Member States of the EC (Schengen, Dublin), as well as domestic regulations of particular States have been aimed towards restricting the possibility of seeking economic refuge in Europe, and maintaining simultaneously the possibility of granting asylum to persons persecuted for political, national, racial etc. reasons. The FRG used to be the most important target of all asylum seekers, and former legislation enabled them to spend a long time in Germany while waiting for a final decision. The reform and rationalising of the asylum legislation has become an important task for all political forces in Germany. It has required changes in the constitutional (Basic Law) of the FRG, so that a compromise between all political parties represented in the Parliament was necessary. The amendment entered into force on 1 July 1993 and provoked discussions not only in the FRG but also in the neighbouring States. The monograph by A.Zimmermann tries to explain the basic elements of the reform of the German asylum law.

The most important part of the book is devoted to notions of secure countries of origin and safe third States. The author proves that the introducing of a rebuttable presumption of safe country of origin (meaning a country where no political persecution takes place) is acceptable both in the light of the 1951 Geneva Convention on Refugees and the European Convention on Human Rights. In our opinion such a stance is correct as it is aimed towards the elimination of abuses of the right to seek asylum while leaving a door open to the persecuted. Of course, a precondition for such a solution is an observance of the principle of non-refoulement. Let us

add here that further developments within the Third Pillar of the European Union under the Treaty of Amsterdam, as well as recent legislation in different European countries show that the rule of the safe country of origin applied to all States of the European Union nearly automatically has become customary However, the limitation of a judicial control to certain categories of cases is disputable.

The situation is different in respect to safe third states. Under the Geneva Convention no State is forbidden to return the asylum-seekers to another State, in particular if respective international agreements have been concluded and the non-refoulement principle is observed. In fact, readmission agreements and the Schengen and Dublin Conventions will prevail over the Geneva Convention on Refugees as *leges speciales* in the meaning of Article 30 of the Vienna Convention on the Law of Treaties. On the other hand, according to the Geneva Convention, even if there is no obligation to grant asylum, everyone is entitled to seek refuge in the country of one's choice. From that point of view the concept of safe third countries is disputable, although one can argue that the rights of an asylum seeker are not violated.

Finally, we must mention that the following parts of the book are devoted to an evaluation of the developments in German asylum law from the point of view of the constitutional law, and to the possible future harmonisation of asylum law within the Third Pillar. It is interesting to notice that the latter goes further than suggestions by A. Zimmermann, as the Treaty of Amsterdam transferred measures concerning asylum and aliens to the competence of the Community.

Władysław Czapliński

J. HANDOLL, ***Free Movement of Persons in the EU***, John Wiley & Sons, Chichester–New York–Brisbane–Toronto–Singapore 1995

The free movement of persons is the one of four fundamental freedoms creating the EC internal market. It is also a basic element of the institution of Union citizenship. This question appears also as the subject of provisions of a number of international agreements, whose signatories are Community Member States. There are three dimensions setting the thrust of John Handoll's work. In each of these cases the author pays particular attention to the division of competencies between Community Bodies and individual Member States, the legal basis of their action and the effectiveness of respective provisions.

In the publication under review, the free movement of individuals, seen as a component of the internal market, is examined in detail in the context of three freedoms: the free movement of workers, the freedom of establishment and the free movement of services. The right of movement and residence is considered also in respect of students, retired persons and a residual class of individuals, who do not enjoy this right under other provisions of Community law. These questions are the subject of Chapters 3 and 4. Chapter 7 provides a substantial analysis of the derogations from and exceptions to free movement rules: on grounds of public policy, public security of public health, in the context of exercising public service or authority, as regards the sphere of reserved national powers, as well as in respect of situations internal to the Member State.

J. Handoll conceives free movement rights arising in consequence of conferment of the Union citizen status, in principle, as separate and not dependent on other specific economic and social (functional) rights of free movement. Nevertheless he maintains that as long as the Council has not adopted proper measures, concrete civil rights on free movement and residence may be effectively enjoyed just by means of existing measures relating to functional rights. The institution of Union citizenship is discussed in a separate chapter, in which the author, first of all, draws the extensive outline of principal developments leading up to the introduction by the Maastricht Treaty of provisions in question. Discussing the substantive content of respective rights associated with Union citizenship Handoll indicates, *inter alia*, serious problems relating to the exercise of the right to diplomatic and consular protection in the context of international rules (among others, the need of acceptance for third States assertion, diplomatic protection by a State other than that of nationality, the necessity of rendering this right independent on the existence of domestic law). Handoll's considerations on the nature of Union citizenship, which are focused on two fundamental questions: the continued significance of national citizenship and the constitutive nature of Union citizenship, are also very interesting.

The fundamental mechanism which underlies functional and civil free movement instruments is the principle of non-discrimination on grounds of nationality. This rule has the broad application in question and even affects areas only indirectly relating to free movement (e.g. access to vocational training). The detailed analysis of the action of the mentioned principle is provided in Chapter 5 of the book. A separate issue is the problem of the reverse discrimination, which may arise in relationships between individual Member State and its own national in respect of free movement. The author pays attention also to this question. One of the important measures facilitating the genuine enjoyment of free movement rights, besides the mentioned non-discriminatory rule, are also Community legal instruments on the mutual recognition of qualifications which are presented briefly in Chapter 6.

Beneficiaries of rights to free movement (seen as an element of the internal market and the Union citizenship) are, in principle, only nationals of Community Member States; thus the pivotal issue in this area is citizenship. The competence to determine the nationality, conditions of its acquisition or loss, has been reserved for individual Member State, provided that this action has not cut down conferred Community rights to free movement (the *Micheletti* case). However, in the publication under review, Handoll deals also with the issue of the position of third State nationals. This question is discussed in three aspects. First of all, the author has examined existing Community law measures which are addressed in principle to Member State nationals, but which, at times, guarantee also third States nationals rights relating to free movement. The separate base for considerations are international agreements on free movement. Finally, the two last chapters of the work are entirely devoted to questions of the status of third States citizens in the context of EC immigration, asylum and refugee policies as well as visas and external frontier control issues.

It should be noted that the EU Treaty provisions concerning the III Pillar has been essentially emended in October 1997 in Amsterdam, thus the author's observations have partly lost their adequacy. But this does not change the fact that the reviewed work is a comprehensive guide on European free movement issues which constitute a valuable and useful source of information to everyone who is interested in the EC law, Community internal market issues and generally questions concerning the migration phenomenon.

Katarzyna Pazderska

RYSZARD CHOLEWIŃSKI, *Migrant Workers in International Human Rights Law. Their Protection in Countries of Employment*, Clarendon Press, Oxford 1997

[...] our treatment of the alien or the stranger in our midst, particularly in the form of the immigrant worker and his or her family is a measure our humanity. If we succeed in adequately protecting migrant workers and their families, we shall also be advising and serving the rights and interests of all who live and work within our system of nation-states, including the rights and interests of those we aspire perhaps to protect most, namely citizen-members – thus Ryszard Cholewiński concludes his work, and these words express the philosophical essence of his exposition. The author confirms his extensive erudition. The logical, compact argument enriches an extensive historical background. The issues touched by him are explained in a very accessible way but without detriment to the substantial content.

The focus of the publication under review is on the international protection of the economic, social, cultural, political and residence rights of migrant workers and their families, which have been formulated as the most significant for their existence during the stay in countries of employment. Classical human rights and freedoms are not discussed in any depth. The personal scope of this study, however, is marked for reference to the broad understanding of a definition of migrant worker, which includes long- and short-term immigrant employees, self-employed and seasonal migrant workers as well as studying or training but simultaneously working aliens.

The composition of the work embraces three parts. Cholewiński devotes the first part to an introduction into sociological aspects of the migration phenomenon and the basic thrust of international (universal and regional) legal regulations in respect of the position of aliens. In the following part the author examines the action of international instruments which compose universal standards specifically relating to the protection of immigrants, worked out by the United Nations Organisation and the International Labour Organisation; special attention is paid to: ILO Conventions No. 97 of 1949 on Migration for Employment and No. 143 of 1975 on Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migration, as well as the U.N. Convention of 1990 on Protection of the Rights of All Migrant Workers and Members of their Families. The whole third part is a case study – comprehensive, detailed evaluation of regional human rights standards (relevant to the protection of the mentioned rights of immigrants), based on the legislative output of the European Community and the Council of Europe.

In the mentioned publication Cholewiński does not limit himself merely to a presentation of selected legal instruments, but also draws our attention to their supervision and enforcement mechanisms which illustrate their genuine functioning. He emphasises that universal and regional human rights instruments are full of promise in terms of the protection of the economic, social, political, cultural, and residence rights of migrant workers, but deliver considerably less in reality. He also observes that the only universal set of standards relating to the protection of mentioned migrant workers and their families rights, which are currently in force at the international level, are ILO Conventions regarding this area. The author simultaneously has a high opinion of the EC framework protecting the rights of migrant workers, finding it to be the most advanced international regime in question, as well as with regard to its enforcement; nevertheless he sharply criticises significant limitations of the personal scope of this protection regime.

The most interesting question touched by Cholewiński seems to be the illegal immigration issue. The author distinctly perceives the dramatic plight of this most vulnerable group of

migrant workers and the importance of this problem. While examining international protecting standards he notices the almost complete lack of rudimental affective legal safeguards in question. Only two, from among universal instruments taken into consideration, provide any comprehensive protection to illegal migrants – i.e. the U.N. Convention on the Protection of Migrant Workers and their Families and the ILO Convention No. 143. The author returns to this topic by the way of the European case study presentation, especially in the context of proposed measures of combating this phenomenon such as among others: employer sanctions, instruments of the Schengen Convention and the EC Convention on Controls on Persons Crossing External Frontiers patterned after its draft. The problem still remains open.

Katarzyna Pazderska

K. STEELE (ed.), *Anti-Dumping under the WTO: A Comparative Review*, Kluwer Law International and International Bar Association 1996, pp. 279

The end of the 1980s witnessed a rise in the number of anti-dumping cases initiated not only by traditional "users" of these measures of market protection, but also, with increasing frequency, by developing countries. This trend was also reflected within the framework of GATT 1947, in particular through the unprecedented initiation of several anti-dumping disputes under the 1979 Agreement on Implementation of Article VI of the GATT. Many of the resulting panel reports remain unadopted. Despite initial suggestions to omit anti-dumping regulations from the Uruguay Round package, the problem became a hot issue on the Round's agenda, and a new Agreement on Implementation of Article VI of the GATT 1994 (the "WTO Anti-Dumping Agreement") was finally agreed upon. It is one of the multilateral agreements on trade in goods contained in Annex 1A to the WTO Agreement, which, unlike its predecessor, is binding on all WTO Members without exception.

The book under review comes as a response to the strong and continuing interest in the complex phenomenon of anti-dumping and the legal regulation thereof. The book's title is, however, misleading, for it may be read as a promise of a comparative presentation of GATT and WTO anti-dumping regulations and practice. Disappointingly, the comments on the WTO Anti-Dumping Agreement are limited to six pages: in a brief introductory overview K. Steele, who finds it inappropriate to "plumb the depths of the new Code's provisions" (p. 4), simply lists a "non-exhaustive" list of matters whose regulation has been changed by the WTO Anti-Dumping Agreement. In terms of procedure, new provisions have been adopted with respect to: standing to apply for an initiation of an anti-dumping investigation, *de minimis* dumping margins and volumes, time limits and evidence. Where substance is concerned, the author points out new provisions regarding sales below cost, currency fluctuations, normal value and export price comparisons, threat of material injury, individual treatment of dumping, "sunset" of anti-dumping duties, and dispute settlement.

The rest of the book contains presentations of anti-dumping regulations of 9 states and the European Union, with the aim, as proposed in the preface by P.C. Mavroidis from the WTO Legal Affairs Division, "to shed light on national approaches to anti-dumping law and practice

and facilitate a comparison with international law". The link with practice is emphasized by the choice of contributors, among whom are attorneys, members of the International Bar Association, some of whom have had broad experience in practicing anti-dumping and countervailing duty law, and are known for their publications in these fields (for example D. Palmeter).

The presentation is country-by-country, in alphabetical order. Many of the anti-dumping regimes (the United States, Canada or the European Community) are well known because they have been extensively discussed elsewhere, and therefore the inclusion of others (Japan, Mexico or Taiwan) is particularly welcome. What should be assessed positively is that the selected countries represent different categories of users of the anti-dumping weapon. The first category includes the "Big Four", that is, Australia, the European Community, the United States and Canada, which were jointly responsible for initiating over 90% of anti-dumping and countervailing duty actions since the adoption of the 1979 Anti-Dumping Agreement (p. 2–3). Their anti-dumping regulations, some dating back to the beginning of this century, are the most well developed. These regulations were among the first to be amended in implementation of the WTO Anti-Dumping Agreement. In the case of the European Community only limited changes to the existing legislation were required, a more notable one being the separation (through the adoption of two distinct Regulations) of anti-dumping and countervailing duty rules.

The second category of countries may be broadly characterized as "newcomers" on the anti-dumping battlefield. Of these, New Zealand, Mexico and South Africa have increasingly relied on the anti-dumping weapon since the mid-1980s. Also Japan, Korea and Taiwan, "the traditional «victim» countries from Asia" (p.3), appear to be drawing lessons from their "pursuers" and do not hesitate to strike back.

The study of the contributions leaves one with the impression that, notwithstanding the inevitable national specificities, in the area of anti-dumping the respective domestic regulations have much in common, and are based on largely uniform principles. Of course, the impact of the law and practice of the United States and of the European Community cannot be underestimated (as has been emphasized in some of the contributions), but this increasing uniformity must be attributed, at least in part, to the existence of international regulations in this field since the late 1960s. Moreover, there is reason to believe that in the future the focus will be on the WTO Anti-Dumping Agreement, which despite some problematic solutions (such as the standard of review for panels in anti-dumping matters) will play the role of a strong harmonizing factor.

Although the WTO Anti-Dumping Agreement is characterized by more detailed and specific rules in comparison to the previous GATT codes, it has left many problems unresolved. It is interesting to note how some of the WTO Members have reacted to such absence of regulation. For example, the controversial concept of anti-circumvention has been maintained or enhanced in most countries covered by the book, with the exception of Korea, Taiwan and (possibly) South Africa. D. Palmeter is skeptical whether the relevant U.S. provisions are permitted under the Agreement (p. 273). Another concept unadopted by WTO law, that of Community interest, has found its counterpart in the criterion of "necessity of protection" in Korean law. It is to be seen whether and to what extent these developments on the national level will affect future WTO regulations.

Apart from the above and despite the overall positive inspiration of the WTO Anti-Dumping Agreement, some of the national solutions still leave much to be desired. The author of the chapter on Australia notes that his country's procedures and laws are still characterized by lack of transparency and detail, contributing to an active approach to litigation by the parties (p. 69–70). In the case of the European Community, an obvious setback in comparison to the previous

rules is that anti-dumping measures can now be adopted by the Council by simple majority (previously, by qualified majority), which may lead to an increased use of anti-dumping actions (p. 119). In the case of Korea, no specific provisions for judicial review exist and "it is not clear against which government authority, and in which stage of the proceedings, administrative litigation may be filed" (p. 151).

Anti-dumping practice of the United States and Canada (and potentially Mexico) is affected by NAFTA, under which private parties from these countries may choose to submit challenges in anti-dumping matters to a binational panel. Accordingly, a brief chapter of the book is devoted to dispute settlement under NAFTA, outlining the basic principles of this regime. The statistics are impressive: since 1989 over 50 binational panels have been established to review anti-dumping and countervailing duty matters. Unfortunately, of these, only the *Softwood Lumber* dispute is discussed in some detail.

The aim of the book, as articulated by P. Mavroidis, has been achieved only partly. The discussion of the national regimes is in most cases thorough and informative, often accompanied by convenient procedural charts, but as concerns the comparison with international law (in particular, an assessment of compliance with the WTO Anti-Dumping Agreement), this complicated task has been largely left to the reader.

Joanna Gomuła

E.-U. PETERSMANN, ***The GATT/WTO Dispute Settlement System. International Law, International Organizations and Dispute Settlement***, Kluwer Law International 1997, pp. 247 and Annexes

This is a most welcome book in times when international economic law, and especially the law of the World Trade Organization, is gaining increasing attention. E.U. Petersmann is a well-known expert on GATT/WTO issues, author of numerous publications in this field, who has the advantage of being an insider of the Organization, having served for 15 years as its legal adviser and having participated in many GATT dispute settlement proceedings. The author is also an academic, which has been reflected in the book by his analytical approach to complex legal and economic issues. An example of the latter is the first Chapter, in which the WTO is presented as an element of the international legal order and in the context of major theories on international relations. The author discusses the "constitutional principles" of the law of international organizations, focusing on the objective rule of law principles, separation of powers, fundamental rights, necessity and proportionality of governmental restraints, democratic participation, and social justice. In his opinion, the WTO Agreement, adopted by 124 countries and the EC, is the "most important worldwide agreement since the U.N. Charter" (p. 45). It is, moreover, a "global integration agreement", which regulates international movements of goods, services, persons and related payments in an integrated manner, and thus contributes to a reduced fragmentation of the legal regulations of these areas. The author believes the following elements affect the constitutional functions of the WTO (p. 47–53): the single undertaking approach (all members are bound by the Uruguay Round Agreements, subject to only a few

exceptions), termination of the previously binding GATT (referred to as "GATT 1947" as distinct from the currently binding "GATT 1994"), the principle of legal primacy of the WTO Agreement over other international trade agreements, the structuring of the WTO institutions and decision-making powers so as to avoid mutually harmful, non-cooperative behavior, and emphasis on the worldwide legal guarantees of freedom, non-discrimination and rule of law. Chapter 1 ends with a (perhaps too optimistic) prediction that the Uruguay Round negotiations and its results may serve as a model for global reforms of the U.N. Charter.

Chapter 2 is of largely historical value and concerns the dispute settlement system of the GATT in the years 1948–1995. In this period, an evolution of this system may be noted: from a non-formalized application of the general GATT Articles XXII and XXIII to a significantly developed procedure, codified in a number of decisions and understandings adopted by the Contracting Parties. This is an example of "progressive transformation of traditionally «power-oriented» trade, monetary and other international policies into «rule-oriented» policies", which "constitutes one of the most important achievements of law and policy since World War II" (p. 84). This transformation resulted in the inclusion among the Uruguay Round Agreements of the Dispute Settlement Understanding ("DSU"), which establishes an integrated dispute settlement system of the WTO. The basic principles of the new regime are discussed in Chapter 5 of the book. In comparison to the previously binding procedures, the most notable features of the new regime include: the general applicability of the DSU to all WTO agreements (subject to some exceptions and to a number of special or additional rules and procedures relevant to individual agreements), the principle of "negative consensus" in the adoption of panel reports (a report is automatically adopted unless there is consensus not to adopt), and the establishment of an Appellate Body for the review issues of law covered in panel reports.

Two chapters (3 and 4) focus on specific topics involving WTO dispute settlement. Chapter 3 is devoted to the important problem of trade-related environmental measures, presented in the context of clarification and development of GATT/WTO law through its dispute settlement system. The application of these measures has been closely tied to Art. XX of GATT, which lists the general exceptions to GATT principles. E.U. Petersmann gives an overview of relevant panel reports issued in the 1980s, including the following cases: U.S. prohibition of imports of tuna, U.S. taxes on petroleum, and Canada's export restrictions on unprocessed herring and salmon. The presentation of GATT panel reports issued in this decade focuses on the well-known *Tuna-Dolphin* dispute and, as could be expected, ends with the *Reformulated Gasoline* case. The author is not free of criticism of the Appellate Body's reasoning and methods of interpretation in the latter case, but is of the opinion that overall its "conclusions are an important improvement over the previous GATT case-law relating to Article XX of the GATT" (p. 116). The Chapter closes with an interesting list of potential problems relating to trade-related environmental measures and a discussion of the relationship between GATT/WTO law and multilateral environmental agreements.

Chapter 4 deals with so-called non-violation and situation complaints under Art. XXIII of the GATT, which may be raised in circumstances where a benefit is nullified or impaired but no Member has failed to carry out its obligations. E.U. Petersmann has dealt with this topic in detail before, but his previous analyses are enriched by an interesting discussion of the specific solutions adopted in some of the Uruguay Round Agreements (the DSU, the Subsidies Agreement, the Agreement on Agriculture, GATS and the TRIPS Agreement). The problem of non-violation complaints has to this date been marginal: by the end of 1995, out of a total of 250 complaints, this basis was referred to in only 14 panel or working party proceedings. The author points out the "very broad scope of application" of both violation and non-violation

complaints (p. 175). He suggests that situation complaints be formally abolished, their bases being, in his opinion, vague and outdated.

An overview of the first experiences within the framework of the new regime is provided in Chapter 6. The author notes several characteristic features of its functioning to date, including the frequent recourse to the system and its active use by less-developed countries. He draws attention to the complex legal interrelationships among the various Uruguay Round Agreements, which is only partially resolved by an interpretative note giving primacy to the multilateral agreements on trade in goods over GATT 1994. Apart from discussing the application of the DSU to particular areas (trade in services, intellectual property rights, restrictive business practices, government procurement), E.U. Petersmann signals some vital legal problems, such as the relation between the legalization of the dispute settlement proceedings and the willingness of members to accept bilaterally agreed solutions, the relevance of *res judicata* in WTO litigation, the standard of review, and the exhaustion of local remedies rule. A slight drawback of this not always orderly but otherwise interesting and informative Chapter is the inter-mixing, without a clearly defined purpose, of old and recent practice. Moreover, contrary to the promise comprised in the title of the Chapter, the author refrains from revealing much of his views on the future of the system. However, this may be due to the fact that the future, as in any great experiment of such magnitude as the WTO, is simply difficult to predict.

The text is followed by useful annexes: listing reports issued under Article XXIII of the GATT 1947 and under the Tokyo Round Codes, as well as disputes initiated under the DSU. The texts of the DSU and other related documents are also attached.

Joanna Gomuła

E. VERMULST, P. WAER, *E.C. Anti-Dumping Law and Practice*, Sweet & Maxwell 1996, pp. 427 and Annexes

E. Vermulst and P. Waer are practicing lawyers who have been involved in many anti-dumping proceedings and published extensively on various issues in this field. This book, which deals with the anti-dumping law and practice of the European Community, is therefore a natural consequence of the authors' experience in this field. It is designed as "a handbook to E.C. anti-dumping law, as applied in practice" (p. 6). The book covers a period of 16 years (through March 6, 1996), which has allowed to take into account different phases of development of EC anti-dumping rules, including the most recent phase, influenced by the conclusion of the WTO Anti-Dumping Agreement.

The book is divided into three parts. Part 1 begins with a presentation of EC investigatory procedures (Chapter 2), in which the major players are the Commission (in particular, Directorate-General I), the Council of Ministers and an Advisory Committee, which consists of representatives of each Member State and a representative of the Commission as chairman. The European Parliament has no competencies in anti-dumping matters, and its involvement in such matters is limited to being a recipient of annual reports from the Commission. With respect to initiation of anti-dumping proceedings, it should be noted that the Commission's prevailing practice has been not to accept complaints against specific companies (selective

complaints), as opposed to complaints against all producers in a country. Another problem affecting initiation of anti-dumping proceedings is the test for negligible dumped imports, which in EC law differs from that of the WTO (under the former market share is decisive, under the latter, it is the share in total imports). The authors suggest that although the EC test will in most cases be more liberal, the Commission "presumably would apply the WTO test", if it proves otherwise in a particular matter (p. 27). One may ask, however, what would be the precise basis of the Commission's action in such situation. Chapter 2 also contains a section on verification procedures of information submitted in questionnaires (an EC practice which is, among others, distinct from U.S. practice), as well as a discussion of the procedural safeguards of interested parties.

Chapter 3 discusses protective measures applicable in cases of injurious dumping, including undertakings to increase prices or cease exports (approx. 1/3 of EC investigations are concluded in this way), as well as anti-dumping duties, which are imposed by regulation and, as a consequence, are directly applicable, without the necessity of implementing legislation. EC practice does not exclude the cumulation of anti-dumping duties and countervailing duties or quantitative restrictions.

Part 1 closes with a chapter on a very important topic, that is, judicial review in the EC. The authors note that "[a]fter initial hesitancy, the Court in recent cases seems to have established a comprehensive system of judicial review in anti-dumping (and anti-subsidy) cases" (p. 149). Unfortunately, the book does not really explain the principles on which this "comprehensive system" would be based. Related problems include: the hybrid nature of anti-dumping regulations (which are of normative character, but at the same have the effect of decisions of direct and individual concern to the parties), different legal bases for challenging anti-dumping decisions (of which Art. 173 is the most commonly used), and the scope of review under Art. 173(4). In the past, the Court seems to have focused on procedural issues, avoiding involvement in matters of substance. This may change following the award, in 1994, of jurisdiction in anti-dumping matters to the Court of First Instance.

After a presentation of procedural issues in Part 1, matters of substance relating to anti-dumping are discussed in Part 2. These include: dumping determination, injury determination and the notion of Community interest. Chapter 6 deals with the first of these problems, focusing on the construction of export price, the determination of normal value, and the comparison of these two values. Note should be taken of the concept of a single economic entity, developed by the Commission when investigating associated parties for the purposes of dumping determination. Specific regulations relate also to dumping from non-market economy countries. The authors have distinguished eight factors which the Commission takes into account when deciding whether a company in such country is sufficiently independent to be treated individually (as opposed to the one country/one duty rule), which include: the convertibility of earnings, the degree of foreign investment, the prices of raw materials, the bargaining power of employees and employers, the establishment of export prices, and the degree of control by the government over management (p. 207-208).

Chapter 7, devoted to injury determination, begins with an overview of the treatment by the Commission of the notion of "like product". Until 1984, the Commission interpreted this notion narrowly, but since then has demonstrated a tendency to disregard minor differences in physical characteristics of the products, in favor of their end-uses and substitutability, not necessarily in compliance with the WTO definition (p. 282 ff.). The authors point out other discrepancies with WTO regulations, which include different tests for decumulation (market share in the EC, volume of dumped imports in the WTO). The next chapter presents certain aspects of the calculation of injury margins.

Part 2 ends with a brief discussion of the criterion of Community interest (Chapter 9), a concept specific to the EC. The relevant factors considered here by the Commission (not always in a consistent manner) include: user and importer interests, competition considerations, maintaining and developing in the EC of crucial technologies and strategic industries, and political factors. The authors predict (p. 374) that this criterion will be of growing importance in the future.

Part 3 is composed of three chapters, dealing, respectively, with anti-circumvention measures, absorption and anti-absorption duties, and registration procedures. The first of the above problems is of particular importance, in view of the fact that anti-circumvention regulations have been excluded from the new WTO Anti-Dumping Agreement, thus raising the question whether the respective internal legislations are in compliance with the WTO. The authors do not take a decisive view on this matter, admitting only that "it could be argued" that EC anti-circumvention legislation violates WTO rules (p. 388). The propriety of anti-circumvention measures may soon be resolved by WTO dispute settlement bodies, as a result of a complaint brought by Korea against the United States.

The book contains 11 annexes, among them: overview of sunsetted anti-dumping proceedings in 1985-1995, list of Commission decisions on refund applications, overview of surrogate countries used in non-market economy proceedings in 1980-1995, list of administrative proceedings, and list of Court cases.

The book under review is not an easy book, but neither is the subject it concerns. However, it satisfies the goals of the authors: containing a multitude of technical and procedural details, it is a handbook which may be particularly useful to practitioners of EC anti-dumping law.

Joanna Gomuła

POLISH BIBLIOGRAPHY OF INTERNATIONAL LAW

Public International Law 1997

BOOKS

BIERZANEK REMIGIUSZ, SYMONIDES JANUSZ: *Prawo międzynarodowe publiczne* [Public International Law]. 5th ed. (changed and updated). Warszawa 1997, Wydawnictwo Prawnicze PWN, pp. 446, bibliogr.

BIOETYKA a prawa człowieka Wybór materiałów międzynarodowych [Bioethics and Human Rights. Selected International Instruments]. Introd. and elaborated by Tadeusz Jasudowicz. Toruń 1997; "Comer", pp. 57.

BISZTYGA ANDRZEJ: *Europejski Trybunał Praw Człowieka* [European Court of Human Rights]. Katowice 1997, Górnośląska Wyższa Szkoła Handlowa, pp. 340.

CZAPLIŃSKI WŁADYSŁAW: *Zmiany terytorialne w Europie Środkowej i Wschodniej i ich skutki międzynarodowoprawne (1990–1992)* [Territorial Changes in Central and Eastern Europe and their International Law Effects (1990–1992)]. Warszawa 1997, Wydawnictwo Naukowe "Scholar", Fundacja Promocji Prawa Europejskiego, pp. 251, sum., bibliogr.

DEMOKRACJA w stosunkach międzynarodowych [Democracy and International Relations]. Ed. and introd. by Edward Haliżak, Dariusz Popławski. Warszawa 1997, Wydawnictwo Naukowe "Scholar", pp. 115.

DYNIA ELŻBIETA: *Uznanie rządu w prawie międzynarodowym* [Recognition of Government in International Law]. Lublin 1997, UMCS, pp. 152, bibliogr.

FRANKOWSKA MARIA: *Prawo traktatów* [Law of Treaties]. Warszawa 1997, Szkoła Główna Handlowa, pp. 254.

GALSTER JAN, WITKOWSKI ZBIGNIEW: [In:] *Kompendium wiedzy o Unii Europejskiej* [Compendium of Information on the European Union]. 2nd ed. (changed and updated). Toruń 1997, TNOiK, pp. 194, bibliogr.

GIERTYCH JĘDRZEJ: *Polska i Niemcy. Granica polsko-niemiecka w świetle norm międzynarodowych* [Poland and Germany. Polish-German Frontier in the Light of International Norms]. Wrocław 1996, "Nortom", pp.195.

HOŁDA ZBIGNIEW: [In:] *Ochrona praw człowieka* [Protection of Human Rights]. Lublin 1996, UMCS, pp. 54.

IKANOWICZ CEZARY: *Protokół dyplomatyczny i organizacja służby zagranicznej RP* [Diplomatic Protocol and Organisation of Foreign Relations Service of the Republic of Poland]. Warszawa 1997, Prywatna Wyższa Szkoła Handlowa, pp. 159.

KANTOWICZ EWA: *Ochrona praw dziecka w kontekście działalności UNICEF* [Protection of the Rights of the Child in the Context of the Activities of UNICEF]. Warszawa 1996, "Constanti", pp. 188, bibliogr.

KAWECKA-WYRZYKOWSKA ELŻBIETA: *Stosunki Polski ze Wspólnotami Europejskimi od 1989 roku* [Relations between Poland and the European Communities since 1989]. Warszawa 1997, Szkoła Główna Handlowa, pp. 371.

KNYPL ZENON: *Wprowadzenie do prawa europejskiego* [Introduction into European Law]. Warszawa 1997, Centrum Europejskie UW, pp. 164.

KRUK MARIA: *Parlament Europejski. Traktaty i praktyka* [European Parliament. Treaties and Practice]. Warszawa 1997, Wydawnictwo Sejmowe, pp. 88.

KWIECIEŃ ROMAN: *Tożsamość Litwy, Łotwy i Estonii w świetle prawa międzynarodowego* [The Identity of Lithuania, Latvia and Estonia in the Light of International Law]. Warszawa 1997, Polska Fundacja Spraw Międzynarodowych, pp. 24.

ŁUKASZUK LEONARD: *Międzynarodowe prawo morza* [International Law of the Sea]. Warszawa 1997, Wydawnictwo Naukowe "Scholar", pp. 308, bibliogr.

MACHIŃSKA HANNA: *Rozwój prawa i instytucji Wspólnot Europejskich. Podstawy funkcjonowania Unii Europejskiej* [Development of Law and Institutions of the European Communities. Bases of Functioning of the European Union]. Warszawa 1997, Centrum Europejskie UW, pp. 118.

MALINOWSKA IZABELA: *Prawa człowieka i ich ochrona międzynarodowa* [Human Rights and their International Protection]. Warszawa 1996, "Elipsa", pp. 87.

MIĘDZYNARODOWE konflikty zbrojne a ustalenia Haskiej konwencji o ochronie dóbr kultury. Studia i materiały [International Armed Conflicts and Provisions of the Hague Convention on Protection of Cultural Goods. Studies and Materials]. Ed. by Leonard Łukaszuk, Wiesław Śmiałek, Dariusz Drewniacki. Warszawa 1997, Akademia Obrony Narodowej. pp. 245.

MIĘDZYNARODOWE prawo humanitarne. Wybrane zagadnienia ze szczególnym uwzględnieniem obowiązku jego krzewienia i upowszechniania [International Humanitarian Law. Selected Problems Including the Obligation of Information and Popularisation]. Ed. and introd. by Tadeusz Jasudowicz. Toruń 1997, TNOiK, pp. 187.

MIKOŁAJCZYK BARBARA: *Mniejszości w prawie międzynarodowym* [Minorities in International Law]. Katowice 1996, UŚl., pp. 161, bibliogr., sum.

ORGANIZACJE w stosunkach międzynarodowych. Istota – mechanizmy działania – zasięg [Organisations in International Relations. Essence – Mechanisms of Activity – Scope]. Ed. by Teresa Łoś-Nowak. Wrocław 1997, UWr., pp. 186.

PODRAZA ANDRZEJ: *Unia Europejska a Europa Środkowa i Wschodnia* [European Union and Central and Eastern Europe]. Lublin 1997, KUL, pp. 120.

PODSTAWOWE dokumenty Rady Europy z dziedziny polityki społecznej [Basic Documents of the Council of Europe in the Field of Social Policy]. Selected and elaborated by Remigiusz A. Henczel, Joanna Maciejewska. Warszawa 1997, Wydawnictwo Naukowe "Scholar", Fundacja Promocji Prawa Europejskiego, pp. 309.

POKÓJ i sprawiedliwość przez prawo międzynarodowe. Zbiór studiów z okazji 60 rocznicy urodzin Profesora Janusza Gilasa [Peace and Justice through International Law. Collected Essays in Honour of Professor J. Gilas on His 60th Birthday]. Ed. by Cezary Mik. Toruń 1997, TNOiK, pp. 421.

POLSKA – NATO. Wprowadzenie i wybór dokumentów 1990–1997 [Poland and the NATO. Introduction and Selected Documents 1990–1997]. Ed. by Janusz Stefanowicz. Documents selected by Jerzy Stańczyk. Warszawa 1997, Inst. Studiów Politycznych PAN, pp. 238.

POLSKA w Unii Europejskiej. Perspektywy, warunki, szanse i zagrożenia [Poland in the European Union: Perspectives, Conditions, Charges, Threats]. Ed. by Cezary Mik. Toruń 1997, TNOiK, pp. 313.

PRAWA człowieka w konfliktach zbrojnych. Rekonstrukcja międzynarodowego prawa humanitarnego [Human Rights in the Armed Conflicts. Reconstruction of International Humanitarian Law]. Ed. and introd. by Tadeusz Jasudowicz. Toruń 1997, TNOiK, pp. 199.

PRAWA człowieka w sytuacjach nadzwyczajnych ze szczególnym uwzględnieniem prawa i praktyki polskiej [Human Rights in the State of Emergency with Special Interest in the Polish Practice]. Ed. and introd. by Tadeusz Jasudowicz. Toruń 1997, TNOiK, pp. 176.

PRAWO międzynarodowe i wspólnotowe w wewnętrznym porządku prawnym [International Law and Community Law in the Municipal Legal Order]. Ed. and introd. by Maria Kruk. Warszawa 1997, Wydawnictwo Sejmowe, pp. 223 .

SITEK MAGDALENA: *Problemy ekologii w polityce prawnej i prawie Wspólnoty Europejskiej. Wkład do europejskiej kultury prawnej* [Ecological Problems in Legal Policy of European Community Law. Contribution to European Legal Culture]. Toruń 1997, "Wit-Graf", pp. 176, bibliogr., sum.

SOŁTYSIŃSKA ALEKSANDRA, CZUBIK PAWEŁ: *CEFTA: Środkowoeuropejska Strefa Wolnego Handlu. Komentarz do umowy międzynarodowej wraz z podaniem obecnie obowiązujących między stronami stawek celnych* [CEFTA: Central-European Free Trade Agreement. Comments to the International Agreement Including Current Tariffs]. Kraków 1997, "Audytoriat", pp. 280.

STUDIA prawno-europejskie [Studies on European Law]. Ed. by Michał Seweryński. Łódź 1996, UŁ, pp. 122.

TAJWAN w stosunkach międzynarodowych [Taiwan in International Relations]. Ed. by Edward Haliżak. Warszawa 1997, Wydawnictwo Naukowe "Scholar", pp. 148, bibliogr.

THEORY of International Law at the Threshold of the 21st Century. Essays in Honour of Krzysztof Skubiszewski. Ed. and introd. by Jerzy Makarczyk. The Hague–London–Boston 1996, Kluwer Law International, Wydawnictwo Naukowe "Scholar", pp. 1007.

UNIA Europejska [European Union]. Lucjan Ciamaga, Ewa Latoszek, Krystyna Michałowska-Gorywoda, Leokadia Oręziak, Eufemia Teichmann. Warszawa 1997, PWN, pp. 487, bibliogr.

ZIĘTEK AGATA: *Międzynarodowy status Hongkongu* [International Status of Hong Kong]. Lublin 1997, UMCS, pp. 210, bibliogr.

ARTICLES

ABI-SAAB GEORGES M.: "De la sanction en droit international. Essai de clarification". [In:] *Theory...*, pp. 61–78.

ABO SAEID TAREK: "Autonomia palestyńska a prawo narodów do samostanowienia" [Palestinian Autonomy and Right of Self-Determination]. *Humanistyczne Zeszyty Naukowe Prawa Człowieka* 1997, No. 4, pp. 140–143.

ADAMIEC JOLANTA: "Przyszłość Unii Europejskiej po Konferencji Międzyrządowej" [Future of the European Union after the Intergovernmental Conference]. *Sprawy Międzynarodowe* 1996, No. 3/4, pp. 113–128.

ADAMIEC JOLANTA: "Szczyt w Dublinie o rewizji traktatów wspólnotowych" [Dublin Summit on the Revision of European Treaties]. *Wspólnoty Europejskie* 1997, No. 2, pp. 12–17.

ALDRICH GEORGE H.: "Individuals as Subjects of International Humanitarian Law". [In]: *Theory...*, pp. 851–858.

AMBROZIEWICZ PIOTR: "Klucze do Unii. Art. 90 i art. 37 Traktatu Rzymskiego" [Key to the Union. Articles 90 and 37 of the Treaty of Rome]. *Gazeta Sądowa* 1997, No. 22, pp. 3; No. 23, pp. 3.

AMERASINGHE CHITTHARANJAN F.: "International Law and the Concept of Law". [In:] *Theory...*, pp. 79–88.

ANTONIEWICZ PRZEMYSŁAW: "Stosunki z Austrią" [Relations with Austria]. *Rocznik Polskiej Polityki Zagranicznej* 1996, pp. 163–168.

ANTONOWICZ LECH: "Samostanowienie narodów jako zasada prawa międzynarodowego" [Self-Determination of Peoples as a Principle of International Law]. *Annales UMCS* 1996, Sectio G: *Ius*, No. 43, pp. 69–84, sum.

ARNOLD RAINER: "Prawo europejskie – bieżący raport" [European Law – Current Report]. *Monitor Prawniczy* 1997, No. 2, pp. 86–89; No. 4, pp. 169–174; No. 6, pp. 257–259; No. 8, pp. 334–337.

AULEYTNER ALEKSANDRA: "Traktat z Amsterdamu" [Treaty of Amsterdam]. *Monitor Prawniczy* 1997, No. 11, pp. 465.

BACH DOBROCHNA: "Uwagi na tle opinii doradczej MTS w sprawie legalności groźby lub użycia broni jądrowej" [On the Advisory Opinion of the International Court of Justice concerning the Legality of Threat of Using Nuclear Weapons]. *Państwo i Prawo* 1997, No. 9, pp. 46–57.

BANACH MARIAN: "Umowy międzynarodowe w dziedzinie ochrony środowiska – przyczynek do systematyki umów" [International Agreements in the Area of Environment Protection – Contribution to Agreements Systematisation]. *Zeszyty Naukowe AE Kraków* 1996, No. 481, pp. 5–15, sum.

BARDONNET DANIEL: "Quelques observations sur le recours au réglement juridictionnel des différends interétatiques". [In:] *Theory...*, pp. 737–739.

BARTA JANUSZ, MARKIEWICZ RYSZARD: "Zobowiązania traktatowe Polski w zakresie ochrony praw autorskich i praw pokrewnych" [International Obligations of Poland in the Field of Protection of Copyrights and Corresponding Rights]. *Rocznik Polskiej Polityki Zagranicznej* 1996, pp. 99–106.

BERNATOWICZ GRAŻYNA, KUPICH ANDRZEJ: "Polska w strukturach regionalnych" [Poland in Regional Structures]. *Rocznik Polskiej Polityki Zagranicznej* 1996, pp. 57–66.

BERNATOWICZ GRAŻYNA: "Reforma instytucji Unii Europejskiej" [Reform of European Union Institutions]. *Sprawy Międzynarodowe* 1997, No. 3, pp. 45–58.

BERNATOWICZ GRAŻYNA: "Stosunki z krajami Półwyspu Iberyjskiego" [Relations with Countries of the Iberian Peninsula]. *Rocznik Polskiej Polityki Zagranicznej* 1996, pp. 157–162.

BERNHARDT RUDOLF: "*Ultra vires* Activities of International Organizations". [In:] *Theory...*, pp. 599–610.

BIAŁORUCKI BOHDAN: "Polska w GATT i WTO" [Poland in GATT and WTO]. *Sprawy Międzynarodowe* 1997, No. 2, pp. 75–96.

BIELEŃ STANISŁAW: "Blaski i cienie członkostwa w Pakcie" [Ups and Downs of Membership in the Pact]. *Dziś* 1997, No. 6, pp. 52–59.

BIELEŃ STANISŁAW: "Uwarunkowania przystąpienia Polski do NATO" [Terms of Accession of Poland to NATO]. *Studia Europejskie* 1997, No. 1, pp. 117–134.

BOSSUYT MARC: "Overview of Council of Europe Standards on the Status of Aliens, Including Refugees and Asylum-Seekers". *Polish Yearbook of International Law* 1995/1996, vol. 22, pp. 37–48.

BOUTROS-GHALI BOUTROS: "Pour un droit international de la démocratie". [In:] *Theory...*, pp. 99–108.

BROMS BENGT: "The Caveat Ruling in Case A 18". [In:] *Theory...*, pp. 753–762.

BROWNLIE IAN: "Some Questions Concerning the Applicable Law in International Tribunals". [In:] *Theory...*, pp. 763–770.

BRZEZIŃSKI ANDRZEJ M.: "Geneza międzynarodowej Konwencji o wykorzystaniu radiofonii w interesie pokoju z 23 września 1936 r." [Origin of International Conference on Use of Broadcasting for Peace of 23 September 1936]. [In:] *Pokój i sprawiedliwość...*, pp. 39–50.

BUKHARI SYLVIE: "Prawo do ingerencji czy prawo do pomocy humanitarnej" [Rights to Intervention or Right to Humanitarian Assistance]. *Communio* 1996, No. 4, pp. 54–67.

BURDEAU GENEVIÈVE: "Les organisations internationales, entre gestion publique et gestion privée". [In:] *Theory...*, pp. 611–624.

BURGER WIESŁAW P.P.: "Zachodnia granica Polski w procesie jednoczenia się Niemiec i na konferencji '2+4'" [Western Boundary of Poland in German Unification and 2+4 Conference]. *Przegląd Zachodnio-Pomorski* 1996, No. 3, pp. 47–63.

BYRSKA MAŁGORZATA: "Bazy danych w Dyrektywie Unii Europejskiej oraz propozycje zmian w polskiej ustawie o prawie autorskim i prawach pokrewnych" [Databases in the European Union Directive and Proposal of Amendments to the Polish Law on Copyright and Neighbouring Rights]. *Przegląd Prawa Handlowego* 1997, No. 8, pp. 1–9.

CAFLISCH LUCIUS: "Réflexions sur la création d'une cour criminelle internationale". [In:] *Theory...*, pp. 859–890.

CAHIER PHILIPPE: "Le role du juge dans l'élaboration du droit international". [In:] *Theory...*, pp. 353–366,

CHARPENTIER JEAN: "Engagements unilatéraux et engagements conventionnels: différences et convergences". [In:] *Theory...*, pp. 367–380.

CHOJNOWSKA ALDONA: "Stosunki z Ukrainą" [Relations with Ukraine]. *Rocznik Polskiej Polityki Zagranicznej* 1996, pp. 133–140.

CHYTROWSKI WOJCIECH: "Obrona ludzkiej godności podczas konfliktu zbrojnego i stanów nadzwyczajnych" [Protection of Human Dignity in Armed Conflict and States of Emergency]. [In:] *Międzynarodowe prawo humanitarne...*, pp. 13–42.

CIECHANOWICZ JANINA: "Harmonizacja polskiego prawa ochrony środowiska z prawem Wspólnot Europejskich na przykładzie nadzwyczajnych zagrożeń środowiska" [Harmonisation of Polish Environmental Protection Law with the Law of the European Communities Exemplifying an Extreme Menace to Environment]. *Przegląd Prawa Europejskiego* 1997, No. 1, pp. 63–73, sum.

CIECHANOWICZ JANINA: "Implementacja konwencji helsińskich o ochronie środowiska Morza Bałtyckiego w prawie polskim" [Implementation of Helsinki Conventions on Protection of Environment of the Baltic Sea in Polish Law]. [In:] *Pokój i sprawiedliwość...*, pp. 51–60.

CIECHANOWICZ JANINA: "Ratyfikacja Konwencji o różnorodności biologicznej z 1992 roku w świetle harmonizacji polskiego ustawodawstwa z wymogami Unii Europejskiej" [Ratification of 1992 Convention on Biological Diversity in Relation to Harmonisation of Polish Legislation with the European Union]. [In:] *Polska w UE...*, pp. 207–334, sum.

CIECHANOWICZ JANINA: "Zasada ekorozwoju w Konwencji o różnorodności biologicznej" [Principle of Ecodevelopment in the Convention on Biological Diversity]. *Państwo i Prawo* 1997, No. 6, pp. 42–53.

CIECHAŃSKI JERZY: "Znaczenie ONZ dla utrzymania pokoju i bezpieczeństwa międzynarodowego w świetle układu z Dayton" [Role of the U.N. for Maintenance of Peace and International Security in the Light of the Dayton Peace Accord]. *Sprawy Międzynarodowe* 1996, No. 2, pp. 71–90.

COLLINS STEPHEN: "Rozbieżność stanowisk brytyjskiego i niemieckiego w sprawie rozszerzenia Unii Europejskiej na wschód" [Discrepancy between British and German Positions towards Enlargement of the European Union to the East]. *Sprawy Międzynarodowe* 1997, No. 4, pp. 47–60.

COTTIER BERTIL, RIEBEN SCHIZAS ANNE PP.: "From the Free Trade Agreements with EFTA Countries to the European Agreements with the New Democracies: Old Wine in New Bottles?". *Acta UWr. Przegląd Prawa i Administracji* 1997, No. 37, pp. 31–45.

CREMERS PIET-HEIN A.J.: "Prawa człowieka a ich wykonanie" [Human Rights and their Implementation]. *Jurysta* 1997, No. 7, pp. 13–16.

CZAPLIŃSKI WŁADYSŁAW: "Akty prawne Wspólnot Europejskich w orzecznictwie Trybunału Sprawiedliwości" [Legal Acts of European Communities in Jurisprudence of the Court of Justice]. [In:] *Prawo międzynarodowe...*, pp. 188–202.

CZAPLIŃSKI WŁADYSŁAW: "Czy piłka nożna rządzi się własnymi prawami?" [Is Football Governed by its Own Special Rules?]. (Comment to the *Bosman* Case) *Przegląd Prawa Europejskiego* 1997, No. 1, pp. 107–111.

CZAPLIŃSKI WŁADYSŁAW: "Zasada równouprawnienia płci w orzecznictwie Europejskiego Trybunału Sprawiedliwości" [Principle of Sex Equality in Jurisprudence of the European Court of Justice]. [In:] *Wokół problemów zawodowego równouprawnienia kobiet i mężczyzn*, Warszawa 1997, Wydawnictwo Naukowe "Scholar", pp. 29–44.

CZAPLIŃSKI WŁADYSŁAW: "Zasada sprawiedliwości w międzynarodowym prawie sukcesji państw" [Principle of Equity in International Law of State Succession]. [In:] *Pokój i sprawiedliwość...*, pp. 61–72.

CZUBIK PAWEŁ: "Ograniczenia funkcji czynności notarialnych konsula RP w świetle polskiego prawa konsularnego na tle uregulowań prawa międzynarodowego publicznego" [Diminishing of Notarial Duties and Activities of the Polish Consul According to International Law and Polish Consular Law]. *Rejent* 1997, No. 10, pp. 55–74.

CZYKWIN ELŻBIETA: "Białoruska mniejszość narodowa w Polsce i węgierska na Słowacji" [Belarussian Minority in Poland and Hungarian Minority in Slovakia]. *Test* 1996, No. 1, pp. 75–102.

D'AMATO ANTHONY: "Purposeful Ambiguity as International Legal Strategy: The Two China Problem". [In:] *Theory...*, pp. 109–122.

DARANOWSKI PIOTR: "Kilka uwag o prawach jednostki w Unii Europejskiej/Wspólnocie Europejskiej" [Some Remarks on the Rights of Individual in the European Union/European Communities]. [In:] *Studia prawno-europejskie...*, pp. 80–97.

DARANOWSKI PIOTR: "ONZ-owski system ochrony praw człowieka" [U.N. System of Protection of Human Rights]. [In:] *Szkoła praw człowieka*, Warszawa 1996, Helsińska Fundacja Praw Człowieka, pp. 123–136.

DAUSES MANFRED A., STURM MICHAEL: "Prawne podstawy ochrony konsumenta na wewnętrznym rynku Unii Europejskiej" [Legal Bases of Consumer Protection in Internal Market of the European Union]. *Kwartalnik Prawa Prywatnego* 1997, No. 1, pp. 33–57.

DEGAN VLADIMIR-DJURO: "Some Objective Features in Positive International Law". [In:] *Theory...*, pp. 123–146.

DETTER INGRID: "The Effect of Resolutions of International Organisations". [In:] *Theory...*, pp. 381–392.

DROZD ANDRZEJ: "Międzynarodowe organizacje muzułmańskie (wybrane zagadnienia prawnomiędzynarodowe)" [International Moslem Organisations. Selected International Legal Problems]. *Ruch PES* 1997, No. 1, pp. 27–43, sum.

DRZEMCZEWSKI ANDRZEJ, NOWICKI MAREK A.: "Europejska Konwencja Praw Człowieka a Polska cztery lata po ratyfikacji" [European Convention on Human Rights and Poland Four Years After Ratification]. *Lithuania* 1997, No. 1/2, pp. 147–168.

DUMAŁA ANDRZEJ: "The European Union and the Countries of East-Central Europe". [In:] *The Future of East-Central Europe*. Lublin 1996, UMCS, pp. 46–56.

DUPUY RENÉ, J.: "Formalisme juridique et Cour internationale de justice". [In:] *Theory...*, pp. 393–402,

"EUROPEJSKI Komitet Ubezpieczeń w dobie transformacji rynku ubezpieczeniowego" [European Insurance Committee and Transformation of Insurance Market]. Prep. by Anna Tulińska. *Prawo Asekuracyjne* 1997, No. 2, pp. 53–67.

FITZMAURICE MALGOSIA: "The Contribution of Environmental Law to the Development of Modern International Law". [In:] *Theory ...*, pp. 909–926.

FLEMMING MARIAN: "Status prawny żołnierzy na obcym terytorium" [Legal Status of Soldiers in Foreign Territory]. *Wojskowy Przegląd Prawniczy* 1997, No. 1, pp. 3–18.

FLEMMING MARIAN: "Traktowanie polskich jeńców wojennych przez Niemcy i ZSRR w czasie II wojny światowej a prawo międzynarodowe" [Treatment of Polish Prisoners of War by Germany and U.S.S.R. during Second World War]. *Wojskowy Przegląd Prawniczy* 1997, No. 3/4, pp. 15–29.

FROWEIN JOCHEN ABR.: "Reservations and the International Public Order". [In:] *Theory...*, pp. 403–412.

FUCHS DARIUSZ: "Podstawy prawne działalności ubezpieczeniowej na Europejskim Rynku Wewnętrznym a projekt dyrektywy o umowie ubezpieczenia" [Legal Basis of Insurance Activities on the Euromarket and Draft of Insurance Contract Directive]. *Rejent* 1997, No. 10, pp. 75–97.

GADKOWSKI TADEUSZ: "Zasada dobrego sąsiedztwa w międzynarodowym prawie atomowym" [Principle of Good Neighbourhood in International Nuclear Law]. [In:] *Pokój i sprawiedliwość...*, pp. 89–102.

GELEWSKI TADEUSZ M.: "Uzbrojenie obronne statku handlowego w konfliktach zbrojnych na morzu w świetle prawa i praktyki" [Defensive Weapons of Commercial Ships in Armed Conflicts on Sea in Light of Law and Practice]. [In:] *Pokój i sprawiedliwość...*, pp. 109–126.

GELLER PAUL E.: "Własność intelektualna na rynku światowym – wpływ postanowień TRIPS w sprawie rozstrzygania sporów" [Intellectual Property on World Market – Influence of TRIPS Agreements on Dispute Settlement]. *Zeszyty Naukowe UJ Prace z Wynalazczości i Ochrony Własności Intelektualnej* 1997, No. 68, pp. 9–27.

GILAS JANUSZ: "Liga Narodów a ONZ" [League of Nations and United Nations]. *Zbliżenia Polska–Niemcy* 1996, No. 2, pp. 27–36, Zsf.

GILAS JANUSZ: "The Association of Poland with European Community. A Political Interpretation of Economic Treaties". [In:] *The Future...*, pp. 363–368.

GŁUSZENIA CEZARY: "Czystki etniczne – nowe wyzwanie dla międzynarodowego prawa humanitarnego" [Ethnic Cleansing – New Challenge for International Humanitarian Law]. [In:] *Międzynarodowe prawo humanitarne...*, pp. 65–88.

GOŁEMBSKI FRANCISZEK: "Stosunki z Wielką Brytanią" [Relations with Great Britain]. *Rocznik Polskiej Polityki Zagranicznej* 1996, pp. 147–150.

GOMUŁA JOANNA: "Dispute Settlement under Association Agreements with Central and Eastern European States". *Polish Yearbook of International Law* 1995/1996, vol. 22, pp. 107–128.

GOMUŁA JOANNA: "Funkcjonowanie systemu rozstrzygania sporów w ramach Światowej Organizacji Handlu" [Functioning of Dispute Settlement System in the Framework of World Trade Organisation]. *Państwo i Prawo* 1997, No. 7, pp. 43–56.

GÓRKA MACIEJ: "Sankcja we wspólnotowym prawie konkurencji" [Sanctions in Community Competition Law]. [In:] *Pokój i sprawiedliwość...*, pp. 127–140.

GÓRKA MACIEJ: "Zasada odpowiedzialności odszkodowawczej państwa za naruszenia prawa wspólnotowego" [Principle of Liability of State for Damages for Breach of Community Law]. *Przegląd Prawa Europejskiego* 1997, No. 1, pp. 32–40, sum.

GÓRSKI MAREK: "Prawo międzynarodowe a ochrona warstwy ozonowej" [International Law and Protection of Ozon Stratum]. *Studia Prawno-Ekonomiczne* 1997, No. 55, pp. 79–90, sum.

GRABOWSKA GENOWEFA: "Prawo międzynarodowe a prawo wewnętrzne" [International Law and Domestic Law]. [In:] *Małżeństwo w prawie świeckim i w prawie kanonicznym* [Marriage in Secular and Canon Law]. Katowice 1996, Instytut Wymiaru Sprawiedliwości przy Sądzie Wojewódzkim, pp. 139–146.

GRAŚ ANDRZEJ: "Możliwości kontrolne Trybunału Europejskiego w II filarze Unii Europejskiej" [Control Competence of the European Court of Justice in Respect to the Second Pillar of the European Union]. *Przegląd Prawa Europejskiego* 1997, No. 1, pp. 11–19, sum.

GROEN JAMES: "The Canadian Province of Alberta's International Relations with Russia: An Explanation for its Intensity". *Acta UWr. Przegląd Prawa i Administracji* 1997, No. 36, pp. 101–120.

GROEN JAMES P.: "Intergovernmental Relations and the International Activities of Ontario and Alberta". *Acta UWr. Prawo* 1996, No. 253, pp. 87–91, sum.

GRONOWSKA BOŻENA: "Formalno-organizacyjne przesłanki korzystania z derogacji w dziedzinie ochrony praw człowieka. Kontrola międzynarodowa" [Formal and Organisational Premises of Deroga-

tion in Human Rights Protection. International Supervision]. [In:] *Prawa człowieka w sytuacjach...*, pp. 27–36,

GROSSFELD BERNHARD: "Europäische Identität aus juristischer Sicht". [In:] *Księga pamiątkowa ku czci Profesora Leopolda Steckiego* [Commemorative Book in Honour of Prof. Leopold Stecki]. Toruń 1997, TNOiK, pp. 19–28.

GRZEŚKOWIAK ALICJA: "Zasada równości kobiet i mężczyzn na forum Zgromadzenia Parlamentarnego Rady Europy" [Principle of Equality of Women and Men within the Parliamentary Assembly of the Council of Europe]. *Ethos* 1995, No. 1, pp. 57–75.

HARRIS GEOFFREY: "Rola Parlamentu Europejskiego w procesie rozszerzania Unii Europejskiej" [Role of European Parliament in EU Enlargement]. *Studia Europejskie* 1997, No. 1, pp. 37–56.

HEJDUK MAŁGORZATA, KOŚNIKOWSKI ANDRZEJ: "Komitety i komitologia w procesie kształtowania polityki wspólnotowej" [Committees and Comitology in Establishing Community Policy]. *Wspólnoty Europejskie* 1997, No. 12, pp. 15–17.

HERMANOWSKI JAROSŁAW: "Uwagi UNCITRAL dotyczące organizacji postępowania arbitrażowego" [UNCITRAL Rules concerning the Organisation of Arbitral Proceedings]. *Prawo Spółek* 1997, No. 9, pp. 46–57.

HIGGINS ROSALYN: "Some Observations on the Inter-Temporal Rule in International Law". [In:] *Theory...*, pp. 173–182.

JABŁOŃSKI JAROSŁAW: "Działania Międzynarodowego Komitetu Czerwonego Krzyża" [Activities of the International Red Cross Committee]. [In:] *Międzynarodowe prawo humanitarne...*, pp. 57–63,

JANUSZ GRZEGORZ: "Prawa mniejszości narodowych, etnicznych i językowych" [Rights of National, Ethnic and Linguistic Minorities]. [In:] *Szkoła praw...*, pp. 292–307.

JASIECKI KRZYSZTOF: "Wpływ instytucjonalizacji powiązań międzynarodowych na procesy transformacji ustrojowej w Europie Środkowej i Wschodniej" [Influence of the Institutionalisation of International Connections upon System Transformation in Central and Eastern Europe]. *Studia Europejskie* 1997, No. 1, pp. 57–72.

JASUDOWICZ TADEUSZ: "Europejska Konwencja Bioetyczna na tle międzynarodowego systemu normatywnego" [European Convention on Bioethics and the International Normative System]. [In:] *Księga pamiątkowa...*, pp. 51–78,

JASUDOWICZ TADEUSZ: "Nauczanie i upowszechnianie praw człowieka oraz prawa humanitarnego. Wypisy z dokumentów międzynarodowych" [Teaching and Dissemination of Human Rights and Humanitarian Law. Extracts from International Documents]. [In:] *Międzynarodowe prawo humanitarne...*, pp. 169–175.

JASUDOWICZ TADEUSZ: "O zasadach ogólnych prawa uznanych przez narody cywilizowane – garść refleksji" [On General Principles of Law Recognised by Civilised Nations – Some Reflections]. [In:] *Pokój i sprawiedliwość...*, pp. 141–162.

JASUDOWICZ TADEUSZ: "Obowiązek krzewienia międzynarodowego prawa humanitarnego. W poszukiwaniu optymalnego modelu jego realizacji" [Duty to Disseminate International Humanitarian Law. Looking for an Optimal Model of Implementation]. [In:] *Międzynarodowe prawo humanitarne...*, pp. 97–127.

JENNINGS SIR ROBERT: "International Lawyers and the Progressive Development of International Law". [In:] *Theory...*, pp. 413–424.

JERZMAŃSKI JAN: "Gospodarka odpadami niebezpiecznymi w prawie Unii Europejskiej – wnioski dla Polski" [Dangerous Waste in EU Law – Conclusions for Poland]. *Prawo i Środowisko* 1997, No. 2, pp. 11–15.

KAWECKA-WYRZYKOWSKA ELŻBIETA: "Wyniki Konferencji Międzyrządowej a członkostwo Polski w Unii Europejskiej" [Results of Intergovernmental Conference and Poland's Membership in EU]. *Wspólnoty Europejskie* 1997, No. 9, pp. 22–27.

KNYPL ZENON: "Status prawny portów morskich Unii Europejskiej" [Legal Status of Maritime Ports in the European Union]. [In:] *Przekształcenia własnościowe w gospodarce morskiej* [Ownership Transformations in the Maritime Economy]. Sopot 1997, Wydawnictwo Prawnicze "Lex", pp. 275–293.

KOHL ALPHONSE: "Ujednolicenie europejskiego prawa sądowego a perspektywa wejścia Polski do Wspólnoty Europejskiej" [Unification of European Judicial Law and Perspective of Poland's Accession to the European Community]. [In:] *Jednolitość prawa sądowego cywilnego a jego odrębności krajowe* [Uniformity of Civil Court Law and its Domestic Distinctness]. Lublin 1997, UMCS, pp. 53–58.

KOLASA JAN: "On the Procedural and Organizational Law Adopted by the Organs of the European Union". [In:] *Theory...*, pp. 625–642.

KOOIJMANS PETER H.: "Some Thoughts on the Relation between Extra-Legal Agreements and the Law-Creating Process". [In:] *Theory...*, pp. 425–438.

KORBUTOWICZ TERESA: "Porozumienia poziome w prawie i praktyce Europejskiej Wspólnoty" [Horizontal Agreements in Law and Practice of the European Community]. *Acta UWr. Ekonomia* 1996, No. 2, pp. 55–87.

KORINEK KARL, HOLOUBEK MICHAEL: "Auf dem Weg zu einem Europäischen Grundrechtsstandard". *Acta UWr. Prawo* 1997, No. 257, pp. 147–157.

KOZIŃSKI MIROSŁAW H.: "Tryb rozstrzygania międzynarodowych sporów inwestycyjnych z udziałem państwa, jako forma gwarancji dla inwestorów zagranicznych" [Participation of the State in the Settlement of International Investment Disputes as a Form of Guarantee for Foreign Investors]. [In:] *Pokój i sprawiedliwość...*, pp. 163–192.

KRANZ JERZY: "Réflexions sur la souveraineté". [In:] *Theory...*, pp. 183–214.

KRÓLIKOWSKA-OLCZK MARIA: "Problematyka pomocy państwa dla podmiotów gospodarczych w świetle prawa Wspólnoty Europejskiej" [The Problems of State Aid to the Economic Subjects in the Light of European Community Law]. [In:] *Studia prawno-europejskie...*, pp. 115–122.

KUSIAK RENATA: "Możliwości prawne transgranicznej współpracy samorządowej w świetle konwencji i umów zawartych przez Polskę" [Legal Possibilities for Self-government Transboundary Cooperation in the Light of Conventions and Agreements Concluded by Poland]. *Acta UWr. Przegląd Prawa i Administracji* 1997, No. 38, pp. 119–126,

KWIECIEŃ ROMAN: "Prawo międzynarodowe a porządek prawny państwa. (Zagadnienia teoretyczne)" [International Law and Domestic Legal Order. Theoretical Issues]. *Studia Prawnicze* 1997, No. 3/4, pp. 51–91.

LASOK DOMINIK: "Pojęcie i zakres prawa gospodarczego Unii Europejskiej" [Notion and Scope of Economic Law of the European Union]. [In:] *Gospodarka – Administracja – Samorząd terytorialny* [The Economy – Administration – Territorial Self-government]. Poznań 1997, UAM, pp. 233–248.

LASOK DOMINIK: "Porządek prawny Wspólnoty i Unii Europejskiej" [Legal Order of the Community and of the European Union]. *Państwo i Prawo* 1997, No. 3, pp. 22–29.

LAUTERPACHT ELIHU: "The Juridical and the Meta-Juridical in International Law". [In:] *Theory...*, pp. 215–234.

LEWOCKA-SZCZEŚNIAK AGNIESZKA: "Ochrona konkurencji a umowy franchisingu na tle postanowień traktatu europejskiego (zastosowanie art. 85(3) traktatu do kategorii umów franchisingu)" [Protection of Competition and Franchising Contracts in the Light of the European Treaty (Application of Art.85(3) to Franchising Contracts]. *Przegląd Ustawodawstwa Gospodarczego* 1997, No. 5, pp. 11–15.

LISSOWSKI OLGIERD: "Maquiladora i nafta. Prawne i ekonomiczne zagadnienia współpracy transgranicznej USA–Meksyk" [Maquiladora and Oil. Legal and Economic Problems of Transboundary Cooperation USA–Mexico]. *Przegląd Zachodni* 1996, No. 4, pp. 91–109.

LUCHTERHANDT OTTO: "Integrationskräfte im Separatismus Russlands". [In:] *Księga pamiątkowa...*, pp. 79–87.

LUKASHUK IGOR I.: "Customary Norms in Contemporary International Law". [In:] *Theory...*, pp. 487–508.

ŁASKI PIOTR: "Uwagi na temat sukcesji państw i sukcesji rządów w świetle prawa międzynarodowego" [Remarks on Succession of States and Succession of Governments in the Light of International Law]. *Zeszyty Naukowe ATR Bydgoszcz. Nauki Społeczne* 1996, No. 26, pp. 17–26, sum.

ŁASKI PIOTR: "Zasiedzenie w prawie międzynarodowym" [Acquisitive Prescription in International Law]. *Annales UMCS* 1996, No. 43, pp. 297–308, sum.

ŁUKASZUK LEONARD: "Międzynarodowa ochrona własności intelektualnej – główne elementy systemu i nowe problemy" [International Protection of Intellectual Property – Fundamental Elements of the System and New Problems]. [In:] *Pokój i sprawiedliwość...*, pp. 209–228.

ŁUKASZUK LEONARD: "New Forms of International Co-operation and New Concepts of Security". [In:] *The Future...*, pp. 235–242.

MACHIŃSKA HANNA: "Zasada równości kobiet i mężczyzn w prawie Unii Europejskiej" [Principle of Equality of Women and Men in the Law of European Union]. [In:] *Wokół problemów...*, pp. 11–28.

MAJEWSKA-JURCZYK BARBARA: "Określenie rynku w prawie antymonopolowym (na przykładzie orzecznictwa Komisji Unii Europejskiej i Europejskiego Trybunału Sprawiedliwości)" [Determining the Market in Antimonopoly Law in the Decisions of the Commission of the European Union and European Court of Justice]. *Acta UWr. Przegląd Prawa i Administracji* 1997, No. 37, pp. 127–141.

MAKARCZYK JERZY: "The International Judical Function: Some Reflections". [In:] *Theory...*, pp. 787–803.

MASTERNAK-KUBIAK MAŁGORZATA: "Zwyczaj i prawo zwyczajowe" [Custom and Customary Law]. [In:] *Prawo międzynarodowe...*, pp. 44–53.

MATEY MARIA: "Praca i polityka socjalna w regulacjach europejskich" [Labour and Social Policy in European Regulations]. [In:] *Nowy ład pracy w Polsce i w Europie* [New Labour Order in Poland and Europe]. Warszawa 1997, Wydawnictwo Naukowe "Scholar", pp. 133–181.

MCWHINNEY EDWARD: "The International Court and Judicial Law-Making. Nuclear Tests Revisited". [In:] *Theory...*, pp. 487–508.

MEDNIS ARWID: "Ochrona danych osobowych w konwencji Rady Europy i dyrektywie Unii Europejskiej" [The Protection of Personal Data under the Convention of the Council of Europe and under the Directive of the European Union]. *Państwo i Prawo* 1997, No. 6, pp. 29–41.

MENKES JERZY: "Od współpracy policyjnej do «przestrzeni wolności, bezpieczeństwa i sprawiedliwości»" [From Police Cooperation to an Area of Freedom, Security and Justice]. *Sprawy Międzynarodowe* 1997, No. 3, pp. 59–78.

MENKES JERZY: "Poszerzenie UE a II i III filar integracji – perspektywy, zagrożenia, warunki" [Enlargement of the EU in the Context of II and III Pillars of Integration – Projects, Threats and Conditions]. [In:] *Polska w UE...*, pp. 33–37, sum.

MENKES JERZY: "Przystąpienie Polski – rozszerzenie NATO (aspekty polityczno-prawne)" [Poland's Accession –Enlargement of the NATO (Political and Legal Aspects)]. [In:] *Pokój i sprawiedliwość...*, pp. 229–260.

MEYER TIM DE, COWAN CHARLES: "Removing International Trade Barriers After the Uruguay Round: Domestic Action in the Law of the European Union and the United States". *Polish Yearbook of International Law* 1995/1996, vol. 22, pp. 129–155.

MICHALSKA ANNA: "O potrzebie nowej traktatowej regulacji kompetencji Komitetu Praw Człowieka" [On the Need of New Treaty Regulation of Competence of the Human Rights Committee]. [In:] *Pokój i sprawiedliwość...*, pp. 261–272.

MICHALSKA ANNA: "Rada Europy w obronie mniejszości narodowych" [Council of Europe in Defence of National Minorities]. *Sprawy Narodowościowe* 1996, No. 1, pp. 83–90.

MICHAŁEK JAN J.: "WTO – nowy światowy ład ekonomiczny?" [WTO – New International Economic Order?]. *Sprawy Międzynarodowe* 1996, No. 2, pp. 47–70.

MICHOŃSKI ARKADIUSZ: "Reforma administracyjna w Komisji Europejskiej" [Administrative Reform in the European Commission]. *Wspólnoty Europejskie* 1997, No. 11, pp. 4–7.

MIK CEZARY: "Formuła Keck-Mithouard i jej znaczenie dla rozwoju europejskiego prawa wspólnotowego" [Keck-Mithouard Formula and its Importance for the Development of the European Communities Law]. [In:] *Księga pamiątkowa...*, pp. 89–108.

MIK CEZARY: "Ochrona praw człowieka w europejskim prawie wspólnotowym" [Human Rights Protection in the European Community Law]. [In:] *Szkoła praw...*, pp. 404–416.

MIK CEZARY: "Sądy polskie wobec perspektywy przystąpienia Rzeczypospolitej Polskiej do Unii Europejskiej (przyczynek do dyskusji)" [Polish Courts in View of Accession of the Republic of Poland to European Union]. *Przegląd Prawa Europejskiego* 1997, No. 1, pp. 20–31, sum.

MIK CEZARY: "Unia Europejska wobec sytuacji nadzwyczajnych" [European Union and States of Emergency]. [In:] *Prawa człowieka w sytuacjach nadzwyczajnych...*, pp. 83–100.

MIK CEZARY: "Wkład Unii Europejskiej w rozwój prawa międzynarodowego publicznego (zarys problematyki)" [Contribution of the European Union to the Development of Public International Law (an Outline of the Problem)]. [In:] *Pokój i sprawiedliwość...*, pp. 287–326.

MIK CEZARY: "Wolności rynku wewnętrznego w świetle wyroków Europejskiego Trybunału Sprawiedliwości" [Freedoms of the Internal Market in the Light of the Jurisprudence of ECJ]. *Przegląd Prawa Europejskiego* 1997, No. 1, pp. 95–106.

MIK CEZARY: "Wprowadzenie do prawa międzynarodowego praw człowieka" [Introduction to International Law of Human Rights] [In:] *Szkoła praw...*, pp. 103–122.

MIKOŁAJCZYK ADAM: "Stosunki umowne pomiędzy subpaństwowymi podmiotami władzy politycznej różnych państw (współpraca transgraniczna)" [Agreements between Subnational Subjects of Political Authorities of Different States (Transboundary Cooperation)]. *Ruch PES* 1997, No. 3, pp. 15–34, sum.

MIKOŁAJCZYK BARBARA: "Zasada niewydalania uchodźców a pojęcie «kraju bezpiecznego» (wybrane aspekty prawne)" [The Principle of Non-expulsion of Refugees and the Concept of a "Safe Country" (Selected Legal Aspects)]. *Państwo i Prawo* 1997, No. 3, pp. 30–42.

MONACO RICCARDO: "Reflexions sur la theorie des sources du droit international". [In:] *Theory...*, pp. 517–530.

MORAWSKA ELŻBIETA: "Ochrona praw człowieka w procesie KBWE" [Protection of Human Rights and the CSCE]. [In:] *Szkoła praw...*, pp. 152–166.

MORIN JACQUES-YVAN: "La Preeminence du droit dans l'ordre juridique europeen". [In:] *Theory...*, pp. 643–690.

MULLERSON REIN: "On Cultural Differences, Levels of Societal Development and Universal Human Rights". [In:] *Theory...*, pp. 927–954.

NASCIMENTO E SILVA GERARDO E.: "The Widening Scope of International Law". [In:] *Theory...*, pp. 235–242.

"NATIONAL Strategy for Integration. The Committee for European Integration". Introd. by Danuta Huebner. *Yearbook of Polish European Studies* 1997, vol. 1, pp. 177–233.

NOWAKOWSKA JOANNA: "Międzynarodowy Trybunał Karny dla osądzenia sprawców naruszeń prawa humanitarnego w byłej Jugosławii od 1991 roku" [International Penal Tribunal for Perpetrators of Violations of Humanitarian Law in the Former Yugoslavia since 1991]. *Przegląd Sądowy* 1997, No. 3, pp. 69–90.

NOWAKOWSKI TOMASZ: "Suwerenność a wspólna polityka zagraniczna i bezpieczeństwa". Cz. 1–2 [Sovereignty and Common Foreign and Security Policy]. *Wspólnoty Europejskie* 1997, No. 1, pp. 4–9; No. 2, pp. 9–11.

NOWICKI MAREK A.: "Europejski system ochrony praw człowieka" [European System of Protection of Human Rights]. [In:] *Szkoła praw...*, pp. 137–151.

NOWICKI MAREK A.: "Pozycja obrońcy w sprawach karnych w orzecznictwie organów Europejskiej Konwencji Praw Człowieka" [A Defendant's Position in Criminal Cases According to the Jurisprudence of the European Convention of Human Rights Bodies]. *Palestra* 1997, No. 3/4, pp. 106–121.

OBRADOVIC DANIELA: "The Doctrine of Divisible Sovereignty in the Community Legal Order". [In:] *Studia prawno-europejskie...*, pp. 26–49.

OGONOWSKA ANNA: "Prawna ochrona baz danych" [Legal Protection of the Databases]. *Wspólnoty Europejskie* 1997, No. 2, pp. 45–48.

OGONOWSKA ANNA: "Prawo europejskie w Internecie" [European Law on Internet]. *Przegląd Prawa Europejskiego* 1997, No. 1, pp. 74–79, sum.

PARZYMIES STANISŁAW: "Traktat Amsterdamski a członkostwo Polski w Unii Europejskiej" [Treaty of Amsterdam and Poland's Membership in the European Union]. *Sprawy Międzynarodowe* 1997, No. 3, pp. 5–8.

PARZYMIES STANISŁAW: "Traktat Amsterdamski o Unii Europejskiej" [Treaty of Amsterdam on the European Union]. *Sprawy Międzynarodowe* 1997, No. 12, pp. 9–22.

PATRZAŁEK ALEKSANDER: "Niektóre problemy systemu wyborczego do Parlamentu Europejskiego" [Some Problems of the Electoral System to the European Parliament]. *Acta UWr. Prawo* 1997, No. 257, pp.173–180,

PECHSTEIN MATHIAS: "Osobowość prawna dla Unii Europejskiej" [Legal Personality for the European Union]. *Przegląd Prawa Europejskiego* 1997, No. 1, pp. 5–10, sum.

PERA BOŻENA: "Status prawny państw stowarzyszonych ze Wspólnotami Europejskimi" [Legal Status of Countries of Central and Eastern Europe – Associated Members of the European Union]. *Zeszyty Naukowe AE Kraków* 1996, No. 481, pp. 17–31, sum.

PERKOWSKI MACIEJ: "Definicja konfliktu zbrojnego nie mającego charakteru międzynarodowego" [Definition of Non-international Armed Conflict]. [In:] *Międzynarodowe prawo humanitarne...*, pp. 43–56.

PERRIN GEORGES: "La determination de l'Etat lese. Les regimes dissociables et les regimes indissociables". [In:] *Theory...*, pp. 243–248.

PINTO MORAGODAGE C.W.: "'Common Heritage of Mankind': From Metaphor to Myth, and the Conseqences of Constructive Ambiguity". [In:] *Theory...*, pp. 249–268.

PIONTEK EUGENIUSZ: "Central and Eastern European Countries in Preparation for Membership in the European Union – a Polish Perspective". *Yearbook of Polish European Studies* 1997, vol. 1, pp. 73–87.

POPŁAWSKA EWA: "Organy i procedura stanowienia prawa wspólnotowego oraz udział w niej państw narodowych" [Organs and Procedure of Community Legislative Process and the Participation of the Member States]. [In:] *Prawo międzynarodowe...*, pp. 159–187.

POPŁAWSKA EWA: "Zasada subsydiarności" [Principle of Subsidiarity]. *Przegląd Legislacyjny* 1997, No. 1, pp. 167–179.

POPOWICZ KRZYSZTOF: "Traktat Amsterdamski – omówienie i komentarz" [Treaty of Amsterdam – Content and Comment]. *Radca Prawny* 1997, No. 6, pp. 25–39.

"PRAWO ochrony środowiska Wspólnoty Europejskiej" [Environmental Law of the European Community]. *Prawo i Środowisko* 1997, No. 3, pp. 26–37.

PRUSZYŃSKI JAN: "Das Recht auf Kulturgueter in den westlichen und noerdlichen Gebieten Polens". *Polish Yearbook of International Law* 1995/1996, vol. 22, pp. 187–200.

PRZYBOROWSKA-KLIMCZAK ANNA: "Zobowiązania Polski wynikające z umów międzynarodowych w dziedzinie praw człowieka" [Obligations of Poland Resulting from International Human Rights Instruments]. [In:] *Prawa i wolności...*, pp. 7–21.

PRZYBYSZ PAWEŁ P.: "Pojęcie i substancja praw niederogowalnych w prawie międzynarodowym praw człowieka" [Notion and Substance of Non-Derogable Rights in International Human Rights Law]. [In:] *Prawa człowieka...*, pp. 37–44.

RADECKI WOJCIECH: "Ochrona przyrody w ustawodawstwie polskim i w przepisach Unii Europejskiej" [Protection of Nature in the Polish Legislation and in the Regulations of the European Union]. *Prawo i Środowisko* 1997, No. 3, pp. 20–25.

RAEPENBUSCH Sean van: "La jurisprudence de la Cour de justice des C.E. en matiere sociale". *Yearbook of Labour Law* 1997, No. 9, pp. 137–182.

REDELBACH ANDRZEJ: "Zasada rzetelności postępowania w rozstrzygnięciach organów strasburskich" [Principle of Fair Proceeding in the Decisions of the Strasbourg Organs]. *Ruch PES* 1997, No. 2, pp. 13–42, sum.

REZEK FRANCISCO: "Sur le fondement du droit des gens". [In:] *Theory...*, pp. 269–274.

ROSENNE SHABTAI: "The General List of the International Court of Justice". [In:] *Theory...*, pp. 805–816.

ROSS CATHRYN: "Reforma struktury instytucjonalnej Unii Europejskiej w świetle Konferencji Międzyrządowej" [Institutional Reform of the European Union in the Light of the Intergovernmental Conference]. [In:] *Telekomunikacja...*, pp. 29–61, bibliogr.

ROTA DEMETRIO L.: "Environmental Policy Implementation in the European Union". *Studia Prawno-Ekonomiczne* 1996, No. 54, pp. 9–33, sum.

RÓWNY KAZIMIERZ: "Ewolucja podstawy traktatowej ochrony środowiska we Wspólnocie Europejskiej" [Evolution of Treaty Bases of Environmental Protection in the European Community]. *Przegląd Prawa Europejskiego* 1997, No. 1, pp. 112–117.

RZEPLIŃSKA IRENA: "Cudzoziemcy w systemie międzynarodowej ochrony praw człowieka" [Aliens in the System of International Protection of Human Rights]. [In:] *Szkoła praw...*, pp. 334–342.

SAGANEK PRZEMYSŁAW: "Ekstraterytorialne stosowanie prawa Wspólnot Europejskich" [Extraterritorial Application of the Law of the European Communities]. *Przegląd Prawa Europejskiego* 1997, No. 1, pp. 41–54, sum.

SAHOVIC MILAN: "Le probleme de l'efficacite du droit international". [In:] *Theory...*, pp. 275–282.

SANDORSKI JAN: "Opieka dyplomatyczna a zasada wyczerpania dróg prawa międzynarodowego publicznego (zarys problematyki)" [Diplomatic Protection and the Principle of the Use of Public International Law Measures (an Outline)]. [In:] *Pokój i sprawiedliwość...*, pp. 327–364.

SCHACHTER OSCAR: "New Custom: Power, *opinio juris* and Contrary Practice". [In:] *Theory...*, pp. 531–540.

SCHROEDER MEINHARD: "Umweltschutz und Subsidiaritaetsprinzip im Recht der Europaeischen Union". [In:] *Gospodarka...*, pp. 439–446.

SCHULZ ANNA N.: "Zastrzeżenia, deklaracje, sprzeciwy do konwencji o prawach dziecka" [Reservations, Declarations and Protests to the Convention on the Rights of the Child]. *Studia Prawnicze* 1997, No. 3/4, pp. 163–182.

SCHWEBEL STEPHEN M.: "May Preparatory Work be Used to Correct Rather than Confirm the 'Clear' Meaning of Treaty Provision?" [In:] *Theory...*, pp. 541–548.

SEYERSTED FINN: "Basic Distinctions in the Law of International Organizations: Practice *versus* Legal Doctrine". [In:] *Theory...* pp. 691–700.

SHOYELE OLUGBENGA: "State Succession and Debts in the African States". *Polish Yearbook of International Law* 1995/1996, vol. 22, pp. 65–80.

SKOCZNY TADEUSZ: "Państwowe monopole handlowe w prawie wspólnotowym" [State Monopolies of Commercial Character in the EC Law]. *Studia Europejskie* 1997, No. 3, pp. 45–68.

SKRZYDŁO ANDRZEJ: "Rozwój współpracy transgranicznej i międzyregionalnej w latach 1994–1995" [Development of Frans-border and Inter-regional Co-operation in 1994-1995]. *Rocznik Polskiej Polityki Zagranicznej* 1996, pp. 67–74.

SOHN LOUIS B.: "Enhancing the Role of the General Assembly of the United Nations in Crystallizing International Law". [In:] *Theory...* pp.549–562.

SOKOLEWICZ ZOFIA: "Obywatelstwo a narodowość. Uwagi w związku z ustanowieniem obywatelstwa Unii Europejskiej" [Citizenship and Nationality. Considerations on the Establishment of European Union Citizenship]. *Studia Europejskie* 1997, No. 1, pp. 13–35.

SOLOCH PAWEŁ: "Polska i NATO" [Poland and NATO]. *Kwartalnik Konserwatywny* 1997, No. 1, pp. 26–29.

SOMMER JERZY: "Kontrola substancji chemicznych w prawie wspólnotowym" [Control of Chemical Substances in Community Law]. *Ochrona Środowiska* 1997, No. 4, pp. 54–60.

SOMMER JERZY: "Ochrona czystości wód we Wspólnotach Europejskich" [Protection of Purity of Water in the European Communities]. Parts. 1–2. *Ochrona Środowiska* 1997, No. 2, pp. 53–58; No. 3 pp. 55–60.

STEBELSKI STANISŁAW L.: "Wspólna Polityka Zagraniczna i Bezpieczeństwa Unii Europejskiej" [Common Foreign and Security Policy of the European Union]. *Sprawy Międzynarodowe* 1997, No. 3, pp. 23–44.

STEIGER HEINHARD: "Plaidoyer pour une juridiction internationale obligatoire". [In:] *Theory...*, pp. 817–832.

STORME MARCEL: "Ujednolicenie zasad cywilnego prawa sądowego w Europie" [Unification of Judicial Private Law in Europe]. [In:] *Jednolitość...*, pp. 353–360.

"STOSUNKI traktatowe Polski" [Treaty Relations of Poland]. Ed. by Barbara Wizimirska. *Rocznik Polskiej Polityki Zagranicznej* 1996, pp. 317–336.

STRABURZYŃSKI ANDRZEJ: "Prawo przejścia tranzytowego" [Transit Crossing Law]. [In:] *Prawo i sprawiedliwość...*, pp. 365–376.

STRYCHALSKI ANDRZEJ: "Międzynarodowe prawo humanitarne" [International Humanitarian Law]. [In:] *Szkoła praw...*, pp. 270–280.

SUCHARITKUL SOMPONG: "State Responsibility and International Liability in Transnational Relations". [In:] *Theory...*, pp. 283–300.

SWINARSKI CHRISTOPHE: "Aux contours des fondements du droit international humanitaire". [In:] *Theory...*, pp. 965–978.

SYMONIDES JANUSZ: "Ochrona własności kulturalnej w czasie konfliktu zbrojnego: nowe inicjatywy UNESCO zmierzające do zwiększenia efektywności Konwencji Haskiej z 1954 roku" [Protection of Cultural Property in Armed Conflicts: New Initiatives by UNESCO towards the Strengthening of the Effectiveness of the Hague Convention of 1954]. [In:] *Pokój i sprawiedliwość...*, pp. 377–388.

SYNOWIEC EWA: "Swoboda przepływu osób w ramach Unii Europejskiej" [Unhampered Population Flow in the European Union]. *Wspólnoty Europejskie* 1997, No. 4, pp. 31–40.

SZAFARZ RENATA: "Contemporary European Law: Exclusivism, Paternalism and Partnership". [In:] *Theory...*, pp. 701–720.

SZAFARZ RENATA: "Idea solidarności pokoleń w prawie międzynarodowym oraz w praktyce UNESCO" [Idea of Solidarity of Generations in International Law and in the Practice of UNESCO]. [In:] *Pokój i sprawiedliwość...*, pp. 389–398.

SZAFARZ RENATA, SARNECKI PAWEŁ, GALICKI ZDZISŁAW: "Opinia w sprawie procedury tworzenia umów międzynarodowych (z uwzględnieniem roli parlamentu)" [Opinion on the Procedure Concerning International Agreements (Including the Role of the Parliament)]. *Przegląd Sejmowy* 1997, No. 3, pp. 72–89.

SZAFARZ RENATA: "OSCE Procedures for Peaceful Settlement of International Disputes". *Polish Yearbook of International Law* 1995/1996, vol. 22, pp. 95–106.

SZAFARZ RENATA: "The Practice of Poland as the 'Other State Party' and as a Depository – as Regards Succession of Recently Established States in Respect of Treaties (a Case Study)". *Polish Yearbook of International Law* 1995/1996, vol. 22, pp. 221–235.

SZPUNAR MACIEJ: "Organy uprawnione do składania wniosku o wydanie orzeczenia wstępnego w trybie art. 177 traktatu ustanawiającego Wspólnot Europejską" [Organs Entitled to Request Preliminary Rulings under Art.177 of the Treaty Establishing the European Community]. *Państwo i Prawo* 1997, No. 7, pp. 57–67.

SZPUNAR MACIEJ: "Źródła i pojęcie prawa wspólnotowego" [Sources and Notion of Community Law]. *Rejent* 1997, No. 4, pp. 11–32.

ŚWITAL RADOSŁAW: "Prawo ubezpieczeń gospodarczych w Unii Europejskiej" [Insurance Law in European Communities]. *Wiad. Ubezp.* 1997, No. 9/10, pp. 12–18.

ŚWITAL RADOSŁAW: "Wspólnotowe prawo ubezpieczeń gospodarczych – ewolucja unormowań dyrektywalnych. Orzecznictwo Trybunału Sprawiedliwości" [Insurance Law in European Communities – Development of Directives and Decisions of the Court of Justice]. *Wiad. Ubezp.* 1997, No. 11/12, pp. 12–14.

TEGLER EUGENIUSZ: "Wybrane aspekty układu stowarzyszeniowego Polski z Unią Europejską" [Selected Aspects of the Association Treaty of Poland with the European Union]. *Europa Regionu* 1996, No. 1, pp. 169–183, zsf.

TERWIESCHE MICHAEL: "International Responsibility Arising from the Implementation of a Security Council Resolution. The 2nd Gulf War and the Rule of Proportionality". *Polish Yearbook of International Law* 1995/1996, vol. 22, pp. 81–93.

TOMUSCHAT CHRISTIAN: "The Concluding Documents of World Order Conferences". [In:] *Theory...*, pp. 563–586.

TRAWCZYŃSKI JACEK: "Europejska konwencja o zwalczaniu terroryzmu" [European Convention on Elimination of Terrorism]. *Przegląd Policyjny* 1997, No. 1, pp. 90–92.

TYRANOWSKI JERZY: "Suwerenna równość, samostanowienie i interwencja w prawie międzynarodowym" [Sovereign Equality, Self-Determination and Intervention in International Law]. [In:] *Pokój i sprawiedliwość...*, pp. 399–410.

UNGER PETER: "Wybrane ekonomiczne i finansowe aspekty harmonizacji prawa krajowego z normami Unii Europejskiej" [Selected Macroeconomic and Financial Aspects of Harmonization of National Law with European Union Norms]. *Zeszyty Naukowe AE Kraków* 1996, No. 481, pp. 63–75, sum.

VAITIEKUS SEVERINAS: "Ochrona mniejszości narodowych na Litwie – więzi oraz oddziaływanie wzajemne prawa krajowego i międzynarodowego" [Protection of National Minorities in Lithuania – Ties and Interaction of Domestic Law and International Law]. *Lithuania* 1997, No. 1/2, pp. 134–146.

VALTICOS NICOLAS: "Pluralite des ordres juridiques internationaux et unite du droit international". [In:] *Theory...*, pp. 301–322.

VIGNES DANIEL: "La politique etrangere et de securite commune de l'Union europeenne (la PESC) dans l'optique du 5 eme elargissement. Comment la reforcer?". [In:] *Theory...*, pp. 721–733.

WAJDA STANISŁAW: "Proces dostosowania polskiego prawa do prawa ochrony środowiska Wspólnoty Europejskiej" [Process of the Adaptation of Polish Law to the Natural Environment Protection Law of the European Community]. [In:] *Pokój i sprawiedliwość...*, pp. 411–421.

WASILKOWSKI ANDRZEJ: "Monism and Dualism at Present". [In:] *Theory...*, pp. 323–336.

WASILKOWSKI ANDRZEJ: "Suwerenność państwa wobec integracji w strukturach europejskich" [State Sovereignty and Integration in European Structures]. *Prawo Rolne* 1996, No. 3, pp. 77–90.

WEIL PROSPER: "Competence et saisine: un nouvel aspect du principe de la juridiction consensuelle". [In:] *Theory...*, pp. 833–848.

WOJCIECHOWSKI JERZY A.: "Polska w Unii Europejskiej – utrata suwerenności?" [Poland in the European Union – Loss of Sovereignty?]. *Wspólnoty Europejskie* 1997, No. 4, pp. 6–8.

WOJCZEWSKI LUDWIK: "Postępowanie przed organami powołanymi przez Europejską Konwencję o Ochronie Praw Człowieka i Podstawowych Wolności" [Procedures between the Organs of the European Convention on the Protection of Human Rights and Fundamental Freedoms]. *Przegląd Sądowy* 1997, No. 6, pp. 3–17.

WOLFKE KAROL: "Some Reflections on Kinds of Rules and International Law-Making by Practice". [In:] *Theory...*, pp. 587–598.

WÓJTOWICZ KRZYSZTOF: "Osobowość prawnomiędzynarodowa Wspólnot Europejskich" [International Legal Personality of the European Communities]. *Acta UWr. Prawo* 1997, No. 257, pp. 291–298.

WYROZUMSKA ANNA: "Stan obecny i kierunki rozwoju prawa europejskiego (regionalnego). Zarys problemu" [Present State and Directions of Development of European (Regional) Law. An Outline of the Problem]. [In:] *Studia prawno-europejskie...*, pp. 5–25.

ZIELIŃSKA ELEONORA: "Działania Rady Europy w dziedzinie równości kobiet i mężczyzn na rynku pracy" [Activities of the Council of Europe in the Field of Equality of Women and Men on the Labour Market]. [In:] *Wokół problemów...*, pp. 45–60.

ZIEMBIŃSKI ZYGMUNT: "Justice among Individuals and Justice among Nations". [In:] *Theory...*, pp. 337–349.

ŻUKROWSKA KATARZYNA: "Organizacje międzynarodowe w nowych warunkach" [International Organizations in New Conditions]. *Sprawy Międzynarodowe* 1996, No. 3/4, pp. 85–102.

Private International Law 1997

BOOKS

HERMANOWSKI JAROSŁAW, JASTRZĘBSKI JÓZEF D.: *Konwencja Narodów Zjednoczonych o umowach międzynarodowej sprzedaży towarów Konwencja wiedeńska Komentarz* [U.N. Convention on International Sales of Goods. Vienna Convention. Comments]. Warszawa 1997, Dom Wydawniczy ABC, pp. 564.

LUDWICZAK WITALIS: *Międzynarodowe prawo prywatne* [Private International Law]. 5th ed. (updated). Poznań 1996, "Ars boni et aequi", pp. 298.

POCZOBUT JERZY: *Umowa leasingu w prawie krajowym i międzynarodowym* [Leasing in Domestic and International Law]. 2nd ed. Warszawa 1996, Wydawnictwo Prawnicze PWN, pp. 374.

WESOŁOWSKI KRZYSZTOF: *Komentarz do konwencji o umowie międzynarodowego przewozu drogowego towarów (CMR)* [Comments on the CMR Convention]. Zielona Góra 1996, Agencja Rozwoju Regionalnego, pp. 146.

ARTICLES

BOS MAARTEN: "Droit international public et droit international privé: deux idetités bien distinctes". [In:]: *Theory of International...*, s. 89–98.

CISZEWSKI JAN: "Aktualne zagadnienia dotyczące umów o obrocie prawnym w stosunkach między Polską a innymi państwami" [Current Problems Concerning International Agreements on Legal Commerce between Poland and Third States]. *Kwartalnik Prawa Prywatnego* 1997, No. 2, pp. 327–343.

FUCHS BERNADETA: "Prawo właściwe dla umów franchisingowych" [Proper Law for Franchising Contracts]. *Kwartalnik Prawa Prywatnego* 1997, No. 1, pp. 59–95.

HERMANOWSKI JAROSŁAW: "Rozstrzyganie sporów w handlu zagranicznym przed arbitrażem handlowym" [Dispute Settlement by Arbitration in International Commercial Relations]. *Prawo Spółek* 1997, No. 7/8, pp. 70–77.

HERMANOWSKI JAROSŁAW: "Umowa o arbitraż w międzynarodowym obrocie towarowym" [Arbitration Compromise in International Goods Commerce]. *Podatki i Prawo* 1997, No. 8/9, pp. 35–41.

KLATKA JĘDRZEJ: "Odpowiedzialność z tytułu niewykonania lub nienależytego wykonania umowy w konwencji wiedeńskiej o umowach międzynarodowej sprzedaży towarów" [Liability for Non-Implementation or Non-dilligent Implementation of Contract under the Vienna Convention on Contracts of International Sales of Goods]. *Rejent* 1997, No. 4, pp.134–156.

KOCOT WOJCIECH: "Międzynarodowy charakter umowy sprzedaży towarów oraz procedura jej zawarcia w ujęciu Konwencji wiedeńskiej" [International Nature of a Contract on Sales of Goods and Proceeding of its Conclusion under the Vienna Convention]. *Monitor Prawniczy* 1997, No. 8, s. 310–317.

LALIVE PIERRE: "Sur des dimensions culturelles de l'arbitrage international". [In:]: *Theory...*, pp. 771–786.

NAPIERAŁA JACEK: "Konwencja o umowach międzynarodowej sprzedaży towarów" [Convention on Contracts of International Sales of Goods]. *Prawo Spółek* 1997, No. 1, pp. 28–33.

NAPIERAŁA JACEK: "Zwolnienie dłużnika od odpowiedzialności za naruszenie umowy międzynarodowej sprzedaży towarów" [Releasing Debtor from Liability for the Violation of an International Contract on Sales of Goods], *Studia Prawnicze* 1997, No. 3/4, pp. 5–31.

PAZDAN MAKSYMILIAN: "Prawo właściwe dla umów franchisingowych" [Proper Law for Franchising Contracts]. [In:] *Księga pamiątkowa...*, pp. 505–516.

PERERWA INNA, TYNEL MAŁGORZATA: "Wykonywanie orzeczeń międzynarodowych sądów arbitrażowych na Białorusi" [Execution of International Arbitral Awards in Belarus]. *Przegląd Ustawodawstwa Gospodarczego* 1997, No. 10, pp. 23–25.

PÓŁTORAK NINA: "Uznanie i wykonalność orzeczeń zagranicznych według konwencji brukselskiej i lugańskiej" [Recognition and Execution of Foreign Judgments under the Conventions of Brussels and Lugano]. *Kwartalnik Prawa Prywatnego* 1997, No. 4, pp. 657–683.

RAJSKI JERZY: "Swoboda umów w ujęciu przepisów konwencji wiedeńskiej o umowach międzynarodowej sprzedaży towarów" [Freedom of Contracts under the Vienna Convention on Contracts of International Sales of Goods]. [In:] *Studia z prawa prywatnego*. Katowice 1997, UŚl., pp. 263–278.

SCHULZE REINER: "Was ist Europaeisches Privatrecht?". [In:] *Z dziejów prawa*. Katowice 1996, UŚl., pp. 189–203, streszcz., sum.,

SMORSZCZEWSKI CEZARY: "Jurysdykcja krajowa w sprawach cywilnych i handlowych według konwencji brukselskiej i lugańskiej" [Jurisdiction in Civil and Commercial Matters Under the Conventions of Brussels and Lugano]. *Kwartalnik Prawa Prywatnego* 1997, No. 4, pp. 627–656.

STORME MARCEL: "Okoliczności sprzyjające i okoliczności utrudniające harmonizację zasad prawa sądowego cywilnego w Europie" [Circumstances Favorizing and Discouraging a Harmonisation of Principles of Judicial Civil Law in Europe]. *Annales UMCS Sectio G: Ius* 1996, No. 43, pp. 27–32.

TYNEL ANDRZEJ: "Procedura wykonania krajowych i zagranicznych orzeczeń arbitrażowych w Federacji Rosyjskiej" [Procedure of the Execution of International Arbitral Awards in the Russian Federation]. *Przegląd Ustawodawstwa Gospodarczego* 1997, No. 2, pp. 21–26.

TYNEL ANDRZEJ: "Z orzecznictwa sądów arbitrażowych Wykładnia konwencji moskiewskiej przez Sąd Arbitrażowy w Moskwie" [From the Jurisprudence of Arbitral Tribunals. Interpretation of the Moscow Convention by the Arbitral Tribunal in Moscow]. *Przegląd Ustawodawstwa Gospodarczego* 1997, No. 9, pp. 18–19.

WALTER GERHARD: "Najnowsze tendencje rozwoju w międzynarodowym cywilnym prawie procesowym" [Most Recent Trends in the Development of International Civil Proceeding Law]. *Annales UMCS Sectio G: Ius* 1996, No. 43, pp. 33–51.

WOJCIECHOWSKA ANNA: "Uniwersalizm autorskich praw osobistych w dobie międzynarodowych konwencji" [Universalism of Personal Copyright in the Time of International Conventions]. *Zeszyty Naukowe UJ Prace z Wynalazczości i Ochrony Własności Intelektualnej* 1997, No. 69, pp. 19–25.

PAUL GUGGENHEIM PRIZE

TO BE AWARDED IN 1999

The Paul Guggenheim Prize, amounting to **Swiss francs 12 000.-**, will be awarded to a monograph of major importance in the field of public international law (except European law). The monograph must be of the highest quality and be the work of a young author at the beginning of his/her career. Works submitted may be in the form of published books or of manuscripts intended for publication; they may be written in English, French, German, Italian or Spanish. Works which have already been awarded a prize of a similar nature will not be considered.

Applications accompanied by a **curriculum vitae**, a list of publications and five copies of the work submitted **must be received, no later than 1st February 1999**, by: The Paul Guggenheim Foundation, The Graduate Institute of International Studies, 132, rue de Lausanne, 1211 Geneva 21 (Switzerland). Applicants are required to specify whether the work submitted has already been awarded a prize.

The Regulations pertaining to the Prize may be obtained at the same address.

INP PAN
P-1045