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The Gdańsk Convention on Fishing and Conservation of the Living Resources in the Baltic Sea and the Belts

by REMIGIUSZ ZAORSKI

In the field of international relations concerning exploitation of the biological resources of the sea the general tendency is the regulation of fishing and conservation of living resources through multilateral conventions. International agreements aiming at the preservation of the biological resources on a level guaranteeing optimum productivity are in force in all intensively exploited sea areas. In modern times a rational fishing economy has become an absolute necessity.[1]

An exception to the rule was hitherto the Baltic Sea, with the absence of an international argeement concluded by all States whose vessels are fishing in the area.

There are only a few bilateral and tripartite agreements signed by socialist States or covering specific species.[2] However, in order to maintain productivity, it has become necessary to ensure the participation in the agreement on the conservation of the living resources of all States using the Baltic Sea. This is dictated by the increase of catch as well as by the geographical features of the Baltic Sea as an inland sea with an abundant intake of river waters, whose organic life is poor, compared with other seas.

Resolutions of international conferences and international organizations have on many occasions drawn the attention to the necessity of taking

[1] Cf., R. ZAORSKI, *Eksploatacja biologicznych zasobów morza w świetle prawa międzynarodowego* [*The Exploitation of the Biological Resources of the Sea in the Light of International Law*], Gdynia 1967, pp. 9. ff.

[2] For example, Agreement between the Ministry of Navigation of the Polish People's Republic and the Ministry of Communication of the German Democratic Republic concerning mutual cooperation for the promotion of greater safety of navigation and fishing in the Baltic Sea signed on 12 January, 1956 in Warsaw; Agreement between the governments of the GDR, Poland and the Soviet Union on cooperation in the field of sea fishing, signed in Warsaw on 28 July, 1962; Agreement on the protection of salmon resources in the Baltic Sea, signed in Stockholm on 20 December, 1962.

multilateral steps aimed at preserving the living resources of the Baltic Sea.[3]

Poland, actively engaged in international cooperation in the field of sea fishing, has never failed to emphasize the considerable importance of the application in the Baltic Sea of rational methods of fishing, based on an international convention signed by all Baltic States. The adherence to such a very broadly conceived principle, embracing cooperation between Baltic States in various fields, found its expression in a note of the Government of the Polish People's Republic of 21 July, 1960, in which it was stated that "agreements aimed at ensuring and strenghtening peaceful relations among Baltic countries would serve the interests of all nations of the region." [4]

In the course of the 1963—1972 period Polish science of international law has on several occasions raised the problem of international cooperation aimed at protecting the living resources of the Baltic Sea.[5] Studies carried out on the subject led to concrete proposals regarding the principles on which a future agreement between Baltic States on the protection of the biological resources of the Baltic Sea ought to be founded.[6]

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[3] The Rome conference on the protection of the biological resources of the sea, 1955, Doc. A/Conf. 10/6, para. 73 ; *Conseil permanent international pour l'exploration de la mer*, in : *Rapport et procès-verbaux des réunions*, vol. 45, part 1, p. 60 ; *Rapport de la quarante sixième réunion statutaire de Conseil*, Copenhague, septembre-octobre 1958, p. 22 ; *Procès-verbal de la réunion*, 1959, p. 63.

[4] "Zbiór dokumentów", 1960, No. 7, p. 1086.

[5] R. Zaorski, *Współpraca międzynarodowa w dziedzinie ochrony biologicznych zasobów Morza Bałtyckiego* [*International Cooperation in the Field of Protection of the Biological Resources of the Baltic Sea*], "Ruch Prawniczy, Ekonomiczny i Socjologiczny", 1963, No. 1, pp. 37 ff. ; R. Zaorski, *Zagadnienia ochrony zasobów biologicznych Morza Bałtyckiego* [*Problems of Protection of the Biological Resources of the Baltic Sea*], in : *Zagadnienia Prawne Bałtyku* published by the Institute of Legal Sciences of the Polish Academy of Sciences, Warszawa 1969, p. 169 ff. ; R. Zaorski, *Problems of Conservation of Living Resources of the Baltic Sea*, "Polish Yearbook of International Law", vol. 3, 1970, Warszawa 1972, p. 39 ff.

[6] The proposals regarding the principles on which the future international agreement had to be based included : (a) a definition of the various regions of the Baltic Sea environment ; (b) the establishment of a protection system in the open sea and in the territorial sea of the Baltic States ; (c) the creation of a conservation system based on scientific research ; (d) the application of all generally recognized means of protection ; (e) the establishment of an International Commission authorized to adopt recommendations related to protection and the adoption of procedures similar to those provided for in the Fisheries convention in the North-East Atlantic from 1959 ; and (f) the establishment of an appropriate control system in order to ensure the application of the recommendations, R. Zaorski, *Zagadnienia ochrony zasobów* ..., p. 174. The Convention of Fishing and Conservation of the Living Resources in the Baltic Sea and the Belts, signed in Gdańsk in 1973 is in conformity with all these postulates.

The implementation of cooperation between the Baltic States has been running into difficulties because of the absence of a final settlement of the German problem after World War II and the non-recognition by the Western powers of the existence of two German states.

The past few years have produced some favourable changes on the European political scene. Political détente, brought about by the treaties signed by the Soviet Union, Poland and the German Democratic Republic on the one hand and the Federal Republic of Germany on the other, the positive results of the first stage of the European conference on security and cooperation held in Helsinki, have created appropriate conditions for the development of cooperation among the Baltic States in the field of the utilization of the resources of the Baltic Sea.[7]

These circumstances prompted the government of the Polish People's Republic to renew its efforts aimed at concluding an international agreement on the protection of the living resources of the Baltic Sea, to which all Baltic states would adhere. In May 1973 a Polish draft proposal of a convention was presented through diplomatic channels, together with an invitation to participate in a meeting of experts to be followed by a diplomatic conference.

The meeting of experts attended by delegations of all Baltic States took place in Sopot in June 1973.[8] All delegations expressed their support for the Polish initiative and recognized that the Polish draft convention can serve as a basis for the work of the diplomatic conference.[9]

The diplomatic conference was held in Gdańsk from 4 to 13 September, 1973. Delegations of all Baltic States—Denmark, Finland, the German Democratic Republic, the Federal of Germany Republic, Poland, Sweden and the Soviet Union were present, together with observers of international organizations and bodies.[10]

The results of the conference, which worked in plenary sessions in its

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[7] The Polish Minister of Foreign Affairs, Stefan Olszowski drew the attention to all these factors in his inaugural speech delivered on 4, September, 1973. See Doc. BSDC/5.

[8] The meeting was attended by delegations from Denmark, Finland, the GDR, the FGR, Poland, Sweden and the Soviet Union. See Doc. BSDC/1.

[9] The delegations of the Baltic States have proposed various changes and amendments, which have been submitted together with the Polish draft proposal to the diplomatic conference. See Doc. BSDC/1.

[10] The representatives of the following international organizations and organs took part in the conference as observers : The UN Economic Commission for Europe ; FAO ; the United Nations Environment Programme ; the International Council for the Exploration of the Sea ; the International Commission for the North-West Atlantic Fisheries ; the International Commission for the South-East Atlantic Fisheries ; the Joint Fishery Commission.

General Committee, Drafting Committee and Working Group on Fishing Rules were embodied in a Convention on Fishing and Conservation of the Living Resources in the Baltic Sea and the Belts (referred to later as the Gdańsk Convention) and signed on 13 September, 1973.[11]

In the preamble to the Convention the signatory States recognized their joint responsibility for the conservation of the living resources of the Baltic Sea and stated that "maximum and stable productivity of the living resources of the Baltic Sea and the Belts is of great importance to the States of the Baltic Sea basin." Thus, the contracting parties confirmed their adherence to two basic principles: joint responsibility for the protection of the living resources and their rational exploitation and broad international cooperation. The Gdańsk Convention has created the first foundation for cooperation of the Baltic States, which have decleared their readiness to broaden such cooperation in the common interest of conserving the living resources of the Baltic Sea on a level of optimum productivity.

The community of interests of the Baltic States is the characteristic feature of the whole Gdańsk Convention. This is reflected, among other things, in the setting of the Convention area, which includes territorial seas, waters with exclusive fishing rights and in the broadly conceived protection means.

The area to which the Gdańsk Convention applies includes all waters of the Baltic Sea and the Belts, bounded in the west by a line as from Hasenore Head to Guiben Point, from Korshage to Spodsbierg and from Gilbierg Head to the Kullen (Art. II). Thus, the Gdańsk Convention extends its area to the line established in the Convention on Fishing in the North-East Atlantic of 1959.[12] For the first time the convention areas on fishing have been set in such a way as to leave no area without protection. For hitherto the fishing agreements left out the Belts as separate fishing areas. Thus, for example the Belts were not included in the agreement covering the catch of plaice and flounder in the Baltic Sea of 1929.[13] The solution adopted by the Gdańsk Convention takes into consideration the unity of the biological environment and creates the foundation for the application of appropriate protective measures, with due regard to the specific features of the Belts.

The unity of the biological environment has also dictated the inclusion into the convention area of territorial seas and of areas of exclusive fishing

[11] Together with the signing of the Convention a Final Act of the Gdańsk Conference and a resolution were also signed.

[12] Convention on Fisheries in the North-East Atlantic, signed in London on 24 January, 1959, See "Dziennik Ustaw" ["Journal of Laws," later cited as Dz.U.], No. 45, 1963, item 250, Art. 1.

[13] See Dz.U., No. 30, 1931, item 207, Art. 1.

rights. The limits of these categories of sea waters are set as geometrical lines for the purpose of establishing the competence of the coastal State and not from the biological point of view. In the interest of protecting the living resources of the sea it is necessary to apply protective measures in the entire area. This applies in particular to the situation of the Baltic Sea, whose coastal waters are areas of the most florishing organic life.

From the point of view of the coastal State exercising its sovereignty over territorial seas this represents a contractual limitation of that sovereignty agreed to in one's own interest. There are no uniform rules in the practice of international treaties regarding the inclusion of territorial seas in convention areas.[14] The solution adopted by the Gdańsk Convention corresponds to the modern requirements of protection. Rational fishing economy calls for the same treatment of coastal waters and open seas as far as the conservation of living resources is converned.

This applies equally to areas of exclusive fishing rights, where the coastal State enjoys the same fishing rights as in territorial seas. The breadth of the exclusive fishing rights zone does not exceed 12 miles, counting from the basic line of territorial seas. Thus, there is no basis, when recognizing the maximum limit of territorial seas as being 12 nautical miles, for a separate treatment of the zone of exclusive fishing rights.[15]

The Gdańsk Convention does not extend over internal waters, within the limits of which applies only the internal jurisdiction of the Baltic States. In accordance with Polish national jurisdiction the Gdańsk Convention does not extend over part of the Nowowarpieńska Bay and Szczecin Bay, over part of the Gdańsk Bay, over part of the Vistula Bay and over the waters of ports and roadsteads.[16]

In accordance with the general practice applied in other international agreements the Gdańsk Convention contains a provision that "nothing in this Convention shall be deemed to affect the rights, claims or views of any contracting State in regard to the limits of territorial waters and to the extent of jurisdiction over fisheries, according to international law." (Art. III).

This standard formula found in many international treaties may have

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[14] For example, the Convention on Fisheries in the North-West Atlantic, signed in Washington on 8 February, 1949 (see Dz.U., No. 31, 1962, item. 143) excludes from the convention area the territorial seas of the contracting States (Art. 1); however, territorial seas are included in the Convention on Fisheries in the North-East Atlantic, signed in 1959 and in the Convention on the Conservation of the Biological Resources of the South-East Atlantic signed in Rome on 23 October, 1969, [See Dz.U., No. 19, 1972, item 133].

[15] R. ZAORSKI, *Eksploatacja* ... [*Exploatation* ...], p. 95 ff.

[16] The limits of Polish internal waters have been set in the Decree on the protection of the national borders of 23 March, 1956, (See Dz.U., No. 9, item 51, Art. 4).

particular importance in modern times whose characteristic feature is the strong tendency to extend the jurisdiction of the coastal States over wide zones of adjoining waters. True enough, there is no danger of any Baltic State establishing a 200 miles zone of exclusive fishing rights, however, the problem of the extension of the jurisdiction over fisheries of coastal States has been extensively discussed at the sessions of the United Nations Committee on Peaceful Uses of the Sea-Bed and Ocean Floor beyond the Limits of National Jurisdiction. Some States have fixed by unilateral acts zones of exclusive fishing rights much wider than the recognized 12 miles limit counting from the basic line of territorial seas.[17]

The topicality of the problem was further increased by the fact that the Gdańsk conference was sitting immediately after the latest Geneva session of the United Nations Committee on the Peaceful Uses of the Sea-Bed and Ocean Floor beyond the Limits National Jurisdiction. This explains why the question of the claims of Baltic States to extend their fishing rights was raised during the Gdańsk conference. The agreed views of the Baltic States on this problem have found their reflection in the final act of the Gdańsk conference. The contracting parties have stated that at present none of them claims jurisdiction outside a limit of 12 nautical miles from those lines from which they measure the breadth of the territorial waters (point 11, al. 1). At the same time, while not excluding the possibility of any of them claiming in the future fishing rights outside the 12 miles limit, they agreed that in such a case the Gdańsk Convention "should be reviewed." (point 11, al. 2). Claims of wider jurisdiction would jeopardize the existing state of equilibrium. At present all Baltic States extend their fishing jurisdiction over an area of 12 nautical miles (the 12 mile territorial waters in the case of the Soviet Union or the territorial sea and the zone of exclusive fishing rights of a joint breadth of 12 nautical miles in the case of, for example, Denmark and Poland). That equilibrium constitutes one of the elements of the community of interests of the Baltic States, which contributed to the agreement on the problem of the conservation of the living resources of the Baltic Sea.

Protection in the convention area has been extended to all fish species and other marine resources (Art. 2, al. 2). Thus the entire fauna and flora of the Baltic Sea is included. Such a broad definition of living resources is in conformity with the latest tendencies in the field of protection, which emphasize the unity of the biological environment and the necessity of applying comprehensive measures in order to protect the seas.

The two most exploited fishing grounds of the North-East and North-

[17] See list elaborated by FAO : *Limites et statut de la mer territoriale, des zones de pêches exclusives, des zones de conservation des pêcheries et du plateau continental*, Doc. FID/C/127.

West Atlantic, are emboded by the conventions of 1949 and 1959, still in force which apply only to fish species.[18] However, the convention on fisheries on the South-East Atlantic concluded 10 years later in 1969 concerns already all fish species and other marine resources.[19] The Gdańsk Convention followed that last example.

The achievement of the best possible results from the exploitation of the living resources of the Baltic Sea through proper conservation measures involves comprehensive scientific research on the application of the appropriate conservation means. The necessity of founding a protection system on scientific findings has been raised at the very outset of the efforts undertaken in order to preserve the biological resources of the seas.[20] The role of scientific research has been strongly emphasized in the final act of the Rome conference of 1955.[21] All international agreements on the conservation of the living resources of the seas now in force contain provisions on the application of scientific research for that purpose.

The Gdańsk Convention contains also such provisions. The contracting parties decided to cooperate in broadening and coordinating scientific research. This task has been turned over to the Baltic Sea International Commission on Fisheries. In accordance with the Gdańsk Convention the Commission itself is not carrying out scientific research, but works out proposals concerning coordination of scientific research in the convention area (Art. IX, al. 1).

Research can be carried out by individual contracting States and coordinated by the International Commission or advantage can be taken of the findings of international organizations. Article IX, alinea 2 authorizes the International Commission to seek, when appropriate, the services of the International Council for the Exploration of the Sea, an organization well renowned and highly respected for its great achievements.

The recommendations concerning conservation of the living resources of the sea made by the International Commission must be based, as far as practicable, on results of scientific research (Art. IX, al. 1/c).

The nature and extent of the recommended conservation measures are determined by international agreement. The prevailing tendency in treaty law is the comprehensive treatment of such measures, which is easely understandable in view of the growing conservation requirements. The

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[18] The Convention of Fisheries in the North-West Atlantic of 1949 and the Convention of Fisheries in the North-East Atlantic of 1959 specify excplicitely that they are concerned only with the conservation of fish.

[19] Convention of the Protection of the Resources in the South-East Atlantic, Art. III.

[20] R. ZAORSKI, *Eksploatacja ... [Exploatation ...]*, p. 190, ff.

[21] Doc. A/Conf. 10/6, para 24.

Gdańsk Convention is taking a similar approach. Measures which the International Commission may consider and in regard of which it may make recommendations include: (a) any measures regulating fishing gear, appliances and catching methods, (b) any measures regulating the size limits of fish that may be retained on board vessels or landed, exposed or offered for sale, (c) any measures establishing closed seasons, (d) any measures establishing closed areas, (e) any measures improving or increasing the living marine resources including artificial reproduction and transplantation of fish and other organisms, (f) any measures regulating and/or allocating between the contracting States the amount of total catch or the amount of fishing effort according to objects, kinds, regions, and fishing periods, (g) any other measures related to the conservation and rational exploitation of the living marine resources of the Baltic Sea. (Art. X).

A comparison of the Gdańsk Convention with the agreements concerning the Atlantic area reveals that the former offers the possibility of applying comprehensive conservation measures. It provides not only for a limitation of catch but also for the establishment of the amount of fishing effort as well as for the application of other unspecified measures. Thus, for example the Fishing Convention on the North-East Atlantic concluded in 1959, while providing for measures related to the regulation of the amount of total catch or the amount of fishing effort, sets out differing and strict conditions for their actual application. A decision taken by the international commission has no binding effect; its recommendation must be approved by the contracting parties in the normal way, provided for in the procedure of concluding international agreements.[22]

The first two conventions concerning the North-East and North-West Atlantic required the application of a similar procedure when introducing a new conservation measure not specified in the conventions. This practice has been abandoned in the Fishing Convention in the South-East Atlantic signed in 1969 (Art. VIII).

All conservation measures mentioned in Article IX, al. 1(c) of the Gdańsk Convention can be recommended if warranted by the results of scientific research. The contracting States can thus rest assured that the exploitation of the living resources of the Baltic Sea will be carried out in a rational way. On the other hand it is also an expression of mutual trust

[22] "Measures regulating the total amount of catch or the amount of fishing effort during any period, or any other measures designed to protect the fishing resources in the convention area, can be added to the measures specified in Art. 1 on a proposal accepted by a majority of at least two-thirds of votes of delegations present and voting and subsequently aproved by all contracting States in accordance with their constitutional procedure." (Art. 7, item 2).

and community of interests of all Baltic States in the conservation of these resources on a level insuring optimum productivity.

For the purposes of the Gdańsk Convention the contracting States have established a permanent organ—the International Baltic Sea Fisheries Commission (referred to as the International Commission). The practice of establishing of international commissions for the purposes of fishing conventions dates back from the beginning of the 20th century and the usefulness of these commissions has been generally recognized.[23]

The Gdańsk Convention stipulates that each contracting State may appoint to the International Commission not more than two representatives, apart from an unrestricted number of experts and advisers. (Art. V). The office of the Commission is in Warsaw.

The main duty of the Commission, apart from coordinating scientific research and keeping under review the living resources and the fisheries by collecting information, is to prepare and to submit to the Baltic States recommendations related to conservation measures for their consideration. (Art. IX, al. 1).

The work of the International Commission in this respect has been preceded by extensive discussions during the diplomatic conference. The conference reviewed informations concerning the present state of fishing resources of the Baltic Sea. It was recognized that the state of those species which are exploited industrially must be kept under special control and that appropriate protection measures must be taken. In order to speed up the work of the International Commission the conference established a Working Party on Fishery Rules, which considered a Draft of Fishery Rules in the Baltic Sea representing an attempt at applying concrete conservation measures in practice, submitted by the delegation of the Soviet Union.[24] It has been recognized that the draft, with due regard to observations and ammendments offered by other delegations, can be accepted as a basis for discussion and considered at the first session of the International Commission.

The procedure applying to the implementation of the recommendations of the International Commission is based on the Fisheries Convention in the North-East Atlantic of 1959 and on the Fisheries Convention in the South-East Atlantic. These two conventions provide for the entry into

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[23] R. ZAORSKI, *Eksploatacja ...* [*Exploatation ...*], p. 200 ff.

[24] The draft proposal on fishing rules in the Baltic Sea deals with the following problems : division into regions, size limits, limits of the size of fishing vessels, minimum size of fishing nets mesh, catch for non-consumption purposes, limitation of catch of certain species, regulation of size limits of fish, aclimatization of new species in the Baltic Sea.

force of recommendations without the prior approval by the contracting States. Each State can however express its reservations.[25] The above mentioned system proved to be more practical that the system adopted by the Fisheries Convention in the North-West Atlantic of 1949, which provides for the acceptance of recommendations by all States participating in the Commission.[26]

The recommendations of the International Commission regarding the application of appropriate conservation measures are taken by a two-third majority of votes of the contracting States present and voting at the meeting (Art. VIII, al. 3). A positive vote on a decision does not imply its immediate entry into force. The contracting States are given a ninety-day period from the date of notification of a recommendation in the course of which they can submit their objection. In that event a State has no obligation to give effect to that recommendation (Art. XI, al. 2).

In the event of an objection being made within the ninety-day period any other contracting State may similarly object within a further period of sixty days.

If objections to a recommendation are made by three or more contracting States, the other contracting States are relieved forthwith of any obligation to give effect to that recommendation (Art. XI, al. 3).

Each participating State in the International Commission can at any time withdraw its objection and give effect to a recommendation.

The system of entry into force of the recommendations of the International Commission adopted by the Gdańsk Convention is aimed at reconciling the desire to see all conservation measures applied by all contracting parties with the principle of sovereign equality of States. Thus a State disagreeing with the proposed measure can voice its objection and refuse to apply the recommendation. On the other hand, by establishing the minimum number of States required in order to keep the conservation system in force, the Gdańsk Convention is trying to a certain extent to ensure the participation of all contracting States in the said system. For one dissenting State endangers the whole conservation programme and affects adversely all users of the Baltic Sea.

Although a system allowing for the making of objections has been adopted by the Gdańsk Convention, it may be expected that the awareness of a community of interests will militate against such a practice. On the contrary, it can be assumed that a consensus among all members of the International Commission will be reached. The Baltic Sea covers a relative-

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[25] Convention of Fisheries in the North-East Atlantic of 1959 (Art. 8), Convention on the Conservation of Resources of the South-East Atlantic of 1969 (Art. IX).

[26] Art. VIII.

ly small area and its users are few; agreement on conservation programme is indispensable for the preservation of its living resources.

Apart from the general obligation of each State to make a ratified international treaty part of its internal legislation, the Gdańsk Convention contains a provision obligating the contracting States to take measures necessary to ensure the application of the provisions of the convention and the recommendations of the International Commission which have become binding (Art. XII).

In order to ensure the application of the conservation measures by all users, the Gdańsk Convention, imitating other international agreements, contains a provision authorizing the International Commission to draw the attention of any State which is not a party to the Convention to such fishing operations undertaken by its nationals or vessels in the convention area, which might affect negatively the activities of the Commission or the implementation of the purposes of the Convention (Art. XIII).[27]

Apart from recommendations concerning conservation measures, the Gdańsk Convention provides for the International Commission adopting decisions and resolutions (Art. VIII, al. 3 and 4). These have not been specified. However it may be surmised that decisions will be concerned with administrative, financial and such matters which are related to internal problems of the Commission (procedure, election of the Secretary of the Commission, establishing of working groups and auxiliary organs, budget, etc). In accordance with Article VIII, alinea 3, decisions are taken by a majority of two-thirds of votes of the contracting states present and voting. Decisions concerning internal matters of the Commission taken in accordance with the above mentioned procedure are binding on all contracting States.

Article VIII of the Gdańsk Convention makes also mention of resolutions. In view of the fact that resolutions have no binding effect it can be assumed that the International Commission is adopting resolutions by a simple majority.

Apart from recommendations relating to the application of specific conservation measures the International Commission has the right to adopt measures concerning the introduction of controls over the application of such recommendations by the contracting States (Art. X, (g)). The adoption of such measures and their implementation is subject to the same rules of procedure which apply to recommendations.

Controls carried out on territorial seas or in zones of exclusive fishing rights remain within the competence of the State concerned. States are

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[27] For example Convention of Fisheries in the South-West Atlantic of 1949, Art. XIII.

reluctant to agree to controls carried out in areas under their jurisdiction. The above mentioned provision of the Gdańsk Convention may concern rather controls on high seas by controlers especially nominated for that purpose.

In modern treaty practice there are cases of contracting States nominating special functionaries authorized to control ships sailing under their flag.[28] In the event of an infraction to the treaty provisions the controler has the right to stop the ship and to make an official report. The jurisdiction remains with the organs of the State whose flag the accused ship is flying. The Baltic States may introduce a different control system, the provisions of the Gdańsk Convention allowing them to do so.

Whereas the possibility of introducing on the spot investigations has only been mentioned in the Gdańsk Convention, contains specific provisions about control carried out through information and reports submitted to the International Commission. Such forms of control are generally applied and constitute one of the fundamental conditions of a rational fishing policy.[29]

The Gdańsk Convention obligates the contracting States to furnish to the International Commission statistical data and informations concerning catch, fishing effort, etc, as well as reports on the implementation of the Commission's recommendations on the areas under the jurisdiction of the States concerned (Art. XII, al. 3). This will enable the Commission to carry out its task of watching over the state of the living resources of the Baltic Sea.

The Gdańsk Convention worked out in an atmosphere of mutual understanding and international cooperation is—no doubt—not only of regional but also of world wide importance.

The Gdańsk Convention creates the necessary foundations for a rational exploitation of the Baltic Sea resources. This is at present a matter of prime importance from the point of view of protecting the sea environment. However, the Convention has not solved all problems related to the protection of the biological resources of the Baltic Sea and of its comprehensive exploitation. It represents only the first step in the solution of international problems involved in the utilization of the Baltic Sea waters.[30]

The protection of the Baltic Sea against pollution is a matter which is

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[28] For example, Convention on High Sea Fisheries in the North Pacific of 1952 (Art. X); the Soviet-Japanese Convention on Fisheries in the North-East Pacific of 1956 (Art. 7).

[29] R. ZAORSKI, *Eksploatacja ...* [*Exploatation ...*], p. 233 ff.

[30] Attention to this problem was drawn by the Polish Minister of Foreign Affairs Stefan Olszowski in his statement of 4 September, 1973.

closely linked to the provisions of the Gdańsk Convention. In March 1974, a conference of the Baltic States was held in Helsinki and resulted in the signing of a convention on the protection of the Baltic Sea against pollution. The new convention will be a valuable addition to the Gdańsk Convention, reinforcing the efforts of the Baltic States to protect the living resources of the region. The growing exploitation of off-shore oil fields, the transport of oil by large tankers, industrial and communal sewage represent a potential danger to the closed area of the Baltic Sea. The Helsinki conference proves, that the Baltic States are aware of the necessity of international cooperation in this field.

At the Gdańsk conference, the Polish delegation raised the question of enlarging international cooperation in such fields as for example: scientific research, unification of the system of navigation signs, navigation rules, unification of rules of salvage operations, port utilization rules. In the view of the Polish delegation all these matters ought to be settled by international agreements.

In his opening statement the Polish Minister of Foreign Affairs Stefan Olszowski drew the attention to the broader aspects of the Gdańsk Convention. The Convention, said he, "may set a pattern for States in other regions of the world not only as far as living resources of the sea are concerned, but also in the fields concerning the full utilization of the resources of the seas and oceans."[31] The Gdańsk conference has demonstrated that agreement can be reached among States with different political and social systems on the basis of respect for the principle of sovereign equality of States and for the interests of all concerned. In an era when, together with progressive development of the law of the sea, excessive claims are made by coastal States regarding the jurisdiction over sea areas adjoining to their shores, in an era marked by serious difficulties in harmonizing the interests of States exploiting the resources of the seas, the Gdańsk Convention offers an outstanding example of international cooperation leading to positive results.

[31] Doc. BSDC/5.

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Maritime Law of the CMEA Countries

(Some Basic Problems)

by JAN ŁOPUSKI

I. General Remarks on the Maritime Law of the CMEA Countries

1. When considering certain general aspects of the maritime law of the CMEA countries attention should be given to the following points.

A. Although some of the CMEA countries have now acquired an important position in the world shipping none of them may be called a traditional great maritime power. The rapid development of the Soviet shipping industry as well as of the shipping industries of some other countries followed mainly after the World War II. Considering the importance of tradition in the maritime law this point seems to be of importance. The maritime law now in force in the CMEA countries is not burdened with the tradition of providing an excessive protection to shipowners' interests.

B. Economic factors have always played a predominant role in the formation of maritime law. These factors cannot, therefore, be disregarded in our attempt to make a general appraisal of the maritime law of the CMEA countries.

The countries concerned based their economy on the socialist system; this concerns also their maritime economy. They need commercial fleets first of all to serve their increasing volume of foreign trade. The Soviet Union is a noteworthy exception where maritime shipping plays an important role in the carriage of goods in the internal trade between Soviet ports.

One should indicate, however, another aspect of this problem. The shipping relationships between the CMEA countries are, on the whole, not strongly developed. For various reasons the exchange of goods within the community of the CMEA countries depends in a relatively low percentage

on maritime transport.[1] The countries concerned need shipping before all to serve their overseas trade with countries belonging to other socio-economic systems and to earn freights on the world shipping market. For this reason they are interested in the extension and strengthening of their shipping relationships with all maritime countries independent of their social or political systems and, consequently, in the participation in the work of various international organizations dealing with the world shipping problems.[2]

2. A brief survey of maritime law of the CMEA countries, as presented below, reveals considerable differences in spite of these countries' adherence to the socialist system. In fact, these differences are greater than in the maritime law of certain groups of States (e.g., the Scandinavian or common law group) where a considerable degree of uniformity has already been achieved. This has a variety of reasons. The role played by the shipping industry in the national economy of each of the CMEA countries is not the same. Maritime law of the Baltic and Black Sea Countries has been formed under the influence of different cultural traditions. One may also say that the interest taken by some of the CMEA countries in the work concerning the unification of maritime law at the universal scale is in no way identical (or, in any case, has not always been identical). This is reflected by the state of participation of the CMEA countries in the existing international conventions on maritime law; also the language barriers are to be mentioned; out of seven European CMEA countries, five speak languages which are not commonly known beyond their frontiers.

Considerable differences exist in the form of maritime legislation as accepted in the European CMEA countries. Out of seven countries concerned only three (Bulgaria, Poland and the USSR) dispose of full and relatively modern maritime codes. The commercial codes still in force in the German Democratic Republic* and in Roumania which contain parts con-

[1] In 1970 the share of maritime transport in the total volume of goods transported between the CMEA countries was 12,7 per cent. See N. Možarov, *Wielostronna koordynacja planów rozwoju transportu morskiego krajów RWPG* [*Multilateral Coordination of Plans of Maritime Transport Development in the CMEA Member-Countries*], "Technika i Gospodarka Morska," 1974, No. 2, p. 67.

[2] Shipping enterprises of the socialist countries are members of various shipping conferences, being in fact a kind of international cartels. See S. Ładyka, T. Łodykowski, *Handel międzynarodowy i żegluga morska w gospodarce światowej* [*International Trade and Shipping in World's Economy*], Warszawa 1973, p. 400. Shipping, agency and shipbroker enterprises of all CMEA countries are members of the biggest "private" international shipping organization, The Baltic and International Maritime Conference in Copenhagen. The CMEA countries participate actively in the work of various bodies belonging to the "UN family" dealing with shipping problems.

* In the GDR a new law on shipping trade was issued while this article was in press so that consideration could not have been given to its contents.

cerning the maritime trade, date from the end of the last century. Hungary has a rather fragmentary legislation concerning maritime transport, restricted to laws introducing international conventions as ratified by Hungary. Czechoslovakia has a more developed maritime legislation but the respective rules are scattered in various acts and do not present a coherent system of maritime law.

However, the existing differences as to the merits and form of the solutions applied in the CMEA countries should rather be attributed to different levels of development of maritime economy and to the impact of different traditional concepts of maritime law than to the different policies. In fact, up till recently there was no serious effort to obtain some degree of uniformity of the maritime laws of the CMEA countries ; systematic comparative studies were lacking and the sources of information on this subject were insufficient.

3. One should stress, however, the positive attitude of the CMEA countries to the idea of the universal unification of maritime law by means of international legislation created through the common effort of countries belonging to different socio-economic systems. This may in a way be the cause of their neglect to make a serious effort towards achieving some degree of uniformity within the community. Their national maritime legislations have generally accepted the rules of international conventions and main traditional concepts of maritime law, and their shipping practice follows the pattern of the international shipping practice. Consequently their maritime law and practice are not free from certain anachronisms which are very similar, if not identical, to those which may be traced in the maritime law and practice of other countries.

4. It would be an ungrateful and even impossible task to indicate, within the scope of the present study, all the existing differences in the maritime law of the CMEA countries. Moreover, this task would be more or less useless considering the changeable situation which concerns not only the maritime law of these countries. Stability of maritime law which has often been praised as one of its essential features may now be seriously questioned. The impact of modern technology and organization necessitates a certain modernization of maritime law and the appearance of new political and economic forces on the world scene has changed the "balance of interests" (or rather the balance of economic power) reflected in certain basic concepts of the present maritime law as contained in the international conventions and national legislations of many countries.

Maritime law is therefore in the process of reconstruction, the international organizations playing an important role therein, and the international legislation exercises a strong influence on the national legislation of the countries concerned. While the full uniformity of maritime law is an aim

which may not be easily achieved, this international law-making process may not be disregarded by any country wishing to participate in the international shipping trade. And the fact that in certain countries obsolete maritime laws are still in force may at least partly be attributed to their waiting until more concrete results are achieved at the international level.

We may, therefore, suggest that maritime law, both national and international, is in a transition period, and this applies also to the maritime law of the CMEA countries. While some of these countries have made the effort and issued new maritime codes partly in order to make their maritime laws more adequate to the socio-economic relationships incident to maritime shipping, as well as to make them more up-to-date with regard to the actual state of the international legislation, in some other countries the work on the codification of maritime law has not yeat been completed.

5. From the theoretical point of view certain concepts and solutions of maritime law as contained in the commercial codes originating from 19th century present a limited interest only. We shall concentrate therefore our attention on the new maritime codes of the CMEA countries (Bulgaria, Poland and the Soviet Union) and on the Czechoslovak legislation, trying to indicate certain trends, common to them, in solving the main problems of maritime law, as well as the main differences, without entering into the details of the respective regulations.

A certain selection of problems will be necessary. Since, as we have already pointed out, the maritime law of the CMEA countries is largely modelled on the international legislation, it would not be feasible to discuss at length these solutions which are little more than a reception of international regulations. We shall rather point out to these concepts which being more or less original may enrich and influence the international doctrine of maritime law. We shall also try to trace if, and to what an extent (if any), the principles of socialist economy have influenced the rules of maritime law of the CMEA countries.

II. The Place of Maritime Law in the General System of Law

6. The problem of classification of maritime law which seemingly has not been causing much trouble in the common law countries is of considerable importance in countries which have based their legal systems on written laws — i.a., the European CMEA countries. Although the problem is mainly a theoretical one, it is not deprived of practical consequences. Maritime laws as contained in various codes and statutes do not regulate relationships incident to maritime shipping in a complete way and gaps

exist which must be filled in by legal rules deriving from other sources than written maritime laws.

In the great codifications of 19th century maritime law was considered as a subdivision of commercial law of a particular nature. In the commercial codes of the last century (e.g. French, German, Italian, Dutch, Spanish) separate books or parts contained rules on maritime trade and consequently general principles of commercial law applied to relationships governed by maritime law.[3] But the socialist legal doctrine does not recognize commercial law as a separate branch of law and the new codifications of civil law of the CMEA countries cover the problems which were originally governed by the commercial codes.[4] This has posed the problem of relationship between the civil and maritime laws and is closely connected with the so-called "autonomy of maritime law."

7. The question whether maritime law is independent in relation to other principal branches of law, and in particular in relation to civil law, has often been discussed by jurists both in East and West. It was particularly lively discussed in the French doctrine of maritime law.[5] Views on the autonomy of maritime law were represented in the Soviet doctrine of maritime law[6] as well as by certain Polish theoreticians of maritime law.[7] Nevertheless the general theory of socialist law has been reluctant to classify maritime law as a separate branch of law in the fundamental division.

It would seem that the arguments of those who opposed the idea of autonomy of maritime law have now been added weight. Actually this idea is no more seriously defended. Although nobody denies originality, and even particularism, of maritime law, mainly conditioned by its historic development and specific character of relationships incident to maritime shipping, its dependence on main branches of law (civil, administrative and labour law) cannot be questioned. This dependence is clearly expressed in the preliminary provisions of the Bulgarian Merchant Shipping Code

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[3] These affiliations between the maritime and commercial law were denied by certain theoreticians (particularly in France) who indicated that maritime law had closer ties with civil law than with commercial law. The new French maritime law was separated from the Commercial Code.

[4] Compare solutions accepted by the Polish Civil Code of 1964 or by the Hungarian Civil Code of 1959 as well as by the civil codes of the Soviet republics.

[5] See R. RODIÈRE, *Le particularisme du droit maritime*, "Le Droit Maritime Français," 1974, No. 304, pp. 195–206, where the evolution of views on this subject is presented by the emminent French jurist. He denies the autonomy of the maritime law in relation to the civil law and indicates the weakening of its particularism.

[6] See A. D. KEILIN, *Soveckoe Morskoe Pravo*, Moskva 1954, pp. 3–6.

[7] The idea that maritime law should be considered as one of the branches of law in the fundamental division is represented by S. MATYSIK, *Prawo morskie—zarys systemu* [*Maritime Law—An Outline of the System*], vol. 1, 1971, p. 19.

(Art. 1, para. 2) and Polish Maritime Code (Art. 1, para. 2) which provide that in civil matters incident to maritime shipping, in absence of provisions of the relevant code, provisions of the civil law shall apply. Article 18 of the USSR Merchant Shipping Code provides that rules of the civil, administrative or other legislation of the USSR and Soviet republics shall apply, respectively, to civil, administrative, or other legal relationships arising in merchant shipping if not regulated by the Code.

Since the above mentioned codes are of a concise type, the regulation of both civil and administrative relationships as contained therein must necessarily be more or less fragmentary. In particular certain general rules proper to the respective branches of law are lacking. The accepted solution opens therefore the way for the application of provisions of the civil and administrative law and the scope of application of such provisions is not inconsiderable. This is clearly confirmed by the judicature of the Polish Supreme Court in maritime cases.

8. It should be stressed that while maritime law forming part of the old commercial codes contained relatively few rules concerning administrative matters, in the maritime codes of Bulgaria, Poland and the USSR the scope of administrative provisions is quite considerable with a tendency of being extended, which is stimulated by the progress of international legislation concerning particularly the safety of navigation. Administrative provisions of these codes are supplemented by an extensive legislation as contained in executive orders issued by proper administrative bodies on the strength of authoritiy given to them by the rules of the codes. Labour relations on ships are governed by specific provisions contained in special acts or collective agreements which are subordinated, however, to the general rules of labour law as in force in the given country. The maritime law of these countries presents itself, therefore, as a set of rules concerning specific relationships incident to maritime shipping, which — in the general classification — belong by their nature to different main branches of law — civil, administrative and labour law. In the Polish theory of law such a set of rules concerning specific relations is classified as a complex branch of law.[8] The number of complex branches of law grows with the progress of specialization and division of socio-economic relations.

III. National Maritime Law and International Legislation

9. Although the maritime law of all the CMEA countries is largely modelled on the international legislation, the formal participation of these countries in the international conventions concerning maritime law is far

[8] The Soviet author Professor V. F. MEŠERA (Učobnoe pocobe po kursu "Morskoe pravo," Leningrad 1969, p. 12) has classified maritime law as a complex branch of law.

from being uniform. In particular their attitude to Brussels conventions on civil maritime law is varied. While Poland participates in five out of six Brussels conventions on maritime law concluded in the years 1910, 1924, 1926 (collisions, salvage, bills of lading, limitation of shipowner's liability, maritime lines and mortgages),[9] and Hungary in all six (i.e. also in the convention on the immunity of State-owned ships), Bulgaria and Czechoslovakia participate in none of them. The USSR participates in two 1910 conventions (collisions and salvage) and the German Democratic Republic considers itself to be bound by the same 1910 conventions as well as by 1924 bills of lading convention. Roumania participates in four conventions (collisions, salvage, bills of lading, maritime lines and mortgages). It is noteworthy that the relevant ratifications or accessions originate from the interwar period. In the postwar period the attitude of the CMEA countries to international conventions sponsored by the International Maritime Committee has showed a certain reserve although the national maritime law associations of some of these countries participate in the work of the Committee. However, Poland ratified in 1972 the Brussels Convention on the Limitation of Shipowners' Liability (1957).

Less reserve is shown by the CMEA countries in respect of technical conventions belonging to the field of administrative law. All CMEA countries participate in 1960 SOLAS Convention and in 1958 Convention on the Inter-Governmental Maritime Consultative Organization, and some of them in 1966 Load Lines Convention. Poland and the USSR participate in the 1954 Convention on the Prevention of Oil Pollution.

In case of conflict between the rules of the municipal law and those of an international convention, the latter take priority. This is expressly provided for in Article 23 of the Bulgarian Merchant Shipping Code and Article 17 of the Soviet Merchant Shipping Code but it seems that the same solution is accepted by other CMEA countries. In Poland, the text of an international convention after having been published in the official "Dziennik Ustaw" [Journal of Laws] becomes a part of the Polish internal law, and in matters of an international character falling under such convention the provisions of the convention take priority over the provisions of the municipal law.

IV Maritime Law and the Application of Custom

10. Although in the socialist theory of law customary law is recognized as an independent source of law beside the law created by proper legislative acts, in the European CMEA countries the role played by customary

[9] In 1972 Poland ratified the Brussles Convention on the limitation of shipowners' liability (1957) without denouncing the 1924 Convention relating to the same matter.

maritime law is negligible. Since no rule of law can be created without participation of the State, the socialist States aim at the possibly full regulation of the socio-economic relationships by written laws.

The role played by custom is more important. Custom, however, is not recognized as an independent source of law. These are rules of practice accepted in certain circles of the society or branches of economy, which are legally binding only where a rule of written law so provides. The application of custom may also be based on the will of the parties to the contract. Reference to custom is quite often met in the provisions of the maritime law of the CMEA countries. In most cases it means reference to local customs, but Article 222, paragraph 2 of the Polish Maritime Code and Article 303 of the Bulgarian Merchant Shipping Code refer to international shipping custom.

Where written provisions refer to custom, its role is a supplementary one. But where the application of custom is based on the will of the parties to the contract, it takes priority over the non-mandatory rules of positive law.

One may observe however, a diminishing role played by custom in the shipping trade. In Poland, where customary rules are being registered by the Polish Chamber of Foreign Trade, very few, if any, rules were registered in the last decade, while the number of injunctions, bye-laws and standard documents is steadily growing. The situation becomes assimilated to that in air transport, where custom is practically non-existent.

V. Rules on the Conflict of Laws

11. The new maritime codes of Bulgaria, Poland and the USSR contain sets of specific rules on the conflict of laws applicable in matters regulated by these codes, while in other CMEA countries rules of general private international law are applicable. But even these specific rules on the conflict of laws as contained in the three above mentioned codes differ considerably. It would seem that when drafting these rules the legislators concerned departed from different assumptions. So the rules contained in the USSR Merchant Shipping Code are mainly of a unilateral character ; they specify matters in respect of which the provisions of this Code are applicable (Art. 14, para. 1, items 1–11). The rule contained in Article 14, paragraph 2 is exceptional because it is bilateral ; it provides that rights and obligations of the parties to certain maritime contracts (carriage of goods, carriage of passengers, time charter, towage, marine insurance) are governed by *lex loci contractus*. An opposite concept is represented in the Polish Maritime Code. The rules on the conflict of laws as contained in its

preliminary provisions are bilateral and less numerous than those contained in the Bulgarian or Soviet codes ; they do not concern contractual relationships in respect of which the rules of the Private International Law (1965) apply.

The regulation of the conflict of laws as contained in the Bulgarian Merchant Shipping Code is the most extensive (Arts. 9–26). Its character is not uniform ; some rules are unilateral and some other are bilateral. They generally favour the law of the flag.

12. It is not intended to give a detailed presentation of the rules on the conflict of laws as accepted in the new shipping legislations of the CMEA countries ; a separate study would be needed therefore. We shall restrict ourselves to present solutions accepted in respect of the main problems.

The Polish Maritime Code gives to the contracting parties an unlimited freedom (Art. 11, para. 1) to provide in the contract for the application of foreign law. The only restriction follows from the general public order clause (Art. 11, para. 2) which states that foreign law contrary to the fundamental principles of the legal order prevailing in Poland shall not be applied. The Bulgarian and Soviet Codes are less liberal on this point ; Article 24 of the Bulgarian Code provides that agreements concluded by Bulgarian organizations or subjects providing for the application of foreign law or shipping custom are valid if not contrary to the mandatory provisions of the Bulgarian Code. It follows therefrom that the mandatory provisions of the Bulgarian Code are identified with public order rules and consequently their application cannot be avoided by reference to foreign law. The same follows from Article 15 of the Soviet Code.

13. The freedom of choice of forum (court or arbitration) having seat in a foreign country is expressly granted by Article 25, paragraph 1 of the Bulgarian Code and Article 16 of the Soviet Code in case of relations with foreigners. The Polish Maritime Code does not say anything on this subject, the problem being considered as a procedural one ; it is governed by Article 1105 of the Polish Code of Civil Procedure where the freedom of choice of foreign court or arbitration is granted to Polish socialist organizations in foreign relations.

In connection with the problem of the choice of forum the Bulgarian Code contains two provisions having apparently no equivalents in the legislation of the other CMEA countries and being even in some way unprecedented.

So Article 24, paragraph 2 of the Bulgarian Code provides that an agreement on the choice of court or arbitration does not imply by itself that the parties concerned have agreed to submit their relationship the law of the State where the court or arbitration has its seat. It seems to be a well-established rule of private international law that the choice of forum

does not imply by itself the choice of substantive law. Different views are represented in the British jurisprudence and this may probably be the reason for inserting the relevant provision into the Bulgarian Merchant Shipping Code.

Article 25, paragraph 2 contains a special rule on national jurisdiction. It provides that in respect of disputes concerning relationships incident to maritime shipping in absence of an agreement on the choice of forum, jurisdiction belongs to the courts of that country where the shipowner has its seat or residence. This may give rise to serious doubts in cases where both parties to a dispute incident to maritime shipping are shipowners (e.g. towage contracts). In any way considering the importance of the jurisdiction problem in maritime cases (the well-known practice of "jurisdiction shopping") this provision seems to favour strongly the interests of shipowners.

14. Rules on the conflict of laws in respect of limitation of shipowner's liability are provided only in the Bulgarian (Art. 9) and Soviet (Art. 14, item 8) codes. Nothing in this question is said in the Polish Maritime Code. It would follow therefrom that according to the Polish law the question of limitation of shipowner's liability is governed by the same law which governs the relationship from which the liability derives (*lex causae*)—the problem of limitation being considered as one of substantive law and not a procedural one as under the British or American law.

According to Article 9 of the Bulgarian Code the law of the flag governs both the grounds and limits of shipowner's liability, these two different questions having been linked together. It may cause doubts in cases where under special rules of the Code the shipowner's liability is governed by the rules of some other law than the law of ship's flag, e.g. the law of forum (Art. 14, para. 2) or the law of the place where the adventure ends (Art. 16, para. 1). Should this law apply also to limitation of liability ? The solution accepted in the Soviet Code is clearer since the relevant conflict rule is restricted to limitation question. Under Article 14, item 8 provisions on the limitation of shipowner's liability as contained in Chapter XVI of the Soviet Code apply to shipowners whose vessels fly the Soviet flag. This seems to apply even in cases where the law of some other country would govern the grounds of shipowner's liability.

15. With regard to claims for damages caused by collision of vessels or for salvage remuneration the *lex fori* is competent if collision or salvage occurred on the high seas unless all vessels involved fly the same flag of some other country ; in the latter case the law of that country is applicable irrespective of where the collision or salvage occurred (see Art. 14, para. 2–3 and Arts 15, para. 2–3 of the Bulgarian Code, Art. 10, paras 1–2 of the Polish Code). According to the Polish law the latter rule shall apply also

where foreign vessels of the same flag collide or render to themselves salvage services on waters within the limits of Polish jurisdiction. The position is less certain under the Bulgarian law, since Article 14, paragraph 1 and Article 15, paragraph 1 of the Bulgarian Code provide that in respect of collision or salvage occurring on Bulgarian interior or territorial waters, provisions of that Code are applicable. The Soviet Code provides shortly (Art. 14, item 7) that in respect of collision or salvage claims its rules are applicable if the Soviet "forum" is competent.

16. General average claims are governed by the law of the place where the voyage ends according to the Polish (Art. 9, para. 1) and Bulgarian (Art. 16, para. 1) codes. While the latter Code adds that where all the participants are of the same nationality their national law shall apply, the Polish Code provides for the application of the Polish law where all the participants are Polish. According to Article 14, item 6 of the Soviet Code its provisions on general average are applicable in respect of general averages on Soviet vessels as well as in respect of foreign vessels which end voyage in Soviet ports.

A general appraisal of the rules on the conflict of laws as accepted in the above codes may lead us to a conclusion that the tendency to extend the application of national law is stronger in the Bulgarian and Soviet codes than in the Polish Maritime Code.

VI. Freedom of Contract

17. Private autonomy has traditionally been indicated as one of the basic principles of maritime and commercial law. It has been expressed in the general provisions of both the Bulgarian (Art. 2) and Polish (Art. 2) maritime codes. On the contrary the Soviet Merchant Shipping Code shows more restraint on this point.

One should not forget, however, that for many years the freedom of contract principle has allowed the shipowners to avoid liability imposed by law on the carrier of goods or passengers. A general practice of using standard forms of shipping documents containing a variety of clauses exempting the carrier from liability or limiting his liability has led to a considerable abuse of the private autonomy by the shipowners. The struggle against exemption clauses in which the American Harter Act (1893), the Hague Rules and certain decisions of British courts (e.g. the *Himalaya* case) played role of milestones, is a too well-known process to be presented here. It may, however, be interesting to trace to what an extent it has influenced the modern maritime legislations of the CMEA countries.

18. The Soviet Merchant Shipping Code does not bring any declaration on the freedom of contract in its general provisions, but indicates in the preliminary provisions to chapters concerning particular contractual institutions to what an extent the relevant provisions are mandatory. One should stress that the scope of such provisions is not negligible. In this respect a certain distinction was drawn between legal relationships linking the Soviet organizations and other relationships. In respect of the former, the freedom of contract is restricted, which is more or less typical for the socialist economy systems. So according to Article 119 of the Soviet Code in the mutual relations between the Soviet organizations, all the provisions of Chapter VIII of the Code relating to the contract of carriage of goods by sea are mandatory. In respect of other relationships the provisions of that Chapter are mandatory only when this is expressly provided for by the Code ; but even in the latter case the scope of application of mandatory rules is larger than in the Hague Rules or in the maritime legislations of the other CMEA countries. With regard to the contract of passage, the Soviet Code provides (Art. 168, para. 2) that any contractual restriction of passenger's rights as defined by the Code is null and void. Provisions on the contracts of time charter and towage are generally flexible but some provisions on marine insurance are mandatory (e.g. abandonment, Arts 226–227).

In the Bulgarian Code the scope of mandatory provisions relating to carrier's liability in respect of the cargo is narrower than in the Soviet Code but still wider than under the Hague Rules. The same applies to the Czechoslovak legislation on the carriage of goods by sea. In the Polish and GDR maritime law the scope of mandatory provisions relating to carrier's liability in respect of the cargo is generally modelled on the Hague Rules. In the Polish Code provisions governing carrier's liability for death or personal injuries of a passenger are mandatory while provisions on carrier's liability for the loss or damage to baggage or personal effects of a passenger are flexible.

VII. Controversial Problems

19. Differences in the provisions of the maritime law of the CMEA countries governing the main, traditional institutions of maritime law are more considerable than those concerning its general construction and principles. In this respect the state of affairs existing in the maritime law of the CMEA countries reflects largely the general picture of maritime law considered as a "transnational" phenomenon. Uniformity of rules concerning maritime salvage and liability for collision damage, as achieved in the

first Brussels conventions of 1910, and being more or less general (althought the USA rejected the Convention on collision liability), embraces also the CMEA countries. The same may be said on the application of the York-Antwerp Rules 1950 concerning the general average. On the other hand where the unification on the universal scale is protracted because of sharp conflicts between certain groups of interests, this is reflected by the lack of uniformity in the maritime law of the CMEA countries. So the conflict of views on the concept of limitation of shipowner's liability which for a long time prevailed in the international doctrine of maritime law is reflected by a variety of limitation systems accepted in the maritime legislation of the CMEA countries.[10] There is a lack of uniformity with regard to the legal character of charter contracts which problem is also troubling marine jurists in the western countries. Even with regard to the carrier's liability for cargo damage the uniformity achieved owing to the influence of the Hague Rules is a relative one. The scope of application of mandatory provisions based on the Hague Rules is not identical and certain questions not covered by the Rules (e.g. liability for delay or non-performance of the voyage) are solved in a different way.[11]

20. There are certain divergences of views concerning some basic problems of principle. For instance, certain Soviet maritime jurists represent the view that State immunity should be accorded to State merchant vessels[12] while in Poland the general trend of opinion (with minor exceptions) is against the immunity of State enterprises acting in foreign trade.[13] The immunity of State merchant vessels was described by an emminent marine jurist as *privilegium odiosum*[14] which may only render difficult the development of relationships in the international shipping trade, where parties should enjoy equal rights. Consequently the Polish shipping enterprises have never availed themselves of the immunity protection in case of arrest or threat to arrest their vessels abroad under a court order for the purpose of obtaining security of claims ; recently the Gdańsk court arrested

[10] After the ratification of the Brussels Convention of 1957 on the limitation of shipowners' liability by Poland we may speak of five or even six systems of limitation prevailing in the maritime law of seven CMEA countries.

[11] For the contract of carriage of goods see the study by J. Łopuski and J. Hołowiński, *Umowa morskiego przewozu ładunku w prawie europejskich krajów socjalistycznych* [*The Contract of Carriage of Goods by Sea in the Law of the European Socialist Countries*], Warszawa 1971, (also in Russian and German).

[12] See S. A. Gurejev, *CMEA Countries' Sea Law Unification*, Shipchartering Coordinating Bureau "Information Bulletin," 1973, No. 11, p. 90.

[13] See J. Jakubowski, *Immunitet przedsiębiorstw państwowych* [*State Enterprises Immunity*], "Studia Prawnicze," 1968, No. 17, p. 110.

[14] See J. Górski, review of Matysik's book—*Prawo morskie* [Maritime Law], "Państwo i Prawo," 1972, No. 5, p. 115.

a foreign State merchant vessel in order to constrain her owners to provide security in respect of salvage claim pursued by a Polish enterprise. In relationships between the socialist organizations of the CMEA countries an agreement providing that parties will not resort to judical arrest of State merchant vessels may lead in practice to the observance of immunity,[15] but this should not be confused with the problem of principle.

Another problem on which a certain divergence of views occurs is that of liability for the loss of life or personal injury. In the Soviet legal theory there seems to be a firm opinion that such a liability should be unlimited. In other socialist countries (i.a. in Poland) laws are in force which provide for the limitation of such liability. The experience of air companies indicates that such a limitation is by no means detrimental to the interests of victims, if an adequately high limit of liability is set up, while it facilitates considerably the settlement of claims.

Two more differences should be mentioned which seem to touch upon the problems of principle. Article 28.1 of the Bulgarian Merchant Shipping Code states that State organizations and institutions are owners of vessels, which may be incompatible with the principle of "unity of State ownership" according to which State property is owned by the State. A similar departure from this basic principle of the socialist legal theory may be inferred from Article 14, paragraph 1 of the Polish Maritime Code and the current practice.

Another point concerns marine insurance. Otherwise than the Polish or Bulgarian Codes, the Soviet Code (Art. 196) does not specify civil liability as a possible subject of marine insurance. This may reflect the well-known view prevailing in the Soviet theory of insurance law considering liability insurance as immoral. This view seems now to be abandoned, in any way in practice, since the Soviet shipping enterprises insure their civil liability.

21. Nevertheless looking at the process of formation of the maritime law of the CMEA countries in the perspective of the last two decades we may ascertain that certain rapprochement has been achieved even without any organized action to this end. This concerns in particular the three relatively modern codes *viz.* the Polish Maritime Code (1961), the USSR Merchant Shipping Code (1968) and the Bulgarian Merchant Shipping Code (1970) which have a considerable number of common features.

We shall draw attention here to one of the most important problems of maritime law and namely to the nature of the contract of carriage of goods in respect of which a characteristic and rather novel solution has been more or less uniformly accepted in the above mentioned codes.

[15] See Agreement of the CMEA countries on the collaboration in maritime shipping, dated December 3, 1971 (Art. 13, para. 3).

As it is well-known, in the legal systems of some leading maritime countries (Italy, France, common law countries) a distinction is made between the contract of affreightment (covering both the voyage and time charter contracts) and the contract of carriage of goods.[16]) The motivation of this distinction seems, however, to be more traditional than dictated by the necessities of the modern shipping industry. Whether the contract is by a voyage charter-party or by a bill of lading, its very aim is the transportation of goods for the affreighter, and one may notice a clear tendency in practice to assimilate these contracts, i.a. by the application of uniform rules on carrier's liability under bill of lading (the Hague Rules) to voyage charter parties. On the other hand, there are many valid reasons to distinguish the time charter from the contract of carriage of goods since the former contract may be concluded for a variety of purposes (not only for the transportation of goods).

Following this reasoning, the idea of the contract of affreightment (covering both the voyage and time charter), as distinct from the contract of carriage of a defined consignment, has been rejected by the codes in question, although the traditional distinction between charter contracts, giving to the charterer the right to dispose of a defined cargo space, and simple contracts of carriage of specified goods (called "booking contracts" in the Polish Maritime Code) has been maintained. These, however, are little more but two variants of the contract of carriage of goods, and in spite of certain differences in the determination of the rights and obligations of the parties, the codes in question contain a considerable number of rules which are common to both these variants ; this concerns in particular the rules on carrier's liability. At the same time all these three codes regulate the time charter as a *sui generis* contract distinct from the contract of carriage.

VIII. Some Problems of the General Unification of Maritime Law

22. Although in the last two decades we have witnessed a certain progress in the rapprochement of the maritime laws of the CMEA countries, the problem of unification has been raised only in recent years,[17] which

[16] The distinction between the contract of carriage and the contract of affreightment has also been accepted in the Czechoslovak law on foreign trade (1963).

[17] See J. Łopuski, J. Hołowiński, *op. cit.*, pp. 13–16 and 305–311; J. Łopuski, *Prawo morskie krajów RWPG—problem unifikacji [Maritime Law of the CMEA Countries—A Problem of Unification]*, "Państwo i Prawo", 1971, No. 12, pp. 909–921 and *Maritime Law of the CMEA Countries: Problem of Unification*, "Shipchartering Coordinating Bureau "Information Bulletin," 1971, No. 9 ; S. A. Gurejev, *op. cit.*, pp. 84–97.

may be linked with the strengthening of collaboration in shipping and international trade among the CMEA countries. Before tackling this crucial problem we should consider the unification of maritime law as a global problem, as well as developments taking place on the international scene.

23. We do not want revert here to the long history of intellectual effort aimed at achieving the uniformity of the law of merchant shipping.[18] In the 100 years of its history, the organized activity for the unification of maritime law may register successes and failures, and gives us an interesting picture of struggle between the conflicting economic interests in which humanistic ideals quite often have given way to the dictate of powerful pressure groups. Commonly accepted uniform rules in respect of certain fields of shipping relationships have been elaborated and the scope of international rules is being gradually broadened. On the whole, however, the picture is not encouraging. Out of a considerable number of international conventions only very few met with common acceptance, and quite many of them may be described as dead or half-dead. As for the international regulation, the maritime transport stands clearly behind the air or railway transport.

24. Meanwhile new problems arose which brought about further complications. The situation in international shipping and exploitation of sea resources has changed under a variety of aspects which are not indifferent from the point of view of legal regulation. We have already pointed out to some of the main factors which initiated the process of changes in maritime law. One of them is the impact of modern technology and organization. Increased regularity of sea transport and growing dependence of the vessel on the shore organization of the shipping enterprise assimilate sea transport to other branches of transport, while containers impose the necessity of an integrated organization of combined transport which would need an adequate international legislation. The exploitation of the sea resources by a variety of ways and means has intensified, and the complexity of social relationships connected therewith has increased. In this sector, we have witnessed lately a formidable intensification of legislative action at national, regional and international level. The same may be said about the problem of control of marine pollution.

Balance of economic power on which the establishment of relationships in the international shipping trade was previously based has been essentially changed. For a pretty long time international shipping relationships were influenced by the highly developed capitalist countries and particularly by the traditional maritime powers in which the shipowners represented the

[18] For this question see J. ŁOPUSKI, *Rechtsfragen des Seeverkehrs im Wirkungsbereich internationaler Organisationen*, "Internationale Transport Annalen," 1971, pp. 304–320.

most active pressure group. The maritime law associations from these countries played the leading role in the International Maritime Committee thus influencing the international shipping legislation. One should not be astonished that it strongly favoured the interests of shipowners.

The growing importance of the shipping industry and international trade of the socialist countries and the appearance on the scene of the developing countries has changed the picture. The latter countries, disposing of enormous resources of raw materials so badly needed by the developed countries, energetically demand a reform of maritime law and in particular a better protection for cargo interests. Under their pressure the work on the international shipping legislation passed from the hands of the IMC to the UN international bodies such as UNCTAD and UNCITRAL, where the developing countries have a strong representation.

25. We see, therefore, that the rapid development of maritime economy in many countries and the growing complexity of relationships incident thereto have created problems which urgently require legislative solutions at both the national and international level. It should be stressed, however, that the problems we face now in maritime law are quite different to those which existed at the time of the commencement of international efforts to achieve a unification of maritime law. These efforts were undertaken by jurists and businessmen from the leading maritime countries, which had sufficiently developed systems of maritime law, for the purpose of making these systems more uniform in order to facilitate the international shipping trade. What we see now is a certain reversal of the law-making process, similar to what has been happening in air law. Uniform rules of maritime law are being elaborated by way of international agreements in respect of matters not regulated before or regulated insufficiently by national laws, and these uniform rules are then incorporated by various methods into the national legal systems. The importance attached to the international uniformity of maritime legislation has restricted the initiative of particular countries to extend or improve their national legislations, and action at the national level is often postponed pending the results of an international action. But action at the international level is often endlessly protracted owing to the conflict of interests and diversity of views of participants (e.g., the reform of the Hague Rules). And even when agreement is finally reached, years may pass before it becomes fully effective since States hesitate to ratify it. Meanwhile socio-economic processes continue to develop and new problems arise causing the necessity to amend international agreements often before they have become effective (e.g. the history of the Convention on the Prevention of Oil Pollution). The general situation becomes fluid, national laws fall into obsolescence affecting the regulatory functions of maritime law.

26. There is another important factor which has radically changed the picture. As we know the old law of merchant shipping was created by merchants being a pragmatically thinking social group of professionals open to reasonable compromises. During the last century the interest of governments in the maritime legislation has been steadily growing and now this legislation has become one of many instruments used by governments in their strife for the best advantages in shipping, international trade and division of sea resources. In this way, however, the international legislative activity concerning the maritime law has become a political issue involving the conflict of interests and ideas between various groups of countries, in particular between the developed and developing countries, which affects its efficacy. With the present state of minds one may hardly expect spectacular results at the international level in any case in the near future. Therefore governments should not reduce their efforts to improve and harmonize their national maritime legislations independently of their participation in the work on the international legislation.

IX. Unification of Maritime Law of the CMEA Countries in View of the Universality of Maritime Law

27. The negative aspects of the above described situation may also be traced in the maritime law of the CMEA countries. As it appears from the presentation of the actual state of their maritime legislation, some of these countries have quite obsolete maritime laws and other only very recently showed an interest in the international action concerned with the unification of maritime law. It would seem that there is still no clear line of approach to this problem.

Writing about this problem in 1971 the undersigned[19] expressed the view that whereas the unification of maritime law of the CMEA countries is not indispensable, efforts should be undertaken to obtain a rapprochement of maritime legislations of these countries and to coordinate their activities in this field. It was pointed out that although the results of efforts to unify the maritime law at the universal scale are rather moderate, certain groups of States achieved considerable progress in the rapprochement or unification of their maritime law.[20] There is also little doubt that a better coordination of activities of the CMEA countries, linked with their

[19] See footnote 17.

[20] Consideration should be given to a complete unification of the law of carriage of goods by sea of the Scandinavian countries and an advanced rapprochement of their maritime laws in other sectors. See *Lois maritimes nordiques* (French translations with an introduction by R. Rodière) Paris 1972. In the reports from conferences on maritime law we may hear now quite often of the attitude of the "Scandinavian

participation in the work of international organizations dealing with the problem of maritime legislation at the universal scale, would increase their contribution to this work. These views are largely shared by a Soviet jurist[21] although he seems to be in favour of a more accelerated unification of maritime law of the CMEA countries and suggests that this may be achieved by working out of a uniform maritime statute (including i.a., the rules on the conflict of laws) which could be adopted by the CMEA countries as their national maritime law.

28. One of the main problems to be considered is whether the unification of maritime law would indeed be an important factor in the process of integration of maritime economy of the CMEA countries. It seems that even being aware of the active role played by the legal superstructure on the formation of relationships, this factor should not be overestimated here, considering the importance of ties linking the maritime economies of the CMEA countries with the economies of the free market countries. The strengthening of economic collaboration among the CMEA countries in the field of shipping or sea fisheries may be obtained, where it is really necessary, by the adoption of specific regulations applicable only to relationships between the enterprises and other bodies of the CMEA countries. The adoption of such regulations, as it has already been pointed out by several jurists, should not be confused with the unification of law, since they are not aimed at achieving the uniformity of the rules of national laws but are applicable only to a determined scope of relationships in respect of which specific regulations have turned out to be necessary. "The CMEA General Conditions of Delivery, 1968" and similar regulations elaborated by the CMEA organs and then introduced in the member countries on the strength of orders issued by the ministers concerned may serve as examples of such rules which while having considerable importance for the development of foreign trade relations among the CMEA countries are not any instruments of unification of their national laws.

One should stress that the economic collaboration among the CMEA countries in the field of shipping has been recently intensified owing to the efforts of CMEA bodies[22] and in April 1972 the "General Conditions

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group" instead of the attitude of particular Scandinavian States. One may also point out to the uniform reception of the Hague Rules by the USA and the common law countries.

[21] See S. A. GUREJEV, *op. cit.*, p. 86.

[22] One should mention the work of the CMEA Standing Commission on Transport, as well as of the Conference of Chartering and Shipowning Organizations, of the Shipchartering Co-ordinating Bureau, of the Council on Documentation and of the International Shipowner's Association.

for Mutual Offering of Sea-Going Tonnage and Foreign Trade Cargoes of the CMEA Countries" were adopted by the Conference of Chartering and Shipowning Organizations of the CMEA countries. These regulations are an instrument similar in its legal nature to "The CMEA General Conditions of Delivery 1968" and do not serve the purpose of unification of maritime law.

29. We would also point out that although the process of economic integration of the EEC countries is more advanced than of the CMEA countries, with tendencies to establish uniform commercial law, so far there have been no serious suggestions to unify the maritime law of the EEC countries on a regional basis (in spite of considerable differences). According to a report from the Oxford Symposium on the universalism and regionalism in the international economic and commercial law (October 1973)[23], the majority of participants held the view that universal unification of the maritime and commercial law should be given priority before a regional unification, and that the economic integration on the regional basis should not hamper the development of a universal economic and commercial law.

X. Rapprochement of Maritime Legislations and Coordination of Legislative Policies

30. The rapprochement of maritime legislations and coordination of legislative policies of the CMEA countries is another problem which would belong to the tasks of the Conference of Representatives of the CMEA Countries for Legal Matters. The work will have to be conducted along two distinct lines : (1) coordination of policies of the member-countries participating in the work of international organizations dealing with the international maritime legislation at the universal level (e.g., IMCO, UNCITRAL, CMI, etc.), and (2) harmonization and rapprochement of the maritime legislations within the group of the CMEA countries. In view of the vast programme of reforms of the maritime law as envisaged by the secretariats of the organizations concerned (it covers the most important sectors of maritime law) activities along the first line seem to have most importance and considering the relatively fluid situation in the international maritime law this would eventually bring about the rapprochement of the maritime legislations of the CMEA countries.

The chief aim of the coordinated policy of the CMEA Countries should be to increase the role played by these countries in the creation of the international maritime legislation. By the joining and coordination of ef-

[23] See "Państwo i Prawo", 1974, No. 3, pp. 147–148.

forts more initiative could be shown by the CMEA countries which should come forward with their own legislative solutions. Initiatives of other countries or groups of countries should be thoroughly discussed in order to agree, if possible, on a common attitude. In relation to conventions already signed a joint policy in the matter of ratification would be advisable ; the number of ratifications is in most cases decisive for the entrance of the convention into force.

31. One may envisage certain difficulties in reaching agreement on a joint policy of the CMEA countries towards the international maritime legislation ; the importance of the shipping or fishery industries for the national economy of the member countries is far from being equal, and agreement cannot be reached by imposing the will of one country (or more) on the other ones. The joint action would require the elaboration of a theory or main ideas concerning general evolutionary trends of the international maritime law conforming with the needs of development of the world maritime economy. The interests of the CMEA countries as well as those of the developing countries will have to be duly weighed. The elaboration of such ideas would have to be preceded by the investigation of principal trends in the organization and legal regulation of the international shipping trade and fisheries conforming with general laws of social development. It is suggested that in framing this philosophy the following points should be duly weighed :

— In view of the universal features of maritime law the solutions proposed should correspond to the requisites of the development of international relationships between States belonging to various socio-political systems.

— Preference should be given to modern and progressive theories indicating the necessity of reforming the traditional institutions of maritime law in order to make them adequate to social needs and conditions created by modern organization and technology.

— Consideration should be given to the interests of the developing countries and in particular to their views on the necessity of reforming the law of carriage of goods by sea in order to provide better legal protection to cargo interests.

— The argument often put forward by the traditional maritime powers as if the "balance of interest" secured by the maritime law in its present form were indispensable, needs a critical appraisal. Such an appraisal should be based on an economic analysis supported by appropriate statistical data.

— Consideration should be given to the changes occurring in the balance of economic power in the world and in particular to the growing position of the developing countries as producers of raw materials.

— Consideration should be given to certain tendencies for the integration of transport law under the influence of new forms of organization and technology applied in the international transport (containers, combined transport, etc.).

32. It would seem that on the basis of an accepted philosophy it might possible to work out certain solutions which would find support also among States outside the socialist camp and would enable the CMEA countries to exercise the influence on the creation of the international maritime legislation, being adequate to their economic potential and political significance. This will require, however, a rather broad look on the problem. In matters of longterm policy the approach cannot be burdened with an excessive pragmatism, the more that the shipping and foreign trade interests are neither equally balanced in the economy of the CMEA countries, nor are equally represented. One should rather look at the interest of the whole community, while both the economic and political factors should be considered, including the relations with the developing countries. Those responsible for the shipping policy in the CMEA countries should realize that when competing on the world market with capitalist shipping it is not enough to imitate the methods applied by capitalist competitors. In fact the commercial fleets of the socialist countries are operated in different conditions and on different principles than the fleets of the capitalist countries. In particular one should remember that certain traditional institutions of maritime law, exempting or limiting the liability of shipowners or carriers make possible the existence of a pretty large margin of capitalist shipping, carrying on highly speculative activities (operation of old tonnage, registering of "one-ship companies" in countries providing "flags of convenience," evasion of rules concerning safety of navigation, social and fiscal matters, taking excessive risks, speculating on marine casualties and averages, etc.). For the shipping enterprises of the socialist countries operating mostly new tonnage of a high technical standard, employing properly selected and well-trained crews and rigorously observing rules concerning safety requirements and social conditions, the usefulness of legal devices giving an excessive protection to the interests of shipowners must necessarily be a lesser one. Moreover, one should consider that according to the data available the CMEA fleets provide transportation services to their own trade enterprises in a higher percentage than to the foreign shippers. In the world competition these institutions of maritime law may in the long run bring more harm than good to the shipping interests of the CMEA countries, as they render possible the survival of numerous capitalist shipping enterprises operating tonnage at relatively low costs and high profits unattainable for the shipping enterprises of the CMEA countries.

33. Only after an efficient machinery is established for the coordination of legislative policy of the CMEA countries on the international scene, the interest of the Conference of Representatives may be turned to legislative activities within the CMEA. The scope of problems covered by such activities would largely depend on the outcome of work performed at the universal level. Since, as we have already stated, spectacular results cannot be expected, the national legislators must be prepared to take legislative action in order to solve problems posed by current developments. The Conference of Representatives should provide an appropriate machinery through which an intended legislative action may be communicated to other member-countries or, if necessary, coordinated with their action. The experience of the Nordic Commission through which a considerable rapprochement and a partial unification of the law of the Scandinavian countries has been achieved may be found useful.

Extensive comparative studies concerning the maritime law of the CMEA countries will of course be necessary. As it is reported such studies have already been commenced by the common effort of the maritime research institutes of the member countries.

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Membership and Other Forms of Participation of States in the Activities of the Socialist Economic, Scientific and Technical Intergovernmental Organizations

by ZBIGNIEW M. KLEPACKI

1. The System of Socialist Intergovernmental Economic, Scientific and Technical Organizations

The emergence and consolidation of a system of organizations of socialist States was one of the essential features marking international relations of the period following World War II. And although these organizations' activities are based on the fundamental principles of traditional international public law, their founders, the socialist States, have laid down a series of new and essential principles so that in practice their activities are based on a qualitatively new kind of principles of international relations, while shaping a new type of such relations.

Till the end of 1973, as many as 16 socialist international economic, scientific and technical organizations were called into being :

a. The Council for Mutual Economic Assistance—CMEA, in charge of overall coordination of economic, scientific and technical cooperation ;

b. a series of specific branch organizations such as : Central Control Office for Interconnected Power Systems—CDU ; Organization for Cooperation in the Field of Ball-Bearing Industries—Interpodshipnik ; Organization for Cooperation in the Field of the Iron and Steel Industry—Intermetal ; International Organization for Cooperation in the Field of Small Scale Chemical Production—Interchim ; International Organization for Economic, Scientific and Technical Cooperation in the Field of the Electrotechnical Industry—Interelectro ; Association for the Coordination of the Technical Development and Production of Machinery Required for the Mechanization of Work in Orchards, Wineyards and Vegetable Fields and for Cooperation in the Marketing of such Machinery—Agromasz ;

c. financial organizations such as : International Bank for Economic Cooperation—IBEC ; International Investment Bank—IIB ;

d. transport organizations such as : Organization for International Railway Cooperation—OSZD ; Common Waggon Pool—OPW ;

c. communication organizations such as : Organization for the Cooperation of Socialist States in Telecommunications and Post—OSS ; Organization of Outer Space Communication—Intersputnik ;

f. scientific organizations such as : United Institute for Nuclear Research—UINR ; International Centre for Scientific and Technical Information ; International Laboratory of High Magnetic Fields and Low Temperatures.

With the exception of Agromasz the membership of which is limited to Bulgaria, GDR, Hungary and the USSR and of the International Laboratory in which only Bulgaria, Poland and the GDR participate, all other organizations include the following States: Bulgaria, Czechoslovakia, GDR, Poland, Roumania, Hungary and the USSR. Furthermore, Mongolia belongs to 8 organizations and Cuba to 6. The membership of OSS, OSZD and UINR includes also Albania, the People's Republic of China, the Democratic Republic of Vietnam and the Korean Peoples' Democratic Republic (China has withdrawn from the UNIR). Albania is also a member of the CMEA and Yougoslavia—a member of Interchim.

2. Membership of Socialist Intergovernmental Organizations

a. What Kind of States may Become Members of Socialist Intergovernmental Organizations?

The agreements establishing intergovernmental socialist organizations or the charters of such organizations provide for membership of other States and in the overwhelming majority of cases do not specify whether this applies only to socialist States or to capitalist and developing States as well. There is only one exception—the OSS which limits the membership to socialist States only. This results from the name of the organization and from the preamble of the treaty establishing the organization in which it is stated, among otherthings, that

"recognizing that it is necessary to expand and strenghten cooperation of socialist States in the field of communication [...]"

and, first of all, from Article II of the said treaty which states that "members of the organization are the administrative organs of communication of socialist States, which have expressed the desire to participate in its work, have signed the treaty or adhered to it".

From the formal legal point of view all other organizations are open to membership of all States, socialist as well as capitalist and developing ones. Only the CMEA was till 1962 open to European countries only. In June 1962, the CMEA charter was modified, all territorial limitations were removed, enabling Mongolia to join the organization.

However, the question arises as to whether in practice non-socialist States can participate in the above mentioned organizations. To my knowledge the subject has not been extensively discussed, as yet, by either socialist or bourgeois specialists. The only exception concerns the problem of the CMEA. All Western authors agree that membership of the CMEA by non-socialist States is, in practice, impossible.[1] On the other hand the majority of socialist authors emphasize the open character of the CMEA, without proceeding with an exhaustive analysis of the problem with due consideration of the legal, political and practical points of view.[2] While speaking about the open character of the CMEA they seem most often to imply above all that the CMEA is not aiming at creating a closed and autarchic economic block artificially isolated from the other states. The CMEA offers to non-member countries the opportunity of active participation in its work on the implementation of its specific objectives. At the same time its member countries are aiming persistently at developing on a basis of equality economic, scientific and technical cooperation with other States irrespective of their social and political system. Participation in the CMEA does not impair the possibility of its member-countries to engage in and develop such cooperation with other States. This seems to be the meaning of the open character of the CMEA, implying the desire of its

[1] Cf. for instance, I. AGOSTON, *Le marché commun communiste, Principes et pratique du Comecon,* Genève 1964, p. 58 ; H. BRÄUTIGAM, *Die wirtschaftliche Zusammenarbeit der Ostblockstaaten im Rat für gegenseitige Wirtschftshilfe,* "Zeitschrift für ausländisches öffentliches Recht und Völkerrecht," vol. 21, 1961, 1, p. 696 ; K. GRZYBOWSKI, *The Socialist Commonwealth of Nations,* New Haven 1964, p. 79 ; H. J. POMMER, *Politik und Wirtschaft in Sovietblock,* Mainz 1966, p. 13 ; R. C. RIBI, *Das Comecon. Eine Untersuchung über die Problematik der wirtschaftlichen Integration sozialistischer Länder,* Zurich-St. Gallen 1969, p. 61-62 ; R. SZAWŁOWSKI, *L'évolution du Comecon 1949-1963.* "Annuaire Français de Droit international", 1963, P- 685 ; A. USCHAKOV, *Der Rat für gegenseitige Wirtschaftshilfe. Dokumente zum Ostrecht II,* Koln 1962, p. 29.

[2] For instance N. FADEJEV, *Sovet EkonomiSeskoj Vzaimopomosäi,* Moskva 1964, P- 22 ; M. D. KUDRJASEV, V. I. MOROZOV, *Ustav Ekonomiceskoj Vzaimopomoüäi — pravovoe wyrażenie ekonomiceskogo sotrudnicestva novogo tipa,* "Sovetskoe Gosudarstvo i Pravo," 1960, No. 10 p. 25 ; *Sotrudnicestvo socialisticeskoe. SEw. Itogi i perspektivy,* Moskva 1973, pp. 12-16 ; P. A. TOKARIOVA, *Meidunarodnye ekonomićeskie organizacii socialisticeskih stran,* "Sovetskij Jeżegodnik Meżdunarodnogo Prava" 1959, p. 171.

members do cooperate with non-socialist States rather then the possibility of other States to join the organization as regular members.[3]

As far as the CMEA is concerned it seems unlikely that non-socialist countries could become its members. The provisions of the CMEA charter do! not limit formally the membership to a particular group of States, however, these provisions cannot be isolated from their general context. And it is precisely the requirements arising from the charter of the CMEA with regard to the objective capacity of the States candidates for membership which limit in practice the membership of the CMEA to countries of a specific social and political system.

Thus, for example, in the preamble to the articles of agreement of the CMEA it is stated, among other things, that member countries are determined to

"develop all-sided economic cooperation with a view of implementing international socialist division of labour in the interest of socialist and communist construction in their countries and of lasting peace in the whole world."

The formula implies therefore, on the one hand that the candidates for membership in the CMEA dispose of the capacity to implement international socialist division of labour and, on the other hand, that since the implementation of that objective must serve the interests of socialist and communist construction it can apply only to socialist States.

Article I, paragraph 2 of the charter states that apart from the traditional principles of international law the activities of the CMEA are based also on the principle of brotherly mutual assistance, which being closely connected with the idea of socialist internationalism is a characteristic feature of relations among socialist States. The formula implies therefore another requirement which must be met by candidates for membership—namely the capacity to cooperate in accordance with the principle of brotherly mutual assistance.

Finally there is Article III, paragraph 1, letter b, which stipulates that the CMEA

"cooperates in perfecting international socialist division of labour by coordinating the plans of economic development, specialization and joint production of its member countries."

[3] For instance the above quoted collective work *Sotrudnicestvo socialisticeskoe* while speaking about the open character of the CMEA is emphasizing the above mentioned elements. At the same time it stresses very strongly the fact that within the CMEA are cooperating States of the same social system, that the organization relies on the "single type of their social system, based on social property of means of production and on the theoretical, ideological and political community of views of the ruling Marxist-Leninist parties" (p. 14). Such an approach indicates clearly that States not corresponding to such criteria stand little chance of becoming full members of the CMEA. See also W. MOROZOV, *Strany SEV. Kurs na sirokoe meédunarodnoe sotrudnicestvo,* "Meździunarodnaja Zyzn," 1974, No. 3, pp. 11-20.

The formula implies clearly the requirement to possess the capacity to participate in the coordination of economic plans.

Such requirements can be met only by socialist States. It is unrealistic to suppose that capitalist States could be able to act in accordance with the principle of brotherly mutual assistance, that such a principle could become the foundation of relations between socialist and capitalist states.[4] It is equally unrealistic to consider that capitalist States with their free market economy could take part in one of the most important elements of CMEA activities, namely in the coordination of economic plans.[5]

That is why, although from the formal and legal point of view the CMEA is open for membership to all countries, the ideological principles of its charter imply, in practice, that the membership is limited to socialist countries only. The accession to the CMEA of a non-socialist State would therefore inevitably involve a modification of its character. For it is difficult to visualize a situation, which would be created in the CMEA with the accession to it of a capitalist State and which would result in the non-application of one of its basic principles towards some of its members and their non-participation in the basic form of the organization's activity.[6]

The practice of the CMEA has proved that its member can be only a socialist State. The principle of brotherly mutual assistance is the basis of its daily activity. The coordination of economic plans has been recog-

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[4] For a more elaborate discussion of the same subject see—L. CIAMAGA, H. de FIUMEL, *Struktura i formy prawne Rady Wzajemnej Pomocy Gospodarczej [The Legal Structure and Forms of the Council for Mutual Economic Aid],* "Studia Prawnicze", 1963, No. 2, 236-240 ; H. de FIUMEL, *Rada Wzajemnej Pomocy Gospodarczej. Studium prawno-międzynarodowe* [The *Council for Mutual Economic Aid. A Study in International Law],* Warszawa 1967, pp. 29-36 ; W. HANISCH, G. HERDEL, *Der proletarische Internationalismus, das Grundprinzip in den Beziehungen zwischen den sozialistischen Staaten,* "Staat und Recht", 1959, No. 7 ; M. GENEVSKI, *Mezdunärodno-pravovaja harakteristika i znacenie na principe za socialisticeskij internacionalizm,* "Pravna myśl'," 1966, No. 4 ; *Mezdunarodnye organizacii socialisticeskih stran,* Moskva 1971, pp. 3-30 ; A. MARTIN, *Der sozialistische Internationalismus als Grundprinzip der völkerrechtlichen Beziehungen zwischen den sozialistischen Staaten,* "Deutsche Aussenpolitik", 1958, No. 3 ; J. SANDERSKI, O *niektórych zasadach strukturalnych Rady Wzajemnej Pomocy Gospodarczej [On Some Structural Principles of the Council for Mutual Economic* Aid], "Ruch Prawniczy, Ekonomiczny i Socjologiczny," 1973, No. 3, pp. 13-21 ; H. WUNSCHE, *Die Bedeutung des sozialistischen Internationalismus für die Festigung der Souveränität der Sozialistischen Staaten und die Organisierung ihrer brüderlichen Zusammenarbeit,* published in a collective work *Rechtsbeziehungen der sozialistischen Länder,* Berlin 1966, pp. 11-44.

[5] Cf. H. de FIUMEL, op. *cit.*, p. 61 ; *MeSdunarodnye organizacii....* p. 88.

[6] Cf. T. DOROTA, B. REUTT, *RWPG. Geneza, działalność, perspektywy [The CMEA. Origins, Activities, Perspectives],* Warszawa 1969, pp. 6-7 ; A. WASILKOWSKI, *Zalecenia Rady Wzajemnej Pomocy Gospodarczej* [The *Recommendations of the* CMEA], Warszawa 1969, pp. 21-31.

nized in the Basic Principles of International Socialist Division of Labour—one of the most important documents adopted by the CMEA at its XV session in 1962 as the fundamental factor for the strengthening of international socialist division of labour i.e. as a basic method of the organization's activity. In the document the coordination of economic plans is defined as "voluntary, joint, planned adtivity of socialist States aimed at the maximum utilization of the political and economic superiority of the socialist system in the interest of insuring the quickest victory of socialism and communism."

Finally it has to be borne in mind that the directions and basic principles of CMEA activities are laid down by conferences of representatives of the communist and workers parties of the member-countries. The decisions of these conferences have formally no binding character for the CMEA and, hence, they must be confirmed by the appropriate bodies of this organization. However, in view of the role of these parties as the leading political force in the member countries of the CMEA, the directives adopted by the conferences are in fact binding and the appropriate organs of the organization are only called upon to give them formal legal force. It is therefore difficult to suppose that a capitalist state, which could not participate in such conferences, would agree to comply with its decisions.

Among socialist authors the same view that in practice only socialist States can be members of the CMEA is shared by: T. Dorota and B. Reutt,[7] H. de Fiumel,[8] M. Genewski,[9] R. Vukadinovic,[10] A. Wasilkowski,[11] by several Soviet writers in two collective works,[12] L. Ciamaga, who is contesting the correctness of this opinion states, however, that the possibility of participation of non-socialist States in the CMEA is limited because of their free market economy.[13]

Equally, with regard to several other socialist organizations it is unrealistic to visualize the accession to them of non-socialist States. This applies in particular to such organizations as: Intermetal, Interchim. Interpodshipnik, Interelectro, CDU, Intersputnik and International Information Centre.

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[7] T. DOROTA, B. REUTT, *op. cit.* pp. 6-7.

[8] H. de FIUMEL, *op. cit.* p. 62.

[9] M. GENEVSKI, *Politiceska i pravna harakteristika na Syveta. Ikonomiceska Vzaimapomosc*. Sofia 1959. p. 155.

[10] R. VUKADINOVIC, *Pravna struktura Sovjeta za uzajamnu ekonomicesku pomoc,* "Politicka Misae," 1965, No. 1, p. 28.

[11] A. WASILKOWSKI, op. *cit.*, pp. 21-34.

[12] *Mezdunarodnye organizacii...,* pp. 88-89 : *Kurs mezdunarodnogo prava,* Akademiia Nauk SSSR. Moskva 1967. p. 112.

[13] L. CIAAMAGA, *Od współpracy do integracji. Zarys organizacji i działalność RWPG w latach 1945-1964 [From Cooperation to Integration. An Outline of the Organization and Activity of the CMEA from 1949 to* 1964], Warszawa 1965, pp. 31-33.

por their activities are based among other things on the principle of brotherly mutual assistance. Furthermore, the first four organizations are also following the principles of international socialist division of labour and are acting in the interests of creating conditions for the coordination of development plans of their respective branches and the further development of specialization and joint production.

In the case of some other organizations the accession of non-socialist States could result in perturbing their activities and even in impairing the effective implementation of their tasks ; on the other hand, such non-socialist States would not be able to meet fully their obligations arising from their membership in the CMEA and to participate in all activities of the organization. These remarks apply to such organizations which—even in the absence of statutory obligation to do so—are acting in accordance with the principles of international division of labour. Hence, the conclusion that some developing countries which have adopted certain elements of economic planning have larger possibilities of joining some international socialist organizations.

As far as the remaining socialist organizations are concerned (for example the OPW, OSZD, UINR, the International Laboratory) the accession of non-socialist States is possible, in principle, also from the practical point of view.[11]

It seems, however, that with the passage of time the possibility of accession of non-socialist States if not to all then to the majority of the international socialist organizations, is decreasing slowly but systematically. The exception are organizations of a more technical, character (for example the UINR, the International Laboratory, the OPW, the OSZD). This decreasing possibility results, in my opinion, from the laws governing the economic development of the socialist countries and of the socialist community as a whole.

Their cooperation is increasing as well as the degree of their economic integration, promoted by their economic planning. The decisive majority of the ways and means applied in promoting such integration is based on the fact that the CMEA countries are following a policy of economic planning.

On the other hand, the principles of a new type of international relations among socialist States and the activities of the CMEA apply also to other organizations of these States. In the articles of agreement setting up the majority of these organizations there is no mention that they must act in accordance with, for example, the principle of brotherly mutual assistance. However, in view of the fact that their membership is limited exclu- [14]

[14] L. CIAMAGA, *op. cit.*, pp. 33-34.

sively or, above all, to the member-countries of the CMEA, their activities are carried out in conformity with the principles charateristic of the relations among socialist States, including the principle of brotherly mutual assistance. This is quite natural. For is is inconceivable that the relations among socialist States in all other organizations should be based on different fundamental principles, as compared with those governing their bilateral and multilateral relations within the framework of the CMEA. These principles are indivisible and inviolable, they form the cornerstone of all relations among socialist States. This has been emphasized in many declarations issued by these States and their communist parties. Thus, the declaration of the conference of the representatives of the communist and workers parties of 1957 stated, among other things, that "the foundation of the mutual relations of the countries of the world socialist system and of all communist and workers parties are the tested principles of Marxism-Leninism, the principles of proletarian internationalism."

The declaration of the following conference in 1960 stated that : "the uninfringible law governing mutual relations among socialist countries is based on the strict abidance by the principles of Marxism-Leninism, of socialist internationalism."

The establishment of closer relations between these organizations and the CMEA, the increasing role of the latter in their activities provided for in the Complex Programme of Developemnt of Socialist Economic Integration[15] adopted in Bucarest in July 1971 and already noticeable in actual practice,[16] will, undoubtedly strenghten the tendency to place the activities of these organizations not only on the fundamental principles but on all principles which govern the relationships among socialist States within the CMEA. Finally, the Programme implies clearly that intergovernmental socialist organizations established in the future (it is not stated explicitly whether this applies to all organizations) will base their activities on the principles of the CMEA.[17]

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[15] See, for instance the provisions of chapter 16 of the Complex Programme. The text of the Programme—*Kompleksnaja programma dalnejšego uglublenija i soversenstvovanija sotrudnicestva z rozvitija socialistićeskoj ekonomiceskoj integracii stran-clenov SEV,* Moskva 1971.

[18 6] This process is reflected, for instance, in the conclusion by the CMEA with the majority of the socialist organizations of supplementary protocols to the existing agreements on cooperation, recognizing the leading role of the CMEA in developing cooperation among them and coordinating their activities.

[17] Para. 5 of Chapter 16 of the Complex Programme states, among other things, that "Member-States of the CMEA will take measures designed at insuring that the activity of the existing organizations and of those created in future by the interested states on the basis of the principles of the CMEA [...] [underlining *Z.M.K.],* be properly coordinated with the work of the CMEA."

The first elements gradually reduce, for economic reasons and the remaining elements for political ones, the possiblity of participation of non-socialist States in some, if not in the majority of international organizations of socialist States.

b. The Procedure of Admission of new States to International Socialist Organizations

The procedure of admission of new members varies in different organizations. In some organizations the admission follows the request presented by the interested State. The request must be accompanied by a declaration that the State seeking admission approves the purposes and principles of the organization and that it accepts the rights and obligations arising from its membership. The decision concerning admission of a new member to the organization is made by its ruling organ. In the OSZD the ruling organ acts on a recommendation of its executive body, which must, of course, be seized by such a proposal by the interested State.[18] In all socialist organizations, with the exception of the UINR, a decision concerning the admission of a new member requires the unanimous consent of all member countries. In the UINR only a majority vote is needed.[19] The adoption of the decision must be followed by the ratification by the candidate State of the articles of agreement after which the ratification documents are deposited with the depositary State. This completes the procedure and the State becomes a member of the organization. Such are the rules applied to admission of new members by the CMEA,[20] UINR,[21] IBEC,[22] IIB,[23] OSZD,[24] OSS.[25]

In the case of Intersputnik the admission follows the deposition by the candidate State of a document on the accession to the organization, in which it is stated that the state accepts the rights and obligations arising from the membership in the organization. The ruling organ of the organization has no other action to take, but to note the fact in question. The accession takes place at the day of reception of the above mentioned document by the depositary state.[20]

[18] Art. VII of the charter of the OSZD.

[19] Art. 5 of the charter of the UINR.

[20] Art. II, points 1 and 2 of the charter of the CMEA. Chap. XI of the rules of procedure of the session of the CMEA.

[21] Art. 5 of the charter of the UINR.

[22] Art. XIII of the agreement on the establishing of the IBEC.

[23] Art. XXIII of the agreement on the establishing of IIB, Art. 6 of the charter of the IIB.

[24] Art. VII of the charter of the OSZD.

[25] Art. VIII of the agreement on the establishing of the OSS.

[26] Art. 12, point 6, para. 15, Art. 22 and 23 of the Arts of the Agreement on the establishing of the Intersputnik.

In the remaining organizations such as Interchim,[27] CDU,[28] Interpodshipnik,[29] OPW,[30], International Information Centre[31] and Interelectro,[32] the accession of a new State to the organization occurs by the deposition by the candidate State of a document of accession. In some organizations, for example in the International Information Centre[33] the plenary organ makes the appropriate recommendation to the member states. The accession enters into force after agreement by all countries members of the organization, expressed in an appropriate document adressed to the depositary of the treaty.

c. The Problem of Suspension of the Rights of Membership, of Exclusion and Withdrawal from Intergovernmental Socialist Organizations

The articles of agreement of the organizations of socialist States do not provide for suspension of the rights of membership or exclusion from the organizations. There are arguments in favour and against the introduction to the organizations of socialist States of provisions of that kind.

It would be advisible to consider the question of introducing a provision about the suspension of the rights of membership, which would occur, for instance, authomatically after the lapse of a certain period of time in which the country concerned has ceased to participate in the activities of the organization, thus *ipso facto* ceasing to fulfil its rights and obligations arising from its membership in the organizations (for instance its obligation to pay its contributions). Such a provision could solve many complicated problems arising in situations when some countries suspend their activities in the organization while remaining its members with full rights and when decisions in some matters require the consent of not only the interested States but of all member States of the organization.

This applies to the CMEA, UINR, OSZD and OSS. Since the end of 1961 Albania is not participating in the work of the CMEA and UINR and since 1965 Albania and the People's Republic of China are not taking part in the activities of the OSZD and the OSS. Since the two States have formally not withdrawn from these organizations and their articles of agre-

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[27] Art. XVII of the agreement on the establishing of the Interchim.

[28] Art. XII of the agreement on the establishing of the CDU.

[29] Art. XIV of the agreement on the establishing of the Interpodshipnik.

[30] Art. XII of the agreement on the establishing of the OPW.

[31] Art. XIII of the agreement on the establishing of the International Information Centre.

[32] Art. XIV of the agreement on the establishing of the Interelektro.

[33] Art. VI, point 4, paragraph of the agreement on the establishing of the International Information Centre.

ernent do not provide for exclusion or suspension of rights of membership, they must be considered as members with full rights, which have only suspended their activities.[31] However, contrary to some opinions expressed by several Western authors it can be considered that these states have ceased to be members of the above mentioned organizations.

The articles of agreement of all organizations of socialist States provide for the possiblity of withdrawal. Such withdrawal does not take effect immediately but after a specific period of time following the announcement of the desire to withdraw. There is no formal requirement that the withdrawing State justify its decision. The organizations have adopted various procedures regarding the time limit required for the announcement by the withdrawing State of its desire to leave the organization.[35]

The OSS requires a three months notice.[36] The appropriate provision of the charter of the UINR and the International Information Centre states that the announcement of the intention to withdraw must be made at least three months before the lapse of the current financial year. The withdrawal takes effect after the lapse of the financial year in the course of wich the State concerned has announced its intention to withdraw.[37] In the case of the CMEA,[38] IBEC[39] and IIB[40] the intention to withdraw from the organization must be notified to the other member-countries six months before the withdrawal. A similar requirement appears in the articles of agreement of the OSZD[41] and the OPW.[42] The notification must be made at least six months before the end of the calendar year and the withdrawal takes effect on the 1 of January of next year. The articles of agreement of Intermetal,[43] Interchim,[44] Interpodshipnik[45] and Interelectro[46] provide that the notification be made to the organization before the end of February and that the withdrawal takes effect on the 1 of January of the following

[34] Cf. H. de FIUMEL, op. *cit.*, p. 59 ; W. MORAWIECKI, *Organizacje międzynarodowe [International Organizations],* Warszawa 1965, 2nd edition, p. 470 ; R. SZAWLOWSKI, op. *cit.*, p. 685.

[35] For instance KASER, *Comecon. Integration of the Planned Economies,* London 1965, p. 87 ; R. C. Rrar, op. *cit. p.* 63.

[36] Art. IX of the agreement on the establishing of the OSS.

[37] Art. 8 of the charter of the UINR, Art. XV, point 3 of the agreement on the establishing of the International Information Centre.

[38] Art. II, point 3 of the charter of the CMEA.

[39] Art. XV of the Agreement on the establishing of the IBEC.

[10] Art. XXIV of the of agreement on the establishing of the TIB.

[11] Art. IX of the charter of the OSZD.

[12] Art. XI of the agreement on the establishing of the OPW.

[13] Art. XIV p. 4 of the agreement on the establishing of the Intermetal.

[44] Art. XV p. 3 of the agreement on the establishing of the Interchim.

[45] Art. XIII of the agreement on the establishing of the Interpodshipnik.

[46] Art. XIV of the agreement on the establishing of the Interelektro.

year. Finally, as far as the CDU is concerned a member State can withdraw from the organization after the lapse of one year following the deposition with the depositary of the articles of agreement of an appropriate announcement.[47] Finally in Intersputnik the withdrawal takes effect after the end of the financial year in which one year passed since the announcement made to the depositary of the articles of agreement about the intention to withdraw.[48]

Several western authors emphasize that in the case of socialist organizations, in particular in the case of the CMEA and the Warsaw Treaty Organization, the possiblity to withdraw has, in the light of the obligation arising from the principles of socialist internationalism, a purely formal nature.[49] However, it is difficult to agree with such a point of view. The essence of State sovereignty implies that a State has the right to withdraw from an organization if it deems advisible to do so.[50] There are examples of that kind in the case of international organizations of socialist States. In 1965 China withdrew from the UINR and in 1968 Albania left the Warsaw Treaty Organization.

If we were to follow the reasoning of these authors we would have to conclude that, as far as the CMEA and the Warsaw Treaty Organization are concerned, not only would the member—States be deprived of their right to withdraw but that also all socialist States would be under the obligation to belong to them, which is not actually the case. Such a reasoning implies—as rightly stated by H. de Fiumel—an overestimation of socialist internationalism, which cannot be, after all, treated separately from the principle of State sovereignty.[51]

However, the essence of socialist internationalism implies, among other things, the duty of the socialist States to develop and to strenghten cooperation among themselves, the duty to consolidate the socialist system. Therefore, while recognizing the right of States to withdraw from these organizations it seems that in the light of the obligations arising from socialist internationalism, such situations will occur only sporadically and

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[47] Art. XII of the agreement on the establishing of the CDU.

[49] [8] Art. 17 p. 1 of the agreement on the establishing of the Intersputnik.

[49] Cf. for instance R. C. RIBI, op. *cit.*, pp. 62-64 ; A. Uscakov, op. *cit.*, p. 31.

[50] Cf. W. MORAWIECKI, *Prawo państwa-członka do wystąpienia z organizacji międzynarodowej [The Right of a Member-State to Withdraw from an International Organization],* "Państwo i Prawo", 1965 ; No. 7 ; N. FEINBERG, *Unilateral Withdrawal from an International Organization,* "British Yearbook of International Law", vol. 39, 1963 ; E. SCHWELB, *Withdrawal from the United Nations. The Indonesian Intermezzo,* "American Journal of International Law", vol. 61, 1967 ; N. SINGH, *Termination* of *Membership of International Organizations,* London 1958 ; G. I. TUNKIN, *Teorija mezdunarodnogo prava*, Moskva 1970, pp. 392-394.

[51] H. de FIUMEL, op. *cit.,* pp. 58-59.

under exceptional circumstances, as they do not serve the strenghtening and development of cooperation and the unity of the socialist commonwealth.

3 The Problem of Participation of Non-Member States in the Activities of the Intergovernmental Socialist Organizations or Cooperation with such Organizations

a The Desire of the Socialist States to Develop Economic, Scientific and Technical Cooperation with all States Irrespective of Their Social and Political System

The thesis, according to which full membership in the CMEA and in some degree also in several other socialist organizations is practically limited to socialist States only does not mean that : CMEA and the other socialist organizations constitute a closed economic block, which is isolating itself artificially from cooperation with other States ; the participation in these organizations reduces the ability of their members to engage in and develop economic, scientific and technical cooperation with other States. It is the contrary which is true.

The member countries of the CMEA are continuously striving to develop and to strenghten their cooperation with the capitalist and developing countries.[52] They are against the creation of economic groupings which are discriminating against non-member countries, hampering the normal development of economic cooperation and trade between countries within various geographical regions and world trade as a whole.

This attitude is reflected in the actions undertaken by the socialist States on the international scene. Thus, at the conference held in Moscow in June 1962 they proposed that an international trade conference be called with the participation of all States for the consideration of the problem of creating a world trade organization. The socialist States were among those who have initiated action which led to the establishment of UNCTAD—an organization aiming at developing international trade, in particular trade between States of differing economic and social systems. The same attitude has found its expression in the accession of the majority of the member-countries of the CMEA in recent years to GATT which has as its main objective the liberalization of international trade.

The most recent action undertaken in this respect by the socialist States includes the calling in 1973 of the European Conference on Security and

[52] Cf. W. MOROZOV, *Strany SEV*....

Cooperation in Europe with the purpose of discussing and adopting measures aiming, among other things, at developing economic, scientific and technical cooperation between Eastern and Western Europe. With the same objective in mind the CMEA has taken preliminary steps in July and August 1973 with a view of establishing relations between the CMEA and the European Economic Community.[53]

On the other hand, the legal foundations of some organizations, and in the case of the remaining, their actual practice, create large possibilities for other States, irrespective of their social and political system, to participate in the activities of these organizations or to cooperate with them. Thus, paragraph 5 of the preamble of the charter of the CMEA states that member-states

"confirm their readiness to develop economic relations with all States irrespective of their social and State system, based on the principles of equality, mutual benefits and non-interference in the internal affairs."

Furthermore, Article 10 states that :

"The CMEA may invite countries which are not members of the Council to take part in the activities of its bodies. The conditions, on which the representatives of such countries may participate in the work of the bodies of the Council will be determined by it in agreements concluded with the interested States."

The same principle has been reaffirmed in the Complex Programme of Development of Socialist Economic Integration, which states in paragraph 6 of chapter 17 that :

"In the implentation of the Programme can participate fully or partially any non member state of the CMEA. In the implementation of the whole Programme can participate a non-member state of the CMEA, which agrees with the aims and principles of the Programme."

"A non-member-State of the CMEA wishing to take part fully or partially in the implementation of the Complex Programme must send an appropriate declaration to the Secretariat of the CMEA. Following the reception of the agreement by all member-states of the CMEA which participate in the Complex Programme to the participation of the non-members-State in its implementation, the conditions of the participation of that State in the work of the bodies of the CMEA related to the consideration of problems connected with the realization of the Complex Programme or its parts which are of interest to the State concerned are laid down in a special agreement concluded between the CMEA and that State."

The just quoted provisions of the CMEA charter and of the Complex Programme reveal that the status of a non-member State participating in its work and the forms of such participation are not clearly defined. We are

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[53] Such a proposal was submitted to the French Foreign Minister M. Jobert and to the Luxemburg Minister G. Thorn during their official visit in Moscow at the end of July 1973. For the second time a proposal on that matter was submitted by the Secretary of the CMEA, N. Fadejev to the then President of the Council of Ministers of the EEC I. Norgaard during their unofficial meeting in Denmark at the end of August 1973.

confronted with general formulae which offer the possibility of devising in practice various forms of such participation.

Also the charters and other legal acts of several other socialist organizations provide for the possibility of participation of non-member-States in their activities, leaving it—as in the case of the CMEA—to the organizations themselves to determine the conditions and principles of such collaboration.[54] On the other hand, there is no word on the subject in the legal documents of the remaining organizations. It seems that by analogy with the CMEA, and taking also into consideration the importance of the Complex Programme for its member-States and for the organizations themselves, as well as the provisions of the Programme on the matter, it can be presumed that they also allow for the participation in their work of non-member-States. This has already been borne out by the actual practice of some organizations.

At present the participation of non-member-States in the activities of the intergovernmental socialist organizations occurs in the CMEA, Interchim and Intermetal. Two basic forms of such participation can be distinguished. One bears the character of active participation. It is a cooperation of a clearly defined nature similar to that, which is defined by the doctrine of international organizations as association.[55] The other consists of passive participation. It has therefore a very loose form and is defined by the doctrine of international organizations as observer status.

b. Forms of Active Participation or Cooperation of Non-Member-States in the Activities of the Intergovernmental Socialist Organizations

At present two States are taking an active part in the work of and cooperating with the CMEA, namely Yugoslavia and Finland. According to press informations two other States—Mexico and Irak—are expressing

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[54] Art. 7 of the charter of the UINR, Art. II, point 4 of the rules of procedure of the Council of Ministers of the OSZD Art. II, point 9 of the charter of Interchim and also the charter of the International Information Centre.

[55] H. de FIUMEL states that countries participating in that type of cooperation enjoy in such organizations "a special legal status". H. de FIUMEL, *op. cit., p.* 63 ; R. VUKADINOVIC is of the opinion based on the Yugoslav experience of its collaboration with the CMEA that it is more than an observer status and less than full membership. R. VUKADINOVIC, op. *cit.,* p. 48. Many authors analysing Yugoslavia's status in the CMEA affirm that Yougoslavie is an associate member of the organization. Cf. for instance W. MORAWIECKI, *Narody Zjednoczone. Zamierzenia i rzeczywistość [The United Nations. Intentions and Reality],* Warszawa 1970, p. 355 ; R. C. RIBI, °P. *cit.,* pp. 64-66 ; A. ŁOSSAN, *Działalność i osiągnięcia Rady Wzajemnej Pomocy Gospodarczej [The Activities and Achievements of the CMEA],* "Zeszyty Naukowe SGPiS," 1970, No. 75, p. 150.

their interest in entering into active cooperation with the CMEA.[56] The participation or cooperation of the first two countries is based on a different model. There is, however, one common feature, namely that the mutual relations between the two countries and the CMEA are based on the principle of strict equality, respect of sovereignty and national interests and mutual benefits. But they are not based on the principle of brotherly mutual assistance.

The relations between Yugoslavia and the CMEA represent a distinct model based on an agreement signed on the 17th September 1964 in Moscow.[57] As stated in the preamble to the agreement its purpose is to contribute to the further development of cooperation and to the solution of economic problems of mutual interest of the member-countries of the CMEA and Yugoslavia. The agreement provides for cooperation of Yugoslavia with the CMEA in matters related to foreign trade, money and finance as well as the iron and steel industry, the non-ferrous metals industry, the machine industry, the chemical industry and in the mutual coordination of scientific and technical research. The parties to the agreement can also engage in cooperation in other field of mutual interest.

In order to implement such cooperation the representatives of Yugoslavia are entitled to participate in the work of the appropriate permanent commissions and working bodies of the CMEA. When a problem of mutual interest is on the agenda of a session of the CMEA or its Committee the representatives of Yugoslavia are being invited to participate and to take part in the deliberations. They may also be invited to meetings of the above mentioned organs in order to get acquainted with the problems of economic, scientific and technical cooperation under discussion, although these problems may not be of special interest to Yugoslavia. When the elaboration of problems of mutual interest is turned over to the Secretariat of the CMEA, the Secretariat can, with the agreement of the competent Yugoslav authorities invite Yugoslav experts to participate in the preparation of materials and proposals for the sessions of the appropriate organs of the CMEA. As many as 650 Yugoslav experts took part in the work of the CMEA bodies in 1972 alone.

In the course of discussions on matters of mutual interest the representatives of Yugoslavia have the same rights as the member-countries of the

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[56] See also V. MOROZOV, *Strany SEV...*, p. 20.

[57] The agreement has entered provissionally into force the day of its signature. It entered into force finally on 24 April, 1965 when the exchange of documents on its approval took place between the CMEA and Yugoslavia. For the text of the agreement see : *Podstawowe dokumenty RWPG. Wybór i opracowanie B. W. Reutt [Basic Documents of the CMEA. Selection and Comments by B. W. Reutt]*, Warszawa 1972, pp. 185-190.

CMEA, they participate in the debates, present proposals, make declarations, register reservations. When the CMEA bodies take decission providing also for the participation of Yugoslavia such decissions require Yugoslavia's consent and in this case Yugoslavia is considered to be a so-called interested country. Recommendations adopted with the consent of the Yugoslav representatives are submitted simoultaneously to the member-countries of the CMEA and to Yugoslavia for their consideration. The accepted recommendations are implemented on the basis of the decissions of governments or other competent bodies in accordance with their national legislation. All countries, including Yugoslavia are committed to assure the implementation of the accepted recommendations of the CMEA organs (and approved by their national authorities) and to inform the CMEA about the course of such implementation. The agreement provides also for the possibility of Yugoslavia accepting and implementing previous decissions and recommendations of the CMEA, with the consent of other interested member-countries.

In accordance with the agreement the member-countries of the CMEA and Yugoslavia are obligated to an exchange of informations and documents concerning economic, scientific and technical problems of mutual interest.

Conflicts arising in the course of the implementation of the agreement are settled in direct negotiations between the representatives of the CMEA and Yugoslavia.

The cooperation between Yugoslavia and the CMEA is developing satisfactorily. Yugoslavia is participating in the work of the CMEA increasing and enlarging continuously the scope of this participation. In 1971 Yugoslavia took part in the activities of 11 permanent commissions of the CMEA and participated in 172 actions undertaken by the CMEA. On the XXVI session of the CMEA held in Moscow in July 1972 an agreement was signed between the CMEA and Yugoslavia providing for the participation of Yugoslav enterprises in the implementation of certain parts of the Complex Programme of Development of Socialist Economic Integration, namely in the field of scientific and technical cooperation in the power, machine and chemicial industries.

Cooperation between the CMEA and Finland represent a different model. It is based on the agreement signed on 16 May, 1973 which entered into force on 14 July of the same year.[58] As stated in Article 1, its purpose is to promote multilateral economic, scientific and technical cooperation

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[5S] For the text of the charter o fthe Commission see : "Biulleten' Ekonomiceskoj Informacji," SEV, Secretariat, 19/73, No. 4, August 1973.

between the member-States of the CMEA and Finland in matters of common interest.

Unlike cooperation between Yugoslavia and the CMEA cooperation between the CMEA and Finland is not being implemented within the framework of the CMEA bodies but through a special Commission for the Cooperation between the CMEA and Finland created in accordance with the above mentioned agreement. Thus, whereas the first model of cooperation could be defined as cooperation within the CMEA, the second must be considered to lay outside the CMEA. The Commission is composed of representatives of Finland and the member-countries of the CMEA appointed by their appropriate national authorities. The Secretary of the CMEA or a person authorised by him takes also part in the sessions of the Commission. At the invitation of the Commission may also participate in its deliberations the representatives of other CMEA bodies and such organizations of socialist States which have concluded an appropriate cooperation agreement with the CMEA. The sessions of the Commission are held at least once each year in places agreed upon each time on the previous session. The session are presided over by turns by the representative of one of the member-States of the CMEA and the representative of Finland. The Commission may create its permanent and temporary auxiliary bodies. The work of the Commission is being prepared by two secretaries, one appointed by the CMEA the other by Finland.

The Commission is examining the possibilities of developing multilateral cooperation between the member-States of the CMEA and Finland, determines the fields and problems which offer opportunities for cooperation, studies the ways and means of its implementation and acts accordingly. It initiates the elaboration of multilateral agreements on economic, scientific and technical cooperation between the interested member-States of the CMEA and Finland and their organs, organizations and enterprises. It discusses the problems related to the implementation by the member-countries of the CMEA and Finland of the recommendations accepted by them and of the multilateral international agreements concluded on its recommendation. It assists in the organization of consultations and exchange of informations between the member-countries of the CMEA and Finland as well as between their organs, organizations and enterprises in the field of multilateral economic, scientific and technical cooperation on matters of common interest.

The Commission adopts recommendations on economic, scientific and technical cooperation and decissions on organizational and procedural matters. The adoption of recommendations and decissions require the unanimity of the member-countries of the CMEA which expressed their interest in the matter and of Finland. The decissions enter into force the day of the

signing of the protocol of the meeting of the Commission in the course of which they have been adopted. On the other hand, the recommendations, which are binding only on such States which expressed their interest in the matter, are presented by the countries concerned for approval to their competent authorities. The members of the Commission must, within 60 days from the day of signing of the protocol of the Commission, in the course of which the recommendation was adopted, inform the other States about their decission. The agreed upon recommendations enter into force through multilateral or bilateral agreements concluded between the member-countries of the CMEA and Finland or between their respective organs, organizations and enterprises.

As far as other organizations of socialist States are concerned, there is only one organization, namely Intermetal, in the work of which not a State but enterprises of non-member-States are actively participating. In accordance with an agreement signed on 29 November, 1968 in Budapest the Union of Yugoslav Metallurgical Enterprises is participating in its work since 1969 and, from 10 February, 1970 in accordance with an agreement signed in Budapest on the Roumanian foreign trade enterprise Metalimport. These enterprises receive together with all other members of Intermetal all documents related to sessions of organs of the organization concerning matters of common interest ; they participate in the preparation of such sessions ; they have the right to present proposals for discussion prior to and during the sessions, on matters, of course, of common interest ; they participate in plenary sessions of organs in the course of which these matters come under discussion with the right to present their views. In the course of the meetings of the organs of Intermetal, bilateral negotiations with delegations of member-States are taking place and their results are recorded in special protocols compiled by the executive and administrative organ of the organization. On the basis of the results arrived at during such negotiations commercial deals between these enterprises and the foreign trade institutions of the member countries are being concluded.

It must be mentioned that the same may apply in the near future to some other organizations of socialist States. According to press reports Yugoslavia has expressed its interest in the second half of 1972 in the participation in the work of the IBEC an the IIB, and in 1973 in the participation in the work of Interpodshipnik. The ensuing negotiations led to the signing on 27 April, 1974 in Moscow of an agreement on Yugoslavia's cooperation with the IIB.[59]

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[59] Cf. "Yugoslavia Export," No. 271, June 1974 p. 2.

c. Loose Forms of Cooperation of Non-Member-States with International Socialist Organizations

The second basic form of cooperation of non-member-States with the socialist organizations consists of their participation in the work of these organizations as observers. Compared with the former, such a form of cooperation is much looser and can be defined as passive cooperation.[60]

Non-member-States can participate in a meeting of as socialist organization on the invitation of its appropriate organ. Thus, for example, in the case of the CMEA such non-member-States may take part in plenary sessions of the Council, of its Executive Committee and of the permanent commissions, and get acquainted with their activities. They receive all documents related to sessions to which they are invited as well as copies of the records of such sessions. Sometimes the organs of the CMEA may ask the invited countries to present materials. However, such countries have no right to vote or to propose items for inclusion in the agenda. In specific cases they can be granted the right to speak. Such a right is not granted in a general form but applies to each speach.

As stated above, the institution of observer occurs in the CMEA. It appeared first in 1956 when Yugoslavia and the People's Republic of China took part in that capacity in the VII session of the Council. In the subsequent sessions of the CMEA took part intermittently as observers the representatives of Yugoslavia, Korean People's Democratic Republic, Cuba, Democratic Republic of Vietnam and Mongolia. In June 1973 the Mexican Vice-Minister of Trades and Industry stated in Geneva in a press interview that his country favours the idea of cooperation with the CMEA in an observer capacity.[61] There were observers also in Interchim till the end of 1973, when Yugoslavia changed its observer status in this organization to the status of full membership.

[60] W. MORAWIECKI in the first edition of his book *Organizacje Międzynarodowe [International Organizations]*, Warszawa 1961, defines such a form of participation in the work of the CMEA as associated membership (p. 394). It is difficult to agree with such an opinion, as associated membership implies active participation of the associated member in the whole work of the organization or in its part on conditions differing from those of regular members. It is true that in some universal organizations the status of an associated member implied passive participation in their activities, but such status was only accorder to non self-governing territories. The institution of the latter type, in contrast to the first, is disappearing together with the liquidation of collonialism. Cf. W. MORAWIECKI, *Narody Zjednoczone [United Nations]*, p. 352. It may be mentioned that the author has corrected his stand on that matter in the second edition of his book *Organizacje mie_dzynarodowe [International Organizations]*, Warszawa 1965, in which while discussing the participation of observers from several countries in the work of the CMEA, he does not qualify such form of cooperation as associated membership, (comp. p. 470).

[61] W. MOROZOV, *Strany SEV...*, p. 20.

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The Recognition and Enforcement of Foreign Arbition Awards in Poland

by JERZY JAKUBOWSKI

International commercial arbitration has, in practice, acquired a monopoly position with regard to the solution of conflicts arising from international economic intercourse.[1]

International commercial arbitration cannot function properly without an international system of recognition and enforcement of arbitral awards. This has been recognized relatively early; already in 1927 a Convention on the enforcement of foreign arbitral awards has been signed in Geneva. Poland did not accede to the Convention for reasons which H. Trammer explained once in the following words: "The non—adherence to the Convention was the result of the opposition of the commercial circles of these days, who were defending themselves against the compulsory enforcement of foreign arbitral awards, because owing to the foreign trade structure of that time arbitration abroad was the rule [...]."[2]

Poland has signed and ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 worked out within the framework of the United Nations.[3]

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[1] On the role of arbitration in international trade see, among others, S. Buczkowski, *Rola arbitrażu w gospodarce socjalistycznej* [*The Role of Arbitration in the Socialist Economy*] "Annales Universitatis Mariae Curie-Skłodowska," vol. 1 1954, sectio G, pp. 209–258;
J. Jakubowski, *Umowa sprzedaży w handlu zagranicznym. Metody i formy regulacji* [*Sale in International Trade. Methods and Forms of Regulation*], Warszawa 1966, p. 127 and ff;
E. Wengerek, M. Tyczka, *Sądownictwo polubowne w handlu zagranicznym i międzynarodowym obrocie morskim* [*The Arbitration in Foreign Trade and International Maritime Intercourse*], "Przegląd Ustawodawstwa Gospodarczego," 1968, p. 6, 212–213.

[2] H. Trammer, *Zarys problematyki międzynarodowego procesu cywilnego państw kapitalistycznych* [*Outline of Problems of International Civil Procedure of Capitalist States*], Warszawa 1956, pp. 99–100.

[3] "Dziennik Ustaw" ["Journal of Laws", further as Dz.U.], 1962, No. 9, item 41.

In connection with Poland's adherence to the New York Convention the problem arises as to whether Poland is a party to that Convention with the reservations referred to in Article I, alinea 3 of the Convention, or without any reservations.[4]

Poland has made reservations in accordance with Article I, alinea 3 of the Convention while signing it, however these reservations have not been reiterated when the Convention was ratified. It is thus debatable whether Poland is a party to the Convention with or without reservations. It can be argued that Poland has ratified the Convention in the form in which it has signed it, i.e. with reservations. On the other hand, it can be maintained that while not reiterating these reservations when the Convention was ratified Poland has withdrawn them.

In the Register of Texts of Conventions and Other Instruments Concerning International Trade Law, published by the United Nations, Poland is mentioned as a party to the Convention "with the reservations referred to in Article I, alinea 3."[5] On the other hand, in the collection of texts published by E. Wierzbowski Poland has not been included among States which adhered to the Convention with reservations.[6]

The New York Convention deals with foreign arbitral awards. In accordance with Article 1150, paragraph 2 of the Code of Civil Procedure a foreign arbitral award is defined as an arbitral award rendered abroad; thus, Poland adheres to the so-called territorial theory of the origin of arbitral awards.

The Convention applies to awards of *ad hoc* arbitration courts as well as to awards of permanent (institutional) arbitral bodies (Art. I, al. 2 of the New York Convention).

In accordance with Article III of the New York Convention Poland has

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[4] Art. I, item 3 reads as follows: "When signing, ratifying or acceding to this Convention, or notifying extension under Article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration."

[5] "Register of Texts of Conventions and Other Instruments Concerning International Trade Law," vol. 2, United Nations, New York 1973, p. 31. Similarly in the collection of texts published by the Italian Arbitration Association: *Multilateral Conventions and Other Instruments on Arbitration*, Roma 1974, p. 60.

[6] *Umowy międzynarodowe PRL dotyczące obrotu prawnego. Wybór tekstów* [*International Agreements of the Polish People's Republic Concerning Legal Intercourse. Selected Texts*], Warszawa 1966, pp. 525–527.

accepted the obligation to recognize arbitral awards[7] as binding and to enforce them following the procedures provided for in the municipal legislation. The recognition and enforcement of the award cannot be subject to the fulfilment of conditions substantially more onerous and to the payment of substantially higher fees and other charges compared with those imposed on the recognition and enforcement of domestic arbitral awards.

To obtain recognition and enforcement the party applying for such recognition and enforcement shall at the time of the application supply :

a) the duly authenticated[8] original award or a duly certified copy thereof ;

b) the original agreement or a duly certified copy of the arbitration agreement, under which the parties undertake to submit to arbitration their differences and which defines the competence of the tribunal which has made the award (Art. IV, alinea 1 of the New York Convention).

The award and the agreement must be supplied together with a translation in Polish (Art. IV, item 2 of the New York Convention).

As rightly stressed by A. Bülow, the party applying for the recognition and enforcement must supply only formal evidences ; it is up to the debtor to prove the existence of impediments to recognize and/or enforce the award.[9]

If the tribunal recognizes that the application is incomplete it can return it to the requesting party ; the request can be presented anew.[10]

As far as the procedure of recognition and/or enforcement of a foreign arbitral award is concerned, the New York Convention refers the matter to the municipal legislation of the State where the award is presented for recognition and enforcement (Art. III). In Poland the procedure in question is determined in Articles 1148 and 1151 of the Code of Civil Procedure.

In case of a foreign arbitral award which cannot be enforced by way of execution (dismissal of the claim or declaratory or constitutive decision)

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[7] Any foreign arbitral award, if we assume that Poland is a party to the Convention without reservations arising from Art. I, alinea 3, or an arbitral award on a commercial matter made in one of the contracting States, assuming that Poland adhered to the Convention with reservations arising from Art. I, alinea 3.

[8] The question who must certify has been deliberately left open by the Convention. Thus, the creditor is free to choose. Cf. A. Bülow, *Das UN-Überreinkommen über die Anerkennung und Vollstreckung ausländischer Schiedssprüche,* "Konkurs—Treuhand—und Schiedsgerichtswesen," 1959, No. 1.

[9] A. Bülow, *op. cit.*

[10] Cf. H. Trammer, *Konwencja o uznawaniu i wykonywaniu zagranicznych orzeczeń arbitrażowych* [*Convention of the Recognition and Enforcement of Foreign Arbitral Awards*], "Państwo i Prawo," 1961, No. 11, p. 742.

the provisions of Article 1148 of the Code of Civil Procedure are applied. A decision on the recognition can be taken by a panel of three professional judges of a Voivodship Court territorially competent to deal with the matter or in the region of which there is a territorially competent district court and in the absence of such a basis—a competent court for the City of Warsaw (Art. 1148, para. 1 of the Code of Civil Procedure). The court decides after proceedings with the participation of the public prosecutor (Art. 1148, para. 2 of the Code of Civil Procedure). From the decision of the court is admitted to apply for revision by the court of higher instance and an action for renewal of proceedings can be brought against a final decision (Art. 1148, para. 3 of the Code of Civil Procedure).

An application for recognition may be made by anyone who has in it a legal interest (Art. 1147, para. 1 of the Code of Civil Procedure).

The procedure of enforcement of adjudicating sentences is identical to the procedure of recognition of other decisions, determied in Article 1148 of the Code of Civil Procedure.

The subject matter of the hearing mentioned in Articles 1148 and 1151 of the Code of Civil Procedure is to determine whether there are reasons justifying the refusal to recognize or to enforce an award according to Article V of the New York Convention.

In accordance with Article V, item 1 of the Convention at the request of the party against whom it is invoked the competent Polish court will refuse recognition and enforcement of an award only when the party concerned will prove that :

(a) the parties to the agreement referred to in Article II of the New York Convention were, under the law applicable to them, under some incapacity,[11] or the said agreement is not valid under the law to which the parties have subjected it, or failing any indication thereon, under the law of the country where the award was rendered, or

(b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case, or

(c) the award deals with a difference not contemplated in the agreement or not falling within the terms of the submission to arbitration or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced ; or

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[11] We have thus a reference to personal law established on the basis of conflicts rule of the *lex fori*—in Poland on the basis of Arts. 9 and 3 of the Act on Private International Law of 1965.

(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties,[12] or, failing such agreement, was not in accordance with the law of the country where the arbitration took place ; or

(e) the award has not yet become binding on the parties,[13] or has been set aside or suspended by a competent authority in the country in which, or under the law of which, that award was made.[14]

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[12] The attempts aiming at a restrictive interpretation of the principle of the freedom of the parties to determine the arbitration procedure have no basis in the wording of the Convention. See for instance Ch. N. FRAGISTAS, *Arbitrage étranger et arbitrage international*, "Revue critique de droit international privé," 1960, No. 1, p. 1 and ff., or H. TRAMMER : *Konwencja...* [*Convention...*], p. 743. Various attitudes towards this question are discussed by A. BÜLOW, *La convention des parties relative à la procédure d'arbitrage visée à l'Art. V para. 1 litt. (d) de la Convention de New York*, in : *Arbitrage commercial. Essais in memoriam E. Minoli*, Torino 1974, pp. 81–95. In favour of a literal interpretation is, in particular, Ph. FOUCHARD, see, among others, his paper published in the collection : *Materielles Recht und Verfahrensrecht in der internationalen Schiedsgerichtsbarkeit*, Frankfurt a.M. 1972, p. 43.

[13] This concerns a situation when ordinary means of appeal can be applied against an award. A request for setting aside an arbitral award (or a request for its annulment) does not belong to such means of appeal. Cf. P. SANDERS, *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, "Nederlands Tijdschrift voor Internationaal Recht", No. 1. On the variety of interpretations of the word "binding" in this context see Ph. FOUCHARD, *L'arbitrage commercial international*, Paris 1965, pp. 532–534.

[14] On the basis of Art. IX, item 2 of the European Convention on International Commercial Arbitration of 1961, of which Poland is a contracting party (Dz. U., 1964, No. 40, item 270) para. 1 of that Art. limits the application of Art. V, para. 1 letter (e) of the New York Convention only to cases dealt with in para. 1 of Art. IX of the European Convention in so far as relations with contracting States of the latter Convention which are at the same time parties to the New York Convention, are concerned. Art. IX, para. 1 of the European Convention reads as follows :

"The setting aside in a Contracting State of an arbitral award covered by this Convention shall only constitute a ground for the refusal of recognition or enforcement in another Contracting State where such setting aside took place in a State in which, or under the law of which, the award has been made and for one of the following reasons :

"a. the parties to the arbitration agreement were under the law applicable to them, under some incapacity or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made, or

"b. the party requesting the setting aside of the award was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case ; or

"c. the award deals with a difference not contemplated by or not failing within the terms of submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters

Recognition and enforcement of an arbitral award may also be refused if a competent Polish court establishes that :

(a) the subject matter of the difference is not capable of settlement by arbitration under Polish law ; or

(b) the recognition or enforcement of the award would be contrary to the public policy of the Polish People's Republic (Art. V, item 2 of the New York Convention).

The examination of the reasons justifying refusal can be undertaken by the court also *ex officio*.

In view of the fact that the New York Convention deals exhaustively with the conditions of recognition and enforcement, which is reflected by the use of the word "only" in Article V, the competent Polish court will not have recourse to Articles 1146 and 1150 of the Code of Civil Procedure, which determine the conditions of recognition and enforcement of decision of foreign courts.[15]

Because of the fact that the Polish enterprises fulfil voluntarily foreign arbitral awards rendered against them, there are, as a rule, no request addresses to Polish courts by foreign nationals for recognition or enforcement of such awards.

With regard to arbitral awards rendered in member countries of the Council for Mutual Economic Assistance (CMEA) the provisions concerning recognition and enforcement of awards contained in the Moscow Convention of 1972 on Settlement by Arbitration of Civil Law Disputes Resulting from Relations of Economic, Scientific and Technical Cooperation are being applied.[16] As far as relations between countries which adhered to it are concerned, the Moscow Convention has priority before the New York

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submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration need not be set aside ;

"d. the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such an agreement, with the provisions of Article IV of this Convention."

H. TRAMMER is right when he emphasizes that the debtor is not entitled in Poland to ask a foreign arbitral award be set aside (*Konwencja*... [*Convention*...], footnote 16, p. 747).

About Art. IX of the European Convention see F. E. KLEIN, *Das Europäische Übereinkommen über die internationale Handelsschiedsgerichtsbarkeit*, "Zeitschrift für Zivilprozess", 1963, No. 5/6, pp. 351–354.

[15] This is generally emphasized in literature. See for instance S. N. LEBEDEV, Mieždunarodny torgovy arbitraž (Moskva 1965, p. 153. Another view represented, is wrongly in my opinion, by D. PFAFF, *Die Aussenhandelsschiedsgerichtbarkeit der sozialistischen Länder im Handel mit der Bundesrepublik Deutschland*, Heidelberg 1973, p. 375.

[16] Dz.U., 1974, No. 7, item 37.

Convention. This follows from the generally accepted rule of international law on the priority of regional treaties over universal ones as well as from the provisions of Article VII, alinea 1 of the New York Convention.[17]

The system of recognition and enforcement of arbitral awards provided for in the Moscow Convention concerns awards rendered by arbitration courts, dealt with in Article II of that Convention, on matters arising between organizations of the countries concerned and defined in Article I.[18]

In accordance with Article IV, alinea 1 of the Moscow Convention such awards are final and binding. Thus the Convention reflects the generally accepted principle of a single instance in arbitration. On the other hand, the Convention does not preclude the possibility of such an award being set aside by a competent court of the country where such an award was rendered.[19] This results clearly from Article V, alinea 1 p.c. It must be regretted, however, that the Convention failed to deal in a uniform way with the conditions of setting aside of the awards ; it may be expected that the gap so left will be filled in the future. In relations between countries—parties to the European Convention on International Commercial Arbitration of 1961 the above mentioned provision of Article IX of that Convention could be applied.

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[17] The provision speaks about agreements entered into (in French *"conclus"*), it seems, however, that this applies also to agreements which will be concluded in the future.

[18] For a more detailed discussion of the application of the Convention see H. STROHBACH, *Konvention über die schiedsgerichtliche Entscheidung von Zivilrechtsstreitigkeiten, die sich aus Beziehungen der wirtschaftlichen Zusammenarbeit ergeben*, "Recht in der Aussenwirtschaft" 1972, No. 7, p. 1 and ff. H. TRAMMER, *Rozstrzyganie przez sądy polubowne sporów cywilnych ze stosunków współpracy gospodarczej [Settlement by Arbitration Courts of Civil Dispites Arising from Economic Cooperation]*, "Państwo i Prawo", 1973, No. 2, pp. 32–34 ; J. JAKUBOWSKI, *Rozwój międzynarodowego arbitrażu handlowego w ramach RWPG [Development of International Commercial Arbitration within the CMEA]*, *ibid.*, pp. 21–25 ; Z. L. NANOWSKI, *Nowa konwencja o międzynarodowym arbitrażu handlowym [New Convention on International Commercial Arbitration]*, "Przegląd Ustawodawstwa Gospodarczego," 1973, No. 5, p. 153–155 ; J. JAKUBOWSKI, *La Convention de Moscou du 26 mai 1972 sur le règlement des litigęs par voie d'arbitrage*, "Revue de l'Arbitrage," 1973, No. 2, pp. 60–63 ; V. SEDLACEK, *Na marginesie konwencji o rozstrzyganiu w drodze arbitrażu sporów cywilnoprawnych wynikających ze stosunków współpracy gospodarczej i naukowo-technicznej [Remarks on the Convention on the Settlement by Arbitration of Civil Law Disputes Arising from Economic, Scientific and Technical Cooperation]*, "Prawo w handlu zagranicznym," 1973, No. 31, pp. 18–29 ; H. TRAMMER, *La convention de Moscou sur l'arbitrage du 26 mai 1972*, in : *Arbitrage commercial. Essais in memoriam Minoli*, Torino 1974, pp. 519–520.

[19] In Poland such a possibility is provided for in article 712 of the Code of Civil Procedure.

Article IV, alinea 1 of the Moscow Convention states that the parties to a dispute shall enforce voluntarily the awards of arbitral courts. At first sight such a statement may seem rather a pure declaration, however, if one considers the character of relations and persons with which the Convention deals (Art. I and II of the Convention) it must be recognized that it is of great practical value.[20]

It must be emphasized that the awards of arbitration courts dealt with in Article II of the Convention are, as a rule, enforced voluntarily by the enterprises of the States-parties to the Convention. Nonetheless in case of non-enforcement there is a need for a legal basis for a compulsory enforcement of the arbitral award.

The Moscow Convention distinguishes between recognition and enforcement of awards. The distinction of recognition is of practical value in case of awards establishing the existence of a legal relationship, of a right or obligation and awards creating or modifying a legal relationship, right or obligation.

With regard to recognition, the Moscow Convention has adopted the principle of automatic recognition in other countries parties to the Convention of arbitral awards rendered in one of such countries. The rendering of an award in one of them means that the award is automatically and without further procedure recognized in all others.

Thus, if in one of the countries—parties to the Convention an arbitral award will be rendered against a Polish enterprise, refuting its claim or in other way disadvantageous for it, the only recourse left to that enterprise will be to apply in the country in which the award has been rendered to set it aside.

The problem of enforcement has been settled in the Moscow Convention in a very simple manner, namely by providing that the award shall be enforced in accordance with the same procedure as applied with respect to enforcing decisions of the State courts of the country, in which the arbitral award has to be enforced (Art. IV, alinea 2). It follows that in Poland, in accordance with Articles 776 and 777 of the Code of Civil Procedure, an arbitral award rendered pursuant to the Moscow Convention represents an execution title, which for enforcement purposes requires only an execution clause. Such a clause will be granted on request of the creditor by the district court competent to deal with the affairs of the debtor (Art. 781, para. 2 of the Code of Civil Procedure). An excecution clause is granted by a single judge on request of the creditor (Art. 782, para. 1). Against the decision of the court concerning the granting of the execution

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[20] H. TRAMMER represents a different opinion. See *Rozstrzyganie...* [*Settlement...*], p. 34.

clause may be filed a complaint (Art. 795, para. 1 of the Code of Civil Procedure). The time-limit for the application for the creditor runs from the date of granting the execution clause or from the date of issue of a negative decision. For the debtor the time-limit runs from the date of delivery to him of the notice about the initiation of execution (Art. 795, para. 2 of the Code of Civil Procedure).

Article V of the Moscow Convention mentions all the cases in which a State court may refuse to enforce an arbitral award, i.e.—in Poland—to grant the execution clause :

(a) if the award has been rendered in violation of the rules of jurisdiction stipulated by the Moscow Convention, or

(b) if the party against which the award has been rendered proves that it was deprived of the possibility to defend its rights because of the violation of arbitral rules of procedure or other circumstances which it could not prevent or about which it could not inform the arbitration court, or

(c) if the party against which the award was rendered proves that it has been set aside or suspended in accordance with the national legislation of the country in which the award was rendered.

While the refusal to grant an execution clause can in case (a) be made *ex officio*, in the remaining cases (b) and (c) it can take place only if the debtor proves the respective circumstance.[21]

In accordance with Article V, alinea 2 of the Moscow Convention in case of a refusal by a State court to enforce an arbitral award for reasons mentioned in Article V, alinea 1 of the Convention, the party in favour of which the award was rendered may initiate new proceedings on the same basis before the proper organs within three months running from the day when the negative decision has entered into force. The provision in question raises no doubts as to its construction in the case of violation of principles of jurisdiction. However, in the case when the party against which the arbitral award was rendered has proved that it has to be set aside or suspended in accordance with the national legislation of the country where it was made, I would be inclined to admit that we are facing a situation similar to the return of the case for a new examination and that it lays with the arbitration court which has rendered the award in question. The same would apply to the case of a refusal for reasons mentioned in Article V, alinea 1 of point (b) of the Moscow Convention, i.e. if the debtor proves that he has been deprived of his rights of defense.

The legal régime described above covers also amicable settlements, provided that they have been approved by the arbitration court (Art IV, alinea 3 of the Moscow Convention). Therefore it is not enough that the

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[21] H. TRAMMER, *ibid.*, p. 35.

settlement has been reached before an arbitration court, it must be confirmed by it. The problem arises as to the form such confirmation must take. It seems that it should be a decision of the court (a sentence based on the amicable settlement or a decision confirming such a settlement).[22]

The Moscow Convention provides for a statutory limitation of two years for the submission of the award or the amicable settlement for enforcement (Art. IV, alinea 5). The expression "may be brought to execution by enforcement" is ambiguous : it is not clear, is meant here the request for granting of the execution clause or the request for the compulsory execution of an arbitral award already with an execution clause. I would be inclined to accept the former interpretation and recognize that the problem of prescription with regard to requests to perform the enforcement is still subject to the rules of national legislation.[23]

In matters related to rail transport the enforcement of arbitral awards made in accordance with the Berne Conventions (CIM and CIV) is dealt with in Articles 61 paragraph. 5 of these Conventions.[24]

The recognition and enforcement in Poland of arbitral awards rendered in Yugoslavia, which is not a party to the New York and Moscow Conventions, is governed by the provisions of the agreement between Poland and Yugoslavia on legal relations in civil and penal matters of 1960.[25] According to Article 49, alinea 1, point c of that agreement the contracting States recognize and enforce on their respective territories legally binding and enforceable awards of arbitration courts rendered on the territory of the other contracting State in property cases and also amicable settlements arrived at in such matters before such courts, if at least one party is an economic organization having legal personality.

Finally the question arises as to whether an arbitral award rendered in a country which does not adhere to any of the above mentioned Conventions can be recognized and enforced in Poland.

If one recognizes that Poland is a party to the New York Convention without the reservations arising from Article I, alinea 3, it would ensue that it is under obligation to recognize and enforce arbitral awards rendered in countries which are not bound by the above mentioned international agreements.

However, if one claims, as I do, that Poland is a party to the New York Convention with the reservations arising from Article I, alinea 3, then the compulsory enforcement of arbitral awards rendered in countries not

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[22] On the same problem see V. SEDLACEK, *op. cit.*, p. 31.

[23] H. TRAMMER expresses a similiar view. See *Rozstrzyganie...* [*Settlement...*], p. 35.

[24] Dz.U., 1964, No. 44, item 300.

[25] Dz.U., 1963, No. 27, item 162.

adhering to neither of the above mentioned Conventions cannot take place. It follows clearly from the provision of Article 1150, paragraph 1 of the Code of Civil Procedure. However, the recognition of such an award is possible provided that the conditions specified in Article 1146, paragraph 1 of the Code of Civil Procedure are met :

(1) the award is binding in the State in which it has been rendered ;

(2) the matter does not belong, under Polish law or in accordance with an international agreement, to the exclusive jurisdiction of Polish courts or courts of a third State ;

(3) the party concerned has not been deprived of its right to defence, and in case of legal incapacity — of proper representation,

(4) the matter has not been finally settled by a Polish court or proceedings have not been started before a Polish court competent to deal with it, before the sentence of the foreign court became binding,

(5) the award is not in contradiction with the basic principles of the Polish legal order,

(6) when rendering the award in a matter, in which Polish law has to be applied, this was actually done, unless the foreign law applied in the case does not differ in a substantial way from Polish law.

The award is subject to recognition under conditions of reciprocity (Art. 1146, para. 1 of the Code of Civil Procedure).

In closing it may be mentioned that several countries (the Byelorussian SSR, Bulgaria, Czechoslovakia, the Ukrainian SSR and USSR) have ratified the New York Convention with the reservation concerning its application to arbitral awards rendered in other countries parties to the Convention, but have declared, that they will, under conditions of reciprocity, recognize and enforce arbitral awards rendered in other countries on the basis of the Convention. In the USSR this declaration became a general rule governing the recognition and enforcement of arbitral awards.[26] This seems to represent the best solution of the problem of recognition and enforcement of foreign arbitral awards.

[26] S. N. LEBEDEV, *op. cit.*, p. 191 and ff.

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The Legislation of the Federal Republic of Germany and the Problem of Normalization of Mutual Relations between the Polish People's Republic and the Federal Republic of Germany

by ROMAN JASICA

On 7 December, 1970, the Polish People's Republic and the Federal Republic of Germany signed in Warsaw the Treaty Concerning the Bases of Normalization of Their Mutual Relations.[1] These bases of normalization have been defined in the Treaty as follows :

(i) The recognition by the Federal Republic of Germany of the existing western frontier of Poland, contained in the unanimous affirmation by the two Parties to the Treaty in Article I, point 1

"[...] the existing border line the course of which was established in chapter IX of the decisions of the Potsdam Conference of 2 August 1945 as from the Baltic Sea immediately west of Świnoujście and thence along the Odra River to the confluence of the Lusatian Nysa River and along the Lusatian Nysa River to the Czechoslovak frontier, constitutes the Western State Frontier of the Polish People's Republic" ;

(ii) The recognition by the Federal Republic of Germany of the inviolability of that frontier, contained in the confirmation by the two Parties to the Treaty in Article I, point 2 of "the inviolability of their existing frontiers, now and in the future", and in their mutual pledge "to respect unreservedly their territorial integrity," as well as in their awareness expressed in paragraph 5 of the Preamble to the Treaty

"that the inviolability of the frontiers and respect for the territorial integrity and sovereignty of all States in Europe within their present frontiers are the basic conditions of peace" ;

and

(iii) The renunciation by the Federal Republic of Germany of any territorial claims towards Poland, contained in the declaration by the two Parties to the Treaty in Article I, point 3

[1] "Dziennik Ustaw" ("Journal of Laws," hereinafter quoted as Dz.U.) 1972, No. 24, item 168 ; Bundesgesetzblatt (hereinafter quoted as BGBl.) 1972 No. 2, p. 361. For the English text see : "Bulletin," Ministry of Foreign Affairs, Department of Press and Information, No. 3, January 1971, pp. 5–6, Polish Institute of International Affairs.

"that they have no territorial claims against one another nor shall they advance such claims in the future."

The bases of normalization having been defined, Article III, point 1 of the Treaty states that the two Parties to the Treaty

"shall undertake further steps aimed at full normalization and all-round development of their mutual relations, the lasting basis of which shall be the present Treaty".

Article III, point 2 specifies the fields in which such further steps shall be taken. They are the fields "of economic, scientific, scientific-technical, cultural and other relations". It is now up to the two Parties to decide which steps should be taken, in which fields, and in what sequence.

Some steps have already been done. One of them, and a very important one, was the establishing of diplomatic relations between the two countries. Another one is the work of experts from the two countries on the content of history text-books.

There is, however, a specific field in which further steps are not only necessary but simply obligatory and, what is even more important, obligatory to only one Party to the Treaty, and namely to the Federal Republic of Germany, has the Treaty to play the role it was intended for.

It is the field of internal legislation of the Federal Republic of Germany which contains a great number of laws and provisions passed before the signing of the Treaty and based on principles contradictory to its letter and spirit by either directly negating the bases of normalization of mutual relations between the two Parties or maintaining and instigating by different means among the citizens of the Federal Republic of Germany the feelings of enemity and hatred towards Poland and its people.

It is impossible in the limits imposed by the character of this publication to deal with all such laws of the Federal Republic of Germany. The aim of this publication is to show the rightness of its thesis on the example of only some of the laws and provisions most characteristic in this respect. These laws are :

(i) The Basic Law (The Constitution) of the Federal Republic of Germany of 8 May, 1949,[2] adopted by the West-German Parliamentary Council ;

(ii) The Law on Citizenship of 22 February, 1955,[3] as well as some provisions of the Second Law on Citizenship of 17 May, 1956 ;[4]

(iii) The Law Concerning the Questions of Expellees and Refugees of

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[2] *Grundgesetz der Bundesrepublik Deutschland*, for the English text see J. PEASLEE, *Constitutions of Nations*, vol. 3, The Hague 1968, pp. 361–398.

[3] *Gesetz über die Staatsangehörigkeit vom 22. Februar 1955*, BGBl., part I, p. 65.

[4] *(Zweites) Gesetz über die Staatsangehörigkeit vom 17. Mai 1956*, BGBl., part I, p. 431.

19 May, 1953[5] (Federal Law on Expellees) with its subsequent supplements and changes contained in the Law of 27 July, 1957,[6] of 29 June, 1961,[7] and of 19 September, 1961,[8] the unified text of which was published on 23 October, 1961.[9]

The problems to be dealt with first are those of the recognition of the Odra-Nysa line as the western State frontier of Poland, of the inviolability of that frontier, and of the renunciation of any territorial claims against Poland.

Article 23 of the Constitution states that it

"shall apply for the time being in the territory of the Laender Baden, Bavaria, Bremen, Greater Berlin, Hamburg, Hesse, Lower Saxony, Northrhine-Westphalia, Rhineland-Palatinate, Schleswig-Holstein, Wuerttemberg-Baden and Wuerttemberg-Hohenzollern. In other parts of *Germany* [italics added—*R.J.*] it shall be put into force on their accession" [to the Federation—*R.J.*].

As far as the problem of the operation of the Constitution in Greater Berlin is concerned it suffices to say that already on 8 April, 1949, the Foreign Ministers of the United States, United Kingdom and France stated in point (a) of their instructions to their military governors in Germany issued together with other documents in connection with the preparations to the creation of the Federal Republic of Germany, that they "are not able to agree at this time that Berlin should be included as a Land in the initial organization of the German Federal Republic."[10] Because the Parliamentary Council had not complied with this decision and placed Greater Berlin in Article 23 on the list of Laender in which the Constitution was to be put into force, the three Military Governors suspended on 12 May, 1949, the operation of the Constitution in that city. They stated that "Berlin may not be accorded voting membership in the Bundestag or Bundesrat nor be governed by the Federation" and that "she may, nevertheless, designate a small number of representatives to attend the meetings of those legislative bodies."[11] The three Western Powers confirmed their stand in their information to the Government of the Union of Soviet Socialist Repu-

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[5] *Gesetz über die Angelegenheiten der Vertriebenen und Flüchtlinge (Bundesvertriebenengesetz—BVFG) vom 19. Mai 1953*, BGBl., part I, p. 201.

[6] *(Zweites) Gesetz zur Änderung und Ergänzung des Bundesvertriebenengesetzes (2. ÄndG BVFG) vom 27. Juli 1957*, BGBl., p. 1207.

[7] *(Drittes) Gesetz zur Änderung des Bundesvertriebenengesetzes (3. ÄndG BVFG) vom 29. Juni 1961*, BGBl., part I, p. 813.

[8] *(Viertes) Gesetz zur Änderung des Bundesvertriebenengesetzes (4. ÄndG BVFG) vom 19. September 1961*, BGBl., part I, p. 1721.

[9] *Bekanntmachung der Neufassung des Bundesvertriebenengesetzes vom 23. Oktober 1961*, BGBl., part I, p. 1882.

[10] Cmd., 7677, p. 10 ; *Documents on Germany under Occupation 1945–1954*, selected and editied by B. RUHM von OPPEN, London 1955, pp. 379–380.

[11] B. RUHM von OPPEN, *op. cit.*, pp. 390–391.

blics, forming Annex II to the Quadripartite Agreement on Berlin of 3 September, 1971, which states that the three western sectors of Berlin "continue not to be a constituent part of the Federal Republic of Germany and not to be governed by it."[12]

Article 23 of the Constitution does not explain what it means under the term "Germany." The explanation can, however, be found in its Article 116, paragraphs 1 and 2, dealing with the problems of German citizenship. This Article reads as follows :

"(1) Unless otherwise provided by law, a German within the meaning of this Basic Law is a person who possesses German citizenship or who has been admitted to the territory of the German Reich, as it existed on 31 December, 1937, as a refugee or expellee of German nationality or the spouse or descendant of such person.

"(2) Former German citizens who between January 30th, 1933, and 8 May, 1945, were deprived of their citizenship for political, racial or religious reasons, and their descendants, shall be regranted German citizenship on application. They shall be considered as not having been deprived of their German citizenship if they have established their domicile in Germany after 8 May, 1945, and have not expressed a contrary intention."

The Constitution uses in Article 116 two different terms : "the German Reich as it existed on 31 December, 1937" in paragraph 1, and "Germany" in paragraph 2. Were paragraph 1 to deal only with facts which had occured before 8 May, 1945, and paragraph 2 with those which occured only after that date, one could say that these two terms have two different meanings. This is, however, true only with regard to paragraph 2, which deals with facts which occured solely after 8 May, 1945, while paragraph 1 deals with facts which occured both before and after that date, because refugees and expellees have been admitted both to the territory of the German Reich before 8 May, 1945, and to the territory of occupied Germany after that date. One has, therefore, to conclude that the Constitution uses these two terms alternately, that it resignes of all annexations made by the German Reich after 31 December, 1937 (and among them of the western territories of prewar Poland and of the former Free City of Gdańsk), but not of any part of the territory Germany had, as the German Reich, on that day.

This conclusion has been confirmed by several commentaries of the Constitution,[13] but, first of all, by several laws adopted later by the Bun-

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[12] *United States Foreign Policy 1971. A. Report of the Secretary of State,* Washinghton 1972, p. 577, Department of State Publication 8634.

[13] E.g. *Kommentar zum Bonner Grundgesetz,* ed. Dennewitz u.a., Hamburg 1950 ; *Das deutsche Bundesrecht. Sammlung der Gesetze und Verordnungen der Deutschen Bundesrepublik mit Erläuterungen und einem Überblick über das Landesrecht,* Baden-Baden 1949 p. 115 : *Das Bonner Grundaesetz* commented by Dr. Hermann von MANGOLDT, Berlin 1957, Band 1, p. 633 ; F. KLEIN, *Neues deutsches Verfassungsrecht,* Frankfurt am Main 1949, pp. 39–41.

destag. Thus, the Law on Citizenship of 22 February, 1955, already mentioned above, uses in paragraph 7, point 1 the words "the territory of the German Reich as it existed on 31 December, 1937 (Germany)", and clearly states in paragraph 7, point 2 that these words apply both to facts which have taken place before and after 8 May, 1945, and after the coming into force of the Constitution as well. The most flagrant expression of the theory that Germany still exists in the boundaries it possessed on 31 December, 1937, can be found in paragraph 1, point 1 of the Law on Expellees of 19 May, 1953, also mentioned above, which speaks openly of the "German eastern territories for the time being under foreign administration."

If one takes into account the terms "the Soviet Occupation Zone" and "the Soviet Occupied Sector of Berlin" (since October, 1949, forming the territory of the German Democratic Republic), the words used in paragraph 1, point 1 refer to the Polish Western and Northern Territories (with the exception of the territory of the former Free City of Gdańsk) and to the Kaliningrad Region of the Russian SFSR. The Constitution expects in its Article 23 all these territories to accede to the Federation.

Did Germany really exist after 8 May, 1945, within the borders the German Reich had had on 31 December, 1937 ?

The four victorious powers—France, the Union of Soviet Socialist Republics, the United Kingdom, and the United States of America—in their declaration of 5 June, 1945, on the creation of occupation zones in Germany[14] stated that

"Germany, within her frontiers as they were on the 31 December, 1937, will, for the purpose of occupation, be divided into four zones".

They knew that the frontiers of Germany would be changed because already at the Yalta Conference, on 11 February, 1945, the Heads of Government of three of them—USSR, UK, and USA—recognized "that Poland must receive substantial accessions of territory in the North and West,"[15] a final decision in this respect having, however, not been taken, they adopted a purely formalistic stand that Germany which surrendered unconditionally to them on 8 May, 1945, was a Germany in its frontiers as on 31 December, 1937.

Bearing in mind the decision of the Yalta Conference, the four victorious powers stated on the same day of 5 June, 1945, in their declaration on

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[14] Cmd., 6648 ; "Official Gazette of the Control Council for Germany," Supplement I, p. 11 ; *Documents on Germany, 1944–1961*, New York 1968, pp. 18–19, Committee on Foreign Relations, United States Senate ; B. RUHM von OPPEN, *op. cit.*, p. 35.

[15] Cmd. 6598 ; Foreign Relations of the United States ; The Conferences at Malta and Yalta, 1945, Department of State Publication 6199 ; B. RUHM von OPPEN, *op. cit.*, p. 6.

the assuming of the supreme authority with respect to Germany[16] that "Germany has become subject to such requirements as may now or hereafter be imposed upon her" and that they "will hereafter determine the boundaries of Germany or any part thereof and the status of Germany or of any area at present being part of German territory."

They were fully entitled to make such a statement because, as they stated in the same declaration,

"there is no central Government or authority in Germany capable of accepting responsibility for the maintenance of order, the administration of the country and compliance with the requirements of the victorious Powers."

Needless to say that this was the result of the war unleashed by the German Reich in which the German people committed "terrible crimes under the leadership of those whom, in the hour of their success, they openly approved and blindly obeyed."[17]

Less than two months later, on 2 August, 1945, the Heads of Government of the USSR, UK, and USA took at the Potsdam Conference the decision on the changing of the frontiers of Germany : In Chapter VI USSR was given Koenigsberg (presently Kaliningrad) together with one part of the former East Prussia, and in Chapter IX Poland was given the territories east of the Odra and the Lusatian Nysa Rivers and the remaining part of the former East Prussia, as well as the territory of the former Free City of Gdańsk.

The relevant provisions of Chapter IX read as follows :

B. Western Frontier of Poland

"The three Heads of Government agree that, pending the final determination of Poland's western frontier, the *former German territories* east of a line running from the Baltic Sea immediately west of Świnoujście, and thence along the Oder River to the confluence of the western Nysa River and along the western Nysa to the Czechoslovak frontier, including that portion of Eeast Prussia not placed under the administration of the USSR in accordance accordance with the understanding reached at this Conference including the area of the former free city of Gdańsk shall be under the administration of the Polish State and for such purposes *shall not be considered as part of the Soviet Zone of occupation in* Germany" [all italics added—*R.J.*]

The same formulations were later used in the Treaty between the Polish People's Republic and the Federal Republic of Germany in Article I, paragraph 1 to describe the Polish western frontier, with the sole differ-

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[16] Cmd., 6648 ; "Official Gazette of the Control Council for Germany," Supplement I, p. 7 ; *Documents on Germany 1944–1961*, New York 1968, pp. 12–17, Committee of Foreign Relations, United States Senate ; B. RUHM von OPPEN, *op. cit.*, pp. 29–35.

[17] *Decisions of the Potsdam Conference*, Chapter III, "Official Gazette of the Control Council for Germany," Supplement I, p. 13 ; *Foreign Relations of the United States : The Conference of Berlin (The Potsdam Conference), 1945* ; B. RUHM von OPPEN, *op. cit.*, pp. 40–50.

ence that the term "the Lusatian Nysa River" instead of "the western Nysa River" was used.

In Chapter XIII "the Conference reached the following agreement on the removal of Germans from *Poland*, Czechoslovakia and Hungary :

"The three Heads of Government, having considered the question in all its aspects, recognize that the transfer to Germany of German populations or elements thereof, remaining in *Poland*, Czechoslovakia and Hungary, will have to be undertaken". [all italics added—*R.J.*]

In execution of this decision the Control Council for Germany elaborated on 25 November, 1945, plans for the transfer of the German population to be moved from Austria, Czechoslovakia, Hungary and Poland into the four occupation zones of Germany.[18] According to the plans "the entire German population to be moved from Poland (three and a half million persons) will be admitted to the Soviet and British zones of occupation in Germany"—two million to the Soviet zone and one and a half million to the British zone. The movement of the German population was to start in December 1945 and to be completed in July 1946.

The Polish and British representatives, combined reparation executive, signed an agreement on 14 February, 1946, on the transfer of the German population from Poland to the British zone.[19] They agreed "that the transfer and movement of Germans from their homes in Poland and their resettlement in the British zone will be carried out in a humane and orderly manner" and that the "expellees will be accepted by the British authorities on *the border of Poland and the Soviet Occupation zone of Germany*" [italics added—*R.J.*].

Bearing in mind the declaration on the creation of occupation zones in Germany, the three Heads of Government stated clearly that the territories given to Poland "should not be considered as part of the Soviet zone of occupation in Germany." Consequently they described the territories given to Poland as "the former German territories" or simply as "Poland." In the light of the unequivocal statements quoted above the term "the administration of the Polish State" can only be understood as the exercize by Poland of full sovereignty over the territories given to it in Potsdam.

Thus the words "the final determination of Poland's western frontier" can only have the meaning contained e.g. in Article 30 of the Treaty of Peace with Germany signed in Versailles on 28 June, 1919,[20] which also deals with frontiers running along waterways and which reads as follows :

"In the case of boundaries which are defined by a waterway, the terms 'course' and 'channel' used in the present Treaty signify : in the case of non-navigable rivers,

[18] B. RUHM von OPPEN, *op. cit.*, pp. 89–90.

[19] B. RUHM von OPPEN, *op. cit.*, pp. 107–108.

[20] Dz.U., 1920, No. 35, item 199.

the median line of the waterway or of its principal arm, and, in the case of navigable rivers, the median line of the principal channel of navigation. It will rest with the Boundary Commissions [in the French text "Commissions de délimitation"—*R.J.*] provided by the present Treaty to specify in each case whether the frontier line shall follow any changes of the course or channel which may take place or whether it shall be definitely fixed by the position of the course or channel of the time when the present Treaty comes into force."

The final determination of the western frontier of Poland was already done in the Treaty concerning the performing of the demarcation of the State frontier between Poland and Germany concluded by the Polish People's Republic and the German Democratic Republic in Frankfurt an der Oder on 27 February, 1951,[21] in execution of the Treaty concerning the demarcation of the established and existing State frontier concluded by the same countries in Zgorzelec on 6 July, 1950.[22]

One can, however, in no case agree to an interpretation according to which the terms "the final determination of the western frontier of Poland" used in the decisions of the Potsdam Conference open the possibility to start in the future from the very beginning the discussion about that frontier. It has to be emphasized that the decision to change the eastern frontier of Germany was taken by a German Government. That that German Government was composed not of Germans but of the Supreme Commanders of the victorious Powers, was the fault of the German people who were unable to create their own Government by themselves. Therefore, they cannot say today that the decision of that German Government composed of non-Germans to change the eastern frontier of Germany is not binding upon them. They have to accept it as they did accept in fact all other decisions of that Government. Perhaps, if there were a new German Government composed of Germans, they would, guided by their feeling of guilt, be ready and willing to accept terms much more worse than those decided upon by the German Government composed of the victorious Powers, limited by their compassion and magnanimity.

Taking a strictly formalistic point of view one could express the opinion that Germany did exist in her frontiers as they were on 31 December, 1937, till 2 August, 1945, on which day her eastern frontier was changed by the three victorious Powers acting in the capacity of the German Government. The facts do not allow, however, this opinion to be accepted.

There was a deep conviction among the whole Polish people, expressed also by the Polish Government in Warsaw, the Polish Government—in—Exile in London, and by the Polish Roman Catholic Church as well, based on history, but first of all on the decisions of the Yalta Conference, that the territories east of the Odra and Nysa Rivers were due to Poland and

[21] Dz.U., 1952, No. 53, item 346.

[22] Dz.U., 1951, No. 14, item 106.

that, therefore, the Polish armed forces and their Soviet allies did not conquer enemy territory, but regained Polish territories ; at the beginning they were even called "Regained Territories." Had one part of the decisions of the Yalta Conference concerning Poland, namely the shifting of the Polish-Soviet frontier westward to the Curzon Line, been realized without any protest of the Western Allies, the Poles had all good reasons to admit that the Western Allies would not protest against the realization of the second part of those decisions, namely to give Poland "substantial accessions of territory in the North and West."

Therefore, following the Polish and Soviet armies advancing to the west, Poles spontaneously settled the territories between the prewar Polish-German frontier and the Odra and Nysa Rivers, emptied by the Germans who had fled in great numbers to the west with the retreating German armed forces. It is estimated that in the territories east of the Odra and Nysa Rivers there were left only 3,700,000 inhabitants, of whom about 1,000,000 were of Polish nationality.[23] Organs of local administration and courts of justice were created and they started to act on the basis of agreements reached with local Soviet military commanders, in some regions, like the former East Prussia, already at the end of February and the beginning of March, 1945.[24] However, these organs did not regard themselves as civilian occupation authorities acting on behalf of the Soviet military commanders but as organs of Polish administration exercizing power over Polish territory. The regarded the Soviet armed forces not as occupants of Germany but as an allied army which presence in the Polish territory was necessitated by the war which was still going on. They spontaneously applied Polish law from the very beginning of their activities, disregarding the fact that its validity was extended formally upon these territories only on 27 November, 1945. As a matter of fact, there was no other law they could apply : according to the practice of States in cases of territorial changes, in the absence of such a formal incorporation of the law of the State taking over the territory, they could apply the law they found there, as it was the case e.g., after World War I in respect to the territories of Poland which belonged before that War to the German Reich

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[23] K. JONCA, A. KONIECZNY, *Z problemów adaptacji ludności na Śląsku w XX-leciu PRL* [*Problems of the Adaptation of the Population in Silesia in the 20 Years of the Polish People's Republic*], in : *Rola prawa w integracji Ziem Zachodnich*, Warszawa 1966, p. 14.

[24] K. SKUBISZEWSKI, *Zachodnia granica Polski* [*The Polish Western Frontier*], Gdańsk 1969, p. 47. See also H. CZERNIK *et al.*, *Kształtowanie się organów ścigania i wymiaru sprawiedliwości na Dolnym Śląsku* [*The Formation of Organs of Prosecution and of Administration of Justice in Lower Silesia*], in : *Rola prawa w integracji Ziem Zachodnich*, pp. 46–58.

(Prussia), when the German law was retained.[25] However, the law they found was the Hitlerite law filled with odious ideology, and it could not be applied. They also could return to the law which was in force there in the previous period, i.e., the law of the Weimar Republic, as it was the case e.g., after World War I, in respect to the territories of Soviet Russia conquered by Poland where the validity of the old law of Czarist Russia was restored.[26] This method also could not be applied because the law of the Weimar Republic was unknown to judges, administration officers and to the arriving Polish population.

It is true that there were some legislative acts of Poland which seem to accept that the Polish-German frontier ran as on 1 September, 1939 (and also on 31 December, 1937), but all of them date from the time before the capitulation of Germany. Thus, the Decree of the Polish Committee of National Liberation of 6 September, 1944, on the land reform, spoke of the liberation "of the whole of Poland" and of the future "extension of the western frontier of the Republic" of Poland,[27] it applied only to the territories of prewar Poland, and not to the territories west of the prewar Polish German frontier. The Decree of 5 February, 1945, on the depositing and exchange of the German Mark in the territories of the Republic of Poland liberated after 6 January, 1945,[28] and the ordinance of the Minister of Finances of 28 February, 1945, on the extending of the validity of the decree mentioned above to the territories of the Republic of Poland liberated between 6 February and 28, 1945,[29] withdrew the German Mark as legal currency in the territories of the prewar Poland incorporated in the German Reich, but not in the territories west of the prewar Polish German frontier.

It is also true that the territories of the prewar Polish-German frontier were treated in a different way than those of the prewar Poland : they were divided in March 1945 not into Voivodships, as the rest of Poland, but into Regions (Masuria—East Prussia, Western Pomerania, Opole Silesia and Lower Silesia) and were administered not by Voivodes but by Regional Plenipotentiaries of the Government of the Republic of Poland. They were formally incorporated in Poland only on 27 November, 1945, by the Decree

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[25] The Law of 1 August, 1919, on the temporary organization of the administration of the former Prussian Region, Dz.U., No. 64, item 385.

[26] Ordinance of the Commissary General for the Eastern Territories of 15 May, 1919, in respect to civil law and civil procedure, "Dziennik Urzędowy Zarządu Cywilnego Ziem Wschodnich" ["Official Gazette of the Civil Administration of the Eastern Territories"], No. 4, item 23.

[27] Dz.U., No. 4, item 17.

[28] Dz.U., No. 5, item 17.

[29] Dz.U., No. 11, item 61.

of 13 November, 1945 on the Administration of the Regained Territories,[30] the territory of the former Free City of Gdańsk having been incorporated earlier, on 7 April, 1945, by the Decree of 30 March, 1945 on the Creation of the Voivodship of Gdańsk.[31] Some districts of the Region of Western Pomerania, Masuria (East Prussia) and Lower Silesia were incorporated in Poland (precisely in Voivodships of Gdańsk, Białystok, Pomerania and Poznań) already on 7 July, 1945, by the Resolution of the Council of Ministers of that day ;[32] in respect to these districts the respective Voivodes were granted the powers of Regional Plenipotentiaries of the Government of the Republic of Poland.

The Decree on the Creation of the Voivodship of Gdańsk in its Article 3 declared invalid in the territory of the former Free City of Gdańsk all laws which were in force there till the day of its coming into force as contrary to the political system of the democratic Polish State and extended there the validity of the Polish law. This was rather a curious statement because nobody applied the Hitlerite law in that territory. The Decree on the administration of the Regained Territories limited itself to the statement that the validity of the Polish law would be extended upon these territories.

It seems that the legislative activity of Poland in respect to the Western and Northern Territories was not carried on in accordance with a deliberate plan, but was rather accidental : the Polish State was too much preoccupied with the solving of other much more serious problems of a country changing its social and political system and at that almost completely destroyed by war. This view seems to be confirmed by the fact that while introducing Polish law in the territory of the former Free City of Gdańsk and in the Western and Northern Territories the Decrees of 30 March and of 13 November, 1945, did not deal with the problems arisen from the delayed reception of the Polish law in these territories, as it was done e.g. in the Law of 23 June, 1921, on the introduction of some Polish laws and decrees in Western Poland after World War I.[33]

The developments described above prompted the Western Allies to raise unexpected protests before the USSR. The latter, in its answers to the United States and the United Kingdom Governments, explained that the problem of administration of the occupied German territory had not been touched upon neither in the agreements reached by Great Powers nor in the decisions of the Yalta Conference. It also assured the Western Allies

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[30] Dz.U., No. 51, item 295.

[31] Dz.U., No. 11, item 57.

[32] "Monitor Polski" ["Polish Official Gazette"] No. 29, item 77.

[33] Dz.U., No. 75, item 511.

that the transfer to the Polish administration of the territory east of the Odra and Nysa Rivers had no relation to the question of boundaries.[34]

In conclusion one could state that the territory of the German Reich shrinked with the advancement of the Polish armed forces, population and authorities to the west and that already on the day of the unconditional surrender of the German Reich its eastern frontier ran along the Odra and Nysa Rivers. The decision of the Potsdam Conference had, therefore, a declaratory and not a constitutionary character, as it only confirmed the existing state and did not create a new one. New in it was only the evacuation of Germans from Poland to occupied Germany.

The admission, even a formal one, that Germany existed in her frontiers as they were on 31 December, 1937, till 2 August, 1945, when the Potsdam decisions were taken, or even till 27 November, 1945, when the territories east of Odra and Nysa Rivers were formally incorporated in Poland, has no consequences whatsover in the sphere of international law. It only can have some limited consequences in the sphere of civil law, and only in respect to the relations between Germans themselves before they left the territories east of Odra and Nysa Rivers, e.g., in respect to some contracts concluded by them. Nothing is known of the authorities of the Soviet armed forces acting in the capacity of the occupant in cases involving Germans in these territories and applying German law. It seems that even the courts and authorities of the Federal Republic of Germany would have to recognize acts done there in accordance with the Polish law.

Therefore, the recognition by the legislation of the Federal Republic of Germany of the existence of Germany in her frontiers as they were on 31 December, 1937, has been from the very beginning an illegal territorial claim against Poland likely to endanger international peace and security. After the entry into force of the Warsaw Treaty concerning the bases of normalization of mutual relations between the Polish People's Republic and the Federal Republic of Germany it constitutes at the same time a violation of all provisions of that Treaty.

The second problem exerting a negative influence upon the relations between the Polish People's Republic and the Federal Republic of Germany is that of the citizenship of the Federal Republic of Germany as it is posed in the legislation of that country.

Article 116 of the Constitution, already quoted above, as well as the Law on Citizenship of 22 February, 1955, also quoted above, do not create a separate citizenship of the Federal Republic of Germany, but maintain the general notion of the German citizenship, to emphasize the idea that

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[34] H. FEIS, *Between War and Peace. The Potsdam Conference*, Princeton 1960, pp. 36–37.

the Fereral Republic of Germany is the continuance of the German Reich. They only deal with new problems arisen in the result of war, while general questions of the German citizenship remain to be regulated by the old Law on Citizenship of 22 July, 1913,[35] which still remains in force. From the Polish point of view it is, however, more important that the legislation of the Federal Republic of Germany on citizenship set up claims to certain categories of Polish citizens.

To the first category belong those present Polish citizens who before World War II lived as German citizens of Polish nationality in the German Reich east of Odra and Nysa Rivers. After the war they were given Polish citizenship by the Law of 28 April, 1946, on the citizenship of the Polish State of persons of Polish nationality domiciled in the Regained Territories.[36] This Law provides in its Article 1 that.

"the right to Polish citizenship has very person who before 1 January, 1945, had his domicile in the Regained Territories [which was tantamount to having German citizenship—*R.J.*], has proved his Polish nationality before the Verification (Nationality) Commission and has obtained on that basis the confirmation of his Polish nationality by the appropriate administrative authority of the first instance, and has made a declaration of loyalty to the Polish Nation and State."

They were, however, not asked and they did not regard it necessary to renounce their former German citizenship.

To the second category belong some'of the prewar, and also present, Polish citizens who lived in the prewar Polish western territories incorporated illegally during World War II in the German Reich and who were collectively and under constraint or, in some cases, at their wish, placed on the so-called German National Lists and given German citizenship on the basis of the Hitlerite Ordinance of 4 March, 1941, "on the German National List and German citizenship in the incorporated eastern territories,"[37] amended by the Ordinance of 31 January, 1942[38] on the same subject. In these territories there lived before the war a number of Polish citizens of German nationality formally recognized as German national minority, not big enough, however, to justify the granting them German citizenship in a collective manner. The Hitlerite authorities placed on the German National Lists and granted German citizenship not only those persons, but also persons of Polish nationality, making use of everything which would indicate their alleged German origin ; in many cases to have one's place of birth in the territory which before World War I had belonged to the German Reich was the only reason to obtain German citizenship.

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[35] "Reichsgesetzblatt" ["Official Gazette of the Reich," hereinafter quoted as RGBl.], vol. 1, p. 583.

[36] Dz.U., No. 15, item 106.

[37] RGBl., 1, p. 118.

[38] RGBl., 1, p. 51.

In some regions German citizenship was given automatically to the whole population, even if their Polish origin was evident ; the only way to avoid German citizenship in those regions was to escape or to be expelled to other parts of occupied Poland not incorporated in the German Reich (to the so-called *Generalgouvernement*), or to be sent to a concentration camp. In other regions of the incorporated territories, especially in those parts of Upper Silesia which before World War I belonged to Russia, where the manpower was indispensably necessary for the functionning of the local industry, that part of the population which was evidently Polish was allowed to stay and was given a limited citizenship called *Schutzangehörigkeit* which meant that it was placed under the "protection" of the German Reich and had no rigths and duties of "normal" citizens of the Reich.

As far as the first of the two categories mentioned above is concerned, those persons are regarded by the authorities of the Federal Republic of Germany as German citizens because, in the opinion of these authorities, they were in the majority of cases forced to opt for Polish citizenship or opted for it guided by their instinct of self-preservation ; because they have not asked to be relieved from their German citizenship ; and because they still have their domicile in Germany in its borders as they were on 31 December, 1937. Even if they had been deprived as Poles of their German citizenship by the Hitlerite authorities, what had been usually accompanied by the expulsion to occupied Poland (*Generalgouvernement*), and later obtained Polish citizenship on the basis of the Polish Law of 28 April, 1946, quoted above, they can, according to Article 116, paragraph 2 of the Constitution of the Federal Republic of Germany, be regarded as not having been deprived of their German citizenship the moment they established after the war their domicile in the Polish Western or Northern Territories (with the exception of the territory of the former Free City of Gdańsk) which according to the law of the Federal Republic of Germany, would be tantamount to establishing domicile in Germany.

Some commentators in the Federal Republic of Germany express the opinion that persons belonging to this category have double citizenship (Polish and German) and that in case of their migration to the Federal Republic of Germany they have to be regarded as German citizens without the necessity of re-granting them German citizenship.[39]

As far as the second category is concerned, the problem is limited only to those Polish citizens who did not belong to the German minority in pre-war Poland. Those who did were evacuated to Germany on the basis of the decisions of the Potsdam Conference (if they had not fled there them-

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[39] W. SCHÄTZEL, *Das deutsche Staatsangehörigkeitsrecht. Kommentar*, Berlin 1958, p. 216.

selves) ; although there is no law depriving them of their Polish citizenship, it can be admitted that Poland resigned of them.

Those Polish citizens who before the outbreak of war regarded themselves as having Polish nationality and were later given German citizenship by the Hitlerite authorities had, according to the Decree of 28 February, 1945 on the exclusion from the Polish society of hostile elements,[40] replaced by the Law of 6 May, 1945 on the same subject,[41] to undergo a procedure of rehabilitation before the courts of the first instance in which they had to prove that they had been placed on the German National List and given German citizenship against their will or under constraint and that they had demonstrated by their behaviour their Polish national identity. If the result of the rehabilitation procedure was positive, they were given certificates stating that they were Polish citizens of Polish nationality. If the result was negative, they were punished.

Meanwhile, paragraph 1, point 1 of the Law of the Federal Republic of Germany on Citizenship regards as German citizens every person of German nationality who was given German citizenship in the territories incorporated in the German Reich on the ground of the Hitlerite ordinances quoted above, provided he renounced distinctly his German citizenship so given to him or will renounce it in future. Point 2 of that paragraph extends the German citizenship of such a person to his wife and children if, according to the German law, their citizenship originates from him, even if he himself renounced his German citizenship. In the case of an renouncement, paragraph 2 admits that the German citizenship has not been given.

These provisions are in flagrant violation of the Regulations annexed to the Convention No. IV of the Hague of 18 October, 1907, respecting the Law and Customs of War on Land[42] which obliges the occupying power to respect the laws of the occupied country and does not allow to annex the occupied territory or to force its population to betray their own country. This flagrant violation forced some commentators in the Federal Republic of Germany[43] to explain the provisions of paragraph 1 of the Law on Citizenship in a way entirely different from the wording actually used in that paragraph. It is rightly said that internal law becomes ineffective if it contradicts the Hague Law and Customs of War on Land. Attention is drawn to the Law No. 12 of the Allied High Commision for Germany of 17 November, 1949, which declared as null and void the granting under con-

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[40] Dz.U., No. 7, item 30.

[41] Dz.U., No. 17, item 96.

[42] G. MARTENS, *Nouveau Recueil Général*, 3rd ser., vol. 3, p. 461.

[43] *Grundgesetz, Kommentar von Dr. Theodor Maunz and Dr. Günter Dürig*, ed. by T. MAUNZ and G. DÜRING, München 1964, p. 116/7.

straint of German citizenship to French and Luxemburg citizens, and it is stated that the same rule has to be applied to Polish citizens despite the fact that only those of France and Luxemburg were mentioned in that Law. It is said in conclusion that persons given German citizenship in violation of the Hague Law and Customs of War on Land can be regarded as German citizens only in those cases in which their original State ceases to regard them as their citizens or will do so in future or if the persons in question resign themselves of their original citizenship.

It is impossible to agree fully with those views because they mean an indirect recognition of illegal acts of the German occupant in Poland. Those prewar Polish citizens of German nationality who were evacuated to Germany can only be regarded as deprived of their Polish citizenship and could only be given German citizenship on the basis of the German Law of 22 July, 1913, or by a new law of the Federal Republic of Germany which would base on their German nationality and their domicile after the war in the Federal Republic of Germany, but in no case on Hitlerite ordinances.

The actual wording of the Law on Citizenship allows the authorities of the Federal Republic of Germany to conclude, and there is nothing in that Law which would force them to refrain from doing so, that those Polish citizens who underwent the rehabilitation procedure were of German nationality but were forced to admit their Polish nationality and that, therefore, they have not lost their German citizenship and possess now double citizenship. Some of those persons want now to emigrate to the Federal Republic of Germany to join their families there, which does not necessarily mean that they are of German nationality — in many cases they do it for purely economic reasons. They should, in accordance with the Polish Law of 15 February, 1962,[44] on Citizenship, ask the Council of State of the Polish People's Republic to be releaved of their Polish citizenship and after that to ask the competent authorities of the Federal Republic of Germany to grant them German citizenship. But in no case they can return to a citizenship which has been declared null and void.

The legislator of the Federal Republic of Germany was undoubtedly aware of the illegality of the Hitlerite ordinances on German citizenship in the Polish territories incorporated illegally in the German Reich. If he, nevertheless, applied a wording implying their legality, accepting the retaining of the German citizenship by the prewar Polish citizens as a principle and the rejection of the German citizenship as an exception, instead of a proper wording consistent with facts and with international law, it was only because he wanted to follow the same line as the Hitlerite ordinances in question, i.e. to create an impression that all persons, as a

[44] Dz.U., 1962, No 10, item 49.

rule, the Hitlerite ordinances applied to were of German nationality and that, therefore, the population of the Polish territories incorporated in the German Reich was in their majority German and the territories were German, too.

The creating by the Law of the Federal Republic of Germany on Citizenship of situations in which it is possible to regard Polish citizens as possessing also German citizenship is not the only problem which has to be questioned from the Polish point of view. Recognizing the existence of Germany in its borders as they were on 31 December, 1937, the Law in its paragraph 17, point 3 creates a paradoxical situation in which the authorities of the Federal Republic of Germany can grant German citizenship to foreigners coming from another country, or even to Polish citizens coming from Central and Eastern Poland who regard themselves as being of German nationality and who establish their domicile in the Western and Northern Territories of Poland! Some commentators in the Federal Republic of Germany while discussing this paragraph advise not to make use of it in such situations. In the first place they argue, however, that establishing one's domicile in today's "Breslau" can hardly be regarded as one's ties with Germany, and only in the second place that granting citizenship in such a case could create "political complications."[45] The violation of the sovereignty of the Polish People's Republic is, unfortunately, not taken by them into account.

Similar situations can arise in connection with the Second Law on Citizenship dealing with the citizenship of Austrians: establishing his domicile in the Polish western or Northern Territories, an Austrian who became German citizen after the *Anschluß* in 1938, can retain his German citizenship.

The Constitution of the Federal Republic of Germany proclaims in its preamble that

"desiring to give a new order to political life for a transitional period, the German people in the Laender Baden, Bavaria, Bremen, Hamburg, Hesse, Lower Saxony, Northrhine-Westphalia, Rhineland-Palatinate, Schleswig-Holstein, Wuerttemberg-Baden and Wuerttemberg-Hohenzollern, [...] has enacted this Basic Law of the Federal Republic of Germany."

The Laender mentioned in the paragraph of the preamble quoted above are those which belonged to the three western occupation zones of Germany, which means that the Constitution should be regarded as adopted by only one part of the German people living in these three zones. However, the preamble states in the following paragraph that this part of the German people

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[45] W. SCHÄTZEL, *op. cit.*, p. 275.

"has also acted on behalf of those Germans to whom participation [in the enacting of the Constitution—*R.J.*] was denied".

It goes beyond the scope of the present publication to argue whether the population of the three western occupation zones of Germany had the right to act in the name of the population of the eastern occupation zone of Germany who a month later created the German Democratic Republic. From the point of view of the present publication the statement in the Constitution quoted above is important only because, as it has been shown above, there are certain groups of Polish citizens who are regarded by the legislation of the Federal Republic of Germany as German citizens, which means that the Constitution pretends to be adopted also in their name.

Already the recognition by the Law on Citizenship of a group of Polish citizens as possessing also German citizenship constitutes in itself an obstacle on the way to the normalization of relations between the Polish People's Republic and the Federal Republic of Germany. Combined with the claim to the Polish Western and Northern Territories and with the suggestion that even the western territories of prewar Poland possess German character, the Law on Citizenship flagrantly violates the Treaty concerning the bases of normalization of mutual relations between the Polish People's Republic and the Federal Republic of Germany.

A law which is most aggressive and hostile towards Poland and all other Socialist countries is the Law concerning the questions of expellees and refugees of 19 May, 1953 with its subsequent supplements and changes.

The terms *"Vertriebener"* and *"Vertreibung"* translated here as "expellee" and "expulsion" are the sharpest ones to describe in the German language the action of transferring a person from one place to another. It contains the element of ill will and illegality on the side of the expelling, and of detriment and loss on the side of the expelled. This tendency is characteristic of the whole Law and is manifested in it by all possible means.

A general definition of an "expellee" is given in paragraph 1, point 1 of the Law and because of its characteristic content it is worth quoting it *in extenso* :

"An expellee is a person who, as German citizen or a person of German nationality, had possessed his domicile in the German eastern territories for the time being under foreign administration or in the territories outside the borders of the German Reich as they were on 31 December, 1937, and who lost this domicile in connection with the events of the Second World War through expulsion, and especially through displacing or escape [...]".

The dividing of the territory from which, according to the Law, the expulsion was possible, in two categories : "German eastern territories for the time being under foreign administration" and "territories outside the borders of the German Reich as they were on 31 December, 1937," expli-

citly shows that also this Law is based on the concept that Germany continues to exist in the prewar borders.

The Law does not define "the territories outside the borders of the German Reich as they were on 31 December, 1937." Taking, however, into account that to obtain the status of an expellee it is necessary the expulsion to be connected with the events of World War II, it can be admitted that they are the territories of all 51 States which were in the state of War with Germany and the territories of the six allies of Germany (Italy, Japan, Finland, Bulgaria, Romania and Hungary) because, according to the generally accepted rule of international law, they all were the theatre of war. In the territories of all these States there were, at least theoretically, conditions in which it was possible to expel Germans or which would force them to escape ; such conditions did not exist only in the territories of States which were neutral during World War I. Austria, as a German speaking country has also been excluded.[46]

The provisions of paragraph 1, point 1 quoted above exclude from the territories from which the expulsion was possible the territory of the German Democratic Republic (which appears in other provisions of the Law as the complex of two territories : those of the "Soviet Occupation Zone" and of the "Soviet occupied Sector of Berlin"), thus recognizing the territory of the German Democratic Republic, like the territory of the Federal Republic of Germany, as the destination places of expellees and refugees. It creates, however, in paragraph 3 a separate category of "refugees from the Soviet Zone," and in paragraph 4 a category of "persons equalized with the refugees from the Soviet Zone" ; their situation is the same as that of expellees, and wherever in the Law the term "expellee" or "expulsion" is used, it covers also these two special categories of persons.

Although according to its title the Law deals with expellees and refugees, in the text itself the category of refugees does not appear, with the only exception of the "refugees from the Soviet Zone." This seems to be the result of the following way ot thinking : the escape (flight), in its common meaning, admits the initiative on the side of the escaping (fleeing) and ascribes to the outside elements only a secondary character in the sense that the necessity to escape (to flee) can exist only in the subjective apprisal by the refugee of the actually existing situation ; objectively the reason to escape does not necessarily need to exist. This, however, would contradict the general concept of the Law on Expellees which admits that the responsibility for the loss by Germans of their domiciles rests exclusively on the side of external elements. That is why the Law eliminates in its text the category of refugees and equalizes the escapes with expulsions.

[46] *Grundgesetz...*, p. 116/16.

Meanwhile it is well known that many Germans escaped to the west in order to avoid responsibility for crimes committed by themselves personally or by their compatriots, or obeying the orders of the Hitlerite authorities ; the Law on Expellees is not willing to admit this.

Paragraph 1, point 2 of the Law on Expellees includes in the category of expellees further categories of German citizens and of persons of German nationality, namely those who had lost previously in the territories mentioned in paragraph 1 point 1 their permanent residence through marriage, but retained their domicile there (subpoint 5) ; who never had their domicile there but acquired their permanent residence there through birth from a mother covered by subpoint 5 (subpoint 6) ; who never had their domicile or permanent residence there but only carried on their economic activities or profession there (subpoint 4) and were forced because of expulsion from these territories to abandon their permanent residence or the carrying on of their economic activities or profession respectively ; persons who left the territories mentioned in paragraph 1, point 1 for reasons not connected with the events of World War II and namely persons who established their domicile outside the borders of the German Reich after 30 January, 1933, i.e. after the Nazi Party had taken over the power in Germany, because "in view of their hostility towards National Socialism or of their race, religion or opinions, Nazi acts of compulsion were used or threatened to be used against them" (subpoint 1) ; persons who were resettled from "non-German territories" on the basis of international agreements concluded during World War II or in the same period were resettled from territories occupied by the German armed forces "on the basis of acts of German offices" (subpoint 2)—they are called additionally by the Law "*Umsiedler*" ; and finally persons who

"after the carrying out of general actions of expulsion left or are leaving German eastern territories for the time being under foreign administration, Danzig, Estonia, Latvia, Lithuania, Soviet Union, Poland, Czechoslovakia, Hungary, Romania, Bulgaria, Yugoslavia, Albania or China, provided they had established their domicile there before 8 May, 1945" (subpoint 3)—they are called additionally by the Law "*Aussiedler*".

The use of expressions "German eastern territories for the time being under foreign administration," "Danzig," "Estonia," "Latvia" and "Lithuania" is one more example of complete ignorance by the legislator of the Federal Republic of Germany of political realities of postwar Europe.

The fact that from all countries from which theoretically the German population could be transferred only Socialist countries have been chosen and explicitly mentioned, shows that there are precisely these countries the Law wants to blame for the sufferings of Germans resulting from transfers. In this endeavour the Law goes so far as to put China on the list, although there are no informations about one single German expelled from China.

Also provokes objection the use of the terms "general actions of expulsion" used by the Law to describe the transfer of Germans conducted on the basis of Chapter XIII of the decisions of the Potsdam Conference.

It is also impossible to overlook the placing in one and the same paragraph of the questions of persons who were transfered from Poland, Czechoslovakia, Hungary, Yugoslavia and the Soviet Union by the authorities of these countries on the basis of the Potsdam decisions referred to above and of those who had to leave the German Reich or the territories occupied by the German armed forces in the result of actions of the Hitlerite authorities, because this would mean to give equal appraisal to two different causes of the movement of the German population : on the one hand, the cause are the historical results of the war unleashed by the German Reich, on the other, Hitlerite criminal acts the victims of which became the opponents of the National Socialism of different political opinions and various racial, ethnical and religious groups ; these criminal acts—including concentration camps and gas chambers—are described enigmatically by the Law as "Nazi acts of compulsion." Also Germans resettled by the authorities of the German Reich on the basis of international agreements concluded by them or of acts of German offices (*"Umsiedler"*) were the victims of a criminal Hitlerite concept of a "new order" in the conquered Europe. The Law states that some of these persons were moved from "non-German" territories but it conceals that they were settled in other non-German territories—mainly in the Polish territories—after the original population had been placed in concentration camps or—at best—transfered in inhuman conditions to other regions.

To enlarge the number of expellees and, in this way, the dimensions of the problem, the Law on Expellees is not rigorous in granting the status of an expellee : it grants it also to persons who are not German citizens or not of German nationality, if they are spouses of an expellee (para 2, point 3) and to German citizens and persons of German nationality who established their domicile in the territories mentioned in paragraph 1, point 1 only during the war, "if it results from the circumstances that they wanted to stay there permanently also after the war" (para 1, point 4). The Law does not explain, however, which war it has in mind : that won or that lost by the German Reich. It is well known that a certain number of Germans—officials of the Gestapo, police and occupation administration—who moved to countries occupied by Germany, felt there at home and wanted to stay there after the Hitlerite victory ; according to the Law even they can be granted the status of expellees.

The problem of expellees not to die off, paragraph 7 grants the status of an expellee also to children of expellees born after the expulsion.

The next problem resulting from the Law on Expellees is that of the

"expellees from their native land" (*Heimatvertriebenen*), dealt with in paragraph 2 of that Law. Because of the lack of precision of the provisions contained in that paragraph it seems to be necessary to quote it *in extenso* :

"(1) An expellee from his native land is the expellee who on 31 January, 1937, or at any time before that date had possessed his domicile in the territory of the State from which he was expelled (expulsion area) ; the totality of the territories mentioned in paragraph 1 point 1 which on 1 January, 1914, belonged to the German Reich or to the Austro-Hungarian Empire, or later to Poland, Estonia, Latvia, or Lithuania, constitute a uniform expulsion area.

"(2) An expellee from his native land is also an expelled spouse or descendant, if the other spouse or, with respect to descendants one of the parents, possessed as German citizen or a person of German nationality his domicile in the expulsion area (subpoint 1) on 31 December, 1937, or at any time before that date."

From the first part of point 1 conclusion can be drawn that the only criterion of granting the status of an "expellee from his native land" is the moment of possessing one's domicile in the expulsion area on 31 January, 1937, or at any time before that date, and not the location of the place one was expelled from ; in other words that the expulsion area covers all territories mentioned in paragraph 1, point 1 of the Law. However, in the second part of point 1 a new term has been introduced, namely that of the "uniform expulsion area," containing only a part of the territories mentioned in paragraph 1, point 1 of the Law. This is the only place in the whole Law where this term has been used ; point 2 quoted above speaks only of the "expulsion area" and not of the "uniform expulsion area." The question arises, therefore, why the term "uniform expulsion area" has been used and what its meaning is, because, according to the general rule of interpretation of legal texts, every provision of law has to have a meaning and none of them can be meaningless.

The introduction of the term "uniform expulsion area" can have two explanations : a legal and a political one.

In the legal sphere it can constitute the second criterion of granting the status of an "expellee from his native land" beside the first one of the moment of possessing domicile, which would mean that the status of an "expellee from his native land" could be granted only to persons who were expelled from one of the States included in the "uniform expulsion area" and who had their domicile in that State on 31 December, 1937, or at any time before that date. In view of the fact that point 2 refers to the "expulsion area" and not to the "uniform expulsion area" it seems, however, that this restricting interpretation should be rejected.

Before explaining the term "uniform expulsion area" in the political sphere it is indispensable to confront the political maps of Europe on the eve of World War I, in the time between the two World Wars and after World War II in order to state what it means in terms of actual political realities.

The "uniform expulsion area" contains :

(1) the whole of the Polish People's Republic because in 1914 one part of it belonged to the German Reich and the second to the Austro-Hungarian Empire, and "later," in 1918–1939, the third was Poland ;

(2) the whole of the Estonian SSR because in 1918–1939 it was Estonia ;

(3) the whole of the Latvian SSR because in 1918–1939 it was Latvia ;

(4) the whole of the Lithuanian SSR because in 1914 one part of it (Memel) belonged to the German Reich and in 1918–1939 the second part belonged to Poland and the third was Lithuania ;

(5) the whole of the Kaliningrad Region of the Russian SFSR because in 1914 it belonged to the German Reich (East Prussia) ;

(6) the western part of the Byelorussian SSR because in 1918–1939 it belogned to Poland ;

(7) the western part of the Ukrainian SSR because in 1914 one section of it belonged to the Austro-Hungarian Empire and in 1918–1939 the second section belonged to Poland ;

(8) the whole of the Czechoslovak Socialist Republic because in 1914 it belonged to the Austro-Hungarian Empire ;

(9) the whole of the Hungarian People's Republic because in 1914 it belonged to the Austro-Hungarian Empire ;

(10) the northern, central and western parts of the People's Republic of Roumania because in 1914 they belonged to the Austro-Hungarian Empire ;

(11) the northern and western parts of the Socialist Federal Republic of Yugoslavia because in 1914 they belonged to the Austro-Hungarian Empire ;

(12) the north-eastern part of Italy because in 1914 it belonged to the Austro-Hungarian Empire ;

(13) the eastern part of France (Alsace and Lorraine) because in 1914 it belonged to the German Reich ;

(14) the southern part of Denmark (Jutland) because in 1914 it belonged to the German Reich ; and

(15) the whole of Luxemburg because in 1914 it belonged to the German Reich.

Already at a glance it can be seen that the "uniform expulsion area" contains, from ethnical point of view, several categories of territories of an entirely different character : some of them were really German, but they do not correspond not only with the German Reich of 1914 but even of 1937 ; others like the German part of Upper Silesia of 1937, possessed German majority thanks to the germanization policy conducted by the German authorities in the 18th and the 19th centuries ; others, like the other part of Upper Silesia which in 1914 belonged to the German Reich and in

1918–1939 to Poland, where there was a German minority ; and finally those in which few German settlers formed small and isolated islands in the ocean of the local population, like e.g. in Volhynia which in 1914 belonged to Russia, in 1918–1939 to Poland and which is now in the Ukrainian SSR.

If so diversified territories have nevertheless been selected from the general "expulsion area" and put together to create a special "uniform expulsion area," it can only be in order to impose the existence of special ties connecting them with Germany. If it was true with regard to a few of them in the past, it is undoubtedly not true today with respect to all of them.

The introduction of a qualified category of expellees is for the persons concerned of no practical meaning : all expellees, whether the "ordinary" ones or those "expelled from their native land," are given by the Law the same rights and privileges. The only result of this differentiation is that the "expellees from their native land" obtain an identity card of the type "A", "ordinary" expellees—of the type "B", and the "refugees from the Soviet Zone"—of the type "C" (paragraph 15). It seems, therefore, that the only aim of the introduction in the Law of the qualified category of the expellees from their native land was the endeavour to confirm legally their "right to the native land" (*das Recht auf die Heimat*). The Law on Expellees does not say it explicitly, as some authors in the Federal Republic of Germany do, but the hereditary character of the status of an expellee from his native land seems to show that this was the intention of the legislator ; in any case, the Law gives the coming generations the possibility to raise this problem in the future.

The Law contains though a provision which allows to presume that all expellees have the duty to return to the place they were expelled from : paragraph 13 point 2 deprives namely all expellees of their rights and privileges if they do not return to the place of expulsion although the possibility of the return exists explicitly or even presumably.

There is one aspect of the time criterion of obtaining the status of an expelee from his native land which requires attention : the Law demands to have domicile in the expulsion area on 31 December, 1937, or at any time before that date, and in the moment of expulsion. It follows from this formulation that the continuity of domicile between these moments is not requested. In consequence, a German who e.g. had left Polish Upper Silesia in accordance with Article 33 of the Polish-German Convention relating to Upper Silesia signed in Geneva on 15 May, 1922,[47] had returned there after

[47] Dz.U., 1922, No. 44, item 371 ; RGBl, vol. 2, p. 237 ; French text : *Convention germano-polonaise relative à la Haute Silésie faite à Genève le 15 mai 1922.*, Genève 1922, p. 22.

the illegal incorporation of Upper Silesia in the German Reich, and left it again in 1945 either escaping or having been transfered to Germany, obtains the status of an expellee from his native land and all the "honours" contained with that status, which is after all contrary to the aim the legislator was guided by in setting the time limit of 31 December, 1937, and which undoubtedly was to nullify the results of all Hitlerite aggressions done after the day ; all returns of Germans to territories they had left before 31 December, 1937, not only to Upper Silesia, were possible only thanks to Hitlerite aggressions done after that day.

It is also characteristic that the Law does not impose a condition in the form of having been born in the expulsion area or of having possessed one's domicile there for a certain time which, and especially the birth, should be of importance in establishing one's native land. The only explanation of such an approach can be that in the opinion of the legislator the presence of Germans in the "expulsion area" was so natural that it is not necessary to evidence it either by birth or in any other way.

The Law on Expellees accords the expellees several rights and privileges : loans and aid at settlement (para. 41) and at taking over existing farms (para. 42) ; aid at bringing swamps, waste and stubbed land into cultivation (para. 43) ; reduction of income tax (para. 48) and inheritance tax (para. 49) ; facilities in admitting to the exercise of handicraft (paras. 72–76) and hired labour (paras. 77–79) ; allocation of flats (para. 80) ; facilities in social security and relief (paras. 90–91) and at issuing supplementary documents (para. 93) ; councel free of charge (para. 95) ; care for "cultural goods of expellees and refugees and promotion of scientific research" (para. 96). Further rights and privileges are granted the expellees in other laws, and especially in the Law on the uniform distribution of burdens of 14 August, 1952,[48] charging the persons which did not suffer a loss during the war with "compensation dues" and granting "compensation services" to persons who did suffer a loss during the war.

The Law on Expellees provides in paragraph 13 that the rights and privileges shall be withdrawn from those expellees, refugees and refugees from the Soviet Zone who will join economic and social life of the Federal Republic of Germany "in a degree corresponding to their assumed previous economic and social position." The merging of expellees in the economic and social organism of the Federal Republic of Germany and the subsequent withdrawal of their rights and privileges does not, however, as it could be expected, eliminate the problem of expellees : according to paragraph 19 the withdrawal of rights and privileges has to be marked in the

[48] BGBl., 1, 1969, p. 1909.

identity card of the expellee, but the card remains with him and he retains his status of an expellee.

On the occasion of the rather secondary problem of withdrawal of rights and privileges, the anti-Socialist character of the Law on Expellees has been revealed in a striking manner : paragraph 11 of the Law provides namely that the rights and privileges cannot be claimed by those exellees, refugees and refugees from the Soviet Zone who

"(1) established for the first time after 31 December, 1937, their domicile in one of the territories incorporated in the German Reich or occupied by the German armed forces or included into the German sphere of influence, and who exploited the situation arisen there in the result of the rule of the Nazi complusion, or

"(2) in the expulsion area or in the Soviet Occupation Zone or in the Soviet Occupied Sector of Berlin offended by his behaviour the principles of humanity or of law-abidingness".

Paragraph 11 deals plainly with two different periods in every one of which a different kind of offences could be committed respectively by the expellees : point 1 deals with the period of the Hitlerite rule, point 2 with the period which began after the German retreat, when in the "expulsion area," in the Soviet Occupation Zone and in the Soviet Occupied Sector of Berlin the power belonged theoretically to all Allies, but, taking into account the spirit of the Law, first of all to Socialist States. In the opinion of the legislator the Germans could commit in the first period only minor offences described in point 1 as "exploiting of the situation arisen in the result of the rule of the Nazi compulsion," while in the second period they could commit serious crimes described in point 2 as "offences of the principles of humanity and of law-abidingness." On the one hand, it is an attempt to hide the participation of the civilian German population in the conquered areas in war crimes, in crimes against humanity, and sometimes even in genocide, and on the other hand, it is a calumny thrown on all Allies, but first of all on Socialist States, that there were they which created in the "expulsion area," in the Soviet Occupation Zone and in the Soviet Occupied Sector of Berlin an atmosphere in which it was possible for the Germans to "offend the principles of humanity and of law-abidingness."

It is worth noting that paragraph 11 deals only with those expellees who established their domicile in one of the territories incorporated in the German Reich or occupied by the German armed forces or included into the German sphere of influence after 31 December, 1937, and does not mention those Germans who possessed their domicile there before that day. Taking into account the principle *nullum crimen sine poena*, this fact can be interpreted only in that way that the legislator assumes that the last-mentioned category could not commit any offence at all. This is an assumption the generation which survived the German occupation, and especially in Poland, can never agree with, as it can never agree with the

assumption that the "exploiting of the situation arisen in the result of the rule of the Nazi compulsion" was the only offence committed by the German civilian population in the occupied areas.

The German people paid a very high price for the war unleashed by their Hitlerite leaders. Millions of Germans lost their lives and property and became cripples. Millions had to leave the places they lived. The desire of the legislator of the Federal Republic of Germany to help the last ones would be entirely understandable and no law solving reasonably their problems would evoke objection on any part. However, to bring them help is merely an indirect aim of the Law on Expellees, the direct aim being to sow hatred against Socialist States, and first of all against Poland, and to create legal bases of revenge and revisionism.

The Law on Expellees has been a solid base of the activity of all retaliatory and revisionist elements and organizations in the Federal Republic of Germany. Being a law in force it has to be applied by authorities and citizens of the Federal Republic of Germany, even if they agree with the policy of normalization and all-round development of relations between the Polish People's Republic and the Federal Republic of Germany initiated by Chancellor Willy Brandt, and even if they sincerely want to realize this policy.

For some time past voices can be heard in the Federal Republic of Germany criticizing the activities of the organizations of expellees and of associations of compatriotes (*Landsmannschaften*) as contrary to the policy of détente in Europe in general and of normalization of relations between Poland and the Federal Republic of Germany in particular. A control of the expenses of these organizations and associations has been demanded to make it impossible for them to spend governmental allocations for purposes contrary with the policy of the Government of the Federal Republic of Germany. It has been proposed to repeal paragraph 7 of the Law on Expellees which stipulates the hereditary character of the status of the expellee. The retaliatory and revisionist activities of the organizations of expellees and of the associations of compatriotes have been criticized by such organizations as "The Democratic Action" (*Demokratische Aktion*) and "Young Socialists" of the SPD (*Jusos*), as well as by a number of prominent politicians, scientists and writers.

It is unquestionable that a full and real normalization, not to speak of an all-round development, of mutual relations between the Polish People's Republic and the Federal Republic of Germany is impossible as long as the laws discussed above, as well as other laws and provisions of similar character dispersed in numerous laws of the Federal Republic of Germany, will not be repealed or adjusted to the new situation created by the signing on 7 December, 1970, in Warsaw by the Polish People's Republic and the

Federal Republic of Germany of the Treaty concerning the bases of normalization of their mutual relations. All these laws and provisions are contrary to the Treaty, and the Federal Republic of Germany is obliged under international law to repeal or to change them.

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Les relations juridiques à la frontière de la République Populaire de Pologne

par WŁODZIMIERZ KUBALA

1. Observations préliminaires

La notion d'une frontière d'État implique — *ex definitione* — le caractère direct de la contiguïté des territoires soumis à de différents souverains [1]. Cela signifie que la frontière est le point de contact de deux ordres juridiques, parfois même le point de contact de deux différents systèmes juridiques.

A l'époque contemporaine la frontière, en règle générale, ne divise pas, mais unit les États avoisinants. C'est là, en effet, le lieu où se heurtent les intérêts politiques, économiques et socio-juridiques des États, à la solution desquels ces États sont intéressés au même degré. Ce fait évident — ceci mérite d'être noté lorsqu'il s'agit des États socialistes — intègre les efforts des États entrepris en vue de protéger la sécurité et l'inviolabilité de la frontière commune, détermine l'étendue et la forme de coopération en matière d'institution à la frontière des relations juridiques avantageuses pour les deux parties. La preuve pratique en sont les accords internationaux conclus dans ce domaine par la Pologne avec l'Union Soviétique, la République Démocratique Allemande et la Tchécoslovaquie [2].

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[1] Cette question a été à dessein simplifiée dans le présent article. Je passe sous silence le fait de contiguïté des espaces aériens et des eaux (que la frontière sépare aussi les uns des autres) et la question de faire frontière avec l'espace qui n'est soumis à aucune souveraineté (la haute mer).

[2] Cf. l'accord entre le gouvernement de la République Populaire de Pologne et le gouvernement de l'Union des Républiques Socialistes Soviétiques sur les relations juridiques à la frontière d'État polono-soviétique et sur la coopération et l'assistance mutuelle relative aux questions frontalières, signé à Moscou le 15 février 1961 (Dziennik Ustaw [Journal des Lois, cité ci-après J. des L.] n° 47, textes 253 et 254), appelé

Les accords en question font partie intégrante du système général d'actes juridiques réglementant — pour résumer les choses en peu de mots — la situation de droit international de la frontière de la République Populaire de Pologne et les relations juridiques à la frontière. Ledit système se base sur les dispositions des accords de Yalta et de Potsdam où se trouvent les décisions essentielles de caractère politique et de droit international relatives aux frontières d'après-guerre de l'État polonais. Elles sont devenues par la suite la base des conventions de frontière conclues par la Pologne avec l'Union Soviétique [3], la République Démocratique Allemande [4] et la Tchécoslovaquie [5], conventions dont il est question *expressis verbis* dans les préambules respectifs des accords sur les relations juridiques ; ces derniers peuvent, paraît — il, être traités comme des « actes d'exécution » *sui generis* des conventions de frontière.

Dans le présent article on se propose de présenter les questions essentielles faisant partie de la problématique des relations juridiques à la frontière de la République Populaire de Pologne. Ce seront surtout les questions réglées dans les accords sur les relations juridiques ; l'intérêt porté à d'autres actes juridiques sera limité au minimum indispensable, et c'est pour ces raisons qu'on passera sous silence, dans le présent article, la question du trafic de frontière et du commerce juridique.

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dans le texte du présent article « accord entre la R.P.P. et l'U.R.S.S. » ; l'accord entre la République Populaire de Pologne et la République Démocratique Allemande sur les relations juridiques à la frontière commune d'État et sur la coopération et l'assistance mutuelle relative aux questions frontalières, conclu à Berlin le 28 octobre 1969 (J. des L. n° 21, textes 170, 171), appelé dans le texte du présent article « accord entre la R.P.P. et la R.D.A. » ; l'accord entre la République Populaire de Pologne et la République Socialiste de Tchécoslovaquie sur les relations juridiques à la frontière d'État polono-tchécoslovaque et sur la coopération et l'assistance mutuelle relative aux questions frontalières, signé à Prague le 2 décembre 1971 (J. des L. n° 13, textes 126, 127), appelé dans le texte du présent article « accord entre la R.P.P. et la Tchécoslovaquie ». Dans le présent article, je me servirai aussi de la définition collective : les accords sur les relations juridiques, ou plus simplement : les accords.

[3] Cf. l'accord sur la frontière d'État polono-soviétique du 16 août 1945 (J. des L., 1947, n° 35, texte 167) ; l'accord sur l'échange de secteurs des territoires situés dans la voïvodie de Lublin et dans le district de Drohobycz du 15 février 1951 (J. des L., 1952, n° 11, texte 63) ; l'accord sur la délimitation de la frontière d'État existante polono-soviétique dans la partie contigüe à la mer Baltique (J. des L., 1958, n° 37, texte 166).

[4] Cf. l'accord entre la République Populaire de Pologne et la République Démocratique Allemande, signé à Zgorzelec le 6 juillet 1950 (J. des L., 1951, n° 14, texte 106) ; l'acte sur l'exécution de la délimitation de la frontière d'État entre la Pologne et l'Allemagne (J. des L., 1952, n° 53, texte 346).

[5] Cf. l'accord sur la délimitation définitive de la frontière d'État du 13 juin 1958 (J. des L., 1959, n° 25, texte 159).

2. Le tracé et la délimitation d'une frontière d'État

A base du principe généralement admis dans le droit international [6], les accords sur les relations juridiques conclus par la Pologne disposent que la ligne d'une frontière divise verticalement l'espace aérien et l'intérieur du sol (de l'eau) des territoires des parties contractantes. Le principe susmentionné est également sanctionné par les dispositions du droit intérieur polonais ; il a trouvé l'expression dans l'art. 1er al. 1er du décret en date du 23 mars 1956 sur la protection des frontières d'État [7], ainsi que dans l'art. 4 de la loi aérienne en date du 31 mai 1962 [8].

La surface horizontale tracée par la ligne frontalière constitue la limite extérieure du pouvoir souverain d'État de la République Populaire de Pologne. Selon l'avis du professeur L. Ehrlich, ce pouvoir s'étend aussi profondément à l'intérieur du sol (du territoire national) qu'il existe les possibilités techniques d'exploitation de l'intérieur de l'écorce terrestre par l'État donné [9] ; il en est de même avec l'espace aérien où le pouvoir souverain d'État s'étend aussi haut qu'à l'heure actuelle s'étend une capacité réelle de protection par l'État de ses propres intérêts.

Les accords sur les relations juridiques ne comprennent pas la définition d'une frontière d'État. Ils renvoient dans cette question aux arrangements bilatéraux antérieurs qui renferment la description de la ligne frontière tracée entre les États [10]. La définition de la frontière de la République Populaire de Pologne est formulée dans l'art. 1er du décret sur la protection des frontières d'État, qui dispose : « La frontière de la République Populaire de Pologne est une ligne qui sépare le territoire de la République Populaire de Pologne des territoires d'autres États et de la haute mer » (al. 1er) ; « La ligne frontière délimite aussi verticalement l'espace aérien, les eaux et l'intérieur de la terre » (al. 2).

La place prépondérante dans la problématique des relations juridiques à la frontière occuppent dans les accords les questions du cours et de la délimitation de la frontière d'État. Les principes de la délimitation du cours de la frontière sur la terre et les eaux frontières ont été réglées séparément.

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[6] Cf., p. ex., la convention de Paris relative à la navigation aérienne du 13 octobre 1919 (art. 1er) et la convention de Chicago du 17 décembre 1944 (art. 1er).

[7] J. des L., 1956, n° 9, texte 51.

[8] J. des L., 1962, n° 32, texte 153.

[9] L. EHRLICH, *Prawo międzynarodowe* [*Le droit international*], Warszawa 1958, p. 519.

[10] Cf. l'art. 1er alinéas 1er et 2 de l'accord entre la R.P.P. et l'U.R.S.S. ; l'art. 1er al. 1er de l'accord entre la R.P.P. et la R.D.A. ; l'art. 1er de l'accord entre la R.P.P. et la Tchécoslovaquie.

Sur terre, de même que dans les lieux où la frontière traverse les eaux frontières, la frontière court comme une ligne droite, fixe, d'un signe de frontière à l'autre — conformément au principe de l'immutabilité du tracé de la frontière d'État [11]. Sur terre ainsi que sur certaines eaux frontières dormantes ou courantes, la frontière peut former une ligne droite ou bien brisée. Le principe d'une ligne droite a été admis dans les accords comme principe de base. Une seule exception en faveur d'une ligne brisée est prévue dans l'accord conclu entre la République Populaire de Pologne et la Tchécoslovaquie à l'égard du secteur de la frontière tracée dans les Tatras où, conformément à la disposition de l'art. 2 al. 1er phrase 2 de l'accord, la frontière d'État est tracée le long de la ligne de partage des eaux.

Le principe de la mutabilité du cours de la frontière (frontière mobile) est, par contre, obligatoire sur les eaux frontières courantes aussi bien navigables que non navigables. Cette frontière peut former une ligne droite, brisée ou courbe [12]. Sur les eaux navigables (p. ex. l'Odra), la frontière court le long de la ligne médiane du grand courant (*Talweg*) [13], et sur les cours d'eau, de même que sur les voies d'eau non navigables (p. ex. l'Olza), la frontière est tracée par leur milieu ou par le milieu du bras principal. Sur le Golfe de Szczecin et sur le Lac de Nowe Warpno, la ligne frontière passe comme une ligne immobile qui unit les signes de frontière auxiliaires [14]. De même sur le Golfe de la Vistule (Kaliningradskij Zaliv) la frontière est tracée par la ligne immobile marquée par les bouées, pendant que sur le Golfe de Gdańsk — par la ligne de l'alignement fixé à la Mierzeja Wiślana (Baltijskaja Kosa) [15].

Les accords stipulent que, dans la définition de la ligne médiane du

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[11] Art. 3 al. 1er de l'accord entre la R.P.P. et la R.D.A. dispose : « Dans les secteurs terrestres et dans ces endroits où la frontière d'État traverse les eaux frontières, la ligne de frontière court comme une ligne droite fixé d'un signe de frontière à l'autre » ; de même : l'art. 3 al. 1er de l'accord entre la R.P.P. et l'U.R.S.S. et l'art. 2 al. 1er de l'accord entre la R.P.P. et la Tchécoslovaquie. Les eaux frontières — aux termes des accords sur les relations juridiques — sont les fleuves, les torrents, les canaux, les lacs et d'autres eaux intérieures par lesquelles court la ligne de frontière ou qui sont traversées par la ligne de frontière (cf., p. ex., l'art. 2 al. 2 de l'accord entre la R.P.P. et la R.D.A.).

[12] Art. 3 al. 2 de l'accord entre la R.P.P. et l'U.R.S.S. dispose : « Dans les secteurs des eaux frontières courantes, la ligne de frontière est mobile et passe comme une ligne droite brisée ou courbe [...] » ; de même : l'art. 3 al. 2 de l'accord entre la R.P.P. et la R.D.A. et l'art. 2 al. 4 de l'accord entre la R.P.P. et la Tchécoslovaquie.

[13] Le milieu du grand courant (*Talweg*), c'est la ligne la plus profonde du lit, c'est-à-dire le lieu où l'eau coule le plus vite. Cf. C. Berezowski, *Prawo międzynarodowe publiczne* [*Le droit international public*], Warszawa 1966, partie Ire, p. 188 ; L. Ehrlich, *op. cit.*, p. 508.

[14] Art. 3 al. 3 de l'accord entre la R.P.P. et la R.D.A.

[15] Art. 3 al. 3 de l'accord entre la R.P.P. et l'U.R.S.S.

courant [16], les golfes qui se trouvent sur les rivières, torrents ou canaux ne sont pas pris en considération. Dans de tels cas, pour le milieu de la voie d'eau est reconnue la ligne égalisée, éloignée de la même distance des lignes égalisées des deux bords. Dans les lieux où il n'est pas permis de définir exactement les lignes des bords, pour le milieu des eaux frontières en question est reconnu le milieu de la surface d'eau à un niveau moyen des eaux (art. 4 al. 3 de l'accord entre la R.P.P. et l'U.R.S.S.) ou à un niveau qui se maintient au cours d'une année le plus longtemps (art. 3 al. 2 de l'accord entre la R.P.P. et la Tchécoslovaquie). Les îles situées sur les eaux frontières font partie du territoire de l'une ou de l'autre partie, selon leur situation par rapport à la ligne frontière et conformément aux dispositions renfermées dans les documents relatifs à la délimitation de la frontière (les accords frontaliers) [17]. Il est à noter que le principe du grand courant d'un fleuve a été admis antérieurement par l'accord sur la paix et l'armistice préliminaires signé le 12 octobre 1920 par la République Populaire de Pologne, d'une part, et la République Socialiste Fédérative Soviétique de Russie et la République Socialiste Fédérative Soviétique d'Ukraine, d'autre part (art. 1er) [18], ainsi que par le Traité de Versailles (partie II, art. 30) [19].

La mutabilité susmentionnée du cours de la frontière s'exprime dans les déplacements naturels dans l'une ou l'autre direction de la ligne médiane du grand courant ou bien du milieu de la voie d'eau [20]. Par la notion du déplacement naturel du milieu du grand courant on entend de lents changements de configuration des bords de la voie d'eau provoqués par les phénomènes de la nature ayant pour conséquence le déplacement du courant (du milieu) d'un fleuve, d'un canal, d'un torrent ou d'autre cours d'eau, ce qui mène, à son tour, au déplacement de la frontière d'État. Un changement brusque et naturel du lit d'un fleuve frontière ou d'autre voie d'eau, qui provoque le déplacement brusque du courant, n'entraîne pas le déplacement automatique de la frontière d'État. En cas de changements de cette sorte, les autorités compétentes des parties intéressées décident,

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[16] Les accords sur les relations juridiques ne donnent pas de définition de la ligne du milieu du grand courant.

[17] Art. 4 al. 3 de l'accord entre la R.P.P. et l'U.R.S.S.

[18] J. des L., 1921, n° 28, texte 161.

[19] J. des L., 1920, n° 35, texte 200.

[20] Art. 4 al. 1er de l'accord entre la R.P.P. et l'U.R.S.S. dispose : « Sur les eaux navigables, le cours de la ligne de frontière change conformément au déplacement naturel du milieu du grand courant (*Talweg*) », et dans l'art. 4 al. 2 nous lisons : « Sur les eaux non navigables et les torrents, le cours de la ligne de frontière change conformément au déplacement de leur milieu [...] » ; de même : l'art. 5 alinéas 1er et 2 de l'accord entre la R.P.P. et la R.D.A. et l'art. 3 al. 1er de l'accord entre la R.P.P. et la Tchécoslovaquie.

par voie d'un accord, si la frontière d'État doit, dans le secteur donné, rester inchangée, ou bien si aura lieu la nouvelle délimitation de celle-ci. Si, à la suite des processus naturels du changement du lit d'un fleuve se produisent de considérables changements dans le cours de la ligne de frontière, les autorités compétentes (les plénipotentiaires de frontière) des deux États avoisinants décident, par voie d'un accord, sur la restitution de l'état antérieur ou bien sur le besoin de la nouvelle délimitation de la frontière [21].

Les accords sur les relations juridiques réglementent également les principes de délimitation du cours de la frontière au cas où le changement de son cours aurait lieu à la suite de l'aménagement des voies d'eau frontières. En règle générale, l'aménagement d'une voie d'eau ne peut pas aboutir à l'accroissement du territoire de l'une des parties au détriment de l'autre. Il en résulte que l'aménagement du fleuve frontière ne peut pas entraîner des modifications du cours de la frontière d'État.

L'importance essentielle ont les dispositions des accords relatives au cours de la frontière qui passe par les ponts, les écluses et d'autres constructions bâties sur la frontière. Les accords disposent que les ponts, les écluses et d'autres installations et constructions bâties sur les eaux frontières sont coupés par la ligne de frontière au milieu (p. ex. l'art. 3 al. 4 de l'accord entre la R.P.P. et la R.D.A.).

Dans les chapitres consacrés au cours et à la délimitation de la frontière, les accords comprennent, de plus, des dispositions relatives à la démarcation technique du cours de la ligne de frontière, à la sorte et aux dimensions des poteaux, aux contrôles périodiques de l'état de démarcation de la ligne de frontière, de même qu'à la procédure obligatoire à ce sujet. Cette problématique ne fera pas l'objet du présent article.

3. Les plénipotentiaires de frontière

En vertu des accords sur les relations juridiques aussi bien la Pologne que les États qui l'avoisinent ont assumé plusieurs tâches et devoirs liés à la sécurité et à l'ordre à la frontière, dont l'accomplissement a été confié aux organes spécialement appelés à ces fins. Ce sont : les plénipotentiaires

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[21] Art. 5 al. 2 de l'accord entre la R.P.P. et la R.D.A. stipule : « Si, en raison des processus naturels [...], de considérables changements du cours de la ligne de frontière ont lieu, et le rétablissement de l'état antérieur du lit est techniquement non motivé ou lié aux frais très élevés, les Hautes Parties Contractantes décident par la voie d'un arrangement sur le rétablissement du cours antérieur de la ligne de frontière ou sur la nouvelle délimitation de celle-ci ». De même : art. 3 al. 3 de l'accord entre la R.P.P. et la Tchécoslovaquie et l'art. 4 alinéas 5 - 7 de l'accord entre la R.P.P. et l'U.R.S.S.

généraux de frontière, les adjoints des plénipotentiaires généraux de frontière (nommés pour le secteur entier de la frontière), les plénipotentiaires de frontière, les adjoints des plénipotentiaires de frontière ainsi que les assistants des plénipotentiaires de frontière (nommés pour les secteurs particuliers de la frontière). Les plénipotentiaires généraux de frontière et les plénipotentiaires de frontière sont autorisés à nommer des secrétaires, des experts, des interprètes et d'autres personnes indispensables dans l'exercice des tâches de service.

L'accord entre la R.P.P. et la R.D.A., ainsi que l'accord entre la R.P.P. et la Tchécoslovaquie disposent que les plénipotentiaires généraux de frontière sont nommés par les gouvernements, pendant que les adjoints des plénipotentiaires généraux de frontière, ainsi que les plénipotentiaires de frontière le sont par les ministres compétents. D'autres fonctionnaires sont nommés par les plénipotentiaires de frontière ayant le rang plus haut. L'accord entre la R.P.P. et l'Union Soviétique ne prévoit pas de poste de plénipotentiaire général de frontière et, de plus, il stipule que les plénipotentiaires de frontière et leurs adjoints sont nommés par le gouvernement.

Les tâches des plénipotentiaires de frontière sont nombreuses. Il est impossible de les énumérer toutes. Parmi les plus importantes on compte : l'appréciation de l'efficacité de la protection de la frontière commune, l'appréciation de l'état des signes frontaliers ainsi que du cours de la frontière, l'examen des incidents plus importants sur la frontière (p. ex. les coups de feu à la frontière, le franchissement illégal de la frontière, l'homicide ou la lésion corporelle survenus à la suite d'une action effectuée à travers les frontières, etc.), de même que des questions transmises à être examinées par les plénipotentiaires du rang inférieur, le renseignement mutuel dans les questions portant sur la sauvegarde de la frontière, l'interaction et l'échange d'expériences.

Il est donc permis de constater que les tâches des plénipotentiaires de frontière concernent les trois domaines principaux des relations de fait et juridiques à la frontière :

1) la protection directe de la frontière commune (p. ex. l'efficacité de la protection de la frontière, les franchissements illégaux de la frontière),

2) la sécurité générale et l'ordre à la frontière et à sa proximité (p. ex. l'homicide commis sur la frontière, des coups de feu échangés à la frontière),

3) la protection des intérêts sociaux et économiques de l'État (p. ex. les questions sanitaires, l'aménagement des fleuves, la prévention des calamités naturelles).

Dans l'accomplissement des tâches susmentionnées, les plénipotentiaires profitent de certaines prérogatives et facilités en ce qui concerne le fran-

chissement de la frontière (entre autres, l'exemption de la visite douanière, des droits de douane, la possibilité de franchissement de la frontière dans le lieu et le temps voulus — en vertu des pleins pouvoirs et après une notification préalable des organes frontaliers de l'autre partie). Les dites attributions ont pour tâche d'assurer le règlement rapides des problèmes relatifs à l'ordre, des problèmes économiques, militaires et d'autres par la voie dite abrégée, c'est-à-dire sans recourir à la voie diplomatique. Sont notamment réglées par les plénipotentiaires, en vertu de la voie abrégée, les questions telles que la conduite des travaux économiques et techniques sur la frontière (liés, par ex., à l'aménagement des rivières frontalières, à la démarcation de la frontière), l'octroi des autorisations de franchir la frontière par les troupes de sauvetage qui viennent en aide à l'autre partie, l'interaction dans l'organisation du franchissement de la frontière par les troupes militaires, l'explication des dommages survenus par suite d'une action effectuée à travers la frontière (p. ex. le fait de commettre le vol sur le territoire de l'autre État), de même que le règlement des questions relatives au passage de la frontière par les animaux domestiques.

La voie diplomatique a été réservée aux questions dont le règlement dépasse les compétences susmentionnées des plénipotentiaires. Par cette voie sont tranchées également les questions qui n'ont pas été réglées par les plénipotentiaires. Le droit de transmettre une question sur la voie diplomatique ont les plénipotentiaires généraux de frontière (sur les frontières polono-allemande et polono-tchécoslovaque) et les plénipotentiaires de frontière (sur la frontière polono-allemande). Les accords prévoient également la possibilité de transmettre aux plénipotentiaires l'examen plus détaillé des questions qui ont été réglées par la voie diplomatique [22].

L'activité pratique actuelle des plénipotentiaires de frontière a prouvé que la voie, prévue par les accords, de régler diverses questions frontalières, apporte des avantages évidents pour les parties et les populations habitant dans la zone frontalière.

4. La sécurité et l'ordre à la frontière

La sécurité et l'ordre publique constituent des éléments indispensables du fonctionnement et du développement de toute collectivité humaine organisée, notamment de l'État. D'où le besoin et l'importance de la protection de la sécurité et de l'ordre publique en général, et à la frontière en particulier.

La sécurité et l'ordre publique à la frontière et dans la zone frontalière

[22] Cf. l'art. 13 de l'accord entre la R.P.P. et la Tchécoslovaquie ; l'art. 10 de l'accord entre la R.P.P. et la R.D.A.

ont une influence importante sur l'état et le caractère des rapports qui existent entre les États avoisinants, ils influent sur le développement économique des régions contigues à la frontière ainsi que sur l'existence de la population qui y habite.

Les accords sur les rapports juridiques règlent certaines questions relatives à la sécurité et à l'ordre publique à la frontière, entre autres : l'exercice des actes de service par les fonctionnaires d'un État sur le territoire d'un autre État, la conduite des poursuites par la frontière des auteurs de crimes, l'extradition des personnes qui ont franchi la frontière d'une manière illégale ainsi que l'examen des prétentions de répared les dommages survenus par suite de la violation de l'ordre à la frontière et de l'exercice d'une activité économique sur la frontière ou à sa proximité.

Conformément au contenu des dispositions renfermées dans les accords, les plénipotentiaires de frontière des États avoisinants sont tenus de se renseigner mutuellement et sans délai sur tous les cas de franchissement illégal de la frontière commune ainsi que de prendre sans délai toutes mesures en vue d'appréhender l'auteur de cet acte [23].

Les accords entre la R.P.P. et la R.D.A. et entre la R.P.P. et la Tchécoslovaquie admettent la possibilité de faire des poursuites immédiates à travers la frontière [24]. Une telle poursuite ne peut avoir lieu qu'avec le consentement d'un plénipotentiaire de la partie avoisinante ou de son adjoint. Si le retard peut entraîner le danger de fuite de l'auteur du franchissement de la frontière sans autorisation, l'obtention du consentement, dont il est question plus haut, n'est pas exigée ; l'action de poursuite entreprise dans ce dernier cas ne peut avoir lieu qu'au-dehors du terrain des villes et campagnes jusqu'à l'endroit où l'organe de poursuite rencontrera l'organe compétent de l'autre partie, pourtant pas plus loin que 5 km dans l'intérieur de son territoire [25]. Au cours de la poursuite faite sur le

[23] Cf. l'art. 39 lettre B de l'accord entre la R.P.P. et l'U.R.S.S. ; l'art. 13 de l'accord entre la R.P.P. et la R.D.A. ; l'art. 17 de l'accord entre la R.P.P. et la Tchécoslovaquie.

[24] Comme la poursuite immédiate est reconnu le cas où la personne poursuivie se trouve dans le champ de vue de l'organe de poursuite ou bien le chien de police suit les traces par la flair.

[25] Art. 13 al. 3 de l'accord entre la R.P.P. et la R.D.A. dispose : « La poursuite immédiate par la frontière d'État sur le territoire de l'autre Partie Contractante peut être faite par les organes de la garde de la frontière avec le consentement du plénipotentiaire de frontière de l'autre Partie ou de son adjoint. Sans ce consentement, la poursuite ne peut avoir lieu que dans les cas où le retard entraïne le danger immédiat de la fuite de la personne qui a franchi illégalement la frontière, mais seulement jusqu'à l'endroit où l'organe de poursuite rencontre l'organe compétent de l'autre Partie Contractante. Cette poursuite ne peut pas être continuée plus loin que 5 km dans l'intérieur du territoire de l'autre Partie Contractante. La poursuite est interdite dans les villes, campagnes et villages ». De même : l'art. 17 al. 4 de l'accord entre la R.P.P. et la Tchécoslovaquie.

territoire voisin, l'organe de poursuite ne peut se servir des armes que dans le cas de légitime défense [26]. Il est interdit d'opérer dès perquisitions domiciliaires et des fouilles des personnes poursuivies. Il est par contre permis d'opérer une perquisition dite extérieure, notamment si elle a pour tâche de révéler et de retenir des objets qui peuvent servir à attaquer (p. ex. l'arme, le couteau) et des objets provenant de l'infraction (p. ex. les objets de contrabande). Les personnes arrêtées au cours d'une poursuite opérée sur le territoire de l'autre partie sont soumises à un transfert immédiat au plénipotentiaire de frontière aves tous les objets saisis.

Les auteurs du franchissement volontaire de la frontière d'État sans autorisation requise sont sujets, au cours de 48 heures, dès le moment de leur arrestation, au transfert à l'autre partie, à moins qu'ils ne soient les ressortissants de l'État sur le territoire duquel ils ont été arrêtés, ou bien, en dehors du franchissement illégal de la frontière, ils n'aient commis également un acte punissable sur le territoire sur lequel ils ont été arrêtés. Avec la personne arrêtée sont soumis au transfert tous les objets qui lui ont été enlevés, à l'exception des moyens de paiement de l'État sur le territoire duquel cette personne a été arrêtée. Les personnes arrêtées pour le franchissement involontaire de la frontière sans autorisation sont soumises au transfert immédiat, sans avoir besoin de faire une procédure d'explication qui doit être ouverte en cas de franchissement volontaire de la frontière [27].

En dehors des poursuites, les fonctionnaires d'une partie peuvent, sur le territoire de l'autre partie, exercer des actions telles que l'expédition du trafic frontalier, les visites douanières, de même que les actes de remise et de réception aux gares de chemin de fer — dans le cadre des expéditions communes du trafic frontalier entre les États voisins.

Les accords sur les relations juridiques règlent aussi une procédure en cas de découverte des dommages causés par l'infraction à l'ordre sur la frentière les questions relatives à l'exploitation des routes passant par la frontière, les questions portant sur la navigation, la pêche et les cultures agricoles, de même que sur la construction des édifices à proximité de la frontière.

En cas de découverte du dommage survenu à la suite de l'infraction à l'ordre sur la frontière ou de l'activité économique, les plénipotentiaires de frontière compétents sont obligés d'intenter une procédure d'explication qui doit tendre à établir l'auteur de l'infraction, la personne lésée et le

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[26] Art. 22 § 1er du code pénal de 1969 stipule : « Ne commet pas d'infraction celui qui, en état de légitime défense, repousse un attentat illégal et direct contre un bien social ou individuel quelconque ».

[27] Cf. l'art. 14 al. 1er de l'accord entre la R.P.P. et la R.D.A. ; l'art. 18 de l'accord entre la R.P.P. et la Tchécoslovaquie.

montant du dommage. Ladite procédure doit surtout viser à régler une affaire par voie d'accomodement. En cas d'impossibilité de satisfaire les prétentions d'indemnisation, l'affaire est transmise au règlement par la voie diplomatique [28]. Les accords stipulent *expressis verbis* que la procédure d'explication ouverte dans les questions des dommages n'a pas de caractère d'enquête ni d'instruction (voir, p. ex., l'art. 18 de l'accord entre la R.P.P. et la R.D.A.) ; de plus, une telle procédure peut être ouverte en cas de dommage ne dépassant pas 1500 zlotys.

En ce qui concerne la navigation sur les fleuves frontières, il est permis dans le cas des voies navigables, d'exploiter toute la largeur de la voie d'eau, pendant que dans celui d'autres voies, la navigation n'est permise que jusqu'à la ligne de frontière. La pêche est autorisée jusqu'à la ligne de frontière seulement de jour. La culture des champs et la construction des édifices sur la frontière ne peut pas entraver la protection de celle-ci. Les accords imposent aux plénipotentiaires de frontière le devoir de se renseigner mutuellement sur ces questions [29].

5. Les cas admissibles du franchissement de la frontière d'État sans documents obligatoires dans le trafic à la frontière

Conformément à la législation en vigueur en Pologne (art. 288 du code pénal), en Union Soviétique (art. 83 du code pénal de la République Fédérative Soviétique de Russie de 1960 et d'autres républiques), en Tchécoslovaquie (§ 109 du code pénal de 1961) et en République Démocratique Allemande (§ 213 du code pénal de 1968), le franchissement de la frontière d'État n'est possible qu'en vertu d'une autorisation requise (passeport, laissez-passer ou un autre document). Dans la législation pénale polonaise, la notion d' — « une autorisation requise » comprend la possession d'un document approprié autorisant à franchir la frontière ainsi que l'utilisation du point de franchissement de la frontière destiné et ouvert au trafic frontalier [30]. A la notion : « une autorisation appropriée » satisfait le document qui :

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[28] Cf. les articles 44 - 46 de l'accord entre la R.P.P. et l'U.R.S.S. ; les articles 17 et 18 de l'accord entre la R.P.P. et la R.D.A. ; l'art. 21 de l'accord entre la R.P.P. et la Tchécoslovaquie.

[29] Cf. l'art. 31 de l'accord entre la R.P.P. et l'U.R.S.S. ; l'art. 23 de l'accord entre la R.P.P. et la R.D.A. ; l'art. 27 de l'accord entre la R.P.P. et la Tchécoslovaquie.

[30] Cf. W. KUBALA, *Glosa do uchwały Sądu Najwyższego z 9.IX.1964 (VI KO 25/64)* [*La glose à la résolution de la Cour Suprême du 9 septembre 1964 (VI KO 25/64)*], « Nowe Prawo », 1966, n° 4, p. 540 ; IDEM, *Glosa do postanowienia z 4.XII.1969, RW 1487/69* [*La glose à l'arrêt du 4 décembre 1969, RW 1487/69*], « Państwo i Prawo », 1970, n° 7, p. 187.

— donne la preuve de l'identité d'une personne ;

— donne la preuve de la nationalité du titulaire du document ;

— comporte la clause autorisant à franchir la frontière en temps et lieu donnés et qui indique les États et le nombre de passages de la frontière ;

— a été délivré par l'organe compétent de l'administration de l'État ;

— est respecte comme document autorisant à franchir la frontière dans les relations mutuelles des États intéressés.

Les accords sur les relations juridiques à la frontière ne règlent pas la problématique du trafic à la frontière, ils s'occupent, par contre, de certaines questions concernant le franchissement de la frontière, sans avoir des documents obligatoires dans le trafic frontalier, dans les cas particuliers tels que l'inondation, l'incendie ou une autre calamité naturelle survenue à la frontière. La nécessité d'une réglementation juridique des cas de cette sorte résulte du caractère du bien juridique que constituent la sécurité et l'inviolabilité de la frontière commune d'État ; la réalité prouve que ledit bien peut se trouver en collision avec la sécurité des hommes (avec leurs vie ou santé) ou des biens, les faits lesquels les États avoisinants se sont efforcés de prévenir en admettant la possibilité du franchissement de la frontière sans autorisation (du point de vue du droit pénal, c'est la circonstance qui exclue la responsabilité pénale).

Pour ce qui est des questions au-dessus présentées, les accords ont renfermé des solutions plus ou moins pareilles, ce qui a rendu possible de les traiter d'une manière globale. Mais en ce qui concerne les cas du franchissement admissible de la frontière sans avoir des documents obligatoires dans le trafic frontalier, nous y avons affaire avec une autre situation. Premièrement, l'accord entre la R.P.P. et l'U.R.S.S. ne règle point ces questions, et deuxièmement, dans les deux autres accords il y a des solutions différentes. Il est aussi à noter que, sur la frontière avec la Tchécoslovaquie, en dehors de l'accord sur les relations juridiques, entrent aussi en jeu les conventions bilatérales antérieures, à savoir : la convention sur le régime de petite frontière du 1er juillet 1959 [31], l'accord sur l'économie hydraulique sur les eaux frontières du 21 mars 1958 [32] et l'accord la coopération en matière d'assistance minière [33]. C'est pour ces raisons qu'il est indispensable de présenter séparément les dispositions relatives à la frontière avec la R.D.A. et celles concernant la frontière avec la Tchécoslovaquie.

L'accord sur les relations juridiques à la frontière : la R.P.P. — la R.D.A.

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[31] Dénommée dans le texte la convention ; J. des L., 1960, n° 27, textes 153 - 155.

[32] Non publié.

[33] Non publié.

prévoit l'admissibilité du franchissement de la frontière d'État dans deux cas : 1) sur demande des organes d'État compétents — en vue de prêter assistance (art. 39) ; 2) en vue d'éviter le danger menaçant la vie des habitants de la zone frontalière (art. 40).

Le premier cas concerne, en règle générale, les actions de sauvetage de toute sorte entreprises par les autorités et institutions compétentes d'un État sur l'invitations d'un autre. De la teneur de l'art. 39 de l'accord résulte que le fait de s'adresser antérieurement avec la proposition de prêter assistance constitute une condition *sine qua non* de la légalité d'une action. La demande de prêter assistance est justifiée par l'état de calamité naturelle à proximité de la frontière d'État. Le danger de la calamité naturelle, aux termes de la disposition susmentionnée, est l'incendie, l'inondation ou bien d'autres événements qui entraînent ou peuvent entraîner de graves conséquences pour un cercle illimité des personnes ou des biens. En cas d'existence de l'état ou de la menace de la calamité, la frontière d'État peut être traversée par les unités des pompiers, les équipes de sauvetage, les groupes de travail, le personnel médical et vétérinaire, donc, en principe, par toute personne, ce qui résulte des expressions usitées dans le texte de l'accord : « équipe de sauvetage » et « groupe de travail ». Une seule limitation, d'ailleurs tout à fait compréhensible, est l'exigence que les personnes qui se rendent en vue de prêter assistance franchissent la frontière en vertu de la carte d'identité. Elles séjournent sur le territoire d'un autre État pour l'espace de temps qui est indispensable à la prestation d'assistance. Le franchissement de la frontière s'effectue par le point de franchissement de la frontière ou par les endroits fixés par les plénipotentiaires généraux de frontière de la R.P.P. et de la R.D.A.

Conformément à l'art. 40 de l'accord entre la R.P.P. et la R.D.A., les habitants des zones frontalières peuvent, pendant l'incendie, l'inondation et d'autres calamités menaçant leur vie, franchir la frontière d'État dans le lieu quelconque sans avoir une autorisation. De même que dans le cas précédent, l'art. 40 n'énumère pas de circonstances qui provoquent l'état de menace pour la vie des habitants des zones frontalières, ce qui mène à la conclusion qu'en dehors des circonstances mentionnées dans l'article, le franchissement de la frontière sera justifié par de tels événements que les grandes tempêtes, les ouragans ou les bourrasques de neige qui entraînent l'état de calamité naturelle, et de plus, des épidémies et d'autres phénomènes de cette sorte. Le franchissement de la frontière ne peut s'effectuer, en vertu de l'art. 40 de l'accord, qu'en vue de sauver la vie. L'accord ne prévoit pas la possibilité de sauver d'autres biens, et notamment la santé ou les biens des habitants des zones frontalières.

Les dispositions qui règlent les relations juridiques à la frontière avec la Tchécoslovaquie prévoient les cas suivants de franchissement de la fron-

tière sans avoir des documents : 1) le mouvement des personnes sur les routes et chemins communs se trouvant sur le territoire de l'une des parties ; 2) le franchissement de la frontière par les équipes de sauvetage ; 3) le franchissement de la frontière en vue d'éviter le danger qui menace la vie des habitants de la petite zone du trafic frontalier et des personnes naviguant sur le Dunajec et le Poprad.

Le mouvement des personnes dans les routes et chemins se trouvant sur le territoire de l'une des parties contractantes (p. ex. la Route d'Amitié dans les Monts de Karkonosze) est réglé par les dispositions des articles 23 et 29 de l'accord sur les relations juridiques entre la R.P.P. et la Tchécoslovaquie. Il résulte de ces disposistions que les personnes autorisées à exploiter les routes communes ne sont que les ressortissants polonais et tchécoslovaques ; au moment où elles se trouvent sur les routes communes, elles sont soumises aux dispositions de leur État, de plus, elles sont obligées d'avoir sur elles la carte d'identité qu'elles doivent présenter sur toute demande des organes de la protection des frontières et des organes douaniers des deux États. L'arrestation de la personne se trouvant sur la route commune s'effectue lorsqu'elle commet un acte prohibé par la loi de l'État dont elle est ressortissante. Les personnes arrêtées sont soumises à la transmission au plénipotentiaire de frontière de l'autre partie ; avec la personne sont soumis à la transmission également ses objets, à l'exception des moyens de paiement de la partie dont les organes ont effectué l'arrestation. La reconnaissance des routes comme communes, les principes de leur entretien, de même que d'autres questions détaillées sont réglées par les accords particuliers (art. 23 de l'accord). L'institution des « routes communes » constitue l'exemple de la pénétration dans le droit des traités de la coutume et des états réels établis dans la pratique de la vie quotidienne en matière d'utilisation et de possession des biens déterminés (p. ex. l'exploitation des fermes rurales situées sur les territoires de l'État voisin) et des attributions (p. ex. le transport des produits agricoles) ; la thèse susmentionnée est confirmée par les dispositions de la convention sur le régime de petite frontière instituées en vue de faciliter la vie des habitants des zones frontalières de la Pologne et de la Tchécoslovaquie.

Le franchissement de la frontière d'État par les équipes de sauvetage est réglé par les dispositions de l'art. 12 alinéas 1er, 2 et 3 de la convention sur le régime de petite frontière, ainsi que par les dispositions de l'accord sur la coopération en matière d'assistance minière. Conformément à ces accords, en cas de catastrophe naturelle survenue dans la zone de petite frontière [34] ou en cas de catastrophe minière, les équipes de sauvetage d'une

[34] La zone de petite frontière, c'est la zone contigüe des deux côtés à la frontière d'État, chacune de 15 km de largeur.

partie peuvent, sur la demande des autorités minières ou bien sur celle d'autres organes (p. ex. d'un organe compétent de l'administration de l'État, du service de santé, etc.) et transmise par des autorités frontalières, franchir la frontière d'État sans avoir des documents requis. L'exigence d'adresser une demande d'assistance n'est pas obligatoire en cas d'incendie de la forêt qui s'est produit à la frontière, notamment si le retard pouvait entraîner le danger. Les équipes de sauvetage peuvent franchir la frontière dans le lieu commode quelconque. Elles sont autorisées à séjourner sur le territoire de l'autre État aussi longtemps que cela est exigé par la situation donnée. Leur retour s'effectue par le point de franchissement de la frontière le plus proche. En vertu des principes au-dessus mentionnés, peut également franchir la frontière le personnel du service de santé et du service vétérinaire — s'il est demandé qu'il prête une assistance en cas de danger qui menace la vie ou la santé des hommes ou des animaux (p. ex. l'état d'épidémie, l'inondation).

La convention sur le régime de petite frontière ainsi que l'accord sur l'économie hydraulique sur les eaux frontières prévoient également la possibilité de franchissement de la frontière en vue d'éviter le danger qui menace la vie ou la santé des hommes. Aux termes de l'art. 12 al. 4 de la convention, en cas d'inondation ou en d'autres cas motivés, les habitants de la zone de petite frontière peuvent, en vue de sauver leur vie ou santé, franchir la frontière d'État, sans avoir des documents, dans chaque lieu commode. Après avoir franchi la frontière, lesdites personnes doivent se présenter devant les autorités locales (la police, la Garde militaire de frontière). A la lumière des dispositions de la convention, les facteurs qui provoquent l'état de menace doivent exister d'une manière objective, et la possibilité d'éviter le danger — seulement par la voie de franchissement de la frontière d'État. En effet, le franchissement de la frontière doit être traité comme la dernière chance de sauver la vie ou la santé [35].

Dans l'art. 12 al. 4 de la convention il est question des « habitants de la zone de petite frontière », ce qui signifie que du « privilège » de franchissement de la frontière sans avoir des documents requis peuvent bénéficier les habitants de la zone ayant la largeur de 15 km des deux côtés de la frontière commune. L'exception à cette règle est prévue par le § 7 de l'annexe de l'accord sur l'économie hydraulique sur les eaux frontières à l'égard des personnes naviguant sur le Dunajec et le Poprad. Il n'y est prévu aucune restriction subjective.

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[35] Cf. W. KUBALA, *O okolicznościach wyłączających bezprawność nielegalnego przekroczenia granicy państwowej* [*Des circonstances qui excluent l'illégalité du franchissement illégal de la frontière d'État*], « Wojskowy Przegląd Prawniczy », 1967, n° 1, p. 16.

6. Observations finales

Les accords qui règlent les relations juridiques à la frontière de la R.P.P., discutés dans le présent article, constituent sans doute l'exemple de la coopération entre les États. Le développement ultérieur de cette coopération est non seulement possible mais nécessaire, car il est dans l'intérêt des parties intéressées. Les dernières années ont apporté le progrès évident dans ce domaine, dont le meilleur exemple peut être l'accord entre les gouvernements de la R.P.P. et de la R.D.A. du 25 novembre 1971 [36] sur les voyages mutuels des ressortissants des deux États ainsi que l'accord du même type signé entre la R.D.A. et la Tchécoslovaquie.

De lege ferenda il faut soulever le postulat d'élargir la disposition de l'art. 40 de l'accord entre la R.P.P. et la R.D.A. vers le sens de créer la possibilité de franchir la frontière d'État aussi en vue de sauver la santé, et à l'égard de la frontière avec la Tchécoslovaquie — le postulat d'élargir les attributions, dont il est question dans l'art. 12 al. 4 de la convention sur le régime de petite frontière, sur tous les habitants des zones frontalières (p. ex. les touristes et les estivants). Bien fondé est également le postulat d'amendement à l'accord entre la R.P.P. et l'U.R.S.S. où il manque des dispositions relatives aux cas de franchissement licite de la frontière sans documents dans les situations particulières dont il est question, par exemple, dans les articles 39 et 40 de l'accord entre la R.P.P. et la R.D.A. ou dans l'art. 12 de la convention sur le régime de petite frontière.

Dans le contexte de la pratique qui s'établit entre les pays socialistes et qui consiste à abandonner, dans le trafic frontalier, le devoir d'être titulaire de passeport (celui de viser les documents de passeport a été supprimé antérieurement), la prise en considération des postulats susmentionnés serait l'exemple suivant de la réalisation de l'idée de l'amitié, de la coopération et de l'assistance mutuelle entre les États socialistes.

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[36] J. des L., 1971, n° 35, texte 306. L'art. 1er de cet accord dispose : « Les ressortissants des deux États qui franchissent la frontière sont exemptés de l'obligation d'être titulaires de passeports et de visas dans les conditions déterminées par le présent accord ». Conformément à l'art. 4 al. 1er de l'accord, au franchissement de la frontière et au séjour sur le territoire de l'autre État donnent droit, en dehors des documents jusqu'à présent employés, les cartes d'identité qui renferment l'empreinte du cachet d'après le type établi, qui confirme l'admission de la carte d'identité au trafic frontalier.

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Some Remarks on the Function of International Courts in the Contemporary World

by REMIGIUSZ BIERZANEK

1. The Decline in the Role of International Adjudication in the Settlement of International Disputes

For many centuries, States have settled their disputes by chosing either the way of war in order to compel the adversary by force to bow to their will, or the way of peace by resorting to various methods which have evolved during long international practice, such as negotiations, good offices, mediation, inquiry, conciliation, arbitration and — during the present century — judicial settlement. In this situation, the function of international law consisted, on the one hand, of making war, which is by nature a brutal method of settling international disputes, as humanitarian as possible, in accordance with the moral principles and legal consciousness of the epoch, and, on the other hand, of creating an organizational and legal framework to the peaceful settlement of disputes. It was not by chance that the efforts made at the turn of the century aimed at the codification of international law, concentrated on the restatement and codification of the Law of War (some of the Hague conventions of 1907, the London Declaration of 1909), as well as on the creation of legal bases for peaceful settlement of international disputes (the First and the XII Hague Conventions of 1907). During the interwar period, much attention was also paid to the development of peaceful methods for settling disputes (the setting up of the Permanent Court of International Justice, 1922, the Geneva General Act on peaceful settlement of international disputes, 1928). The United Nations Charter also deals at length with the peaceful settlement of disputes (twenty articles touch to some extent on this issue), while the Statute of the International Court of Justice is annexed to the Charter.

In the so-called "classic" system of international relations, the peaceful s_ttlement of disputes has been limited in the past by the fact that the

parties to a dispute had the right to resort to war, thus implying that war constituted the "court of final appeal" even when peaceful methods were being employed. However, profound changes have taken place during the present century, and due to the expected consequences of an atomic war, and the obligations assumed by States not to resort to war as an instrument of national policy, war is ceasing to be a normal and permissible method of settling disputes. Thus, an entirely new situation has been created in the field of international disputes. The logical consequence of the prohibition of the recourse to war is the duty of preventing international disputes from degenerating into armed conflict, or, most particularly, into a nuclear war. A view widely expressed was that as States tended to renounce war and as the process of outlawing this method of settling disputes progressed, we shall witness an abundant development of institutionalized methods for peaceful settlement of disputes, and particularly of international courts, for the solution of an ever increasing number of disputes arising from progressively more intensive and diversified cooperation between States. Reality, however, proves to be much more complicated. Efforts aimed at peaceful settlement of disputes coincide with a phenomenon frequently called the crisis of the international judicial system. At the same time, new organizational forms of international cooperation, and particularly the growth of international organizations, create great possibilities for the adaptation of the traditional diplomatic methods for peaceful settlement of disputes to new conditions, as well as for the search for new methods.

The consensus of opinion among international lawyers is that till now international courts did not prove an effective means of settling international disputes. Many authors, particularly western ones, frequently express their disappointment and frustration over the limited role played since World War II, both by arbitration and by the International Court of Justice, in the settlement of disputes which have been so numerous during this stormy period of history, and which have frequently led to protracted tension in relations between States or into armed conflict.

Thus, according to C. Wilfried Jenks : "Since the Second World War, remarkable advances have been made in virtually every sector of international organization, except the judicial sector. There has been no comparable advance in international adjudication ; on the contrary, there have been no major innovations in the competence, organization, procedure and effectiveness of the International Court of Justice during the last quarter of a century." [1]

Research carried out by the David Davies Memorial Institute of International Studies into 50 case studies yielded the conclusion that "the role

[1] C. W. JENKS, *The Prospects of International Adjudication*, London 1964, p. 1.

of arbitration and adjudication in the settlement of present-day international disputes is a modest one indeed." In more than threefourths of the 50 most important disputes in the 1944–1968 period, arbitration or adjudication does not appear to have even been proposed by either side or by third parties as a means of settlement, leaving only 12 in which either form of proceeding was at all relevant. In seven of the 12 disputes in which consideration was given to settlement by arbitral or judicial tribunals, the proposal was made by one side and not accepted by the other and, since in none of these cases was the principle of compulsory jurisdiction applicable, the proposal was not taken up. In only 4 cases out of a total of 50, was the arbitral or judicial process resorted to and in each of these cases the outcome was unsatisfactory in one way or another.[2] During the first 25 years of the existence of the International Court of Justice, "States have failed to accept the Court as a normal method of settling their legal disputes." [3]

Sir Humphrey Waldock found with undisguised regret that "the historical record does not justify any great optimism as to the possibility that by degrees the Optional Clause may bring about a general system of compulsory jurisdiction," and added that "today, despite the almost universal support for compulsory jurisdiction at the San Francisco Conference, fewer than half the members of the United Nations are adherents to the Optional Clause, and of these many have qualified their acceptance of the Optional Clause by the insertion of numerous limitations, reservations, and conditions in their declarations." [4]

During three years (1965, 1967 and 1968) of the 1963–1972 decade, the International Court of Justice did not issue a single judgment or advisory opinion. A comparison of the number and advisory opinions given by the Permanent Court of International Justice in the years 1922–1939 and the number of judgments and advisory opinions given by the International Court of Justice since World War II is clearly to the disadvantage of the latter.[5]

Many authors point out that the number of cases submitted to the International Court of Justice is not greater than the number of cases tried

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[2] *International Disputes—The Political Aspects*, London 1971, p. 321.

[3] *International Disputes—The Legal Aspects*, London 1972, p. 157.

[4] C. H. M. WALDOCK, *Decline of the Optional Clause*, BYIL 1955–1956, p. 246.

[5] Such a comparison is made by A. GROSS, *A propos des 50 années de justice internationale*, RGDIP, 1972, No. 1, p. 6.

A former United States judge on the ICJ, P. JESSUP, gave the following description of the Court's situation : "I can speak for myself (and I believe for other judges and former judges) in saying that the chief disadvantage of serving on that distinguished body has been enforced idleness." (in : *Proceedings of the American Society of International Law*, September 1971, p. 267).

by the Permanent Court of International Justice, while the number of States parties to the ICJ Statute has increased considerably, since it includes all UN members with the addition of several other States. The decrease in the number of applications to the International Court of Justice is thus due to the reluctance not only of the socialist and post-colonial States, but also, to some extent, of the western States to use the Hague Court.

Furthermore, there has been no increase in the number of advisory opinions given, despite the fact that many more bodies and institutions are now empowered to apply to the ICJ for such opinions. According to the Statute of the Permanent Court of International Justice, only the General Assembly and the Council of the League of Nations could seek advisory opinions from the Court. The current UN system, however, vests this power not only in the General Assembly and the Security Council but also in other UN organs and specialized agencies, provided that they are authorized by the UN General Assembly (13 organizations have received said authorization). Opinions issued by the ICJ, regardless of their legal value, contributed little to the settling of controversial problems in the United Nations. As the London Study Group said : "Experience suggests that the advisory procedure may be of limited effectiveness in settling internal disputes on legal questions where these are acute and where the step of taking the Court's opinion is not supported by each of the disputing groups." [6]

UN organs [7] and other international organizations [8] appealed to States to make greater use of the services of the International Court of Justice, but with no visible result.

2. The Causes of the Limited Role of International Courts in Contemporary International Relations

Attempts have been made to explain the decrease in the number of applications submitted to the Hague Court after World War II, in comparison with the interwar period, by the fact that the Permanent Court

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[6] *Report of a Study Group on the Peaceful Settlement of International Disputes*, London 1966, p. 16.

[7] General Assembly resolutions 171/II and 2723/XXV.

[8] L'Institut de Droit International at its session in Neufchatel in 1959 stated that *"le recours à la Cour de Justice Internationale ou à une autre instance judiciaire ou arbitrale ne saurait en aucun cas être considéré comme un acte peu amical vis à vis de l'État défendant,"* ("Annuaire de l'IDI," 1959, vol. 2, p. 359).

of International Justice dealt with a comparatively large number of cases arising from the application of peace treaties which resulted from World War I while no such situation existed after World War II.[9] However, this explanation is not altogether convincing since 5 peace treaties were in fact concluded in 1947 with the former satellite States of the Axis, while a peace treaty with Japan and a State treaty concerning Austria were signed at a later date. Moreover, many other international treaties were concluded by an increasing number of States during the period following World War II. It should be added that when these treaties were concluded, a large number of States demonstrated an obvious reluctance over the inclusion of arbitration or judicial clauses. In the practical application of these treaties, the parties to them were also reluctant to submit resultant disputes to international courts on the basis of *ad hoc* agreements.

An alternative explanation derives from the fact that international relations of the interwar period were dominated by a conflict of interests between States concerned with the preservation of the *status quo* and the revisionist States. This was manifested by the differing interpretations of the treaties in force at that time. On the other hand, after World War II, three types of international disputes appeared, none of which — as modern experience shows — lends itself easily to the forum of an international court. The first of these types were disputes between East and West, in which legal aspects are strictly intertwined with ideological ones. The second type were disputes between the former colonial powers and national liberation movements or newly founded States. One of the traits of these disputes is that the differences of opinion pertain usually not to what is law but to what should be law, and even the most impartial judge is no authority on such a question. On the other hand, national liberation movements and newly founded States outside Europe show a visible tendency towards treating international law and judicial settlement based upon it, as a European invention, and a component part of the "world of the white man," which functions primarily in the interest of European States.[10] Finally, disputes of the third type, between particular newly founded States outside Europe, show the same tendency.

Furthermore, the new States are often more sensitive than the older States as regards the limitation of their sovereign rights. This is why they are reluctant to assume obligations regarding compulsory jurisdiction. New

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[9] *International Disputes—The Political Aspects*, p. 315.

[10] NORTHEDGE and DONELAN point out on the subject that "The image, which now tends to prevail of the Hague Court as an established highly conservative body, proceeding by orthodox and time-honoured methods, and firmly oriented towards European civilization and legal practice, does not endear it to countries in the developing world." *International Disputes—The Political Aspects*, p. 327.

States outside Europe avoid the submission of cases to the International Court of Justice, having at their disposal, as one of the authors justly remarks — "alternative methods which, in their view, offer greater opportunities for a compromise in a shorter time and with less expense, and which allow greater freedom of action, if the final settlement is not to their liking." He adds that "New States, of course, are not alone in this attitude".[11]

It has also been suggested that the reluctance of States to submit disputes for settlement by international courts is related to the essential changes in contemporary international relations, namely, with the birth of the atomic age and the impossibility of compelling smaller States by force. Thus, whereas in the past, smaller States frequently faced alternatives of either war or submission of a case to an international court, they can now adopt a more uncomprimising attitude. For a dispute, which does not reach the international court, often quiesces. Thus, small States are less interested in submitting their disputes to international jurisdiction. It has been pointed out that the reluctance to submit for settlement by international courts is due to the existing system of international relations, in which war is no longer a means of settling disputes but is regarded as a disaster capable of wiping out our civilization, and in which "small States can violate, with impunity, the rights of big States," because the Treaty for the Renunciation of War of 1928 and the UN Charter "have an adverse effect on the willingness of States to submit to arbitration." [12] In the debate of the VI Commission of the General Assembly the view has been expressed that "even small States, which ought to fined in recourse to justice the best guarantee that their rights will be respected, were reluctant to submit to the jurisdiction of a court and sometimes preferred to exploit the antagonism between the Great Powers to gain advantages that would not have been recognized in law." [13]

Submission to the International Court of Justice of disputes in which the political aspect was predominant involved the Court in the political struggle which was taking place in the United Nations forum. In this situation, decisions reached by the Court were evaluated from a political rather

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[11] Cf. I. Shikita, *The Attitude of New States towards the ICJ*, "International Organization," Spring 1965, p. 218.

[12] Cf. J. Stone, *Law, Force and Survival*, "Foreign Affairs," July 1961, p. 553, and C. W. Jenks, *The Prospects...*, p. 104 ff. Similarly E. Giraud ("Annuaire de l'IDI," vol. 1, 1957, p. 227) said that in the United Nations system "*on prétend interdire aux États tout recours à la force tandis qu'on ne leur donne en fait aucun moyen de faire respecter leurs droits ; ainsi les États peuvent inpunément violer de façon flagrante le droit international*".

[13] Doc. A(8238), p. 13.

than a legal point of view. In the light of this criterion, some advisory opinions given by the Court proved to be particularly unfortunate. Regardless of its legal significance the advisory opinion issued in 1948 on the admission of new members to the United Nations in accordance with Article 4 of the Charter shows that the Court demonstrated little perspicacity in foreseeing the political effects of its own advisory opinion. The difficult problem of the admission of many States, which have waited for several years for admission to the UN, was solved finally in 1955, by the decision of their simultaneous admission, a principle deemed by the ICJ to conflict with Article 4 of the UN Charter. The judgment given in 1966 in the case of South-West Africa (Namibia) aroused deep dissatisfaction and protests from the African States ; while a 1961 advisory opinion of the Court, supporting the standpoint of the United States concerning the legal duty of all member States to finance UN military operations resulted in a political crisis in the United Nations and to paralysis of one of the sessions of the General Assembly. Opinions of this kind did not enhance the authority of the principal judicial organ of the United Nations.

The situation of a Court which has to consider cases in which the political aspect predominates is certainly not an easy one. A leading American political scientist, Stanley Hoffmann, comments on this point in his penetrating analysis of the advisory opinion on the financing of the UN military operations :

"The Court was faced with a task which is practically beyond the capacity of international judges. This is not so much because of the political nature of the question, every important political issue in world affairs has legal aspects which it is legitimate to ask a court to clarify, and every major legal issue in international law has political implications. It is because of two closely connected factors. One, the Court was asked to deal with a set of political developments of a revolutionary character from the viewpoint of law-making and law-amending procedures. Thus the Court found itself caught in the dilemma of having either to declare those developments illegal on the basis of a strict interpretation of the texts, therefore condemning a long evolution of overwhelming political importance or to sanction those developments, thus recognizing in effect the capacity of States and international bodies to revise the law by *de facto* practices [...]. Secondly, the political developments submitted to the Court [...] are also the cause of a violent controversy among States involving two diametrically opposed conceptions of international politics. Thus the Court found itself caught in the dilemma of either having in effect to give its blessing to one of those conceptions, or else refusing to answer altogether." The majority of judges had in effect given its approval to the Dag Hammarskjoeld conception of the United Nations as a 'dy-

namic instrument' capable of 'executive action' toward 'increasingly effective forms of active international cooperation'." [14]

When States select a method for the settlement of a political dispute, they tend to give priority to methods other than adjudication, since court procedure is characterized by "rigidity of the reference standard," due to the fact that a court strives for the "exact application of established norms, leaving no room for conciliation and negotiations." As a result, States show a marked 'restraint' with regard to a procedure which excludes them from participation in the working out of solutions, solutions which are binding for them." [15]

Settlement of disputes is not the only field of international relations on which political factors exert a marked influence. There is a similar influence in other fields which have been traditionally regarded by representatives of various scientific disciplines as being governed by their own development laws, or as being independent from political factors.[16]

The reluctance of States to resort to international court for the settlement of their disputes is partly due to the present State of international law. Provisions of that law, established by States in international treaties and through general practice accepted as law, cannot cover every aspect of the relationship between States. Consequently, those fields of inter-State relations with respect to which States did not consider appropriate to assume legal obligations are subject to arbitrary decision making by States.

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[14] S. HOFFMANN, *A World Divided and a World Court Confused: The World Court's Advisory Opinion on UN Financing*, in the collective work: *The Process of International Organization*, ed. by ROBERT S. WOOD, New York 1971, p. 137 ff.

[15] J. SYMONIDES, *Kontrola międzynarodowa* [*International Control*], Toruń 1964, pp. 19–20.

[16] Gunnar Myrdal says with regard to economic problematique that "During the whole century before World War I and right up to today there has been a tendency to give too much stress on economic factors in international relations. Liberal economic theory was in this respect not different from what later became the Marxist tradition. In particular, it was assumed in both camps that trade worked for peaceful relations, even politically. I would not deny that there is an element of reason in this view, but much more important causal relations go in the opposite direction. There is no political division line, even one which in a most 'unnatural' way puts almost complete barriers in the way of trade and other economic relations, which does not in time become 'natural,' in the sense that on both sides the economies adjust themselves to the political conditions. Big cities, such as Jerusalem or Berlin, can be divided by a political line, or a new 'unnatural' nation boundary can be created, such as those between India and Pakistan after partition, almost extinguishing long-established trade links. The adjustments called forth by a political 'fiat' are normally such as to create the conditions for the permanency of the broken trade links, thus making the 'unnatural' 'natural', or, at least, 'more natural' [G. MYRDAL, *Facts affecting East-West Relations in Europe*, "Coexistence," Oxford, July 1968, p. 141].

So it should be said in this sense that international law has no gaps to be filled by adjudication in the absence of a legal provision.

Blühdorn is certainly right in saying that international law has not yet worked out a sufficient number of positive principles (positive *Völkerrechtsgrundsätze*). This is why giving judgment as well as the declaration by the court of its own lack of jurisdiction encounter serious difficulties, and hence it is difficult to anticipate the decision of a court. States hesitate to entrust the settlement of disputes to international judges who, unlike domestic judges, do not have great experience, since the number of concrete precedents is very small. Over these facts *"kann auch noch so intensive Propaganda für die Regelung internationaler Meinungsverschiedenheiten nicht hinwegkommen."* [17]

It is, therefore, hardly possible to agree with the allegation that "refusal to go to court is a sign of weakness while readiness is not such a sign," because "men do not as a rule start legal proceedings unless they believe that they have a reasonable prospect of success." [18]

Frequently, it is a third State which is interested in the settlement of a dispute. A judgment of an international court, even if it satisfies the litigants, may arouse objections on the part of third States since it creates a precedent unfavourable to them, by which courts would be guided in future similar cases. It is likely that with the increasing interdependence of States, the tendency towards the multilateralization of international disputes will be strengthened.

Finally, there is a further psychological factor which indicates that the International Court of Justice is not the most suitable United Nations organ for decision-making in cases of major political importance. An overwhelming majority of its judges are elderly men, often of a venerable age. There exists, therefore, a generation gap between the comparatively younger active politicians and diplomats and the judges who are approaching or have passed retirement age. The historical acceleration, so characteristic of our century, accentuates this generation gap which results in the court representing some rather out-dated views.

Fortunately, during recent years, there has been the growing feeling in the West (much more often, it is true, among political scientists, but also among jurists) that the reluctance of States to refer cases to international courts is not the result of "ill will" and unwillingness for international cooperation, but there are deeper and more complex reasons. The London Study Group has concluded that, whatever the causes, it remains true to say that "the old belief, so frequent among Anglo-Saxon

[17] R. BLÜHDORN, *Internationale Beziehungen*, Vienna 1956, p. 290.

[18] Sir Francis VALLAT, *Peaceful Settlement of Disputes*, "Cambridge Essays on International Law." London 1965, p. 166.

writers in the interwar period, that the international community could somehow be transformed into a highly integrated whole by legal means, by stronger obligations being imposed on States to settle their disputes by peaceful means, such as arbitration or adjudication, by increasing in some way the scope of compulsory jurisdiction under the World Court's Statute [...] has lost much of its plausibility [...]. The main burden of the settlement of international disputes must rest on political rather than legal institutions and devices, on balancing these interests against those rather than on applying the footrule of general law ; on negotiations, bargaining and the search for mutually acceptable solutions than on a trial in a court of law from which one side emerges the victor and the other the vanquished." [19]

The same Study Group expresses the opinion that "if a half century's experience of international adjudication has proved anything, it is that courts cannot and should not be expected to fill the gap created by the absence of a legislature in the international community." It is not the function of judges and their competence does not include the giving of binding decisions as to what law should be. The question "can only be settled in the international, as it is in the political system within the frontiers of States, by the pressure and counter-pressure of the organized forces in society [...] it is a misunderstanding of international relations to suggest that much more than a small, though still no doubt appreciable, fraction of these differences can be settled by law courts as distinct from the daily mutual bargaining of organized interests." [20]

Charles de Visscher notes that "the reality is that today, as formerly, the international tribunal is generally only given jurisdiction of minor conflicts where the interests involved are limited," and that "the pacifist movement had certainly exaggerated the importance in international relations of the arbitral decisions of the second half of the 19th century." [21] Arbitration "symbolized the messianic hope of subjecting the sovereign State, with its claim to be its own judge, to the Olympian impartiality of third-party judgement, as a means of abolishing war." At present, however, "no serious scholar can leave the vast literature of international arbitration without some sense of frustration and unreality." [22]

According to Claude—"the Court has not become a major instrument in the management of the conflicting relationships of the family of nations. In this connection advocates of the exclusive and invariable use of judicial means of settlement have been persistently disappointed ; the movement

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[19] *International Disputes—The Political Aspects*, p. 320.

[20] *Ibid.*, pp. 321 and 326.

[21] Ch. de VISSCHER, *Reflections on the Present Prospects of International Adjudication*, AJIL, July 1956, p. 471.

[22] J. STONE, *Legal Controls of International Conflict*, London 1959, pp. 97 ff.

for compulsory arbitration which arose late in the 19th century was transformed after World I into a drive to establish the compulsory jurisdiction of the World Court, but the latter version has been hardly more successful than the former." [23]

Reuter explains the reasons why international courts failed as an effective instrument for the defence of peace, while the Peace Palace, built in the early years of the 20th century, "*dans le style de la belle époque*" has become "*plutôt musée que Palais de la Paix*". "*Si la justice internationale a, peut-être, un rôle plus limité que dans certaines conceptions d'une certaine période révolue, c'est simplement parce que l'organisation internationale est plus développée et plus différenciée [...]. Quand nos grand-parents mettaient leur foi dans l'arbitrage, ils ont placé sous ce mot quelque chose d'encore vague. Aujourd'hui, la procédure juridictionnelle est devenue un procédé précis et défini techniquement. Au sens très large du terme, certaines fonctions d'arbitrage appartiennent au Conseil de Sécurité, à l'Assemblée Générale ou à des organismes techniques : il y a des organismes techniques et économiques qui font de l'arbitrage économique d'une façon assez courante.*" [24]

The sober view is steadily gaining the upper hand that one should not urge States to accept the clause of Article 36, paragraph 2, since the best may have been the enemy of the good in the sense that, by placing so much emphasis on acceptance of compulsory jurisdiction, lawyers and statesmen may to some extent have overlooked the possibility of making more immediate progress through the lesser and more flexible procedures of inquiry, mediation and conciliation.[25]

3. The Courts' Own Contribution to the Limiting of the Role of International Adjudication

It is sometimes said that the international courts are not responsible for their own recent decline and that the failure of States to accept the Court as a normal method for settling their legal disputes is not due to the structure or functioning of the Court, although this could admittedly be perfected by minor changes. However, in the light of a retrospective analysis of the activity of the Permanent Court of International Justice and of the International Court of Justice, this favourable view of the functioning of these courts cannot be accepted without important reservations.

[23] I. L. CLAUDE, *Swords into Plowshares*, London 1964, p. 211.

[24] P. REUTER, *La justice internationale dans le système des Nations Unies*, in the work : *Les Nations Unies—chantier de l'avenir*, Paris 1962, vol. 2, pp. 221 ff.

[25] *Report of a Study Group...*, p. 38.

The activity of both these Courts, plus the views developed in the West on the functions and activity of the Hague Court, which views are confirmed to a certain extent by the actual jurisdiction of these Courts, have significantly contributed to a deepening distrust by Governments of the Court as an appropriate way to a peaceful settlement of international disputes as Governments fear that the submission of a dispute to the Hague Court might necessitate acceptance of a judgement which extends beyond the object of the dispute as defined by the parties and which is based on provisions beyond the strict content of international law. The following elements in the activity of the Court tend to justify these fears and distrust.

The Hague Court shows a definite tendency to adjudicate in cases where the legal basis of the court's jurisdiction is doubtful. This was expressed, i.a. in the doctrine of *forum prorogatum.*

After World War II, asserts Rosenne, "the principle of *forum prorogatum* [...] has assumed a prominent place in the practice of States and in the work of the International Court of Justice." [26] It is generally recognized that the jurisdiction of international courts is based upon the consent of States, and thus in a certain sense being a prorogated one. But the core of the problem is the extent to which the principle may be used for justifying the application of one of the parties to summon the other party to appear before the Court.

During the interwar period, the Permanent Court of International Justice pointed out in the *Mavrommatis* case :

"It is not by reason of the jurisdiction conferred on the Court under Article 26 of the Mandate (Palestine), but in consequence of an agreement between the Parties resulting from the written proceedings that the Court has jurisdiction." [27] Furthermore, in the *Minority Schools* case the Court said :

"And there seems to be no doubt that the consent of a State to the submission of a dispute to a Court may not only result from an express declaration, but may also be inferred from acts conclusively establishing it. It seems hard to deny that the submission of the arguments of the merits, without making reservations in regard to the question of jurisdiction, must be regarded as an unequivocal indication of the desire of a State to obtain a decision on the merits of a suit." [28]

Such attitudes, adopted by the Permanent Court of International Justice in the interwar period, were criticized by certain eminent lawyers. Several judges from the bench of the PCIJ in the Minority Schools case

[26] S. ROSENNE, *The International Court of Justice*, Leyden 1957, pp. 284 ff.

[27] *Publications de la CPJL*, série A, No. 5, p. 27.

[28] *Ibid.*, série A, No. 15, pp. 24 ff.

justified their dissenting opinions at length. Judge Huber argued that the PCIJ Statute required the existence of a bilateral agreement between the Parties before an application is filed, and that the jurisdiction of the Court on the merits of a case could not be presumed from the presentation of arguments under Article 36 of the Statute. In particular, the doctrine of *forum prorogatum* cannot be reconciled with the conceptions current in government circles concerning the compulsory jurisdiction of the Court at the time of the drafting of the Statute, which may be easily proved by the records of the preparatory work. What is more, the absence of a plea against the jurisdiction does not create jurisdiction of the Court ; in giving judgment, the Court should ascertain *ex officio* on what legal foundation its judgment on the claims of the Parties is based. Judge Nyholm expressed the opinion that the existence of an agreement concluded in due form must be proved to the Court, and that it seemed impossible to dispense with the formalities, which must be complied with in accordance with the Rules. In an assessment of Poland's conduct in this case, he found that she had expressly maintained her objection to the jurisdiction and would not, in effect, have accepted it. Judge Negulesco argued that the principle according to which the jurisdiction of the Court is strictly defined by the will of States requires that, in case of doubt, it must be that the Court has no jurisdiction. A tacit acceptance of the jurisdiction deduced from the documents of the proceedings is contrary to the Statute and the Rules of the Court ; a special agreement should be drawn up in one form, and not be reached through successive acts in the proceedings.[29]

In the course of a discussion on the revision of the Rules in the years 1934–1936, the judges' opinions concerning *forum prorogatum* were divided. At one stage the Court resolved to reject the institution of *forum prorogatum* (with an equal number of votes, the President gave his casting vote). However, when the Court later reconsidered the problem, it accepted a compromise formulation which, to some extent, preserved the institution of *forum prorogatum*. This was expressed in Article 32 paragraph 2 of the Rules according to which "when a case is brought before the Court by means of an application, the application must [...] also, as far as possible, specify the provision on which the applicant founds the jurisdiction of the Court."[30] By introducing the words "as far as possible" the institution of *forum prorogatum* survived. By the same token, the principle according to which the Court should not accept applications which do not contain legal foundations for the jurisdiction of the Court was rejected.

Great importance is attached to the question of *forum prorogatum* by

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[29] *Ibid.*, pp. 48 ff.

[30] *Publications de la CPJI*, série D, Addendum to No. 2, pp. 65 ff.

Rosenne who holds that it is "a development of possibly far-reaching political consequences." He also remarks that "as late as 1949, it was possible to a discerning writer to regard the *forum prorogatum* as a less important and less frequent manner of conferring jurisdiction on the Court." He says then that "by a process of autonomous judicial interpretation untrammelled by excessive consideration for the *travaux preparatoires* of the Statute or for matters of pure form, the Court has erected an imposing doctrine, which seems to be at some variance with the political attitude of certain States, as to what ought to be the basis of the Court's jurisdiction [...] from the abstract standpoint the activities of the Court must be regarded as satisfactory by those who desire to see a genuine and broad system of jurisdiction established, since *'boni judicis est ampliare jurisdictionem,'* there is probably not a judge nor a jurist who does not want to see the borders of legal competence extended at least to include all matters which, objectively speaking, are legitimately the subject for legal settlement."[31]

Rosenne expresses a somewhat different opinion elsewhere saying that in no case decided since World War I, in which the Court exercized the prorogated jurisdiction, or in advisory opinions acted without the consent of all the States concerned, has it been possible to enforce the decision or implement the advisory opinion. The *Corfu* case judgment is to this day unsatisfied, Senor Haya de la Torre enjoyed the enforced hospitality of the Columbian Embassy in Lima for over three years after the Court ceased to deal with the case. The interim measures of protection in the Anglo-Iranian Oil Company case were never observed, and may only have exacerbated the political dispute. The advisory opinions on Article 4 of the Charter did not hasten the solution of the problem of the admission of new members to the United Nations. The observance of human rights under the terms of the Peace Treaties is, if anything, further removed from international control than it was in 1950 ; the problem of South-West Africa is a source of painful conflict within the United Nations, not assuaged by the 3 advisory opinions. The above facts led the author to express anxiety "lest the Court has advanced too far beyond what the conscience of those responsible for the affairs of their States are as yet prepared to admit, especially having regard to the unsatisfactory state of the law governing the enforcement and execution of judicial decisions."[32]

There is an additional factor contributing in practice to the extension of the jurisdiction of the Court, namely, the development of the doctrine of estoppel which is widely recognized by western international lawyers. For

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[31] S. ROSENNE, *op. cit.*, p. 284 ff.

[32] S. ROSENNE, *op. cit.*, p. 302.

while the *forum prorogatum* may take place in the course of procedure before the Court, the doctrine of estoppel accepts generally, that consent to the jurisdiction of the Court may result from the conduct of a State both prior to and during procedure ; that it is possible to obtain the consent of a State to submit a dispute to the Court from diplomatic correspondence between the Parties before the case is brought before the Court. The doctrine of estoppel may be applied is a Party does not appear before the Court, particularly if, in an earlier judgment, the Court decided that it had jurisdiction.

The tendency to extent its own jurisdiction is sometimes even more marked in the activity of the International Court of Justice than it was in the activity of the Permanent Court of International Justice. For the latter refrained from giving an advisory opinion in the case of Eastern Karelia, recognizing the principle that the Soviet Union a concerned party and not at that time a member of the League of Nations, did not recognize either the competence of the League of Nations or the jurisdiction of the Permanent Court. The International Court of Justice, on the other hand, did not follow this example and decided to give an advisory opinion concerning the interpretation of the peace treaties with Bulgaria, Roumania and Hungary, holding the view that protest by the States concerned did not constitute an obstacle to the recognition of its own jurisdiction.

The International Court of Justice tends to make the widest possible interpretation of international law and thus maximising its range of application. This tendency was also characteristic of the Permanent Court of International Justice. It was manifested, firstly, in the Court's evident inclination to broadly interpret the provisions of international law both in establishing its own jurisdiction and in applying material law. In particular, the Court acted often in accordance with the principle of *ut valeat potius legis dispositio quam ut pereat*, and held the view that it is inadmissible to interpret a treaty in a way that would deprive its text of a large part of its significance.[33]

The International Court of Justice shows in its jurisdiction a definite tendency to apply an extensive interpretation of the Charter provisions in order to grant wider powers to the United Nations and its organs ; and also in cases where the Charter does not say anything on a given problem. As Stoessinger remarks in connection with the advisory opinions in the case of reparations for the assassination of Count Bernadotte "within the

[33] *Publications de la CPJI*, série B, p. 25. The tendency of the Permanent Court of International Justice and the International Court of Justice to apply extensive interpretation is pointed out by numerous authors. Cf., *i.a.*, I. BURGES, *Les déclarations d'acceptation de la juridiction de la CJI—leur nature et leur interprétation*, "Oesterreichische Zeitschrift für Oeffentliches Recht," 1972, p. 237.

United Nations was granted a 'personality' by the Court, a kind of sovereignty of its own which the majority of judges saw implied in the Charter." The Court argued that under International Law, the Organization "must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties." This opinion was issued by the International Court of Justice in spite of the fact that 4 dissenting judges — an Egyptian, a Pole, a Russian and an American—held the view that this "implied powers clause" was not inherent in the Charter.[34]

The above tendency, evident in the jurisdiction of the ICJ, led some authors, to generalize that the Court developed a new doctrine of the duty of the Court, as a principal organ of the United Nations, to participate in the activities of the Organization and to cooperate with the other principal organs and specialized agencies in the attainment of the purposes of the Organization.[35]

Neither the Permanent Court of International Justice nor the International Court of Justice followed the opinions of numerous international lawyers who were in favour of a restrictive interpretation of the provisions of international law as a consequence of the existing system of international relations under which it is impossible to impose any legal duties on States without their consent.[36]

4. The Erroneous Conception of the Function of International Courts

The Hague jurisdiction is also influenced by a conception of the function of international court namely, of an international court system shaped on the pattern of internal court systems of States. Adherents of this conception are in favour of entrusting international courts with the function of remedying shortcomings in the existing international law by means of an extensive interpretation of the provisions of this law. (Such an interpretation is sometimes called "functional"). The vague formulation of

[34] J. G. Stoessinger, *The Might of Nations*, New York 1965, p. 245.

[35] Cf. S. Rosenne, *The Court and the Judicial Process*, "International Organization", Summer 1965, p. 523.

[36] Cf., i.a., the opinion of D. Anzilotti (*Cours de droit international*, Paris 1929, p. 113) according to which "*en cas de doute, la norme doit s'entendre dans le sens le plus favorable à l'État obligé*". According to professor L. Ehrlich (Interprétation des traités, Paris 1929, p. 69), "*il n'y a point d'appui, dans la jurisprudence, pour une présomption en faveur de l'interprétation extensive ; par contre, lorsqu' on parle dans la jurisprudence de l'interprétation restrictive, on n'entend par là que le refus d'appliquer le traité à des cas auxquels les parties, à en juger d'après le texte, n'ont pas voulu l'appliquer : il ne s'agit donc là encore que d'établir la véritable volonté des parties au traité*".

Article 38 of the Statute of the International Court of Justice, which, to some extent, lists the categories of rules applied by the Court, is conducive to the development of such views. For the Article empowers the Court to apply not only "international conventions" and "international custom as evidence of a general practice accepted as law," but also "the general principles of law recognized by civilized nations."

Some of the representatives of the traditional western doctrine see in this article an authorization for the Court to apply legal norms other than positive international law ; to resort to norms of the law of nature, and particularly to "filling gaps" in international law. Sir Hersh Lauterpacht claimed oratorically that Article 38 of the Statute "sounded the deathknell of rigid positivism in international law."[37] In recent years, H. G. Darwin expressed the view that "It is not admitted that legally there are any gaps in international law even if there is uncertainty on many points. It is now generally recognized that in principle international law gives an answer to every question as to rights and duties. No tribunal has ever refused to make a finding on the ground that no rule of law relevant to the point in dispute before it exists ; no State has ever justified a course of conduct on the ground that no rule of international law exists on the point at issue."[38]

The formula—"general principles of law recognized by civilized nations" is a bone of contention both from the legal point of view (it is not obvious what is meant by "general principles of law," which are neither a conventional nor customary law) and the general point of view (which nations in the contemporary world are "civilized"). Moreover, the formula is treated by the postcolonial countries as proof that the Court bears the hallmarks of an institution of the western countries, claiming the right to impose their legal concepts on the rest of the world by virtue of their "civilization mission." Representatives of Third World countries at many occasions have pointed out that their reluctance to use the services of international courts, and especially the International Court of Justice, is due to the insufficient precision of the rules of international law, and particularly to the fact that this law was formulated at a time when the colonial nations were deprived of any opportunity to exert influence on the development of that law. They emphasize that "the function of international law in the modern world could not be to protect vested interests in a period of change, but must be to adjust conflicts of interests on a basis which contemporary opinion regarded as reasonable."[39]

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[37] H. LAUTERPACHT, *The Development of International Law*, London 1934, p. 82.

[38] Cf. *International Disputes—The Legal Aspects*, p. 59.

[39] Cf. the statement of the Indian delegate, K. Rao, in the Special Committee of the UN General Assembly, Doc. A/AC/119, SR 23, p. 9.

Views on the functions of international courts remain under a strong influence of the theory which claimed an analogy between the historical development of the international judicial system and developments in the field of administration of justice during the formation of States. The theory was broadly developed by an influential international jurist of the first half of our century, N. Politics.[40] According to this theory, the organization of justice in all communities must pass through certain developmental phases. The first stage is characterized as *"la justice sauvage"* or *"la justice privée,"* because *"chacun cherchait à s'assurer par les moyens en son pouvoir la réparation des dommages subis."* In the next phase, certain norms of conduct are established by way of custom. They limit the dimensions and establish the forms in which retaliation it is *"la justice privée"* is to be applied. Only in the third stage is it assumed that private justice causes undesirable effects, namely, that the party extorting justice for itself frequently wrongs the weaker party despite the existence of rules limiting the freedom of the former. This suggests therefore, that disputes should be settled by a third party which is not directly interested in the dispute and capable of an impartial examination of the case ; this leads to conciliatory procedure or arbitration. The parties themselves make the decision to submit the dispute to third party settlement and choose the judges themselves. This is a period of *"la justice facultative non réglementée."*

At the next stage of development the community provides facilities for the conclusion of agreements, submitting disputes to organs of arbitration. It establishes rules of procedure before these organs and appoints judges to settle a dispute at the request of the parties. This is a period of *"la justice facultative réglementée."* The next stage brings permanent courts, but the execution of their judgments still rests with the parties and there are no public prosecutors at this stage. Finally, the last phase of the evolution is the appearance of the public execution of judgments and public initiative with regard to the prosecution of prohibited acts. The administration of justice is no longer a private affair, but becomes a civic function and the most important of public services. With slight deviations, the course of this evolution has been universally the same. It has often been a very lengthy process and in the Roman empire, for example, it took 700 years.

As far as international relations are concerned, the administration of justice still compares unfavourably with the national administration of justice. Nevertheless, marked progress has been made, and this is indicated by the fact that justice is no longer administered in private. The first stage of progress consisted of the formation of customary law. Work on

[40] Cf. N. Politis, *La justice internationale*, Paris 1924, pp. 7 ff.

a condification of this law started in the 19th century and it was accompanied by a parallel process extending application of the ancient institution of arbitration. Finally, the setting up of the Permanent Court of International Justice in 1922 was a major step on the road of progress, since according to Politis "*elle apparaît comme l'émanation d'unnouvel ordre social, établi entre les peuples.*" For the Court constitutes "*une grande innovation grosse des conséquences pour l'avenir, c'est le premier essai d'une véritable organisation judiciaire dans les rapports internationaux, c'est aussi la première apparition—encore timide, mais certaine—de la justice publique entre les peuples*".[41]

The writers who point out the above analogy do not take into account the essential differences between the political systems of particular States and the international system. They do not perceive that all historical analogies, even if they appear very attractive, are never full analogies ; for history never repeats itself in the same form. It is particularly fallacious to compare individuals, who are members of a State community, with States which constitute an international community. Such a comparison leads in turn to the erroneous conclusion that in international relations a State represents a private interest which can be compared to an individual in the State community, whose interest should be subordinated to social interest ; furthermore, that the development of international relations unavoidably leads to the formation of legal and political structures analogous to structures produced in the period of the formation of State organizations. In fact, the sole concern here is with public interests, some of which are the interests of the individual nations, while others are interests of the various regions of the world or of all mankind. The supporters of the analogy in question tend to ignore the essential differences between State communities consisting of a comparatively very large number of individuals and which require that subjects of law be treated with a greater degree of abstraction and rigour, and the international community composed of a comparatively small number of States, which makes it possible, or even necessary, to treat the members of that community *quoad personam* in a far more individual manner. Every change in the status of a member of the international community to some extent affects the system of international relations and the balance of forces in that system. This phenomenon is absent from the internal State system.

The judgments of internal courts, particularly of higher courts, are connected with individual cases and take account of the characteristics of a case to a far lesser degree than in international relations. Of even greater significance is the fact that States have their parliaments which are always

[41] *Ibid.* p. 20.

ready to adopt a new law in order to correct a politically erroneous line of court jurisdiction, while any correction of the jurisdiction of international courts is an extremely difficult and lengthy process.

The problem of the impartiality of the judge in internal courts also differs from that in an international court. Although it is agreed that impartiality in considering a case is the fundamental condition, the "alpha and omega" of every court system, it is often far more difficult for an international judge to adopt an impartial attitude in an international dispute. As Max Huber, an outstanding Swiss jurist with wide experience of international disputes, remarked "*Man kann nämlich nicht nur von seinen Sympathien, Vorurteilen, Ideologien abhängen, sondern auch von seinen eigenen Lehrmeinungen, von seiner Vergangenheit als Gelehrter and als Richter* [...] *es wird daher immer eine persönliche Entscheidung erforderlich sein, die eine moralische Verantwortlichkeit nach sich zieht, da die rechtliche Argumentation niemals mit dem logischen und persönlichen Zwange einer mathematischen Darstellung abläuft.*"[42]

Thus, it can be seen that considerable differences exist between the functions of organs settling disputes in internal State relations and in international relations.

5. International Courts and the Rule of Law

The assumption that the limited role of international courts results in a crisis of the rule of law in international relations as well as in a limitation upon the role of international law is erroneous and is not confirmed by contemporary international practice. According to the old maxim, law exists everywhere where social ties exist, *ubi societas ibi jus*, it would be strange and it is unlikely that an increase in international contacts and the interdependence of States would be accompanied by atrophy of the function of international law.

A more accurate assessment is that the role of law is growing, as it is inside States, but it must be pointed out, that this growth is not necessarily connected with an expansion of the function of the courts. The role of law is expanding particularly in relation to the transformation of the economic and socio-political reality, and law begins to govern areas of life which were previously characterized by a free clash of opposed forces and arbitrary decisions. This means that, with regard to the settlement of disputes, the concern of the law-makers is not confined to the adoption of appropriate codes and the organization of a law court system,

[42] Cf. R. BLÜHDORN, *op. cit.*

but that it aims, with increasing effectiveness, at the formation of a social background which would limit the number and prevent the development of disputes and of other negative phenomena which occupy the attention of courts and other State organs. The trend of development thus aims, not at limiting the role of law, but at a different pattern of emphasis.

Recent international practice seems to be marked by a similar developmental tendency. With regard to international disputes, it means that primary emphasis is placed on the elimination of the sources of tension in international relations which lead to international disputes, by means of international treaties. Thus, for example, the treaties concluded between the Federal Republic of Germany and the Soviet Union, the Federal Republic of Germany and Poland, the Federal Republic of Germany and the German Democratic Republic, and the Four-Power Agreement on West Berlin largely removed the sources of disputes between the Federal Republic of Germany and the socialist States in accordance with the principles of international law formulated in the UN Charter. The role of law may also be manifested in another form. In a dispute between Italy and Austria concerning the German-speaking minority of South Tyrol, agreement was reached through a complicated operation involving the use of legislative procedure and executive regulations on the domestic level, and the application of specific legal rules included in the European Convention for the Peaceful Settlement of Disputes.[43] It may be said in connection with the above examples that it was precisely through the removal of tension in their mutual relations, by way of appropriate treaties and agreements, that the States concerned were better able to fulfill their duties arising from the principle of peaceful settlement of disputes contained in the Charter, than if they had confined themselves solely to submitting disputes originating from unregulated relations to international courts.

It is, therefore, wrong to equate the rule of law in international relations with the willingness of States to submit their disputes to international courts, as is sometimes attempted by those who support the expansion of the activities of the International Court of Justice.[44]

The rule of law consists primarily in the observance of law by States and international organizations. International courts play only a small part in international legal relations, and they cannot be regarded, therefore, as a cornerstone of the observance of law in international relations. "*Une place importante demeure pour le droit international même si le rôle du*

[43] Cf V. PECHOTA, *Complementary Structures of Third-Party*, in: *Settlement of International Disputes*, UNITAR 1971, p. 51.

[44] J. G. STOESSINGER (*The Might of Nations*, New York 1965, p. 248) says that "The plight of the International Court of Justice is a fairly accurate reflection of the plight of the international law in general".

juge n'est pas, pour son application, celui qu'on espérait. La règle de droit est assurée par son application quotidienne aux rapports internationaux qu'elle vise, plus que par la jurisprudence qui ne révèle, comme d'ailleurs en droit interne, que les accidents ou les difficultés de cette application. Le respect du droit est marqué dans son application, chaque jour dans les rapports entre les États, organisations internationales et au sein de celle-ci. On pourrait admettre qu'un monde international ne reconnaise au règlement judiciaire qu'un rôle limité sans que l'équilibre des rapports juridiques internationaux apparaisse compromis de ce seul fait, si d'autres moyens de règlement pacifique fonctionnent de façon régulière". The above opinion was expressed by a French jurist, A. Gros.[45] Similarly, the Canadian Secretary of State for Foreign Affairs, Pierre Martin, argued that the "reluctance to think about and articulate problems in legal terms is not necessarily due to lack of interest in or respect for international law ; it may arise because the realities of the issue are obscured, not clarified, by defining them in legal terms, or the reluctance to litigate may be due to a belief that the law, as it is, is unjust or inadequate and must be changed."[46]

6. Opinions Contesting the Role of International Courts

The limited activity of international courts during recent years has led several writers to question the overall usefulness of international judicature.

Professor Burton sharply criticizes the judicial method of settling international disputes. He argues that international conflicts may have their origin in disputes between ethnic or ideological communities within a State, and those conflicts cannot easily be brought before an international court. Conflict avoidance is a more important process than conflict settlement and judicial process can make little contribution to it. It is not for courts to determine values, and perhaps not even when the parties concerned agree that they should do so, for thereby precedents are established that they could affect others. Judicial settlements of political disputes are political determinations in disguise. They are settlements produced within and by the political system. Any attempt to widen the decision-making role of courts to take into account altered values makes a political legislature of courts and no State would find this acceptable. The result is that the judicial process when applied to a political dispute is likely to leave at least one party dissatisfied, and would leave all parties

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[45] A. Gros, *A propos...*, p. 11.

[46] Cf. K. J. Holsti, *International Politics*, Englewood Cliffs, 1967, p. 472.

with a grievance, thus continuing or creating a new conflict situation. A withdrawal from the court system is noted also in internal law, particularly as regards the penal law. There are more frequently heard opinions that the judicial role of the court is found to be less and less appropriate for cases coming before it, and sometimes what was thought to be a judicial function is now being carried out by the social worker at the request of the court. Thus, there prevails a general tendency for non-judicial institutions to gradually take over functions previously carried out by courts, aiming primarily at helping the parties concerned to settle the dispute themselves. The author is of the opinion that both behavioural analysis and experience of judicial procedures strongly suggest that third-party judgments and enforcement of judgments are irrelevant to the nature of the international system, and the role of law and lawyers is no longer relevant outside the narrow one of interpretation of documents and agreements.[47]

Professor Morawiecki has put forward the theses that "international jurisprudence, and particularly arbitration can be of a greater practical importance solely in the realm of international relations of a non-State character ; in inter-State relations, on the other hand, the role of judicial control will remain marginal and modest in comparison with other types of the functions of international control." His conclusion is that "judicial procedure is markedly inconsistent with the nature of modern international relations."[48] These theses were based on an analysis of the controlling function of international organizations, since international jurisprudence was recognized as one of the forms of that function. The decisions of the individual arbiters or judges arising from the confrontation of the factual situation with the normative situation must be conditioned by political, moral and ideological premises, as a result of which the judicial process does not lose the character of a political process. Among the various functions of international control, the judicial process has the character of a very rigid and arbitrary procedure, and the institution of international courts is inadequately prepared for the needs and possibilities of the modern system of international relations. There is, therefore, justification for the fear that court procedure, under conditions of the international system, may have a disfunctional character in that it may even militate against the settlement of conflicts and disputes. For court procedure forces the parties concerned to seek evidence and arguments against the opposing party, and requires the parties to play the role of adversaries, one of whom can win only if the

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[47] BURTON, *Conflict and Communication*, London 1969, pp. 150 and ff. and 182 ff.

[48] W. MORAWIECKI, *Rola sądownictwa międzynarodowego we współczesnych stosunkach międzynarodowych* [*The Role of International Courts in Modern International Relations*], "Państwo i Prawo," 1973, No. 1, p. 49.

other loses. It can hardly be expected under the modern system of international relations that judicial settlement of disputes could play a major role in the satisfaction of essential needs and the solution of difficulties in international relations. One cannot agree, therefore, with authors, who regard the modest role of the International Court of Justice as being abnormal, and who seek to improve and remove the shortcomings of this institution. The modest role of the International Court of Justice is normal, because the preference of Governments for non-judicial, consultative methods of settling disputes is inherent in the contemporary pattern of international relations.[49]

Are international courts really an institution which is incompatible with the needs of contemporary international relations? Or should one, consequently, consider that the founders of the United Nations were in error when they set up the International Court of Justice as "the principal judicial organ" of the United Nations ? And should one, therefore, consider abandoning this rather expensive and currently little used institution ? Such conclusions would be extreme and unjustified. For while evaluating international courts and the crisis of this system,[50] there are two important aspects of the problem which should be considered.

Firstly, we are facing a crisis of a certain concept of international judicial system. This is a concept of international courts playing a role similar to that of internal courts and particularly the political role which they play in the system of Anglo-Saxon law where, due to the vagueness of the common law, internal courts often take matters out of the hands of the law-makers, and particularly in which the supreme courts, take the role of arbiter in disputes between the central authorities and express in their jurisdiction an authentic interpretation of the principles of the system. A concept of courts filling gaps in international law, by means of an extensive interpretation of provisions contained in international treaties, in accordance with the principle *ut valeat potius legis dispositio quam ut pereat.* A concept according to which it would be possible to develop crea-

[49] *Ibid.*, pp. 34 ff.

[50] Strictly speaking, the term "crisis" is not the most suitable term here. For this is not a situation in which an institution developing before and carrying out important international functions loses in a new period its former importance. The role of international courts before World War II was not big either. The effectiveness of these bodies in settling disputes in those periods actually differed little from that in the "critical" postwar period. Submitted to international courts, including the PCIJ in the interwar period, were disputes whose settlement was of no great political significance for the parties concerned ; that is disputes which in any case would not have led to an armed conflict. There are only a few cases in the history of international adjudication in which a dispute of great political significance threatening serious international complications was solved by adjudication.

tively international law in domains where States did not express their consent to certain norms of conduct that is to develop international law with no regard for the will of States or even in defiance of this will.

During the tough and conflict-ridden postwar decade this concept broke down completely and its supporters experienced bitter disappointment and frustration. Their aspirations failed to be realized "because they were too pretentious evaluating incorrectly the true relationship between law and politics in resolving disputes among national political entities."[51]

Equation of World Peace with intense activity of international courts and compulsory jurisdiction of the International Court of Justice in phrases such as, e.g., "If peace is to prevail, in the long run, the States have no choice but to give it support ; Peace needs law, law needs the Court,"[52] could not change the attitude of States. In their quest for a settlement of disputes, the States looked primarily to negotiation and other diplomatic methods, rejecting the conception of an inevitable choice between the sword of Damocles of modern war and the sword of adjudication.

Secondly, it should be taken into consideration that the crisis of the international judicial system is connected with political factors operating particularly during the past thirty years and which led to a decline in the role of international courts.

These decades which perhaps will be presented by the future historians of our times as the period directly following the last of the great world wars, were marked by a great number of tensions and conflicts in international relations, many of which took a heavy toll of life. Simultaneously, it was a period of intensified efforts aimed at solving key problems of the international community : the maintaining and safeguarding of world peace ; de-colonization, the solution of difficult problems connected with the economic, social and cultural development of areas of the "Third World", and the expansion of international organizations constituting a new form of a permanent and intensive cooperation between States. It is noticeable that the postwar decades constitute the first period in history in which States have shown a marked reluctance to resort to major wars in order to settle their disputes with other States—due to the threat of unleashing a nuclear war.

It should be added that in that period some States regarded international arbitration and the international courts, and particularly the International Court of Justice, as an appropriate instrument either for

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[51] L. BLOOMFIELD, *Law, Politics and International Disputes*, "International Conciliation," January 1958, p. 258.

[52] Sir Francis VALLAT, *The Peaceful Settlement of Disputes*, "Cambridge Essays on International Law," London 1965, p. 177.

protecting their vested interests and rights acquired during the period of colonial domination, or for attaining certain political goals in the United Nations which would be difficult to attain by way of political struggle (i.a. the goals whose attainment had been thwarted by the Soviet Union making use of the rights of a permanent member of the Security Council).

The above considerations point to the conclusion that the crisis in international courts is not so much due to the contradiction between international adjudication and the nature of modern international relations; but rather to the nature of postwar international relations, as well as to the mistaken concept of international courts, creating unrealistic expectations which could not be met during this difficult period of history. Furthermore, the International Court of Justice was incapable of divorcing itself from this concept of international courts, thus creating grounds for and deepening the reluctance of an overwhelming majority of States to use the Court for the settlement of their disputes.

Nevertheless, even during this period so unfavourable for their development, international courts, and particularly arbitration courts, proved to be a useful instrument in the peaceful settlement of a number of disputes. It should not be overlooked that disputes continue to arise and this trend will certainly continue, particularly in connection with the developments of international economic cooperation. As a rule, the legal aspect of this type of dispute is of greater significance than its political aspect. For cases of this type, international courts may often prove to be the most convenient instrument for settlement.

7. Prospects of International Adjudication

On the basis of the above analysis of the settlement of international disputes in the postwar period let us attempt some sort of prognosis. Clearly, the task is not an easy one. Partly because of the difficulties inherent in forecasting in the social sciences and particularly with respect to the science of international relations, as "it deals with a type of social action—the conduct of foreign policy—that is pervaded by uncertainty and in which even the most carefully calculated actions partake of gambling."[53] A more serious obstacle, however, is this important dilemma: to what extent can the experience of the postwar period be useful in the future, and which of the tendencies prevalent in the postwar period are exclusive to that period, and which of them are of a more stable nature?

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[53] Cf. S. HOFFMANN, *Erewhon or Lilliput*, in: *International Military Forces*, ed. by L.P. Bloomfield, New York 1964, p. 187.

The above question was the subject of a discussion carried out by a team from the Massachusets Institute of Technology prior to setting up a research project on local conflicts. The team accepted the assumption that "nothing seems surer than the prediction that, whatever else may happen, the decade of the nineteen seventies, because it will be one of revolution, modernization and change, will be one of local conflict."[54] As a result of the discussion, the team selected the postwar period as the subject for its research, because "in general, the kinds of pressure that characterize this period are likely to be prime movers for many years to come". It was recognized that the years after 1945 were not only a source of many examples of the phenomenon of local conflict, but also of local conflicts with a character that seemed likely to project into the next decades. It should be noted, however, that the choice was not a unanimous one, for some of the team members pointed to the uniqueness in its conjunction of ideological cleavage, rapid technological change, and decolonization.[55]

The latter view seems to be a more appropriate starting point for the forecasting on the role of different methods of settling international disputes in the near future, than the viewpoint according to which the next decades will resemble to the postwar years with respect to the types and intensity of conflicts.

If international disputes, as the Soviet authors of the monograph '*Meždunarodnyje konflikty*' argue, are born "first of all as a direct or indirect consequence of the main contradiction of the epoch, namely, the clash of two socio-economic systems in the international arena, as well as of other contradictions connected with the first one, and if they mirror the complex and dynamically developing conditions of that clash,"[56] then it is to be expected that a decrease in the intensity of conflicts in international relations may be attained either in conjunction with solutions of certain contradictions of our epoch, or as a result of imparting to these contradictions a qualitatively different character by turning them into processes of competition and rivalry within the framework of established rules of conduct. In this sense, there are grounds for saying that the process of decolonization has already considerably reduced the scope for conflicts between the nations of colonizers and the nations of the former colonies. If nowhere else, this is evident from the continuing high state of tension in regions where colonialism still survives. An end to colonialism and its effects as well as consolidation of new postcolonial political structures will result in a further reduction in the number and intensity of conflicts.

[54] *The Control of Local Conflict*, Massachusets Institute of Technology, 1967, vol. 1, p. 2.

[55] *The Control...*, vol. 2, p. 74.

[56] *Meždunarodnyje konflikty*, Moskva 1972 p. 8.

A similar situation is found in the conflict between the two socio-political systems, the socialist system and the capitalist system. There are numerous examples in the postwar years of the effect which the "cold war" had on relations between the States of the two systems, and the obstacles which prevented settlement of even minor disputes during this period. Here, too, the change from "cold war" to peaceful coexistence with an increasing number of treaty solutions indicates that the number of conflicts between States with different systems is likely to decrease.

The détente in international relations and the transition to a period of peaceful coexistence seem to indicate a general increase in the effectiveness of peaceful methods of settling international disputes. Is it possible, however, to predict the effectiveness of individual methods? If postwar experience is evaluated, it is generally found that negotiations proved the most effective method of settling disputes, while the contribution of international courts in this field was insignificant. However, no method should be disregarded since a particular method might prove the most appropriate under certain conditions. Claude considers as correct the "pragmatic doctrine that disputes should be handled wherever they can be settled."[57] There is no answer to the question as to which of the existing methods are the most effective, because this depends on the nature of a given dispute or conflict, on the number and composition of the parties to it, on the national and historical traditions represented by those parties, on the existence or non-existence of treaty relations and other factors.[58]

The immediate future will probably also be marked by the superiority of negotiations and other diplomatic methods to judicial procedure, and by an increase in the role of multilateral diplomacy in the settlement of disputes connected with the development of international organizations. But as world peace is being consolidated, there might be a stronger tendency to submit disputes of various kinds to international organs, including courts. This tendency will probably be stronger between States with the same economic and political system, similar cultural traditions and legal systems, than between States with different systems and traditions. The development of cooperation in many fields, particularly in the economic field, may mean that the use of highly developed judicial procedures leading to the settlement of a dispute whose political importance is not essential, especially regarding the interpretation of international treaties, will often prove to be more convenient to the parties concerned. Furthermore, as the "cold war" becomes increasingly something of the past, international disputes of lesser importance will cease to symbolise the more serious

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[57] I. L. CLAUDE, *op. cit.*, p. 213.

[58] Cf. *Meždunarodnyje konflikty*, p. 199.

tensions in relations between the parties concerned. There are indications in recent years of a lessening reluctance to use the international judicial system among the States of the Third World.[59]

When considering the negative attitude of the socialist countries to the submission of disputes to international courts it is important to take into account its historical context, namely the period of the "cold war," during which the western powers continually sought to restrict the activity of the Security Council by passing cases to other international organs. However, despite this, the attitude of the socialist countries was not a totally negative one as was apparent from the co-participation of the Soviet Union in the preparatory work on the draft of the United Nations Charter, envisaging the setting up of the International Court of Justice as one of the principal United Nations organs, the presence of Soviet and Polish jurists among the judges of the International Court of Justice as well as their contribution to the work of the Court and the consent of the socialist countries to the arbitration clause of several conventions.

In discussions within international organizations, representatives of the socialist States did not express the view that the international judicial system is an unsuitable method for settlement of disputes in modern international relations. They also expressed the hope that the future may bring an increase in the willingness of States to sign international conventions on technical and humanitarian matters containing an obligatory arbitration clause.[60] It may be concluded therefore that States which did not previously use the services of the International Court of Justice and which criticized its various decisions, did so because they believed that States participating in a dispute should have the widest possible choice of methods for the peaceful settlement of disputes ; also because they felt that international arbitration and judicial procedure have a definite role, the significance of which depends on the nature and political background of a particular dispute.

However, even if the role of international courts expands, this does not mean that these courts can become the main body for settlement of disputes. This is the western concept of international courts modelled on internal adjudication, and it has completely failed during the postwar years.

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[59] At the Vienna Conference on the Law of Treaties the great majority of delegates, including a large number of delegates from Third World States, were of the opinion that disputes concerning the recognition of a treaty as null and void, the termination or suspension of its operation, as well as the consistence of treaties with *jus cogens*, should be, at the demand of one of the parties to it, submitted to the International Courts of Justice or to an arbitration court.

[60] Cf. the intervention of the Polish delegate R. BIERZANEK, of September 14th, 1964, Doc. A/AC 119/SR 22, p. 11.

The courts may prove an effective body mainly for the settlement of disputes with no great political significance and in which there is a preponderance of legal elements. It is also in western countries the opinions are being expressed that in international relations *"les solutions juridiques ne sont point ainsi négligées, elles sont mises à leur place, une place seconde."*[61] Thus it is unrealistic to expect the International Court of Justice to perform the function of a World Tribunal settling key problems of the contemporary world. Consequently, it seems likely that arbitration courts will develop further, either set up on an *ad hoc* basis or serving regions. Expansion is particularly likely of specialized courts for the settlement of disputes of a certain category. Proposals for reorganization of the Internation Court of Justice by setting up chambers composed of a smaller number of judges seem to be well founded. These would be either specialized or regional would operate more efficiently and at less expense, and would pay more attention to the real will of the States, parties to a dispute.

The prospects for increasing the number of disputes submitted to the ICJ on the basis of the optional clause from Article 36, paragraph 2 of the Statute seem to be particularly limited. For a declaration made under this Article means, in effect, an advance consent to the jurisdiction of the Court in a dispute with any State that has also made a similar declaration, irrespective of at what political moment and with what State the dispute arises. Postwar experience demonstrates that even States who are bound by the clause are reluctant to accept the jurisdiction of the International Court of Justice on this basis.

It is only the transition from the period of peaceful coexistence—"during which social and political problems dividing the world today should be solved"[62]—to further phases of development of international relations that there can be extended the use of institutional methods for peaceful settlement of international disputes to approximate the methods and procedures applied in integrated State communities. This seems to be the necessary order of events and disregard of the rules of *consecutio temporum* cannot change this order.

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[61] C. A. COLLIARD, *Institutions Internationales*, Paris 1970, p. 74.

[62] Cf. Report of the Central Committee of the Communist Party of the Soviet Union to the 22nd Party Congress, 22nd Congress of the CPSU, Warsaw 1962, p. 62.

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Extra-Judicial Control of the Conduct of States by International Organizations

by WOJCIECH MORAWIECKI

I. Location and Dimensions of the Problem Large Spectrum of the Processes of Control

The processes of controlling the conduct of the participants in international relations—thus mainly, but not exclusively, of the nation-States acting through their governments—do aim at a common general objective. This general objective is to assure that the conduct of the participants be in keeping with :

(a) the norms, i.e. the rules of behaviour of general application recognized as morally, politically, or legally binding in relations between their subjects ; or

(b) the postulates, i.e. the models of behaviour considered desirable by individual actors, groups of actors, or organized collectivities of actors (e.g. international organizations).

According to this general definition, the processes of control in international relations constitute a large spectrum of phenomena. They may differ e.g. as to :

(a) the nature of the object of control—actors and their mutual relations ;

(b) the nature of the yardsticks applied to evaluate the behaviour of the actors—norms and postulates ;

(c) the types of the processes of control—determined by the types of political pressure exerted on the controlled actors ;

(d) the nature of organs performing the control—determined mainly by the character of their members.

The processes of control may also pass through various stages or phases in which various means and techniques of control may be used.

In the context of the general theme, as indicated above, the scope of this article is limited to one narrow fragment of the large spectrum of the processes of control in international relations.

Nature of the Actors and Norms

This paper deals, first and foremost, with inter-governmental relations between States. Beyond its scope remain relations between entities of a non-governmental character as well as relations of non-governmental or transnational character which the States may enter into with other States or other entities when they do not act as sovereign but, for instance, as parties to commercial contracts.

Only inter-governmental relations between States—and, to a limited extent, relations of international (inter-governmental) organizations with States and other international (inter-governmental) organizations—are regulated by international public law. This paper concentrates on the norms of international law as yardsticks for controlling the conduct of States as expressed by the conduct of governments acting on their behalf.

One should, however, be aware of the fact that inter-governmental relations between States are regulated not only by international law. Norms of moral character or political rules of the game do play in this domain a considerable role. And sometimes they even prove to be of greater effectiveness and to possess a higher degree of impact on the conduct of governments than norms of a legal character, although the latter are undoubtedly more perfect from the point of view of the technique of regulating international relations.

It is also worth noting that, especially in this sphere of relations, the boundaries between legal and moral or political norms of behaviour quite often cannot be sharply delimited. This difficulty results from many uncertainties as to the extent, and especially as to the stage, of the rule-making process of customary norms. But it also results, in general, from the lack of centralized enforcement which is characteristic of all international law. Moreover, the difficulty of distinguishing the legal from the moral and political norms ensues from the fact that the present-day international law is in a process of dynamic evolution, being also strongly influenced by the emergence and growing role of the Socialist States, as well as of the newly independent States and trying to meet the challenge of the technological revolution or, in general, adjusting itself to the changing international system.

In the process of evolution of international law a particular role is played by the postulative models of behavior, particularly when they are expressed in the resolutions of important international organizations e.g.

of the United Nations. Recommendations and statements, put forward in such resolutions, may constitute, if they correspond with the progressive development of mankind and the interests of peoples, essential stages of the process of creation of international law. And their provisions, although having only the character of desirable models of behaviour, may sometimes acquire an even greater effectiveness than a number of norms formally recognized as binding international law, in particular, when they are supported by powerful political and social forces in the world. Legalistic perfectionism, tending to codify all rules and postulates of international conduct in covenants having the binding force of international law, may prove counterproductive and even self-defeating when such covenants do not enter into force because of insufficient number of ratifications and may thus weaken rather than strengthen the effectiveness of the existing regulations having formally a less perfect normative character (e.g. UN Convenants on Human Rights of 1966 *vis-à-vis* Universal Declaration of Human Rights of 1948).

Types of the Processes of Control

As far as the types of the processes of control are concerned, this paper, being confined to the extra-judicial control by international organizations only, leaves beyond its scope — on the one side — the very large and practically most important area of individual and group actions of States aimed at influencing the conduct of their partners in international relations, and—on the other side—the juridically most perfect but practically less important procedures of judicial control culminating in settlements of inter-State disputes by verdicts of international courts of justice or arbitration.

In the circumstances characteristic of the present state and structure of international relations, the processes of controlling the conduct of States cannot but predominantly possess the character of contingency reactions of individual governments to the actions of other governments. These reactions may be positive or negative according to the positive or negative assessment by the respective governments of the impact that the actions of other governments have upon their national interests. Such process of interaction constitutes the main mechanism of stabilization of international relations. Mutual adjustment of States, as basic units of the international system, results from the necessity to consider and to take into account the reactions of other partners concerned when a decision to undertake an action producing international consequences is being made by any government.

Individual actions considered as means of control can be generally qualified as various kinds of presure exerted by one partner on the other (or a group of partners on another group) in international relations with a view of correcting the latter's behaviour according to the former's interest. Within the range of means admitted by contemporary international law there are such various retaliatory and self-defensive measures as :

(a) reprisals, i.e. counter-measures to defeat actions harmful to national interests protected by international law ;

(b) retorsions, i.e. counter-measures to defeat actions harmful to national interests not protected by international law.

Self-defence by individual States or groups of allied States may even, in the case of armed aggression, assume the character of full scale military operations against the aggressor State.

The mere possibility to be exposed to retaliatory and self-defensive measures discourages illegal or unfriendly actions in international relations.

The effectiveness of individual actions as means of controlling the conduct of other States depends obviously on the relation of power of the respective interacting States. More powerful States exert more effective influence on the behaviour of the less powerful States. The lack of balance of power in relations between adversary States or groups of States is conducive toward the predominance of force over law in international relations. On the contrary, the balance of power can be considered to be a political condition favouring the rule of law in relations between States with conflicting interests. This also is a reason for States to seek support of other States and to protect collectively their interests by setting up alliances. Under contemporary circumstances a broadly conceived balance of power also creates material and political conditions for the practical application of the principle of reciprocity which has to be recognized as constituting the very foundation of the effectiveness of international law.

Within the framework of peaceful means of settlement of international disputes, the political pressure is also brought to bear upon the parties : reciprocally by themselves—in the process of negotiation which constitutes the main and most practical means of resolving conflicts ; and by intervening third parties—in the processes of good offices, mediation, conciliation, enquiry or arbitration.

The process of judicial control is characterized by very formalized procedures. Due to such distinctive features as :

— leaving the power of decision to individual persons (judges, umpires) independent of the governments-parties to the dispute ;

— application of legal norms ;

— legally binding and final character of the judgments ;

— sharp opposition of the goverment-parties to the dispute acting as players in a game (zero sum) in which only one can win and the other lose ;

— the judicial process acquires an exceptionally rigid and arbitrary character.

Generally speaking the type of political process represented by judicial process is not well adjusted to the character of contemporary inter-State relations. International tribunal is a kind of supra-national institution, if the notion of supra-nationality expresses a high degree of power of the international organ over State which ventured to submit to it. Governments are rarely willing to submit their disputes to the compulsory jurisdiction of international courts and when they do so it is with regard to matters rather of minor importance from the point of view of their national interests. This is the reason for a very marginal role that the International Court of Justice of the United Nations, and also the Court of Justice of the European Communities, could play in practice in the field of judicial control of inter-State relations.

A growing role, but still on a scale much smaller than individual measures, is played by collective and organized actions of States. Such actions tend to adopt recently more and more the character of a permanent function exercised by an international organization. Within the framework of an international organization with a relatively stable balance or cohesion of internal political forces, more developed also becomes the body and more predictable the content of norms of conduct and especially of international law.

II. The Function and Its Executors

Definition of the Function of Control by International Organization

The function of control constitutes a particular type of political process taking place within the framework of international organization. It consists, first of all, in establishing the factual situation by various fact-finding actions and then, in confronting it with the relevant norms (or postulates) in view of effecting adjustment to them of the conduct of respective participants in international relations.

The function of control by international organization has for its main object the conduct of member-States or, sometimes, of States parties to an international treaty delegating certain powers of control of its application to an international organization. The organization may also exercise

functions of control with regard to other participants in international relations and, in particular, over another international organizations. This, however, remains beyond the scope of this study.

But even when exercising various kinds of functions of control as to the application by States of international legal norms the organs of international organization cannot in practice avoid dealing with individual persons and their behaviour and, consequently, they cannot completely steer clear of some penetrating into the sphere of territorial jurisdiction of States. This is, however, quite natural because finally the observance of international law by governments of respective States boils very often down to their duty to assure corresponding behaviour of persons acting under their power and jurisdiction as organs of institutions or as private individuals. Investigation and appraisal of the behaviour of such persons becomes in these circumstances an essential element of all sorts of control of application of international obligations.

Organs of Control

When the functions of control become institutionalized they are being exercized by the organs of international organizations.

These are usually inter-governmental organs whose members are States represented by the governmental delegates. The delegates openly act according to instructions or intentions of their governments. Inter-governmental organs usually monopolize the function of control in the phase of confrontation of the factual with normative situation and of the appraisal of the behaviour of governments.

Administrative organs composed of individuals—international civil servants or other agents in the service of international organization—play a considerable role especially in the exercise of such fact-finding functions as collecting and processing of information, observation and inspection.

Between these two poles one can distinguish the organs of an intermediary character. They are composed of experts who retain professional and political functions in their countries and who are approved by competent inter-governmental bodies of international organizations as members of respective organs of control on the nomination by the governments selected according to the principle of equitable geo-political representation. Their role consists in analyzing the information gathered and prepared by administrative organs and in submitting their remarks and proposals of action to the competent inter-governmental organs. The Committee on the Elimination of Racial Discrimination, acting on the basis of an international convention concluded under the auspices of the United Nations, is an example of such an organ. It seems that realistic efforts aiming an institu-

tional reinforcement of the effectiveness of the functions of control of international organization should be nowadays oriented towards such organs of intermediate character.

Political Character of the Function

However, independently of the character of their members, the processes of control exercised by international organs possess a clearly political character. In all cases the effects of the activities of the organs of control are products of more or less subjective perceptions and value judgments of their members and do result in exerting some kind of political pressure on the conduct of governments.

When analyzing the functions of control exercised by inter-governmental organs of an international organization one has to be aware of the fact that in all the phases and stages of the process of control the attitude, or, in other words, the will of an organization, as expressed in the decisions of such organs, represents the reactions of the governments which are their members. As a matter of fact this is a process of evaluating the behaviour of governments subject to international control by the governments being members of the controlling organ of an international organization. The participants in this process cannot avoid being guided and their attitudes cannot but be determined by the notions they possess of the national interests of their respective States. Accordingly, they are not expected to act in an impartial or objective way. Especially in the situations of conflict, in which all or many members of an inter-governmental organ are more or less involved, and when, as it is mostly the case in the organizations of the United Nations system, the decisions may be taken by the majority vote, the result of the functions of control will be determined by the assessments and opinions of a given majority of governments members of the organ as opposed to a given minority. In such situations the decisions of inter-governmental organs of control have to possess a particularly sharp political partiality.

Such is actually the main current of processes of control and the typical character of functions of control exercised by the present-day international organizations. The political character of such processes and functions is obvious.

Although one cannot deny the difference between the processes of control within inter-governmental as compared with administrative organs of international organizations, this difference should not be exaggerated. This is rather a difference in kind but not in type of political process : rather a quantitative difference in degree than a qualitative one.

The functions of control exercised by administrative organs composed

of international civil servants represent essentially the same type of political process. Of course, the members of such organs evaluate the matters and act according to their personal convictions. They do not follow the instructions from any authority, in particular, from any authority outside the international organization whose name they perform the functions of control. But their personal convictions are conditioned and shaped by such social factors as e.g. education, political culture, ideological formation, adherence to determined social class and interest group, and, last but not least, the loyalty to one's own nation-State.

The impartiality which is formally required of the members of international administrative organs cannot but have a limited meaning in the context of the present-day political world with its diversity of cultures, social and economic systems, conflicting class, group and national interests, controversial ideological systems of values, etc. Personal attitudes of individuals—members of international administrative organs—do always correlate more with the interests of some States or groups of States than with the interests of other States or groups of States. In other words they can be located by means of definite coordinates within the frame of reference of the existing national interests.

So the fact that the functions of international control are being performed by persons expected to be impartial and to act free of any outside pressure is rather a factor of minor real impact on the character of those functions viewed as a type of political process. Especially with regard to controversial issues the members of international secretariats, of observation missions, inspection teams, etc., have a great freedom of subjective choice among contradictory information and laternative solutions, when trying to assess the probatory value of the evidence, whether supplied by the parties to the conflict or collected by themselves. Although in a different degree, the same applies to the assessment by members of international administrative organs of the meaning of norms and to the final appraisal of their application.

It is hardly necessary to prove the political and subjective character of the attitudes adopted by semi-governmental experts who serve on special organs of international control occupying intermediate place between inter-governmental and administrative organs of international organizations.

In conclusion, it seems to be unavoidable that all kinds of functions of control performed by all kinds of international organs, no matter what their nature, possess the character of political processes, whose outcomes are more or less conditioned by preferences of their members and directly or indirectly related more to the national interests of some than those of the other States.

III. Main Realm of the Function of Control: Fact-Finding Activities

There are three stages or phases of the process of control :

(a) assessment of the factual situation ;

(b) assessment of the normative situation ;

(c) confrontation of the factual situation with the requirements of the normative situation and the resulting determination of the responsibility of States for non-application of the respective norms of conduct.

These three stages of the process of control follow one another in the chronological as well as logical order. Appropriate means of control correspond with these stages. The process of control may, however, stop at the first or second stage without losing the character of a function of control of international organization. In practice very often the whole process of control stops at the first stage which thus becomes the main realm of the function of control of the present-day international organizations.

The knowledge of the state of environment in which an international organization operates is needed not only to monitor whether and which of its members abide or not by their obligations (or less formal recommendations of the organs) but also to make possible an assessment of its general effectiveness, i.e. of the impact of the organization on its environment, and to enable an adequate formulation of its future tasks.

International organization can apply various means of gathering information. They can be classified according to the degree of the penetration of international action into the sphere of the territorial jurisdiction of States.

Obtaining Official Information

The least degree of penetration into the sphere of territorial jurisdiction of States occurs when governments themselves supply informations on the situation for which they are responsible.

This can take place as a voluntary response of the governments concerned to the requests by the organs of international organizations.

These very mild means of international control have recently developed especially in the practice of the United Nations General Assembly. They have proved to be a rather essential measure to increase the effectiveness of its acts of various legal character especially with regard to such important matters as the liquidation of colonialism or the protection of human rights. The experience shows that the governments usually agree under the political and moral pressure of respective recommendations of the UN General Assembly to supply information as requested.

The appropriate information can be supplied by governments to the

international organization as a result of an obligation accepted under its constitution or on the basis of an international treaty delegating to it adequate functions of control. Such obligations are stipulated i.e. by the constitution of the International Monetary Fund of the GATT, and of the Council for Mutual Economic Assistance.

Systematic and periodic reporting by governments, based on more or less detailed questionnaires worked out by organs of international organizations, constitutes already a higher form and a more effective means of international control. This form has been developed by the International Labour Organization and is also applied by other organizations e.g. UNESCO, FAO, WHO. Detailed questionnaires served as bases for reporting on the situation in the non-selfgoverning territories under the League of Nations mandates and under the United Nations trusteeship.

Some organizations practice annual surveys of the policies and activities of their members. For this purpose the governments submit reports which become subject of consideration, questioning, confrontation with the policies of other governments, and, eventually, critical remarks and appraisal in competent inter-governmental organs. Such procedures are applied e.g. in OECD, NATO and GATT.

Official informations coming directly from governments are received, systematized, analyzed, summarized and commented by special subsidiary bodies composed sometimes of semigovernmental experts which are assisted in this work by specially assigned units of the secretariats of international organizations. The secretariats of international organizations often perform all this work of processing information themselves. In both cases the role of the secretariats is of great importance : not only technically but also politically.

Acting through special study bodies and through its secretariat, the international organization may not restrict itself only to gathering information received from governments.

Adequate information may be also obtained by organs of international organizations, in particular by their secretariats, from official publications. The process does not differ very much from the means of informing the organization about the application of their own obligations by governments themselves. This kind of functions of control has been especially developed by the Economic Commission for Europe and other regional economic commissions of the UN.

The ability to seek informations from all available official sources, to process the data that they contain, to publish the results of analytical and statistical studies based on them, and to bring some conclusions to the attention of member governments — may be considered as an implied power of international organization and as a feature of an active interna-

tional secretariat. Such ability also strengthens the political character of these apparently very mild means of international control.

Establishing the factual situation by such relatively mild means constitutes an easily acceptable measure and, therefore, the most developed in practice kind of fact-finding functions performed by international organizations.

Other Kinds of the Fact-Finding Activities

With the growing degree of penetration into the sphere of territorial jurisdiction of States the means to establish the factual situation become less and less acceptable to governments.

The competence of international organizations and of their particular organs to exercise that kind of fact-finding functions cannot be implied but has to be expressly stipulated in their constitutional acts. Therefore, the process of control in which such more sophisticated means are applied constitute, in practice, less popular or even exceptional kinds of the fact-finding functions of international organization.

So, in general, less popular and rather rare are the cases when an international organization opens access to, and makes use of, informations coming from other than official sources.

This occurs particularly with regard to petitions which can be defined as complaints of the violation by governments of international obligations filed with an international organization by individual persons or groups of persons. Petitions as means of international control are accepted by governments only in very special situations and with regard to particular matters.

After World War I the practice of submitting was employed with regard to the former German and Turkish colonial territories put under the mandate of the League of Nations and also within the system of protection of German national minorities which had been imposed on the newly created States in Eastern Europe by the peace treaties of 1919.

After the World War II petitions have been authorized under the United Nations Charter with regard to the non-selfgoverning territories and under some international conventions concerning the protection of human rights : under the European Convention on Human Rights, with its application limited to some Western European States ; and under a special protocol to the UN Covenant on Political and Civic Human Rights, adopted in 1966 by the UN General Assembly but not yet in force because of unsufficient number of ratifications.

Petitions are received, classified and submitted by the secretariats to the competent inter-governmental organs for further action.

Establishing the factual situation acquires the most drastic character

from the point of view of penetration into the sphere of territorial jurisdiction of States when it assumes the shape of enquiries conducted by international organs on the territory of States. The practical possibility of exercising such functions depends on the admission of international fact-finding bodies to the territories of the States concerned.

Enquiries in the field acquire often the character of operational functions of an international organization. In this case the international organization does take in its own hands all the collecting of evidentiary data and for this purpose it starts its own operations using its own personnel and its own material and financial resources.

Enquiries in the field may assume the form of investigation, observation, visitation or inspection.

The activities of a commission of investigation have an emergency character : its task consists in conducting enquiries about the events that already happened in the places where they happened and in submitting a report on the results of its work to the organ which has set it up. Such a commission is usually composed of the representatives of governments.

History knows very few cases of setting up commisions of investigation.

The history of the League of Nations contains only four such cases. Within the United Nations the number of such cases has not exceeded ten. With only one exception, when the commission set up by the Security Council to investigate the circumstances of the armed attack on the Republic of Guinea in 1970 unanimously established the responsibility of Portugal, the commissions of investigation, especially those set up by the UN General Assembly, did not play a positive role in conflicts to which solution their activities were supposed to contribute.

Such were, e.g., commissions created under the cold war conditions which were to investigate the situation in Greece, Germany and Hungary. Since they had been boycotted and opposed by the governments representing one party to the conflict and composed of members representing only the other party to the conflict they, obviously, could not but play the role of the latter's political instruments. Such one-sided character of their activities was accentuated by the fact that, being boycotted by one party to the conflict, they could not have access to the sources of information on the territory of that party.

When a commission of investigation comprised representatives of both parties to the conflict, as for instance, the commission which had been set up by the Security Council in 1946 to investigate the situation in Greece, its activities resulted in one majority report and one minority report containing completely divergent assessments of facts.

The functions of the observation missions differ from those of the commissions of investigation because they become directly involved in the

processes under their control and so, to some extent, do influence the course of those processes. International observers watch the events in places or areas of continuing conflicts and tensions, usually along demarcation lines separating the parties to the conflicts. Their functions are not limited to fact-finding activities and reporting on events ; they also produce some peace-keeping effects.

The experience of the numerous observation missions of the United Nations shows that they were rather more successful in exercising moderating influence on the intensity and forms of conflicts than reporting influence on the intensity and forms of conflicts than reporting the facts to establish the responsibility for the violation of internatonal legal obligations or final solution of conflicts on the basis of international law.

Observation missions tend to be composed of international personnel specially recruited for this purpose or seconded by governments selected by international organizations acting in agreement with the governments of those States on whose territory the missions are to operate.

Observation functions of international organizations may also serve to supervise plebiscites or elections carried on in accordance with international obligations. Such observation functions had played a particular role when the United Nations were to decide upon the future of the territories under its trusteeship in fulfilment of the right of peoples to self-determination. The observation of plebiscites used to be performed by commissaries nominated by the UN General Assembly and assisted by the members of the US Secretariat.

Visitation constitutes a kind of fact-finding function similar to observation. It differs from observation because of its non-continuous, periodic character. Visitations missions were instituted by the United Nations Charter as one of the means of controlling the situation in the non-selfgoverning territories under the United Nations trusteeship. They were composed of individuals nominated by governments selected by a competent inter-governmental organ and strongly assisted by the members of the Secretariat.

Inspection may be considered as the techniqually most perfect and reliable means of verification of the application of international obligations by States. It constitutes a permanent fact-finding process in which the inspectors, permanently employed by an international organization, get free access at any time to the installations under control. They may use appropriate instruments and interview the persons who can contribute to the discovery of any violations of the international obligations subject to control.

International inspection constitutes the highest degree of penetration of international organs into the sphere of territorial jurisdiction of States. Therefore it meets a strong resistance of the governments and they agree

to submit to it only in very exceptional cases. Only arguments of extreme importance can convince the governments of the necessity to accept international inspection and they agree to pay this relatively high price, in terms of the limitation of sovereignty, only in echange for adequately valuable benefits.

It seems that conditions conducive to the acceptance of international inspection by governments become successively more and more favourable in the field of peaceful uses of atomic energy and nuclear disarmament. The possibilities of the development of inspection functions on a larger scale do exist in relation to the International Atomic Energy Agency with the growing use of nuclear power reactors for production of electricity, and especially in connection with the Treaty on Non-Proliferation of Atomic Weapons approved by the United Nations in 1968 and in force since 1970.

Relevance of Fact-Finding Functions

In accordance with the above survey of various kinds of fact-finding functions of international organizations, the central place within this realm is occupied by the gathering and processing of official information. And thus very often the whole process of control by international organizations is limited to this kind of fact-finding functions.

One should, however, keep in mind that these, as well as other kinds of fact-finding functions, cannot be considered as functions of a technical character. As it has been already indicated, the perception of facts and the evaluation of their evidential weight are influenced by political orientations and ideological postures of the members of the controlling organs no matter what their nature.

It is also worth stressing that the mere statement of facts by an international organ constitutes a political act—as a means of political pressure on the governments concerned. For such a statement expresses indirectly, more or less clearly, a definite appraisal of behaviour of definite governments. In other words, simple statements of facts by international organizations imply some "collective legitimization" or collective disapproval of the behaviour of governments, depending on whether it is in keeping with the norms of international law or not. Governments do attach a considerable importance to such "collective legitimization" as testified by efforts to obtain it from international organizations. For these reasons the seemingly harmless gathering of information from official sources, and apparently only for the purpose of studying the state of the environment of an international organization by its secretariat, may quite effectively influence the conduct of governments which might appear improper in the light of such information.

IV. Other Stages of the Function of Control Assessment of Normative Situation

The norma applied to factual situations in the second stage of the function of control exercised by international organizations possess often a rather high degree of flexibility. Rarely they have the character of legal norms. Much more often they are norms, or only postulates, of moral or political character. The latter may find their expression in resolutions of international organizations, which are not binding legally, but most often they represent the feelings prevailing among the members of the organ exercising the function of control as to what should be considered desirable, good or fair. Moreover, such feelings or convictions do often arise while the situation subject to control by the members of the appropriate organ of international organization is being considered.

Of course, the norms of international law possess a different character. But, as it has been already indicated, the line of division between international norms of legal character and other normative or postulative models of the behaviour of governments is not sharp. As all norms they possess some indispensable flexibility and leave some room for free interpretation.

The scope of freedom with regard to the interpretation of norms depends, in general, on the degree of their generality and on the degree of precision of their formulation. But as far as international law is concerned, its norms quite often have a relatively high degree of generality and a low degree of precision, e.g. the norms of customary law ; or norms contained in treaties which result from compromises ; or those which may be the products of a rather simulated than real agreements ; or those which reflect only a temporary convergence of interests of the parties. Such norms of international law create very large possibilities of divergent interpretations by differently oriented interpreters. The interpretation of such norms can be strongly influenced by the above mentioned subjective feelings and convictions of the members of international organs as to what is good and desirable.

And again the room for divergent interpretations happens to be especially large in situations of conflict when the content of norms, as well as the reality of facts, is already being subject to controversy between the parties to the dispute.

According to a general principle the interpretation of international norms is done in international organizations by the organs which are called upon to apply them. Thus, with the exception of judicial process, the assessment of normative situation is a function most often performed by the inter-governmental organs of international organizations. Sometimes

they are assisted in it by the secretariat, individual consultants, groups of experts constituted *ad hoc*, or judicial bodies. The prevailing inter-governmental nature of the organs performing the function of assessment of normative situation adds to its character of political process.

Appraising the Conformity of Factual Situation with Normative Situation

The third stage of the process of control is closely connected with the second one. The assessment of normative situation, as a stage of the process of control, is done by international organs not for its own sake but it is to serve as a measure for the appraisal of the behaviour of governments.

In this stage, the highest in the process of control—when the freedom of the assessment of factual situation is multiplied by the freedom of the assessment of normative situation—the reactions of the members of international organs become particularly subjective.

In this stage the function of control is performed almost exclusively by organs of inter-governmental character. Usually they do not condemn the conduct of incriminated governments in the form of legally binding verdicts but express only opinions that do possess the character of a political appraisal. However, such a political appraisal, expressed as it is in the name of international organization, constitutes an instrument of considerable political pressure on the governments concerned. The degree of this pressure depends on several factors, especially such as the quantity and quality of member-governments that have supported respective resolution in the process of its adoption, but still more on their political will to make it effective.

Although the degree of political pressure exerted on governments may be different, the pronouncement of formal condemntation by an organ of international organization has to be considered a very drastic measure. In normal situations, when an international organization serves as a mechanism of peaceful cooperation, its members, and consequently its organs, will rather abstain from such measures and, if necessary, rather resort to resolutions expressing their dissatisfaction with the conduct of the respective governments in milder forms, that is, through critical remarks or hopes that international obligations will be more scrupulously respected in the future.

V. General Observations

The function of control may remain and often remains, especially in its first stage, a politically smooth process, if no conflicts arise in the course of its performance by an international organization. But when it

comes to the higher stage of the process, e.g. to the appraisal of the behaviour of governments, adequate functions of control usually take place and find their political justification exactly in conflict situations, that is, when there is a dispute with definite parties to it.

One should keep in mind, however, that because of the political character of the function of control described above, especially in its higher stages, there is a danger that the organs of an international organization, called upon to assess the behaviour of the governments being parties to a dispute and eventually to indicate which party is guilty, may become instruments of the policies and interests of one group of its members directed against the interests of another group of members. In such a case the organization would rather deviate from its natural vocation and disregard its fundamental function of serving as a mechanism for cooperation based on the existing concordance of interests of its members.

Such a risk can be reduced or even excluded by the setting of appropriate structural parameters of the decision-making process. It can be reduced, e.g., by appropriately blanced and representative composition of the inter-governmental is well as administrative organs of control and by a voting procedure providing for an adequately increased majority (e.g. two-thirds or three-fourths). Such a risk could be excluded, in particular, by the requirements of unanimity of all members of the organization. But the latter measure would considerable diminish the ability of the controlling organ to operate effectively, especially when the parties to the conflict or their close allies participate in the decision-making. Such a participation would be rather unavoidable under political conditions that prevail in the present-day international organizations and, with the requirement of unanimity, the type of political process of control would then not differ essentially from direct negotiations between the parties to the conflict.

One should, however, admit that a complete structural protection against the risk of degenerating into a political instrument of one group of members directed against the other is hardly possible and in most cases some amount of such a risk is latent in the organs of international organizations.

The political dimensions of this risk increase when the matters, subject to control, are more important and when the means and forms of control become more drastic and arbitrary. In that case they are not readily acceptable to governments.

For these reasons more categorical decisions of the organs of control—leading to condemnations and to determination of responsibility of governments for the violation of norms of international law, calling for the modification of conduct, and authorizing or putting into operation sanctions—constitute exceptional and extraordinary measures. They are rarely pro-

vided by the constitutions of international organizations and do not often occur in their practice.

Normally the role of an international organization consists in endeavouring to moderate conflicts between its members ; to reduce the existing tensions ; to induce the parties to a dispute ; and to find or accept a mutually satisfying and, therefore, more durable solution.

According to its normal role so conceived the function of control of an international organization in the situations of conflict will remain rather confined to the means of peaceful settlement of disputes described by international law as good offices, mediation, or conciliation. These means are differentiated by the degree of the intervention of the international organization's organs in the relations between parties to a dispute, but they do not go beyond the limits of a consultative political process. The functions of control of an international organization retain consultative character even when its organs—inter-governmental as well as administrative—exert a political and moral pressure more on one than the other party to the dispute, indicating some preferences of the attitudes and the interests of one party to another. But normally the organization should express only the proposals, suggestions or recommendations concerning the solution of conflicts between governments and abstain from the direct or final condemnation of conduct of any party. If it decides to go beyond these limits, the organization—and in fact its members who so decide—should be conscious of the risk of taking sides in the conflict between the groups of its members. This would not only reveal but aggravate the internal crisis of the organization. But this may be unavoidable or even necessary in exceptional situations.

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Universalisme et régionalisme dans la protection internationale des droits de l'homme

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1. Les conventions universelles

Le caractère universel des conventions internationales concernant les droits de l'homme peut être considéré sous deux aspects : de leur contenu et de leur domaine d'application. Le premier acte universel en ce qui concerne le contenu, a été la Déclaration Universelle des Droits de l'Homme.

La Déclaration Universelle mérite, et ceci pour de nombreuses raisons, le nom d'acte universel. Elle a été adoptée par presque toute la société internationale qui était, en ce temps-là, organisée juridiquement. On peut donc admettre qu'elle exprime les aspirations et les tendances de cette société vers la réalisation des buts indiqués dans la Déclaration. Le fait d'avoir adopté la Déclaration exprime l'acceptation de la part des États ayant des systèmes socio-politiques et économiques différents, ainsi que des idéologies et des religions différentes, d'une conception commune des droits fondamentaux de l'homme.

La Déclaration est le premier acte international qui ait considéré le problème des droits de l'homme d'une manière aussi complète. Les actes précédents concernaient un ou plusieurs droits ayant un trait commun. D'aussi larges catalogues de droits de l'homme n'étaient jusque-là formulés que dans le droit interne des différents États, le plus souvent par l'organe suprême. La Déclaration, en tant qu'acte supra-étatique, n'est pas un regroupement mécanique de telles ou telles normes tirées des constitutions des différents États, au contraire, elle s'inspire des diverses doctrines et des différentes conceptions socio-politiques. On voit dans la Déclaration l'influence de la conception naturelle du droit, là où il est question de « la dignité inhérente et des droits égaux et inaliénables » (Préambule). En

même temps, elle fait appel à la conception positiviste lorsqu'elle déclare « qu'il est essentiel que les droits de l'homme soient protégés par un régime de droit ». La Déclaration contient les libertés individuelles ainsi que les droits et les libertés publiques classiques qui avaient été formulés dès le XVIII[e] siècle, au temps où le libéralisme fêtait ses triomphes. A leur côté figurent les droits économiques, sociaux et culturels dont le rôle de premier plan est souligné par la conception marxiste et qui se fraient à grand-peine un chemin vers les constitutions des États capitalistes.

Une autre raison pour laquelle la Déclaration est un acte universel, est que ses normes concernent chaque individu sans distinction de race, de couleur, de sexe, de langue, de religion, d'opinion politique ou de toute autre opinion, d'origine nationale ou sociale, de fortune, de naissance ou de toute autre situation (art. 2 al. 1[er]). Elle se rapporte à tous les gens sans égard à leur citoyenneté ou même à la possession d'une citoyenneté. L'article cité ne le dit pas, il est vrai, *expressis verbis*, mais il semble qu'une telle interprétation est possible si l'on se réfère aux derniers mots : « [...] ou de toute autre situation ». En outre, toutes les prescriptions de la Déclaration, sauf celles concernant les droits politiques, qui sont attribués exclusivement aux citoyens, commencent par les mots : « toute personne a droit ». La Déclaration est donc bien le catalogue de droits de l'homme et non pas seulement du citoyen.

Les normes de la Déclaration s'adressent à « tous les peuples et à tous les organes de la société » (Préambule, articles 1, 2, 29). Les premiers projets prévoyaient d'imposer aux États des obligations correlatives. La forme actuelle a été approuvée non seulement par la Commission des Droits de l'Homme, mais également par le Troisième Comité de l'Assemblée Générale. Le fait que la Déclaration ne soit pas seulement adressée aux États mais à tous les hommes, signifi « la reconnaissance que la société internationale ne se compose pas uniquement d'États » [1].

Les normes de la Déclaration s'adressent à tous les territoires habités, sans distinction fondée sur le statut politique, juridique ou international du pays ou du territoire dont la personne est ressortissante, que ce pays soit indépendant, sous tutelle ou autonome ou soumis à une limitation quelconque de souveraineté (art. 2 al. 2).

La Déclaration est universelle, car elle formule certains droits supra-étatiques en ce sens qu'ils ne peuvent être garantis que dans des actes internationaux, et non pas dans le droit interne. Il s'agit ici du droit de chacun à une citoyenneté et du droit d'asile. Les normes du droit interne d'un pays donné peuvent prévoir la possibilité de donner asile, mais seul

[1] R. CASSIN, *L'Homme sujet de droit international et la protection des droits de l'Homme dans la société universelle*, dans *La technique et les principes du droit public*, t. I, Paris 1950, p. 69.

un acte international peut formuler le principe général qui garantit le droit d'asile dans chaque pays.

La Déclaration prévoit la protection de chaque individu et non pas des groupes sociaux. La Résolution de l'Assemblée Générale a souligné que, face à un tel universalisme de la Déclaration où chaque individu est protégé, des normes sur la protection des minorités sont inutiles. On montre en même temps, il est vrai, la nécessité d'adopter des conventions internationales sur la protection des minorités, mais sous forme d'actes indépendants qui prendraient en considération la spécificité des droits proclamés [2].

La Déclaration s'appuie sur les principes caractéristiques de la civilisation et de la culture européennes. Elle ignore les conceptions asiatiques et africaines, la religion islamique et le bouddhisme qui exercent pourtant une influence prédominante sur la formation des idéologies politiques et des relations sociales de nombreux pays. C'est pour cette raison qu'on reproche à la Déclaration de n'être universelle qu'envers l'Europe [3]. Ce reproche est en partie fondé, mais il ne faut pas oublier que, lors de l'adoption de la Déclaration, il y avait très peu d'États africains indépendants et les autres pays du Tiers Monde étaient trop peu nombreux et trop faibles pour réussir à imposer leurs conceptions au forum de l'Assemblée Générale. Malgré tout, j'estime que l'universalisme de la Déclaration dépasse largement les limites de la civilisation et de la culture européennes, je n'en veux pour preuve que l'adoption unanime de la Déclaration par les pays du Tiers Monde au sein desquels se trouvent presque tous les pays africains. Je reviendrai à ce problème dans une partie ultérieure de mon article.

La Déclaration a été adoptée en tant qu' « idéal commun à atteindre par tous les peuples et toutes les nations » (Préambule), elle n'a pourtant pas imposé aux États d'obligations juridiques. En 1966, l'Assemblée Générale a adopté le Pacte International des Droits Civils et Politiques (appelé par la suite Pacte Politique), le Pacte International des Droits Économiques, Sociaux et Culturels (appelé par la suite Pacte Économique), ainsi que le Protocole Facultatif se rapportant au Pacte International des Droits Civils et Politiques.

Du point de vue du contenu de leurs normes, les deux Pactes sont des actes universels dans le même sens que la Déclaration. Cet universalisme est même plus large du fait que les Pactes ont été adoptés par un nombre d'États plus de deux fois supérieur au nombre d'États ayant adopté la

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[2] U. N. Doc. A/C.3/307, Rev. I/Add. 1.

[3] L. DE VILLEFOSSÉ, *Géographie de la liberté, dans Les droits de l'Homme dans le monde*, Paris 1965, p. 59. A. HUXLEY, *Les droits de l'Homme et les données de la condition humaine*, dans *Autour de la nouvelle Déclaration Universelle des Droits de l'Homme*, Paris 1949, pp. 166 - 170.

Déclaration. Ils contiennent aussi un catalogue de droits et de libertés plus étendu. Pour la plupart des droits, on montre également les moyens de leur réalisation. Le droit des peuples à disposer librement d'eux-mêmes et de leurs richesses naturelles (art. 1er des deux Pactes), inclu dans les Pactes, est une preuve indiscutable de l'évolution des conceptions sur les droits de l'homme.

L'adoption des Pactes est un pas important vers la création de garanties internationales effectives de la protection des droits de l'homme. Ceci tient au fait que cette protection n'est plus seulement une obligation morale des États, elle est devenue aussi une obligation juridique.

Les Pactes des Droits de l'Homme sont ouverts à la signature à tout État membre de l'ONU ou membre de l'une (quelconque) de ses institutions spécialisées, de tout État partie au Statut de la Cour Internationale de Justice, ainsi qu'à tout autre État invité par l'Assemblée Générale des Nations Unies à devenir partie (art. 48 § 1er du Pacte Politique et art. 26 al. 1er du Pacte Économique). Ce sont donc des traités dont les parties peuvent être presque tous, et grâce à la possibilité d'invitation, tous les États du monde. Les Pactes sont donc, du point de vue de leur domaine d'application, des actes universels. Il en résulte que le catalogue des libertés individuelles fondamentales, des droits et des libertés publiques, des droits économiques, sociaux et culturels, doit être garanti par des États possédant des régimes politiques et économiques différents, des structures sociales différentes, ainsi que différentes idéologies, moeurs, cultures, etc.

2. Les traités régionaux

A. La Convention Européenne des Droits de l'Homme

La Convention Européenne des Droits de l'Homme [4] (appelée plus loin Convention Européenne), signée le 4 octobre 1950, est le premier traité international qui ait formulé un aussi large catalogue de droits et de libertés. Elle est entrée en vigueur en 1953 et a donc plus de 20 ans d'existence et d'application qui ont fourni une multitude d'expériences. Les Pactes des Droits de l'Homme ont entré en vigueur en 1976, donc dix ans après leur adoption.

La Convention Européenne est ouverte à la signature et à la ratification à tous les États membres du Conseil de l'Europe (art. 66). C'est donc une convention fermée, et l'article cité souligne clairement son caractère régio-

[4] Nations Unies, Recueil des Traités, vol. 221. La Convention a été successivement complétée par 5 Protocoles Additionnels qui sont entrés en vigueur au cours des années 1954 - 1971.

nal. Ce régionalisme n'est pas seulement géographique, il est également politique du fait que les membres du Conseil de l'Europe sont exclusivement des pays capitalistes (sauf la Yougoslavie qui possède le statut d'État partiellement associé).

Le Comité Juridique de l'Assemblée Consultative du Conseil de l'Europe se référant à l'article 66, a déclaré en 1962 que « l'ouverture de la Convention Européenne à des pays n'étant pas membres du Conseil de l'Europe exigerait une révision de la Convention ». Selon cette opinion, le Comité des Ministres pourrait inviter un État tiers à accéder à la Convention à condition toutefois d'appliquer la même procédure que lors de l'accès d'un nouvel État au Conseil de l'Europe. L'Assemblée Consultative a proposé en 1962 que le Comité des Ministres confie au Comité des Experts, qui déjà à plusieurs reprises avait analysé divers problèmes liés à la Convention Européenne des Droits de l'Homme, la préparation d'un projet d'amendement à la Convention. Cet amendement devait prévoir la possibilité d'accès à la Convention pour un État qui n'est pas membre du Conseil de l'Europe, mais qui possède les qualifications nécessaires, et ceci sur l'invitation du Comité des Ministres, après avoir demandé l'avis de l'Assemblée Consultative [5]. Le Comité des Ministres a rejeté cette proposition.

La Convention Européenne contient exclusivement des libertés individuelles ainsi que des droits et libertés publiques. Le fait qu'elle ne contienne pas de droits économiques, sociaux et culturels, est décrit dans la doctrine en tant que « lacune intentionnelle ». Elle est argumentée par le fait que, puisque les pays appartenant au Conseil de l'Europe se trouvent à différents niveaux de développement socio-économique, l'inclusion dans la Convention Européenne des droits socio-économiques serait injustifiée et inefficace en pratique [6].

L'ensemble des droits et libertés garantis par la Convention Européenne coïncide, d'une manière générale, aves les décisions correspondantes du Pacte Politique. Ces deux actes s'appuient sur la même conception des droits de l'homme, ce qui est visible aussi bien dans le texte des principes généraux que dans le catalogue de droits garantis. Il faut du reste savoir que les normes de la Convention Européenne ont eu une grande influence sur le contenu du Pacte Politique. Les représentants des États de l'Europe Occidentale, siégeant dans divers organes de l'ONU, ont à maintes reprises,

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[5] Cette question a été discutée entre autres du fait de l'intention exprimée par le Canada et les États-Unis d'accéder à la Convention Européenne. Les discussions dans les différents organes ainsi que les recommandations citées sont commentées par L. B. SOHN, *Problems Involved in Opening the European Convention on Human Rights to Accession by the United States and Canada*, dans *Human Rights in National and International Law*, Manchester 1968, pp. 353 - 355.

[6] K. VASAK, *La Convention Européenne des Droits de l'Homme*, Paris 1964, p. 79.

au cours des discussions sur le Pacte, puisé dans les expériences du fonctionnement pratique de la Convention Européenne.

Les différences entre la Convention Européenne et le Pacte Politique sont visibles dans certaines normes déterminant les moyens de réalisation des différents droits. Dans la Convention Européenne, ces normes sont formulées d'une façon plus générale que les normes correspondantes du Pacte Politique. La Convention se limite le plus souvent à la proclamation d'un droit quelconque, sans indiquer les moyens de sa réalisation. Une telle rédaction donne aux États une plus grande liberté d'interprétation et, par là même, d'application de la Convention. Ce n'est toutefois pas une règle, car dans le Pacte on rencontre également des formules très générales, pour ne pas dire abstraites.

Une comparaison détaillée des différentes normes du Pacte Politique et de la Convention Européenne dépasserait le cadre du présent article. Du reste, une telle analyse ne semble pas justifiée, et quant au problème d'un éventuel conflit entre les conventions régionales et les Pactes, j'y reviendrai dans une partie ultérieure.

Le droit des peuples à disposer librement d'eux-mêmes et de leurs richesses naturelles, que l'on rencontre au début des deux Pactes, ne figure pas dans la Convention Européenne. On a à maintes reprises discuté, au sein des différents organes de l'ONU, de l'utilité d'introduire ces normes dans une convention concernant la protection des droits de l'homme, et l'opposition contre ces normes fut pendant un certain temps très forte [7]. Au cours des années, les conceptions de la société internationale sur les droits de l'homme ont fait l'objet d'une importante évolution, les Pactes ont été adoptés dans une atmosphère de détente internationale, au moment de la chute du système colonial, ils sont enfin adressés aux États du monde entier. Tous ces facteurs ont favorisé l'inclusion du droit des peuples à l'autodétermination.

La Convention Européenne proclame qu' « aucune des dispositions de la présente Convention ne sera interprétée comme limitant ou portant atteinte aux droits de l'homme et aux libertés fondamentales reconnus par la loi de la Partie Contractante ou prévus dans toute autre convention à laquelle cette Partie Contractante est partie » (art. 60). L'art. 44 du Pacte Politique dit que « les dispositions de mise en oeuvre du présent Pacte s'appliquent sans préjudice des procédures instituées, en matière de droits de l'homme, par les actes constitutifs et les conventions de l'Organisation des Nations Unies et les organisations spécialisées [...] ». Cet article ne fait pas mention de conventions régionales, ce qui est étrange dans la mesure où, au

[7] Les discussions dans les différents organes de l'O.N.U. sont commentées par L. B. SOHN, *The United Nations and Human Rights*, New York 1968, pp. 101 - 120.

moment de l'adoption du Pacte, la Convention Européenne avait 12 ans d'existence et les travaux sur la Convention Interaméricaine des Droits de l'Homme étaient assez avancés. La disposition de la Convention Européenne citée ci-dessus prouve que ses auteurs entrevoyaient la possibilité que les États ratifiant la Convention peuvent être en même temps parties d'autres traités concernant la protection des droits de l'homme. Cet article ne contient pourtant pas de règle de conflit qui indiquerait le moyen de résoudre un éventuel conflit entre les obligations résultant de la Convention Européenne et celles imposées par le Pacte ou tout autre traité signé dans le cadre de l'ONU.

Les droits économiques, sociaux et culturels sont garantis dans le système européen occidental par la Charte Sociale Européenne (appelée plus loin Charte Sociale) adoptée le 18 octobre 1961 et entrée en vigueur en 1965 [8] Je laisse de côté le Code Européen de la Sécurité Sociale adopté en 1964 (entré en vigueur en 1968), car ses normes correspondent plutôt aux diverses conventions adoptées dans le cadre de l'O.I.T.

La Charte Sociale diffère du Pacte Économique pour quelques raisons importantes. C'est avant tout la structure intérieure de ces deux actes qui diffère. La Charte Sociale est divisée en deux parties. La première partie se compose de 19 dispositions qui formulent 19 droits. Ces dispositions sont rédigées d'une manière très laconique, elles ont plutôt la forme de slogans que d'expressions contenant une norme juridique. Dans les dispositions de la deuxième partie on trouve le développement de ces slogans. On a donc 19 articles dans lesquels les différents droits sont précisés et où l'on montre également les méthodes de leur réalisation. Ceci rend la Charte très claire. De plus, on voit la volonté de ses auteurs de distinguer nettement les droits de l'homme considérés comme fondamentaux des méthodes de leur réalisation. Ceci évite de nombreuses méprises sur le plan des considérations théoriques et également dans l'estimation du degré de réalisation des différents droits.

La disposition susmentionnée de la Charte Sociale est étroitement liée au caractère et à l'étendue des obligations qu'elle impose aux États. Le Pacte Économique dit que « Les États [...] s'engagent à garantir l'exercice des droits [...] » (art. 2 pt 2). Les droits inclus dans la première partie de la Charte Sociale sont considérés comme la déclaration « des buts à atteindre » ([...] *as a Declaration of the aims* [...] *which it will pursus by apriopriate means* — art. 20 pt 1a).

L'adoption de deux actes différents — la Convention Européenne et la Charte Sociale — ainsi que les différentes étendues des obligations que ces actes imposent aux États, prouvent que ces deux catégories de droits ne

[8] Nations Unies, Recueil des Traités, vol. 529, p. 89.

sont pas traitées de la même manière. Ces différences sont du reste clairement soulignées dans la doctrine qui caractérise la Convention comme l'ensemble des dispositions qui « expriment le minimum des exigences du droit naturel », alors que dans la Charte Sociale elles sont sensées être « les buts qui doivent être atteints dans l'avenir » [9].

Il en est de même pour les Pactes des Droits de l'Homme. Au cours des travaux de préparation on a discuté, entre autres, sur le problème : un ou deux Pactes. Les représentants des États socialistes se prononçaient pour l'inclusion de toutes les catégories de droits, c'est-à-dire des libertés, des droits politiques, sociaux, économiques et culturels dans un même acte international [10]. On voulait souligner par là le lien réciproque qui existe entre les différentes catégories de droits, ainsi que leur égale importance pour la société. Après de longs débats on a adopté deux Pactes différents, ce qui donne aux États la possibilité de n'en ratifier qu'un seul. Cette décision ne constitue pas, d'après moi, la preuve comme quoi la société internationale traite différemment ces deux catégories de droits, ainsi que l'affirmaient de leur temps certains représentants de la science socialiste [11]. Dans la science européenne occidentale et dans la pratique de ces pays, on a souligné à maintes reprises le conditionnement réciproque de tous les droits ainsi que leur lien indéchirable. Ces conceptions ont été le plus expressément formulées lors du Séminaire international sur les droits économiques, sociaux et culturels, qui s'est déroulé en 1968 à Varsovie.

L'adoption de deux Pactes différents était justifiée, entre autres, du fait des différentes méthodes d'implémentation, ainsi que des différentes étendues des obligations internationales se rapportant aux droits et libertés d'une part, et aux droits socio-économiques d'autre part. Le Pacte Politique oblige les États à « respecter et à garantir à tous les individus [...] les droits reconnus dans le présent Pacte ». Un État partie au Pacte Économique « [...] s'engage à prendre des mesures appropriées [...] en mettant

[9] F. CASTBERG, *Natural Law and Human Rights*, dans *International Protection of Human Rights*, dans *Nobel Symposium* 7, Stockholm 1968, p. 33.

[10] Cf., entre autres, les discours du délégué polonais : U. N. Doc. A/C. 3/SR. 1274, § 15 ; hongrois : U. N. Doc. A/Conf. 32/SR. 7, p. 85 ; soviétique : U. N. Doc. A/C. 3/SR. 1273, § 35.

[11] Cf. : Z. RESICH (*Ochrona praw człowieka w prawie międzynarodowym* [*La protection des droits de l'Homme dans le droit international*], Warszawa 1973, pp. 49 - 53), qui pense que la division en deux pactes est artificielle ; S. ZAWADZKI, *Le pacte international des droits économiques, sociaux et culturels et les constitutions des pays européens*, « La Pologne et les Affaires Occidentales », Vol. III, 1967, n° 2, pp. 217 - 228 ; B. A. ROMANOV, *Sovetskij Sojuz i meždunarodnaja zaščita osnovnyh prav čeloveka* [*L'Union Soviétique et la protection internationale des droits de l'Homme*], « Sovetskij Ežegodnik Meždunarodnogo Prava », 1965, pp. 361 - 365 ; A. P. MOVČAN, *Meždunarodnaja zaščita prav čeloveka* [*La protection internationale des droits de l'Homme*], Moskva 1958, p. 78 et suiv.

au maximum à profit ses ressources disponibles, en vue d'assurer progressivement le plein exercice des droits reconnus dans le présent Pacte » (art. 2 al. 1er des deux Pactes). Je partage tout à fait l'opinion selon laquelle les normes du Pacte Économique constituent un programme [12]. Cela ne signifie pas qu'elles ne sont pas une source d'obligations internationales dès leur ratification par un État donné. Lorsque l'on parle de la réalisation soit immédiate soit progressive des droits, il faut distinguer deux situations : l'obligation d'agir en vue de la réalisation des droits et l'obligation d'assurer un niveau de protection des droits tel qu'il est prévu dans la convention. La première obligation repose sur l'État dès la ratification des Pactes. L'exécution de la deuxième obligation dépend des droits eux-mêmes. La ligne de démarcation entre les droits qui peuvent être réalisés immédiatement, par exemple par l'adoption de mesures législatives, et les droits réalisés progressivement, ne passe pas entre les deux Pactes. Dans chacun d'eux on trouve ces deux catégories de droits, cependant la plupart des droits inclus dans le Pacte Politique peuvent être réalisés immédiatement, alors que la grande majorité des droits du Pacte Économique sont des droits progressifs. Les deux Pactes imposent aux États des obligations juridiques internationales quant à la réalisation des droits qui y sont inclus, tous les deux ont une même force obligatoire. Ce qui diffère, c'est le caractère et l'étendue de ces obligations.

Au cours de la préparation de la Charte Sociale, deux conceptions se sont trouvées confrontées. Selon l'une d'elles, la Charte devait formuler des buts à longue échéance. Les partisans de la deuxième conception étaient d'avis que les normes de la Charte doivent correspondre aux possibilités socio-économiques actuelles de tous les pays ou, tout au moins, de leur majorité. On considère que c'est l'influence de la deuxième conception qui domine dans la Charte [13].

Il n'y a pas, dans le Pacte Économique, de clause qui rende les obligations des États plus élastiques. Je pense à des normes qui permettent à un État ayant ratifié le Pacte de ne pas appliquer temporairement certaines dispositions ou d'exclure, pendant une période donnée, certains territoires

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[12] W. JENKS, *The Application of International Labour Conventions by Means of Collective Agreements*, « Zeitschrift für ausländiches öffentliches Recht und Völkerrecht », Vol. 19, 1958, p. 203. E. SCHWELB, *Some Aspects of the Measures of Implementation of the International Convenant on Economic Social and Cultural Rights*, R.D.H., Vol. I, 1968, n° 3, pp. 363 - 377. M. SCHREIBER, *Les Nations Unies et les Droits de l'Homme*, R.D.H., Vol. II, 1969, n° 1, p. 106. E. SCHWELB, *The Nature of the Obligations of the States Parties to the International Convenant on Civil and Political Rights*, dans *Problèmes de la protection internationale des droits de l'Homme*, Paris 1969, pp. 312–313.

[13] A. DELPÉRÉE, *Les droits sociaux et la Charte Sociale Européenne*, R.D.H., Vol. I, 1968, n° 4, p. 577.

de l'application des normes de la convention ratifiée. Les dispositions de la Charte Sociale permettent à l'État ratificateur de s'engager à ne garantir qu'une partie des droits inclus dans la Charte. L'État ne possède pas l'entière liberté quant au choix du nombre ou du genre des droits, car la Charte détermine un minimum qui doit être réalisé, en énumérant les droits qui constituent ce minimum (droits figurant dans la première partie de la Charte) et les moyens de realisation correspondants (deuxième partie de la Charte, art. 20 pt 1er lettres b et c). Ces décisions peuvent encourager à ratifier la Charte un État qui, pour différentes raisons, n'est pas en mesure de garantir tous les droits sur l'ensemble de son territoire. Le Pacte Économique impose des obligations telles qu'il est difficile de s'attendre à la pleine réalisation de tous les droits qui y sont formulés, même par les États hautement développés.

Les catalogues des droits inclus dans le Pacte Économique et dans la Charte Sociale ne sont pas identiques. La Charte ne contient pas des droits culturels tels que, par exemple, le droit à l'instruction (art. 13 du Pacte). D'un autre côté, on trouve dans la Charte certains droits qui ne figurent pas dans le Pacte comme, par exemple, le droit des travailleurs émigrants à une protection particulière (art. 19). D'une manière générale, les différences dans le domaine des droits garantis plaident en faveur du Pacte. La Charte Sociale constitue avant tout un catalogue des droits du travailleur et a principalement pour but de formuler les principes généraux sur lesquels doivent reposer les relations entre l'employer et l'employé. Il semble que le but du Pacte Économique soit quelque peu différent. Il contient l'ensemble des droits économiques, sociaux et culturels dont la réalisation est clairement imposée à l'État.

Les différences qui existent entre le Pacte Politique et le Pacte Économique, d'une part, et entre la Convention Européenne et la Charte Sociale, d'autre part, n'ont été mentionnées ci-dessus qu'à tire d'exemple. Ces exemples servent à illustrer les conclusions qui suivent. 1) Le catalogue des droits formulés dans la Convention Européenne et dans la Charte Sociale ne coïncide pas avec le catalogue des droits figurant dans les deux Pacts. 2) Les différences dans le domaine des libertés et des droits politiques ne sont pas importantes, aussi semble-t-il que la ratification du Pacte Politique par un État partie à la Convention Européenne ne doive pas aboutir à un conflit. Il est peu probable, en effet, que l'on donne une signification différente à des formules identiques ou très ressemblantes, sous le prétexte qu'elles figurent dans des actes internationaux différents. 3) Il existe une différence assez importante entre le contenu du Pacte Économique et celui de la Charte Sociale, aussi bien quant aux catalogues des droits que quant aux obligations qui sont imposées aux États. En pratique, les États qui ont ratifié la Charte Sociale, ont utilisé jusqu'ici la possibilité de n'en réaliser

qu'une partie. Il semble de ce fait que l'on ne peut s'attendre à l'acceptation absolue du Pacte Économique de la part de ces États, ainsi qu'à la pleine réalisation des droits qui y sont inclus.

B. La Convention Interaméricaine des Droit de l'Homme

La formation du système de la protection internationale des droits de l'homme sur le continent américain était différente de celle qui s'est déroulée en Europe Occidentale. La Convention Européenne a été élaborée dans un laps de temps relativement court et elle est entrée en vigueur rapidement. Les débuts des travaux d'élaboration de la Convention Américaine remontent à la fin des années quarante et ces travaux ont duré près de vingt ans. Il y a en outre une différence beaucoup plus caractéristique, à savoir l'institution, avant l'élaboration de la Convention Américaine, de la Commission des Droits de l'Homme. Ceci mérite attention du fait que, dans divers projets concernant la création d'autres systèmes régionaux de protection des droits de l'homme, on postule la création de telles commissions, et ceci avant la signature d'une convention contenant le catalogue des droits de l'homme.

La Charte de l'Organisation des États Américains (O.E.A.) de 1948 fait à plusieurs reprises mention de la protection des droits de l'homme. Ainsi, dans le chapitre « Principes », les États américains proclament les droits fondamentaux de l'homme sans distinction de race, de nationalité, de foi ou de sexe (chap. I, art. 5 lettre, j) ; dans le chapitre « Droits fondamentaux et obligations des États », il est dit que « l'État doit respecter les droits de l'individue et les principes de la morale publique » (chap. II, art. 13). En outre, certaines obligations imposées aux États dans le domaine de la politique sociale et culturelle sont étroitement liées à la garantie de certains droits, bien que la Charte n'emploie pas le terme « droits de l'homme ». Notons également que le Préambule dit que « la perspective de bonne entente ne peut signifier que la consolidation [...] du système des libertés individuelles et de la justice sociale basés sur le respect des droits fondamentaux de l'homme ».

Le premier pas vers la création d'un système interaméricain de protection des droits de l'homme a été la Déclaration Américaine des Droits et des Obligations de l'Homme adoptée lors de la IX[e] Conférence Interaméricaine, le 2 mai 1948 [14]. Cette Déclaration, tout comme la Déclaration Universelle des Droits de l'Homme, avait la forme d'une résolution, elle n'imposait donc pas aux États d'obligations juridiques. Le texte de cette Décla-

[14] American Declaration of the Rights and Duties of Man, Resolution XXX, 43 AJIL/1949/Supp. 133. Le texte de la Déclaration également dans *Basic Documents on Human Rights*, Oxford 1971, pp. 389 - 395.

ration était, *grosso modo*, semblable à celui de la Déclaration des Nations Unies. Elle contient des libertés individuelles, des droits et des libertés publiques, des droits économiques, sociaux et culturels. En ce qui concerne la rédaction des normes, la Déclaration est assez laconique et générale ; en plus, elle n'indique pas les méthodes de réalisation des différents droits. Tout comme la Déclaration Universelle, elle a joui d'une grande autorité, elle a à maintes reprises eu une influence sur le comportement des États, elle a été le point de départ de la convention ultérieure.

En 1960, le Conseil de l'O.E.A. a institué la Commission Interaméricaine des Droits le l'Homme en tant qu' « *autonomus entity of Organisation of American States* » [15]. La Commission a été créée dans un but de promotion et non pas de protection des droits de l'homme. Elle effectuait, entre autres, des études sur le respect des droits de l'homme dans différents pays (compétence d'étude), et elle examinait les informations provenant des États, ainsi que les pétitions individuelles concernant les violations des droits de l'homme (compétence d'enquête). Elle n'était toutefois pas habilitée à prendre des décisions dans des questions concrètes, au contraire de la Commission Européenne ; elle pouvait tout au plus adresser aux États des « recommandations générales » [16]. C'étaient les normes de la Déclaration qui ont constitué le point de départ de l'estimation du degré de réalisation des droits de l'homme par les États. La Commission a effectué des études sur le respect des droits de l'homme, entre autres pays, en République Dominicaine et à Cuba.

Au cours de la III^e^ session consultative des ministres des Affaires étrangères de l'O.E.A. en 1963, on a adopté plusieurs résolutions dont la signification pour le développement de la protection internationale des droits de l'homme sur le continent américain a été assez importante. Il faut noter ici la III^e^ résolution : « Confirmation des principes de non-intervention et d'autodétermination », la IV^e^ : « Élections libres », qui, entre autres, recommande aux États « le rétablissement d'un régime légal basé sur l'autorité du droit et sur le respect des droits de l'homme », et la V^e^ : « Union pour le progrès » qui souligne le lien étroit qui existe entre la liberté et la démocratie d'une part et le développement économique et social d'autre part. Elle fait appel aux États afin qu'ils « [...] mettent les

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[15] Le statut de la Commission a été adopté par le Conseil de l'O.E.A., et c'est également lui qui a nommé ses membres et déterminé ses compétences qui ont été successivement élargies au cours des années 1960 - 1969.

[16] Au sujet de l'activité de la Commission et de ses compétences cf. : K. VASAK, *La Commission Interaméricaine des Droits de l'Homme : son rôle et son importance pour les pays en voie de développement*, dans *Internationasel Colloquium über, Menschenrechte*, Berlin 1968, pp. 191 - 211 ; L. R. SCHEMAN, *The Inter-American Commission on Human Rights*, AJIL, Vol. 59, 1965, pp. 335 - 344.

richesses à la disposition de toutes les couches sociales et qu'ils assurent au plus vite la réalisation des besoins dans le domaine du logement, de l'emploi, des terres, de la protection de la santé et de l'instruction ».

La Convention Américaine des Droits de l'Homme a été signée par 12 États parties à l'O.E.A. le 22 novembre 1969, lors de la conférence à San José [17]. Elle n'est pas encore entrée en vigueur ; pour cela il faut 11 ratifications (art. 74 al. 2). La Convention est ouverte à la signature, la ratification et à l'accès de tous les États membres de l'O.E.A. (art. 74 al. 1er). Elle est donc nettement régionale.

Le premier projet de la Convention Américaine a été élaboré vers la fin des années cinquante. Il se composait de trois parties fondamentales : les droits politiques et les libertés, les droits socio-économiques et les mesures d'implémentation [18]. En fin de compte, il n'y a pas de droits économiques, sociaux ni culturels dans la Convention adoptée en 1969. C'est certainement pour cette raison qu'elle a été jugée comme *primitive liberal and capitalist pattern* [19]. En contrepartie, la Convention oblige les États à agir en vue de réaliser progressivement les droits socio-économiques qui figurent dans le protocole additionnel à la Charte de l'O.E.A., adopté le 27 février 1967 à Buenos Aires [20]. Il contient les principes généraux que les États doivent appliquer dans leur politique socio-économique. Ce renvoi de la Convention Américaine au protocole de Buenos Aires constitue, d'après moi, un abaissement du rang des droits socio-économiques. J'en veux également pour preuve le fait que les droits de la société aux prestations de la part de l'État ne sont pas jugés être des droits fondamentaux de l'homme. Les obligations imposées aux États par le protocole de Buenos Aires dans le domaine socio-économique sont infiniment plus modestes que celles formulées dans le Pacte Économique.

La Convention Américaine se réfère, dans le préambule, à la Déclaration Universelle des Droits de l'Homme, et le catalogue des droits et des libertés s'en inspire également pour une large part. Si on compare les titres des différents articles de la Convention Américaine avec les normes correspondantes du Pacte Politique, on ne voit pas de grandes différences entre les textes de ces deux actes. Néanmoins, on ne peut pas parler ici

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[17] American Convention on Human Rights, O.A.S. Official Records Ser. K/XVI/I., Doc. 65, Rev. I, Corr. 2. Texte également dans *Basic Documents...*, pp. 399 - 427.

[18] Les discussions précédant l'adoption de la Convention sont commentées en détail par J. A. CABRANES, *The Protection of Human Rights by the Organisation of American States*, AJIL, Vol. 62, 1968, pp. 889 - 908.

[19] P. CAMARGO, *The American Convention on Human Rights*, R.D.H., Vol. III, 1970, n° 2, p. 334.

[20] Protocol of Amandement to the Charter of the Organisation of American States, International Legal Materials, Vol. 6.

d'identité. Ainsi, par exemple, la Convention Américaine mentionne le droit à la propriété (art. 21) et le droit à la rectification (art. 14) qui sont absents dans le Pacte Politique. Il faut rappeler qu'au cours de l'élaboration des Pactes on a à maintes reprises discuté sur l'inclusion du droit à la propriété qui, après tout, figurait dans la Déclaration Universelle des Droits de l'Homme. Les auteurs des Pactes n'ont pu arriver à un accord quant à la rédaction de ce droit. Le droit à la rectification ne figure pas dans le Pacte du fait, semble-t-il, qu'en 1963 une convention spéciale sur la rectification a été signée dans le cadre de l'ONU. Elle est entrée en vigueur en 1962, donc avant l'adoption des Pactes. D'autre part, on ne trouve pas dans la Convention Américaine l'interdiction d'emprisonner quelqu un pour la seule raison qu'il n'est pas en mesure d'exécuter une obligation contractuelle (art. 11 du Pacte Politique).

On voit donc qu'il existe des différences entre le texte de la Convention Américaine et celui du Pacte Politique, toutefois, comme c'était le cas pour la Convention Européenne, ces différences sont minimes et concernent plutôt les questions de deuxième plan.

La Convention Américaine a été adoptée trois ans après l'adoption par l'Assemblée Générale des Nations Unies des Pactes des Droits de l'Homme. Ainsi, la coordination de ces deux systèmes de protection internationale des droits de l'homme — l'universel et le régional — était une question non seulement théorique, mais également pratique. Sur la demande du Conseil Interaméricain des Juristes, le Conseil de l'O.E.A. a posé, en 1967, deux questions aux pays membres : 1) ont-ils l'intention d'accéder au système universel de la protection des droits de l'home ? ; 2) trouvent-ils utile, dans le cas d'une réponse positive à la première question, de signer la convention régionale ? La majorité des États s'est déclarée en faveur de la signature de la Convention Américaine, soulignant en même temps qu'elle doit concerner uniquement les pays latino-américains, excluant les États-Unis du fait du caractère différent de leurs conceptions politiques et de leurs conditions socio-économiques. Exprimant l'intention presquè universelle d'accéder aux Pactes, on a postulé que la future convention régionale soit, dans ses principes généraux, conforme aux Pactes [21].

Dans les dispositions contenant les directives d'interprétation, la Convention Américaine dit, entre autres, qu'aucune disposition ne peut être interprétée comme une restriction dans la jouissance des droits et libertés figurant dans d'autres conventions dont un État partie à la Convention Américaine pourrait être partie (art. 29 pt. b). C'est donc une disposition identique à celle qui figure dans la Convention Européenne. Elle ne se réfère toutefois pas *expressis verbis* aux Pactes.

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[21] O.A.S. Ser. G/IV - C - 2/787, Rev. 3, 7 juin 1967.

3. Le problème d'un éventuel conflit entre les Pactes et les conventions régionales

Il a déjà été question du fait que les dispositions des Pactes ne règlent pas clairement le problème des rapports entre les Pactes et les conventions régionales, elles n'indiquent pas non plus le moyen de résoudre un conflit éventuel entre les obligations des États résultant des Pactes et celles résultant des conventions régionales. La Convention Européenne a été adoptée et est entrée en vigueur longtemps avant l'adoption des Pactes. De ce fait on a postulé que les représentants des pays membres du Conseil de l'Europe siégeant dans divers organes des Nations Unies et participant à l'élaboration des Pactes, concentrent leur attention sur les problèmes juridiques spécifiques de leurs pays, surtout de ces pays qui étaient déjà parties à la Convention Européenne. F. Ermacora écrivait alors : « *it is not too late yet to insert special provisions ; this will be one of Council of Europe's principal tasks in its relations with the United Nations* »[22]. La clause dont il est question (l'auteur n'en a pas proposé le texte) devait remplir le rôle de règle de conflit entre les dispositions des Pactes et celles de la Convention Européenne. Cependant les Pactes ne contiennent pas de telle règle.

Les problèmes de nature juridique auxquels peuvent se trouver confrontés les États, sont très divers et dépendent, entre autres, de l'ordre dans lequel un État ratifie les Pactes et une convention régionale. On peut avoir affaire aux situations suivantes : a) un État partie à la Convention Européenne ou Américaine ratifie ensuite les Pactes, b) un État membre du Conseil de l'Europe ou de l'O.E.A. ratifie les Pactes et, par la suite, accède à une convention régionale. Si bien que ce sera la convention régionale dans un cas et les Pactes dans l'autre qui seront *lex posteriori*. Il faut en outre prendre en considération la possibilité de ratification par un État appartenant aussi bien au groupe « a » qu'au groupe « b » des conventions régionales ou des Pactes avec réserves[23].

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[22] F. Ermacora dans la discussion sur : F. Capotorti, *Possibilities of Conflict in National Legal Systems Between the European Convention and other international Agreements*, dans *Human Rights in National...*, p. 95.

[23] Aussi bien la Convention Européenne (art. 64) que la Convention Américaine (art. 75) prévoient la possibilité de ratification avec réserves. Les articles cités indiquent le domaine qui leur est autorisé. Les Pactes ne contiennent aucune disposition qui permette leur ratification sous réserves. La question de l'inclusion d'une clause permettant de formuler des réserves est apparue à maintes reprise au cours des travaux de préparation. Ses partisans prenaient pour argument le fait que le droit de formuler des réserves lors de la ratification des traités internationaux est un des principes du droit international et découle de l'adoption de ces actes à la majorité des voix et non à l'unanimité. La plupart des membres de la Commission des Droits de l'Homme étaient d'avis que l'inclusion dans les Pactes d'une clause permettant de formuler des réserves serait contraire au principe fondamental des Pactes, à savoir

Le problème de la résolution d'un éventuel conflit entre les Pactes et les conventions régionales n'est pas le sujet des présentes considérations. C'est en effet un problème trop général du droit des traités, dépassant le cadre de cet article. Mon but est ici de signaler un autre problème. La fonction des Pactes est d'imposer à tous les États du monde, ou au nombre le plus grand possible d'entre eux, les mêmes obligations juridiques internationales dans le domaine des droits de l'homme. Les conventions régionales doivent remplir la même fonction, mais envers des groupes restreints d'États. Dans le cas d'un désaccord entre les dispositions du Pacte et celles de la convention régionale, le règlement du conflit consiste à reconnaître la primauté de l'un de ces acts. Est-il possible, dans ce cas, de réaliser simultanément les idées d'universalisme et de régionalisme des droits de l'homme ? Ces idées s'excluent-elles mutuellement ou peuvent-elles se compléter ? Peut-on espérer une protection meilleure et plus efficace des droits fondamentaux de l'homme de la part des instruments universels ou régionaux ?

Le conflit entre les Pactes et les conventions régionales peut intervenir à trois niveaux : 1) au niveau des divergences quant à la catégorie des droits protégés, qui provoquent que le respect d'une convention entraîne la violation des dispositions d'une deuxième convention, 2) au niveau des divergences dans l'interprétation des prescriptions identiques ou ressemblantes, 3) au niveau de la diversité des mesures d'implémentation prévues dans les Pactes d'une part, et dans les conventions régionales d'autre part.

1. Lorsqu'un État est partie au Pacte et, en même temps, à une convention régionale, il peut se trouver dans une situation telle que les dispositions correspondantes de ces actes sont absolument contradictoires, si bien qu'il est impossible de les respecter simultanément, ou bien encore elles peuvent être partiellement contradictoires. Voici des exemples. La Convention Européenne qui proclame la liberté d'expression (art. 10) et la liberté de réunion et d'association (art. 11), dit aussi qu'aucune des dispositions sus-citées « ne peut être considérée comme interdisant aux Hautes Parties Contractantes d'imposer des restrictions à l'activité politique des étrangers » (art. 16). Ainsi donc, malgré la clause générale interdisant toute discrimination à l'égard des étrangers, il est laissé à la libre appréciation des États de leur garantir ou non le droit de réunion et d'association. Parmi les clauses permettant des restrictions des droits de réunion

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à leur universalisme. Dans la doctrine, on perçoit la prédominance de la conception selon laquelle il est admissible de formuler des réserves lors de la ratification des Pactes selon les principes établis dans la Convention de Vienne sur le droit des traités. Je partage cette opinion. Le manque d'une telle disposition dans les Pactes ne semble pas être la meilleure solution ; il peut conduire en effet à l'interprétation selon laquelle les réserves sont non seulement autorisées mais même illimitées.

et d'association dans le Pacte Politique (articles 21 et 22), il n'est pas fait mention des étrangers. Les principes généraux du Pacte Politique ne prévoient pas, eux non plus, une telle possibilité.

Le droit à la vie, qui figure dans le Pacte Politique et dans les deux conventions, semble être le moins sujet à caution. D'une manière générale, la disposition formulant le droit à la vie peut être interprétée de deux façons : a) le droit à la vie signifie que l'individu a le droit d'exiger les moyens nécessaires à son existence ; b) l'individu a le droit d'exiger une protection contre une décision arbitraire ou non conforme à la loi, qui fasse valoir la peine de mort, ainsi que le droit d'exiger une protection de la part de l'État contre un idividu attentant à sa vie. La première interprétation est liée à la réalisation des droits socio-économiques. Le droit à la vie tel qu'il est entendu dans la deuxième interprétation, figure dans le Pacte Politique et dans les deux conventions régionales. Le Pacte Politique ne répond pas à la question : « à quel moment commence la vie ». En conséquence, il ne règle pas le problème : « à quel moment l'État est tenu de protéger la vie ». La Convention Américaine dit clairement que « le droit à la vie est protégé dès le moment de la conception » (art. 4 pt 1er). Ainsi donc, l'avortement admissible dans la perspective du Pacte Politique est, semble-t-il, interdit par la Convention Américaine. Le Pacte Politique interdit d'infliger la peine de mort aux personnes âgées de moins de 18 ans et aux femmes enceintes. La Convention Américaine, incluant la même interdiction, l'étend aux personnes ayant plus de 70 ans ainsi qu'aux personnes jugées pour délits politiques. Dans la Convention Européenne le droit à la vie est formulé autrement encore. Elle dit que ce droit est protégé par la loi et que la mort peut être infligée en exécution d'une sentence prononcée par un tribunal dans le cas où le délit est puni par la loi de la peine de mort. La mort n'est pas considérée comme infligée en violation de cet article lorsqu'elle résulte de la protection d'une personne contre la violence illégale, de la procédure d'une arrestation ou de l'empêchement d'une évasion, ou enfin si elle résulte d'une répression, conformément à la loi, d'une émeute ou d'une insurrection (art. 2).

Les dispositions citées ci-dessus à titre d'exemples ne sont pas d'après moi, des dispositions contradictoires. Elles formulent toutes le même droit, avec ceci que le domaine de sa protection est différent et les dispositions formulant des restrictions à son égard sont plus ou moins détaillées. Cette dernière circonstance peut avoir une grande importance lors de l'interprétation de ce droit.

Généralement parlant, il n'y a pas de grandes contradictions entre les Pactes et les conventions régionales. La majorité des dispositions s'appuie sur une même conception des droits de l'homme et l'ensemble des droits qu'ils protègent est assez ressemblant. Aussi, au lieu de conflit entre ces

actes, faudrait-il plutôt parler de différences. Ce sont les différences de deux sortes : certains droits ne figurent que dans un seul de ces traités, parfois c'est une différence en faveur de Pacte et parfois en faveur de la convention régionale ; il arrive aussi que les mêmes droits se trouvent inclus dans le Pacte et dans les conventions régionales, mais qu'ils soient protégés différemment. Il ne faut pas oublier que ces différences ne concernent que certaines dispositions et non pas l'ensemble des traités. En conséquence, il est impossible, d'après moi, d'appliquer ici le principe de *lex posteriori*, car cela nous conduirait à l'anéantissement de l'idée de protection internationale des droits de l'homme.

Les Pactes des Droits de l'Homme prévoient qu' « aucune disposition du présent Pacte ne peut être interprétée comme impliquant pour un État [...] un' droit quelconque de se livrer à une activité ou d'accomplir un acte visant à la destruction des droits ou libertés reconnus dans le présent Pacte [...] ». Il ne peut être admis aucune restriction ou dérogation aux droits de l'homme, reconnus par un État partie au Pacte, par convention, sous le prétexte que le Pacte ne reconnaît pas ces droits (art. 5 des deux Pactes). Les dispositions semblables figurent dans la Convention Européenne (articles 17 et 60), ainsi que dans la Convention Américaine (art. 29). Ces dispositions constituent la base de la thèse selon laquelle les Pactes et les conventions régionales doivent se compléter dans leur application. Cela signifie que l'individu peut profiter de l'instrument international qui lui apporte une meilleure protection. Le choix de la convention à laquelle il peut se référer ne dépend ni de l'époque à laquelle l'État a ratifié les deux conventions entrant en ligne de compte, ni du degré de généralité de leurs dispositions [24]. Ce n'est que si l'on admet une telle interprétation qu'il est possible d'appliquer simultanément les Pactes et les conventions régionales de telle manière que soit garantie la meilleure protection des droits de l'homme. Et c'est bien là le but des Pactes et des conventions régionales.

2. Les Pactes et les conventions régionales formulent les principes généraux de l'activité législative des États. Il ne semble donc pas qu'ils soient, à part un petit nombre de dispositions, immédiatement applicables [25]. Le contenu des dispositions de droit interne établi sur la base des

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[24] Cette conception a été exprimée par les participants du Deuxième Colloque international sur la Convention Européenne, tenu à Vienne du 18 au 20 octobre 1965. Cf. également : *Requête N 235/56*, « Annuaire de la Commission Européenne », Vol. II, pp. 257 - 307.

[25] Je laisse ici de côté la question de savoir si la convention ratifiée devient une partie intégrante du système interne du droit. Ce qui m'intéresse, c'est le fait que les dispositions aussi bien des Pactes que des conventions régionales « ne conviennent pas », du fait de leur généralité, à une application immédiate.

Pactes ou des conventions régionales dépendra donc, en premier lieu, de l'interprétation de ces actes par les organes d'État.

Au cours de l'élaboration des Pactes il y a eu de nombreuses controverses quant à la manière de formuler les différentes dispositions. On rencontre souvent dans la littérature l'opinion selon laquelle l'accord auquel on est parvenu en fin de compte sur le texte des Pactes, est purement verbal. Les Pactes s'appuient sur différents principes philosophiques, ils ont été adoptés sur la base des différents systèmes socio-économiques et politiques et ils ne sont pas le résultat d'un compromis dans le domaine des droits de l'homme [26]. Je ne partage pas tout à fait cette opinion, ce dont il sera encore question plus loin, cependant j'estime que le danger de diverses interprétations des Pactes existe réellement.

De nombreuses dispositions des Pactes sont formulées d'une manière très générale, ce qui rend possibles des interprétations très différentes. Cela concerne surtout les clauses générales déterminant les circonstances dans lesquelles il est permis de limiter certains droits. Prenons, par exemple, la possibilité pour un État de limiter certains droits « afin de protéger l'ordre public ». Cette expression n'est pas définie dans les Pactes, pourtant le terme français « ordre public » a une signification différente du terme anglais « *public order* ». Ces différences sont souvent soulignées dans la doctrine, mais dans les textes français et anglais des Pactes ces expressions ne sont accompagnées d'aucun commentaire. Certains droits peuvnet faire l'objet de restrictions qui sont « indispensables dans une société démocratique » (articles 21 et 22 du Pacte Politique). Mais combien de significations possède le terme « démocratie ». Aussi ne faut-il pas s'étonner du pessimisme d'A. Ross qui écrit : « [...] la profonde diversité dans les traditions culturelles, dans le développement économique et politique, dans l'idéologie des différents peuples et États [...] rend difficile la formulation d'une définition des droits de l'homme qui puisse être admise sans recours au mensonge, à l'ambiguïté ou au camouflage » [27].

Ce sont les États parties qui sont habilites a interpréter les traités internationaux ; on a alors affaire à une interprétation authentique [28]. Les règles d'interprétation ne se différencient pas énormément de celles qui ont été élaborées dans la doctrine pour l'interprétation du droit interne. La Convention de Vienne sur le droit des traités contient, il est vrai, les règles

[26] M. Borucka-Arctowa, *Współczesna koncepcja praw człowieka, [La théorie contemporaine des droits de l'Homme]*, dans *Księga Pamiątkowa ku czci Konstantego Grzybowskiego [Livre commémoratif en l'honneur de Konstanty Grzybowski]*, p. 58. M. Moskowitz, *The Meaning of International Concern with Human Rights*, dans *Problèmes de protection internationale...*, pp. 185 - 195.

[27] A. Ross, *The United Nations. Peace and Progress*, New York 1965, p. 350.

[28] Cf. à ce sujet A. Klafkowski, *Prawo międzynarodowe publiczne [Le droit international public]*, 1re éd., Warszawa 1966. p. 271.

générales d'interprétation des traités internationaux, il est cependant inutile de s'attendre à ce qu'elles contribuent à l'uniformisation générale des dispositions des Pactes. Certains traités internationaux régissant les droits de l'homme prévoient la possibilité de leur interprétation par un organe international [29]. Les organes habilités à effectuer le contrôle international de la réalisation des Pactes, ne sont pas compétents pour en effectuer une interprétation qui serait respectée par les États. Le Conseil Économique et Social auquel sont présentés les rapports sur la réalisation du Pacte Économique, peut présenter à l'Assemblée Générale « des rapports contenant des recommandations de caractère général [...] sur les mesures prises et les progrès accomplis en vue d'assured le respect général des droits [...] » (art. 21 du Pacte Économique). Il faut, si l'on veut juger cette compétence du Conseil du point de vue de son rôle dans l'uniformisation de l'interprétation des dispositions du Pacte, attirer notre attention sur les faits suivants : a) le Conseil a à sa disposition les documents présentés par les États intéressés et ces documents peuvent contenir un jugement subjectif idéalisant l'état de fait ; b) le Conseil s'intéresse au respect « général des droits de l'homme » ; il semble donc qu'il n'ait pas la possibilité de saisir les différences dans les interprétations effectuées par les différents États ; c) le Conseil n'adresse pas ses recommandations directement aux États.

Les méthodes de contrôle de la réalisation du Pacte Politique sont plus différenciées, mais ici encore le Comité des Droits de l'Homme n'est pas appelé à en effectuer l'interprétation. Le premier moyen de contrôle sont les rapports des États. Les dispositions du Pacte n'assurent pas la régularité et la continuité du contrôle, laissant au Comité la liberté de fixer les dates de la remise des rapports. Les fonctions du Comité sont définies d'une façon assez énigmatique et elles se ramènent au fait qu'il adresse aux États des « observations générales » (art. 40 § 4) dont le respect n'est point imposé par le Pacte. Un autre moyen de contrôle sont les communications qui peuvent être présentées par un État partie qui prétend qu'un autre État partie ne s'acquitte pas de ses obligations découlant du Pacte (art. 41). La procédure devant le Comité ne conduit pas à une décision astreignante envers l'État ; au cours de l'étude de la communication, le Comité a la possibilité de prendre connaissance de la législation dont la conformité avec le Pacte est contestée, il peut également la juger non conforme au Pacte. Toutefois si l'État n'est pas d'accord avec l'opinion du Comité et s'il ne

[29] La Convention de l'UNESCO de 1962 sur la lutte contre la discrimination dans le domaine de l'instruction prévoit que si les litiges entre les États parties à la convention au sujet de son interprétation ou de son application ne sont pas résolus par la voie de négociations, ils seront examinés — avec l'accord des parties participant au litige — par la C.I.T.

prend aucune mesure en vue de modifier la législation, le conflit reste au point mort. Le Comité n'est pas habilité à adresser des recommandations directement aux États. Il en est de même lors de l'examen des communications émanant des particuliers, dont il est question dans le Protocole relatif au Pacte Politique.

Ainsi donc ni le Conseil Économique et Social ni le Comité des Droits de l'Homme ne sont habilités à effectuer une interprétation des Pactes astreignante envers les États. Il ne fait cependant pas de doute qu'au cours de leurs fonctions de contrôle, ces organes seront dans l'obligation d'effectuer une interprétation aussi bien des Pactes que de la législation interne d'un pays donné. De quelle manière cette interprétation doit-elle être effectuée ? Cette question a été posée de nombreuses fois en rapport avec le fonctionnement et l'application de la Convention Européenne.

On rencontre dans la doctrine l'opinion selon laquelle la Convention Européenne devrait être interprétée par un organe international (Commission, Conseil des ministres, Cour des Droits de l'Homme), de la même manière que le font les organes d'un État donné. Les organes de contrôle international effectuent également l'interprétation du droit interne qui est l'objet d'un jugement du point de vue de sa conformité avec la Convention. Parallèlement, la Convention fait l'objet d'une interprétation par les organes internes des États, à l'occasion de l'établissement du droit interne ou de l'application immédiate de la Convention. On estime que, dans tous ces cas, la résultante devrait être « favorable à la Convention » [30].

En ce qui concerne la Convention Européenne, il est plus facile d'obtenir une interprétation identique ou, pour le moins, ressemblante de la part des organes d'État. Les parties à cette Convention sont des États qui adoptent une même conception des droits de l'homme, qui possèdent des systèmes juridiques et une culture juridique semblables. En ce qui concerne les Pactes, s'ils sont ratifiés à une grande échelle, il sera plus difficile d'obtenir une interprétation uniforme du fait des différences qui séparent les États du monde contemporain [31].

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[30] Cf. U. SCHEUNER, *An Investigation of the Influence of the European Convention on Human Rights and Fundamental Freedoms in National Legislation and Practice*, dans *Nobel Symposium...*, pp. 203 - 206. On a également émis de telles conceptions au cours du Deuxième Colloque à Vienne...

[31] La Convention Européenne a été de nombreuses fois l'objet d'interprétation de la part des organes des États Parties. Depuis 1971, la Section des Droits de l'Homme auprès du Conseil de l'Europe édite un ensemble de décisions de divers organes, avant tout de la Cour Suprême, de la Cour de Cassation et du Tribunal Constitutionnel, où il est question, entre autres, de la conformité du droit interne avec la Convention. C'est une matière extrêmement intéressante et qui peut contribuer à la discussion sur l'interprétation éventuelle des Pactes par les différents États parties à la Convention Européenne.

3. En plus des difficultés signalées ci-dessus quant à la détermination du catalogue de droits, leur interprétation et leur réalisation uniformes, il y a encore un problème, à savoir celui de l'efficacité du contrôle international de la réalisation des traités universels et régionaux. On a souvent exprimé les craintes que le système de communications et de requêtes individuelles peut conduire à des tensions internationales et à des situations de conflit entre les États, surtout s'il s'agit d'États possédant des régimes différents. Les pays socialistes ont exprimé au forum international la conception selon laquelle toute forme de contrôle international autre que les rapports des États, constitue une ingérence dans les affaires d'un État. En conséquence, la science socialiste, et sur tout la science soviétique, estime que les communications et les requêtes individuelles constituent une violation de la clause inclue dans l'art. 2 § 7 de la Charte des Nations Unies qui statue sur l'interdiction d'ingérence de l'Organisation dans les affaires « qui relèvent essentiellement de la compétence nationale d'un État ». Pour les mêmes raisons, les pays socialistes se sont montrés hostiles aux projets d'élargissement du système de contrôle international des droits de l'homme, et surtout au projet d'institution du Haut Commissaire des Nations Unies aux Droits de l'Homme [32]. D'un autre côté, il semble que les représentants des pays occidentaux placent une trop grande confiance dans l'efficacité des communications et des requêtes individuelles. Il est un fait qu'elles remplissent leurs fonctions au sein de la Convention Européenne, mais il semble difficile de s'attendre aux mêmes effets à l'échelle universelle, et ceci pour les causes suivantes : les Pactes formulent des buts à longue échéance et concernent un très large domaine de l'activité nationale. Les différences qui séparent les États font qu'il est impossible d'obtenir une réalisation uniforme des Pactes. En conséquence, il est difficile d'établir un modèle de contrôle pour tous les États. Je doute donc, ayant à l'esprit les circonstances suscitées ainsi que l'ambiance politique régnant dans le

[32] La cause des longues discussions autour de la question de savoir si les droits de l'homme appartiennent à la compétence intérieure de l'État est, entre autres, le manque d'un accord quant à la signification du terme « intervention ». Cf. à ce sujet R. SONNENFELD, *Artikel 2, Ziff. 7 der UN-Satzung in der Praxis der politischen Organe der UN*, « Zeitschriften der Universität Halle », Vol. 16, 1967, pp. 28 et suiv. La conception selon laquelle la protection des droits de l'homme appartient à la compétence intérieure d'un État est exprimée, entre autres, par : Z. RESICH, *Ochrona praw człowieka...*, pp. 36 - 39 ; J. MACHOWSKI, *Prawa człowieka* [*Les droits de l'Homme*], Warszawa 1968, pp. 30 - 31 ; P. RADOINOV, *La protection internationale des droits de l'Homme*, dans *La République Populaire de Bulgarie et les Droits de l'Homme*, Sofia 1970, p. 113. Cf. également V. OUTRATA, *A propos de la question posée par l'exécution et par le contrôle de l'application des Pactes relatifs aux Droits de l'Homme*, « Bulletin de Droit Tchécoslovaque », 1967, nos 1 - 4, pp. 337 - 355.

monde contemporain, que tous les États puissent se soumettre au système de contrôle édicté dans le Pacte Politique et dans le Protocole Facultatif [33].

Les circonstances dont il est question ci-dessus furent sans doute l'une des causes pour lesquelles on a attribué au Comité des Droits de l'Homme des compétences assez modestes et enigmatiques. Si l'on admet que le rôle du Comité consiste non pas en un « jugement » d'un État sur la demande d'un autre État, mais en un rapprochement de divers points de vue dans le but de juger les faits, la concordance de la procédure avec les dispositions du Pacte ainsi que les moyens qu'il faut mettre en oeuvre pour changer la situation contraire aux engagements résultant du Pacte [34], alors on peut s'attendre à un meilleur « rapprochement d'opinions » dans le cadre des conventions régionales que dans celui des conventions universelles.

Le problème des mesures d'implémentation universelles et régionales possède encore un autre aspect, se rapportant cette fois à la forme juridique. Il a été dit ci-dessus que la seule solution qui permette une application harmonique des conventions universelles et régionales est l'adoption du principe de complémentarité ainsi que du principe selon lequel l'individu peut utiliser l'instrument international qui lui assure la meilleure protection de ses droits. Lorsque des États parties aux conventions régionales ratifient les Pactes (les dispositions sur les mesures d'implémentation inclues), ils sont soumis à deux systèmes de contrôle international. Il est alors indispensable d'élaborer les principes généraux permettant leur synchronisation. On propose ici diverses solutions, depuis le maintien des deux systèmes de contrôle tout à fait indépendants, jusqu'à leur liaison permettant aux organes de contrôle prévus dans les Pactes de remplir les fonctions d'organes d'appel ou de quasi-appel.

La dissipation de ces doutes est, semble-t-il, une question relevant d'un lointain avenir. D'après moi, les conventions régionales et universelles rempliront leur rôle si les organes de contrôle coopèrent entre eux. Il est difficile de dire aujourd'hui quels devraient être les principes optimaux d'une telle coopération. En tout cas, dans la situation de la ratification universelle des Pactes par les États parties aux conventions régionales, les organes de contrôle ne devraient pas rester complètement isolés.

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[33] Exprimant des doutes au sujet de l'acceptation unanime du système de contrôle international, j'ai avant tout à l'esprit les communications et les requêtes individuelles. Les rapports sur la réalisation des droits de l'homme sont présentés par les États au Conseil Économique et Social depuis déjà 1955 (selon la résolution du Conseil qui a été adoptée à cette époque). Lors de la Conférence de Téhéran on a proposé l'uniformisation de la procédure des rapports avec celle qui a été introduite en 1955.

[34] Cf. E. SCHWELB, *Civil and Political Rights. The International Measures of Implementation*, AJIL, Vol. 62, 1969, pp. 827 - 868.

4. Les tendances régionales actuelles

A. Afrique

La Charte de l'Organisation de l'Unité Africaine (O.U.A.), adoptée le 25 mai 1963 à Addis-Abéba, proclame l'absolue et pleine adhésion des États membres à la Déclaration Universelle des Droits de l'Homme. L'un des buts de l'O.U.A. est « [...] d'encourager la coopération internationale en respectant, autant que faire se doive, la Charte des Nations Unies et la Déclaration Universelle des Droits de l'Homme » (art. II pt 1er lettre c). Cependant, dans l'art. III, dans lequel sont édictés les principes de l'activité de l'Organisation, il n'est pas fait mention de la protection des droits de l'homme. La Déclaration adoptée lors de la Ire Conférence des États Africains Indépendants, qui s'est déroulée à Accra du 15 au 22 IV 1958, proclamait la loyauté envers les dispositions de la Déclaration Universelle des Droits de l'Homme, elle condamnait le racisme et toute politique de discrimination. Les résolutions adoptées lors de la IIe Conférence des États Africains Indépendants à Addis-Abéba du 15 au 24 VI 1960, étaient formulées dans le même esprit [35].

L'idée de la signature de la Convention Africaine des Droits de l'Homme a été proposée pour la première fois lors du Congrès africain non gouvernemental sur la primauté du droit, réuni à Lagos en janvier 1961. Le congrès a été organisé sous les auspices de la Commission Internationale des Juristes et a rénui les représentants de 23 pays d'Afrique aussi bien francophone qu'anglophone. La « loi de Lagos » invitait les gouvernements africains à « étudier la possibiltité d'adopter une convention africaine des droits de l'homme prévoyant notamment la création d'un tribunal approprié et des voies de recours ouvertes à toutes les personnes relevant de la juridiction des États signataires » (point 4). Cette idée a été maintenue par la République du Somali dans les remarques présentées à l'Organisation des Nations Unies, concernant les Pactes. Le gouvernement somalien indiquait que les différences entre les régions font qu'il est plus facile d'arriver à un accord quant à la garantie des droits de l'homme entre les États appartenant à une même région qu'entre tous les États membres de l'ONU, et elle déclarait, pour cette raison, son intention d'établir un système régional de protection des droits de l'homme dans le cadre de l'Organisation des États Africains [36].

Le problème de la protection des droits de l'homme sur le continent africain, et avant tout la question de la discrimination raciale et de l'apart-

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[35] Les textes des décisions et de la Déclaration dans *Basic Documents...*, pp. 431 - 439.

[36] U.N.Doc. A/5411/Add. 2.

heid, ont été discutés au cours de la Première Assemblée des Chefs d'États et de Gouvernements de l'O.U.A. au Caire en 1964. On n'est toutefois pas revenu à l'idée de la convention africaine des droits de l'homme.

La conception de l'établissement d'un système régional de protection internationale des droits de l'homme a été discutée avant tout lors de la conférence spéciale sur les droits de l'homme dans les pays en voie de développement, qui s'est déroulée en 1964 à Kaboul [37], ainsi qu'au cours du Congrès des Juristes de l'Afrique Francophone à Dakar en 1966 [38]. Cependant, ce problème n'a pas été commenté au forum des représentants des États, si bien qu'il reste jusqu'ici dans la sphère des discussions théoriques. Au cours des conférences citées ci-dessus on a souligné le besoin d'adopter une convention régionale, mais on a en même temps accentué l'adhésion à l'idée d'universalisme des droits de l'homme exprimée dans la Déclaration Universelle. La position des juristes africaíns — car ce sont eux qui, avant tout, prennent la parole en la matière — n'est donc pas sans équivoque.

On a, en faveur de l'adoption d'une convention régionale, les arguments suivants : le développement socio-économique, les relations sociales, les régimes politiques, le système juridique, les traditions et la culture de ces peuples qui s'opposent diamétralement à la situation en Europe ou en Amérique du Nord. Il ne faut pas oublier que seuls quatre États africains (Égypte, Éthiopie, Libéria, Afrique du Sud) ont pris part aux discussions sur la Charte des Nations Unies et sur la Déclaration Universelle. Cette Déclaration a été formulée sous l'influence décisive des conceptions européennes occidentales. Les Pactes des Droits de l'Homme sont, dans une large mesure, le résultat de la pensée marxiste. Et en ce qui concerne la situation des États africains, aucune de ces conceptions ne paraît admissible. Les notions de libertés individuelles et de droits politiques y sont bien souvent tout simplement inconnues. Au niveau actuel de développement socio-économique, où il est difficile de satisfaire aux besoins élémentaires, on ne peut s'attendre à la réalisation des droits figurant dans le Pacte Économique.

La confiance des peuples africains envers les traités internationaux de protection des droits de l'homme adoptés jusqu'ici n'est certainement pas grande. On rencontre en effet sur ce continent des cas de violation flagrante de ces droits et en même temps l'impuissance du mécanisme international de leur protection [39]. Cela influe sans doute sur une certaine aversion en-

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[37] Cycle d'études sur les droits de l'homme dans les pays en voie de développement, Kaboul 1964, U.N.Doc. ST/TAO/HR/21.

[38] « Bulletin de la Commission Internationale des Juristes », 1967, n° 29.

[39] K. M. Bay, *Les réalités du monde noir et les droits de l'Homme*, R. D. H., vol. II, 1970, n° 3, pp. 382 - 392. G. Mangin, *Les droits de l'Homme dans les pays de l'Afrique Francophone*, R. D. H., Vol. I, 1970, n° 3, pp. 453 - 470. L. O. Adegbite, *African*

vers le système universel. Il ne faut cependant pas oublier que c'est justement sur la proposition de l'Égypte qu'on a ajouté au Plan de Dumbarton Oaks, dans le passage déterminant les tâches de la future Organisation, l'expression : « [...] *to promote respect for Human Rights and fundamental Freedoms* » [40].

In y a donc beaucoup d'arguments en faveur de la signature d'une convention régionale. D'un autre côté, on souligne que « la dignité de l'Homme africain exige des normes aussi hautes que celles reconnues ailleurs ; que l'effritement de cette notion serait le signe d'une régression inadmissible. Les exigences fondamentales "de la primauté du droit" ne sont pas différentes de celles acceptées ailleurs, que les difficultés économiques, sociales, culturelles de l'Afrique d'aujourd'hui ne sauraient pas justifier l'abandon des principes fondamentaux de la primauté du droit » [41] Les Africains ont souligné à maintes reprises qu'ils ne sont pas des sous-hommes et qu'il ne convient pas d'établir pour eux des sous-normes.

En résumé, l'opinion sur le continent africain est la suivante : on accepte la conception d'une convention africaine des droits de l'homme, mais on souligne en même temps qu'elle devrait s'inspirer des idéaux universellement admis. La convention africaine ne doit ni concurrencer ni remplacer les conventions universelles; elle doit, dans un certain sens, constituer leur complément [42].

B. Autres régions et initiatives

L'idée de la signature d'une convention arabe des droits de l'homme a été émise pour la première fois au cours du Congrès des Juristes Arabes à Damas en 1960. En 1968, le Conseil de la Ligue Arabe a institué la Commission Arabe des Droits de l'Homme à laquelle on a attribué les tâches suivantes : a) développer l'activité des États vers le renforcement des droits de l'homme, b) protéger les droits de l'individu par l'accentuation de l'aspect humain de la cause arabe, c) développer la conscience et le respect des droits de l'homme parmi les nations arabes [43]. Ses compétences sont

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Attitudes to the International Protection of Human Rights, dans *Nobel Symposium...*, pp. 77 - 79.

[40] U. N. Conference on International Organisation, vol. III, p. 453.

[41] « Bulletin de la Commission Internationale des Juristes », pp. 5 - 6. Cf. également R. PINTO, *Régionalisme et universalisme dans la protection des droits de l'Homme*, dans *Nobel Symposium...*, pp. 185 - 187.

[42] Rapport de la Commission Consultative Africaine sur sa troisième session, Dakar, octobre 1967. Procès-verbaux du Conseil d'Administration du B. I. T., novembre 1967, § 38. Cf. également K. VASAK, *Les droits de l'Homme et l'Afrique*, « Revue Belge de Droit International », 1967, n° 2.

[43] Cf. à ce sujet S. MARKS, *La Commission Permanente Arabe des Droits de l'Homme*, R. D. H., Vol. III, 1970, n° 1, pp. 101 - 108.

donc pareilles à celles que possédait la Commission Américaine des Droits de l'Homme dans la première période de son fonctionnement. Ce sont, d'une manière générale, des compétences de promotion et non pas de protection des droits de l'homme.

Les Congrès des Juristes de l'Asie du Sud-Est et du Pacifique, qui se sont déroulés en 1965 à Bangkok et en 1966 à Ceylan, ont discuté entre autres de la protection régionale des droits de l'homme sur ces territoires. Une convention à ce sujet devrait englober l'Asie du Sud-Eest et les pays du Pacifique ainsi que l'Inde, le Japon et les Philippines. Ces deux congrès, tout comme les congrès africains, ont été organisés sous les auspices de la Commission Internationale des Juristes. Les opinions sur les perspectives réelles de la signature d'une telle convention régionale étaient plutôt pessimistes. On soulignait surtout les grandes différences politiques, socio-économiques et idéologiques qui séparent les États de cette région géographique [44].

On discute également de la possibilité d'adopter des conventions qu'il faudrait appeler sub-régionales. Ainsi Freedom through Law a préparé un projet de Central American Convention qui s'inspire, dans une large mesure, de la Convention Européenne. En 1964, le Central American Jurists Chapter réuni au Nicaragua, a discuté de ce projet.

L'une des principales organisations britanniques de juristes — Justice — a analysé le besoin de signer la Human Rights Convention for Commonwealth. La langue commune et la ressemblance des systèmes politiques étaient les arguments fondamentaux de l'adoption d'une telle convention.

C. Les initiatives régionales dans l'ONU

La question de la protection régionale des droits de l'homme est depuis peu à l'ordre du jour des débats des Nations Unies. Cela s'exprime avant tout par la prise de contacts directs entre la Commission des Droits de l'Homme et les organisations régionales (Conseil de l'Europe, Organisation des États Américains, Ligue Arabe) dans le domaine des droits de l'homme. En outre, en 1967, la Commission des Droits de l'Homme a institué un groupe spécial d'experts dans le but d'étudier la possibilité et la nécessité de créer dans le cadre de l'ONU des commissions régionales des droits de l'homme dans les régions où il n'en existe pas encore. Il s'agit ici de l'Afrique, de l'Asie, de l'Océanie et des États socialistes. Ce groupe n'a pas pris nettement position. Cependant, en 1969, la Commission des Droits de l'Homme a adressé au Secrétaire Général une proposition d'organiser des cycles

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[44] « Bulletin de la Commission Internationale de Juristes », Vol. 26, juin 1966, pp. 11 - 17.

d'études régionaux sur la question de la création de commissions régionales des droits de l'homme [45]. Le premier de ces cycles d'études s'est déroulé au Caire en 1969 ; ses participants ne siégeaient pas en tant que représentants de leurs gouvernements. On y a reconnu le besoin de créer une commission africaine des droits de l'homme dont la tâche serait de promouvoir les droits de l'homme. On a informé de cette position le Secrétaire Général de l'O.U.A. et les gouvernements des États membres en vue de prendre les mesures nécessaires à la création d'une telle commission [46]. En 1970, la Commission Économique de l'ONU pour l'Afrique, en collaboration avec l'O.U.A., a organisé une conférence sur l'African Legal Process and the Individual, au cours de laquelle on a également discuté de la question de la création de la Commission Africaine des Droits de l'Homme [47].

La Commission Interaméricaine des Droits de l'Homme et le Comité des Ministres du Conseil de l'Europe ont présenté à la Commission des Droits de l'Homme de l'ONU leurs opinions sur l'obligation et l'application simultanées des dispositions sur le contrôle international contenues dans les Pactes et dans les deux conventions régionales [48]. Lors de la 26e session de la Commission des Droits de l'Homme, cette question a été largement discutée, mais aucune résolution n'a été adoptée en la matière [49]. Au cours de la Conférence Internationale des Droits de l'Homme à Téhéran, on a présenté un projet de résolution concernant « la nécessité de coordonner les différents mécanismes de mise en oeuvre créés par les traités internationaux, soit universels soit régionaux, et par les résolutions des organisations internationales en matière de droits de l'homme, afin d'éviter des doubles emplois et d'éventuelles contradictions entre les évaluations des divers organes de mise en oeuvre » [50].

A travers les exemples cités, on voit clairement la tendance à la régionalisation de la protection internationale des droits de l'homme. Il est un fait caractéristique que cette tendance gagne en popularité justement après l'adoption universelle des Pactes des Droits de l'Homme. Les initiatives tendant à la protection régionale des droits de l'homme proviennent, d'une

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[45] K. VASAK, *Vers la création de commissions régionales des droits de l'Homme*, dans Problèmes de la protection..., p. 467 - 468.

[46] *A Commission on Human Rights for Africa*, H.R.D.H., Vol. II, 1969, n° 4, pp. 696 - 702.

[47] Economic and Social Council, Doc. E/CN. 14/521, 5 July 1971.

[48] Communication de la Commission Interaméricaine des Droits de l'Homme, N. U. Doc. E/CN. 4/L. 1042/Add. 1, 26 février 1969. Communication du Conseil de l'Europe, N. U. Doc. E/CN. 4/1057/Add. 1, 23 décembre 1970.

[49] Comptes rendus des 1064e et 1065e séances de la Commission des Droits de l'Homme, Doc. E/CN. 4/SR. 1064, 1065.

[50] Acte final de la Conférence Internationale des Droits de l'Homme, Téhéran A/Conf. 32/41, p. 53.

part, des organisations régionales et d'autre part, ce qui est particulièrement caractéristique, de l'Organisation des Nations Unies.

De ces considérations découle la question de savoir quels sont les arguments en faveur du régionalisme et quels sont ceux en faveur de l'universalisme de la protection internationale des droits de l'homme. Comment concilier ces deux tendances ?

5. Les partisans du régionalisme

Parmi les arguments parlant en faveur des systèmes régionaux de protection des droits de l'homme on doit citer avant tout la diversité du monde contemporain. Ces différences se situent au niveau du développement économique, des relations sociales, du régime politique, de l'idéologie, des systèmes juridiques et de la culture juridique, des moeurs, de la religion, etc. En conséquence, la garantie par tous les États des mêmes droits et libertés s'avère extrêmement difficle, parfois même impossible. La Déclaration Universelle des Droits de l'Homme a été adoptée, il est vrai, avec enthousiasme, mais il ne faut pas oublier que cela a eu lieu dans une atmosphère propice à ce genre d'actes. Le souvenir des atrocités de la Seconde Guerre mondiale était encore vivant. En outre, la Déclaration n'imposait pas aux États d'obligations juridiques. Les Pactes des Droits de l'Homme ont été adoptés à l'unanimité, mais ils ont attendu dix ans le nombre de ratifications nécessaire à leur entrée en vigueur.

Les premiers États qui ont ratifié les Pactes sont le Chili, la Colombie, la Costa Rica, l'Équateur, ensuite le Kenya, la Libye, la République Malgache, la Tunisie, donc des États dont le régime politique ne répond pas en principe aux exigences du Pacte Politique et dont le niveau de développement socio-économique ne permet pas la réalisation des décisions du Pacte Économique. Le nombre de ratifications est donc un indice assez douteux du degré de réalisation des conventions concernant les droits de l'homme. Il arrive également qu'un État ne ratifie pas la convention bien que le niveau de protection des droits n'y soit pas pire ; il y est parfois même meilleur que ne le prévoit la convention, et cela du fait d'une régulation différente dans son droit interne de certaines questions souvent de deuxième plan ou de procédure.

Dans le Pacte Politique figurent des droits et des libertés qui sont garanties par la législation de la majorité des pays ou au sujet desquels existe la certitude qu'ils doivent être garantis juridiquement. Il s'agit ici avant tout des libertés individuelles, de la sécurité, de la liberté d'expression, du secret de la correspondance, mais non pas de la liberté de conscience et de religion. Ainsi, par exemple, l'Arabie Saoudite a voté contre la Décla-

ration Universelle du fait justement d'une telle disposition sur la liberté de conscience et de religion. Les longues discussions qui ont précédé l'adoption de la Convention Americaine des Droits de l'Homme étaient dues pour une large part à la diversité des systèmes et des traditions juridiques des différents États. L'ensemble des droits politiques dépend de la base juridique du régime et de l'idéologie régnant dans un pays donné.

Le Pacte Politique consacre relativement peu d'attention aux droits politiques, et les dispositions qui en font mention sont rédigées d'une manière assez générale. Des dispositions plus détaillées seraient inadmissibles à l'échelle universelle, car elles exigeraient l'adoption d'une même conception du système politique. Et il n'y a pas encore de conception aussi universelle.

Lorsque pour la première fois un projet de convention sur le statut de la femme a été émis par la Commission des Droits de la Femme, la majorité des membres du Conseil Économique et Social s'y est opposée. Leur argument était que l'émancipation de la femme est un problème si étroitement lié à la tradition et à la culture, et même à la moralité des différents peuples, qu'il est impossible de régler d'une façon uniforme par le moyen d'un accord mondial [51].

La diversité du niveau de développement socio-économique des différents États fait que les conventions qui constitueraient une résultante des possibilités de tous les pays, seront tout simplement inutiles, et les conventions dans lesquelles le niveau de protection des droits est adapté aux possibilités des pays hautement développés, seront pour les autres pays un idéal impossible à atteindre.

Face aux difficultés du genre de celles indiquées ci-dessus à titre d'exemple, bon nombre d'auteurs est d'avis que seules les conventions régionales sont efficaces. Elles permettent d'établir un catalogue de droits et de libertés correspondant au niveau de développement socio-économique, au régime politique et à l'idéologie d'un groupe d'États donne. Il est plus facile, au niveau régional, de tomber d'accord sur les mesures d'implémentation et de contrôle international. L'expérience de certaines régions peut être utilisée par d'autres. Les conventions régionales ne signifient pas automatiquement que le niveau de protection des droits est inférieur à celui prévu dans les conventions universelles. Au contraire, elles peuvent, tout au moins pour certains droits et libertés, prévoir une protection plus large et plus efficace [52].

L'exemple auquel se réfèrent d'habitude les partisans du régionalisme est la Convention Européenne des Droits de l'Homme. Les pays membres

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[51] Economic and Social Council, Ninth Session, Official Records, E/AV.7/SR. 132.
[52] R. PINTO, *Régionalisme et universalisme...*, pp. 190 - 192.

du Conseil de l'Europe (et donc ceux auxquels est ouverte la convention) ont des régimes politiques semblables. Le niveau de leur, developpement socio-économique est, il est vrai, différencié, mais les principes de leur activité économique sont les mêmes. En plus, ces États collaborent dans le cadre d'autres accords internationaux. Il n'y a pas entre ces États de conflits militaires ou politiques. Leurs société appartiennent à une même civilisation et à une même culture. La convention régionale est, dans une telle situation, un instrument supplémentaire d'intégration internationale. Il semble difficile de diviser le reste du monde en régions géographiques dans lesquelles on puisse établir des systèmes de protection des droits de l'homme pareils au système européen. C'est pourquoi on rencontre diverses conceptions et le terme « régionalisme » est employé aussi bien dans le sens géographique que politique.

A. Eide considère la possibiltité, de créer, à côté des systèmes de protection des droits de l'homme sub-régional (Convention Européenne) et universel (Pactes), un système européen qui engloberait tous les États de ce continent. Toutefois il est d'avis que la Convention Européenne ne peut être admise par les États socialistes, aussi la création d'un système européen de protection des droits de l'homme peut-ci être atteint par deux voies : premièrement, par l'adoption d'une nouvelle convention paneuropéenneet, deuxièmement, par la ratifiaction unanime des Pactes. La ratification unanime des Pactes a pour but, selon l'auteur, de créer une base permettant à l'avenir d'établir un système paneuropéen uniforme de protection des droits de l'homme [53]. Le développement de la collaboration économique, culturelle, scientifique, etc., crée des conditions favorables à un tel accord. L'auteur de cette conception est d'avis que le système de protection des droits de l'homme doit s'appuyer sur le respect des différences fondamentales entre les régimes politiques, les idéologies et les conceptions des droits de l'homme de l'Est et de l'Ouest. L'un des problèmes fondamentaux qui est apparu au cours des discussions sur cette conception, était la solution institutionnelle de cette protection paneuropéenne des droits de l'homme. On a proposé plusieurs institutions, à savoir la Commission Économique Européenne de l'ONU (A. Eide), l'UNESCO en tant qu'organisation qui, de plus en plus, prend les initiatives dans le domaine de la coopération culturelle, et les droits de l'homme sont bien un des éléments de la culture (K. Vasak), et enfin l'O.I.T. du fait de l'expérience qu'elle possède dans le domaine de la protection des droits de l'homme (M. Lannung) [54]. Au cours de cette discussion, on a déclaré presque unanimement qu'il est essentiel que tous les États européens ratifient les Pactes.

[53] A. Eide dans la discussion « Droits de l'Homme et coopération paneuropéenne », R. D. H., Vol. V, 1973, n° 4, pp. 743 - 748.

[54] K. Vasak, M. Lannung, *ibidem*, pp. 748 - 756.

Les Pactes doivent constituer la base normative du système européen et les principes qui y sont formulés doivent être admis par la Convention Européenne.

Malgré les différences qui séparent les États capitalistes et les États socialistes européens, on entrevoit la possibilité de la signature d'une convention commune. D'autre part, on propose que les États socialistes adoptent une convention à part. R. Pinto montre les avantages qui découlent d'une telle convention pour une meilleure protection des droits de l'homme, il présente même certaines propositions quant à son mécanisme d'implémentation [55]. Il semble, bien que l'auteur ne le dise pas clairement, qu'il s'agit ici d'une convention dont les parties seraient uniquement les États socialistes européens.

La première conception peut être appelée régionalisme géographique, la deuxième — régionalisme politico-géographique. En ce qui concerne la réalisation de la première conception, à part les membres de la Convention Européenne, il ne resterait que les États capitalistes démocratiques hautement développés (États-Unis, Canada) qui ressemblent, sous de nombreux aspects, aux pays d'Europe Occidentale. Dans la deuxième conception, la place des États socialistes extra-européens n'est pas clairement définie.

L'un des arguments en faveur des conventions régionales des droits de l'homme est constitué par les expériences qui découlent du fonctionnement de la Convention Européenne. Personne ne met en doute l'importance qu'elle a eue et qu'elle a encore pour la protection internationale des droits de l'homme. Cette convention ne se différencie pas catégoriquement des Pactes et il ne semble pas qu'elle puisse être un obstacle à l'adoption unanime des Pactes par les États membres du Conseil de l'Europe. La Convention Américaine s'inspire dans une certaine mesure de la Convention Européenne et, de plus, ses dispositions ont été, au cours des travaux d'élaboration, confrontées avec les Pactes [56].

L'idée de la signature d'autres conventions régionales des droits de l'homme est actuellement la plus populaire en Afrique et dans les pays arabes, donc là où il existe des organisations régionales qui remplissent les fonctions d'intégration, et cela dans divers domaines de la vie sociale, politique, économique et culturelle. Il semble que les futures conventions des droits de l'homme ne peuvent être adoptées que dans le cadre de ce genre d'organisations. Les conventions qui s'appuient uniquement sur le principe du voisinage géographique des États sont, d'après moi, destinés au fiasco.

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[55] R. Pinto, *Régionalisme et universalisme..., loc. cit.*

[56] Le Conseil de l'O. E. A. a décidé que le projet de la Convention Américaine des Droits de l'Homme doit être « en harmonie aves les Pactes de l'ONU ». O. A. S. Council, Decisions Taken at the Regular Meeting held on June 12, 1968, O. A. S./Ser. G./III/C - 670.

Les conventions s'appuyant uniquement sur le principe du régionalisme politique semblent, elles aussi, inopportunes. Il y a en effet trop de différences entre les États capitalistes pour qu'une telle convention soit effective.

Il existe donc, dans le cadre des organisations régionales, des conditions propices à des futures conventions des droits de l'homme. Mais une autre question se pose : les conventions régionales des droits de l'homme ne vont-elles pas entraîner l'abaissement du niveau de protection des droits reconnus dans les Pactes ? Les différences qui séparant les États du monde contemporain signifient-elles qu'il existe de nombreuses conceptions différentes des droits de l'homme, ou bien si, indépendamment de ces différences, la conception de ces droits est commune pour toute la société du monde d'aujourd'hui ?

6. Les partisans de l'universalisme

Les arguments employés par les partisans des traités universels me semblent moins persuasifs que les arguments en faveur du régionalisme. Il est possible que cela provienne du fait que de nombreux arguments en faveur du régionalisme sont confirmés par le fonctionnement dans la pratique de la Convention Européenne. Les chances de l'entrée en vigueur du mécanisme de contrôle qui est prévu dans les Pactes sont estimées d'une manière plutôt pessimiste.

L'argumentation des partisans des conventions universelles, qui sont en même temps opposés au régionalisme, contient l'idée d'une communauté humaine mondiale et le postulat que certains principes des relations sociales soient communs à tous les pays sans égard aux différences qui les séparent. La Déclaration Universelle constitute un exemple de l'acceptation unanime de certains principes. Il est un fait que la Déclaration a exercé une grande influence sur le droit interne de nombreux pays. Ce sont, en particulier, les pays du Tiers Monde qui ont manifesté leur adhésion aux principes de la Déclaration, on s'y réfère à maintes reprises dans les préambules des constitutions. La Déclaration a eu une importante influence sur les travaux des Nations Unies sur la codification, sous forme de traités, des principes de la protection internationale des droits de l'homme, elle a dirigé l'activité des organisations spécialisées [57]. La pratique prouve, cependant que l'acceptation des principes de la Déclaration n'est souvent

[57] Il est bon de rappeler que, pendant 19 ans, la Déclaration a été citée 75 fois dans les résolutions de l'Assemblée Générale. S. BLEICHER, *The Legal Significance of General Assembly Resolutions*, AJIL, Vol. 63, 1969, p. 444.

qu'une pure formalité n'influant en aucune manière sur l'activité des États. Ce fait affaiblit la valeur de l'argumentation des partisans de l'universalisme.

Ce sont avant tout les représentants de la science des pays socialistes qui se montrent hostiles aux conventions régionales. Ils expriment la crainte que ces conventions mènent à une fragmentation encore plus grande du monde, à la création d'enclaves possédant leurs propres catalogues de droits de l'homme [58]. Les conventions régionales peuvent conduire à l'adoption de normes exprimant différents degrés de protection des droits qui y sont inclus, ce qui accroîtrait les différences existantes. En contrepartie, les conventions universelles peuvent constituer un instrument de nivellement graduel de ces différences [59]. En outre, le renoncement aux conventions universelles en faveur des conventions régionales mène à l'affaiblissement et à la dispersion des efforts internationaux pour la protection des droits de l'homme [60].

Face au fait qu'il existe, à côté du système universel, des systèmes régionaux de protection des droits de l'homme, on a affaire non pas tellement au problème du choix entre ces systèmes, mais plutôt au problème de leur coordination, ainsi qu'au problème de l'opportunité de l'adoption d'autres conventions régionales.

7. Conclusions: l'union de l'universalisme et du régionalisme

A. L'analyse de l'efficacité des conventions universelles et régionales doit être précédée de la réponse à la question de savoir si, dans le monde contemporain, il existe une conception universelle des droits de l'homme, ou s'il en existe de nombreuses conceptions. A mon avis, malgré les différences de régimes politiques, économiques ou autres, il n'y a pas d'importantes différences dans les conceptions quant au catalogue de droits fondamentaux de l'homme. La preuve la plus évidente de cette uniformité des conceptions est l'adoption unanime des Pactes des Droits de l'Homme. La raison de l'adoption des conventions régionales ne provient pas des différences d'opinions sur les questions fondamentales. Il existe de nombreuses différences entre les pays de l'O.E.A. et les États capitalistes européens,

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[58] I. Szabó, *The Theoretical Fundation of Human Rights*, dans *Nobel Symposium...*, p. 295. R. Bystricky, *The Universality of Human Rights in a World of Conflicting Ideologies*, dans *Nobel Symposium...* (intervention dans la discussion).

[59] J. Rosner, *Międzynarodowa polityka społeczna* [*La politique sociale internationale*], Warszawa 1967, p. 325. L'auteur considère ici les avantages qui découlent de l'application universelle des normes de l'O.I.T.

[60] P. Radoinow, *La protection internationale des droits de l'Homme*, dans *La République Populaire de Bulgarie...*, pp. 117 - 118.

mains les deux conventions s'inspirent de la même conception de droits de l'homme et formulent des droits identiques ou resemblants. De plus, les deux conventions ont une forte dose de similitude avec les Pactes. Bien entendu, il existe des différences dont certaines ont été commentées ci-dessus. Il semble toutefois que lorsqu'on compare les Pactes et les deux conventions régionales, on accentue trop souvent les différences et on montre trop rarement les analogies. Certaines différences qui existent entre les textes des conventions universelles et régionales ne signifient pas pour autant qu'elles sont dues à des conception politico-idéologiques différentes [61]. Dans certaines régions géopolitiques ou à certaines périodes dans différents pays, différents droits peuvent être considérés comme prédominants. Ainsi, dans les pays socialistes on a longtemps placé au premier plan les droits socio-économiques ; en conséquence, les droits politiques et les libertés individuelles étaient rejetés au deuxième plan et insuffisamment réalisés. Cette situation était due aussi bien à la configuration des forces politiques dans les différents pays qu'au niveau de développement socio-économique.

La conception occidentale contemporaine et la conception socialiste des droits de l'homme possèdent plus de traits communs que de différences. Les deux conceptions présentent le même catalogue des libertés individuelles, des droits politiques et socio-économiques fondamentaux. L'accent n'est pas toujours mis pareillement sur différentes catégories de droits, il y a également des différences au niveau des méthodes de réalisation et de garantie. Mais ces différences existent également entre les États possédant des régimes socio-économiques semblables. L'analogie des principes fondamentaux des conceptions occidentale et socialiste est assez grande pour ne pas exclure la possibilité d'un accord à l'échelle universelle. L'opportunité ou la nécessité de l'adoption d'une convention socialiste des droits de l'homme ne peut être motivée par les différences d'opinions quant aux principes fondamentaux. Ces différences concernent soit des questions de deuxième plan soit les méthodes de réalisation des droits de l'homme, soit les mesures d'implémentation.

Rencontre-t-on dans d'autres régions du monde, où on propose la signature des conventions des droits de l'homme, des conceptions et des idéologies si spécifiques qu'elles excluent la possibilité d'un accord de caractère universel ? L'argumentation des partisans du régionalisme prouve que ce ne sont pas les différences idéologiques qui jouent le rôle le plus important. Les conventions régionales sont considérées comme une étape vers un ac-

[61] I. Szabö, *La porteé juridique de la Déclaration*, « Revue de Droit Contemporain », Bruxelles 1968, n° 1, pp. 46 - 48. N. Valticos, *Universalité des droits de l'Homme et diversité des conditions nationales*, dans *Problèmes de la protection...*, pp. 384 - 389.

cord à l'échelle universelle. Le régionalisme des droits de l'homme n'est pas un but en lui-même, et les conventions régionales ne doivent pas conduire à la création d'enclaves isolées dans le domaine des droits de l'homme. Au contraire, on souligne bien souvent le fait que les conventions régionales ne peuvent en aucun cas freiner les tendances universalistes. Il est nécessaire que les principes fondamentaux de ces conventions soient conformes aux conventions universelles. Les normes régionales peuvent compléter et modifier certaines dispositions des normes universelles, mais elles ne doivent pas signifier le renoncement à ces dernières [62]. Il n'existe donc pas d'opposition nette entre les partisans de l'universalisme et du régionalisme. Les uns et les autres semblent être d'accord sur le fait que la Déclaration Universelle et les Pactes des Droits de l'Homme formulent des principes qui doivent être admis à l'unanimité. Les partisans du régionalisme semblent juger plus réellement les difficultés que va rencontrer, pendant de nombreuses années, la réalisation des Pactes. D'où la proposition des conventions régionales qui ont pour but de fonctionner pendant une période de transition. Les partisans de l'universalisme craignent que les conventions régionales ne retardent la réalisation des conventions universelles.

L'objet des discussions entre les partisans du régionalisme et de l'universalisme n'est pas le texte des droits fondamentaux de l'homme, mais plutôt les possibilités et les méthodes de leur réalisation. Aussi les Pactes sont-ils considérés comme un ensemble de principes dont le texte ne prête pas à discussion.

B. Les Pactes des Droits de l'Homme imposent aux États d'énormes exigences surtout dans le domaine des droits socio-économiques. En outre, le manque dans les Pactes de clauses qui rendraient plus élastiques tout au moins certaines dispositions, provoque la lenteur de leur ratification. Les États hautement développés, au régime démocratique stabilisé, ne sont pas encore en état d'assurer leur réalisation immédiate et absolue. Aussi faut-il avoir à l'esprit que les Pactes, et ceci pour de nombreuses années encore, rempliront la fonction de « buts à atteindre » et non pas de normes juridiques dont la réalisation pût être exécutée juridiquement. Le haut niveau de protection des droits de l'homme prévu dans les Pactes fait que les chances d'entrée en vigueur des dispositions sur le contrôle international sont modestes. Je pense ici non pas tellement aux rapports des États, mais plutôt aux communications et aux requêtes individuelles. Dans cette situation, les conventions régionales peuvent réellement contribuer au rapprochement des différentes régions aux exigences

[62] P. Modinos, *Coexistence de la Convention Européenne des Droits de l'Homme et du Pacte relatif aux droits civils et politiques des Nations Unies*, R. D. H., Vol. I, 1968, n° 1, pp. 41 - 69.

des Pactes. Mais il semble qu'il existe une autre voie plus efficace de réalisation de la conception de l'universalisme des droits de l'homme. Ce sont, d'après moi, les conventions concernant un ou plusieurs droits ayant un trait commun, adoptées dans le cadre de l'O.N.U., de l'O.I.T. ou de l'UNESCO.

Un fait à remarquer est que, dans les discussions sur l'universalisme et le régionalisme, on prend en considération uniquement les Pactes des Droits de l'Homme. On n'y mentionne pas de conventions adoptées dans le cadre soit de l'ONU soit des institutions spécialisées qui, du point de vue de leur domaine d'application, sont également des actes universels. Je pense que ce sont justement ces conventions qui peuvent contribuer à l'interprétation uniforme des Pactes, et leur réalisation unanime créera les conditions nécessaires à l'adoption universelle des Pactes. Les conventions concernant un ou plusieurs droits remplissent un rôle quasi-exécutif par rapport aux Pactes. Leur texte ne dépasse pas, en général, celui des principes exprimés dans les Pactes. Les conventions de l'O.I.T., de l'UNESCO ou autres concernant les droits de l'homme et conclues sous les auspices de l'ONU, développent et précisent les dispositions des Pactes. Leurs dispositions sont rédigées d'une manière beaucoup plus précise que celles des Pactes. En conséquence, il est plus facile de déterminer le degré de conformité du droit interne aux conventions particulières. Ces conventions entrent en vigueur relativement rapidement du fait — au contraire des Pactes — du petit nombre de ratifications exigées. Pour les États qui les ratifient, elles sont la source d'obligations juridiques internationales clairement définies, pour les autres qui ont l'intention d'y accéder dans l'avenir — elles montrent dans quel sens il convient de modifier la législation afin d'assurer sa conformité à la convention. Ces conventions imposent aux États des obligations dans une partie relativement étroite des relations sociales. La réalisation graduelle des conventions particulières permet à l'État de se préparer à la réalisation des Pactes. Un État qui, actuellement, ne veut ou ne peut pas réaliser certains droits figurant dans les Pactes et qui réalise le reste, peut, par crainte d'être accusé de ne pas remplir ses engagements internationaux, s'abstenir de ratifier les Pactes. Une telle position est compréhensible du fait du manque dans les Pactes de clauses permettant leur réalisation partielle ou leur ratification avec réserves. Les conventions particulières sont, d'après moi, un moyen efficace de réaliser l'idée de l'universalisme des drotits de l'homme. Ces conventions peuvent également constituer une sorte de pont entre les Pactes et les conventions régionales. Leur réalisation par des États qui possèdent des régimes politiques et des systèmes socio-économiques différents devrait permettre la résorption graduelle des différences qui constituent l'argument fondamental en faveur des conventions régionales. Ces conventions

peuvent également contribuer à l'uniformisation de l'interprétation et de l'application des différentes dispositions. Aussi semble-t-il que les efforts de la société internationale doivent aller vers l'accroissement du nombre des conventions spéciales plutôt que vers le régionalisme de la protection internationale des droits de l'homme [63].

Les résolutions et les déclarations des organes de l'ONU peuvent remplir une fonction semblable. Le fait qu'elles n'imposent pas aux États d'obligations juridiques, est ici une question de deuxième plan ; la preuve en est fournie par l'importance de la Déclaration Universelle. Les actes ne possédant pas de force juridique peuvent préparer efficacement le terrain pour une future convention internationale, ils peuvent contribuer à la création d'une ambiance internationale propice. Cela a été le cas de la Déclaration des Nations Unies sur l'élimination de toute forme de discrimination raciale, qui a précédé l'adoption de la convention.

C. Les droits traditionnels de l'homme sont actuellement enrichis d'une série de nouveaux postulats. Ainsi parle-t-on de plus en plus souvent du droit à la vie dans un milieu sain et non pollué ; on postule donc, en conséquence, la protection de ce milieu, la protection des réserves naturelles, etc. Le développement de la science et de la technique permet la réalisation plus rapide de nombreux droits, et surtout des droits socio-économiques. D'un autre côté, il entraîne un certain danger pour les libertés individuelles. Il s'agit ici, par exemple, des expériences médicales, de l'exploitation de l'acquis de la biochimie, de l'exploitation d'installations électroniques qui entraînent le danger de violation du *right to privacy*, etc.[64]. Ces nouveaux droits n'entrent pas dans les catégories philosophico-politiques traditionnelles. Tous les peuples, sans distinction de régime politique ou socio-économique, ont sans doute intérêt à ce qu'ils soient protégés. Ces droits ne peuvent être assurés que par le commun effort de tous les individus, de toutes les sociétés et de tous les États. Ce sont les droits de solidarité considérés comme « droit international des droits de l'homme » [65]. Aussi les

[63] Cf. avant tout : N. VALTICOS, *Les normes de l'Organisation Internationale du Travail en matière de protection des droits de l'Homme*, R. D. H., Vol. IV, 1971, n° 4, pp. 691 - 837; IDEM, *Universalité des Droits de l'Homme et diversité des conditions nationales*, dans *Problèmes de la protection...*, pp. 383 - 403.

[64] Cf. à ce sujet R. BYSTRICKY, *Quelques remarques sur la révolution scientifique et technique et les droits de l'Homme*, dans *Problèmes de la protection...*, pp. 16 - 28. M. ROLLAND, *Le respect de l'homme et l'expérimentation médicale, ibidem*, pp. 247 - 267. H. EEK, *Some Reflection on the Development of the International Human Rights Law and on the Impact on that Law of Scientific Developments*, R. D. H., Vol. IV, 1971, nos 2 - 3, pp. 443 - 453. R. BYSTRICKY, *Réflexions à propos d'une déclaration sur la science, la technologie et les scientifiques*, R. D. H., Vol. IV, 1972, nos 2 - 3, pp. 315 - 332.

[65] K. VASAK, *Le droit international des droits de l'Homme*, R. D. H., Vol. V, 1972, n° 1, pp. 43 - 51.

conventions universelles semblent-elles ici plus opportunes que les conventions régionales.

D. Plus de trente ans d'activité de l'Organisation des Nations Unies dans la protection internationale des droits de l'homme montre que certains principes sont universellement adoptés. Parmi eux il faut citer en premier lieu le lien étroit entre le maintien de la paix dans le monde et la protection des droits de l'homme. C'est une corrélation bidirectionnelle. Un accord international dans le domaine des droits de l'homme ainsi que sa réalisation dépendent, dans une large mesure, de la configuration des forces dans l'arène internationale, des relations entre les États. La collaboration internationale harmonique constitue la base de la réalisation des droits de l'homme qui, à son tour, est l'une des garanties élémentaires de la paix et de la sécurité durables dans les relations entre les États. L'atmosphère de détente internationale et les efforts mondiaux vers la consolidation de la paix créent des conditions favorables aux conventions universelles. Le développement de la collaboration internationale entre les États possédant des régimes et des niveaux de développement socio-économique différents, peut être la base d'une collaboration en vue de la protection des droits de l'homme. Cette circonstance parle également en faveur des conventions universelles.

E. On ne peut donner de réponse à la question de savoir si ce sont les conventions universelles ou les conventions régionales qui assurent une protection plus efficace des droits de l'homme ; cela dépend d'une foule de facteurs divers. Les conventions régionales peuvent apporter beaucoup d'avantages, ce qui ne signifie pas qu'il faille les multiplier à tout prix. Il est bon de rappeler qu'en 1953 on a proposé à l'Assemblée Générale que les efforts de l'Organisation, face aux différences séparant les États, aillent vers la signature des conventions régionales [66]. Cette proposition a rencontré une vive critique, principalement de la part des États sous-développés (Irak, Afghanistan, Philippines). L'un des arguments en faveur de la continuation des travaux sur la convention universelle était l'adoption unanime de la Déclaration Universelle.

Lorsqu'au forum de l'Assemblée Générale et du Troisième Comité on a discuté de l'amendement au projet des Pactes, amendement qui concernait les conventions régionales, le gros de l'opposition est provenu des États asiatiques et africains. Il est un fait à remarquer que la protestation contre cet amendement venait d'États qui n'étaient pas liés par une convention régionale, mais envers lesquels existaient déjà des intentions et des initiatives de ce genre. Il s'est formé au sein des représentants de ces États deux positions envers les conventions régionales. Les uns étaient d'avis que l'in-

[66] La proposition émise par le représentant de la Hollande, appuyéée par le représentant de la Grande-Bretagne : U. N. Doc. A/C. 3/SR., pp. 518 - 529.

clusion dans les Pactes d'une disposition concernant les conventions régionales serait un encouragement à la signature des traités particuliers non conformes aux Pactes. La position des autres était que les conventions régionales doivent régler les problèmes spécifiques d'un groupe d'États donné ; l'inclusion dans les Pactes de toute clause à ce sujet est donc inopportune. Certains États motivaient leur opposition par la crainte d'un certain genre de subordination des Pactes aux conventions régionales, c'est-à-dire, en pratique, à la Convention Européenne [67].

Il n'y a donc pas, sur les continents africain et asiatique, d'uniformité des conceptions au sujet d'une éventuelle convention régionale des droits de l'homme. En même temps, ses partisans soulignent nettement qu'elle doit s'appuyer sur les mêmes principes que les Pactes. Il semble donc que c'est un argument supplémentaire en faveur de l'universalisme.

F. Les travaux débutés par la Commission des Droits de l'Homme peuvent entamer une nouvelle étape de la collaboration internationale en matière de protection des droits de l'homme. Je pense ici au projet de création des commissions régionales des droits de l'homme. De telles commissions, possédant des compétences dans le domaine de la promotion des droits de l'homme, devraient fonctionner auprès des organisations régionales, ce qui en ferait des agents de liaison entre une organisation donnée et l'ONU pour toutes les questions concernant les droits de l'homme. K. Vasak a formulé des propositions détaillées à ce sujet [68]. Les expériences fournies par le fonctionnement de la Commission Américaine des Droits de l'Homme pendant la période précédant l'adoption de la convention, parlent en faveur de l'opportunité de la création de telles commissions.

La décision de créer des commissions régionales des droits de l'homme peut satisfaire aussi bien les partisans du régionalisme que ceux de l'universalisme. Ces commissions permettent la coordination des efforts régionaux tendant à assurer graduellement le respect universel des droits de l'homme. En même temps, elles veilleront à la réalisation des Pactes sur le plan régional.

Les Pactes des Droits de l'Homme constituent la première tentative, à une grande échelle, de création d'un système universel et effectif de la protection internationale des droits de l'homme. Ils ont été entrepris dans la perspective d'un lointain avenir. Les grandes exigences imposées par les Pactes doivent être un encouragement à la recherche de nouvelles méthodes de leur réalisation, à la continuation des efforts dans l'arène internationale. Les principes exprimés dans les Pactes sont en effet proches à toute la société internationale, sans égard aux différences qui les séparent aujourd'hui.

[67] U. N. Doc. A/C. 3/SR., pp. 1432 - 1434.

[68] K. Vasak, *Vers la création...*, pp. 467 - 478.

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The Right of a State to International Intercourse

by ANDRZEJ CAŁUS

I. Introduction

For the past several centuries the problem of rights and duties of States to participate in international intercourse has remained one of the main topics in the practice of international relations as well as in the science of international law. When considering the opinions of the first theoreticians of international law one can quite rightly assume that one of the principal reasons of the eventful development of international law and its science from the 16th and 17th century onwards was the necessity of creating the legal foundations for the maintenance and expansion of international political and economic relations. The founding fathers of the Law of Nations were very much interested to know whether and to what extent a State is duty bound to open its borders to foreign merchants or to receive foreign envoys. More important still was the question of the very right of a State to enter into and to maintain economic or political relations with other States.[1]

Two differing concepts regarding the position of a State in international intercourse are clearly apparent in the science of international law and in

[1] See, for instance, A. GENTILIS, *De iure belli libri tres* English translation by J. C. Rolfe, edited 1612, Oxford 1933, vol. 2, pp. 86–90 ; A. GENTILIS, *De legationibus*, English translation by G. J. Laing from the 1594 edition, New York 1924, vol. 2, pp. 69–70, and 94–95, H. GROTIUS, *De iure belli ac pacis libri tres*, Polish translation by R. Bierzanek from the 1646 edition, Warszawa 1957, vol. 1, pp. 267–275, vol. 2, pp. 21, 22 ; S. PUFENDORF, *De jure naturae et gentium libri octo*, translated by W. A. Oldfather from the 1688 edition, London 1934, vol. 2, pp. 354, 358, 363–365 ; S. RACHEL, *De jure naturae et gentium dissertationes*, English translation by J. P. Bate from the 1676 edition, Washington 1916, vol. 2, pp. 194–195 ; R. ZOUCHE, *Iuris et iudici faecialis sive iuris inter gentes et quaestionum de eodem explicatio*, English translation by J. L. Brierly from the 1650 edition, Washington 1911, vol. 2, pp. 5–6, 94, 109–110 ; F. de VITORIA, *De Indis*, Polish translation by J. Modrzejewski, Warszawa 1954, pp. 78–82.

the practice of international relations. The first emphasized the duty of a State to consent to mutual economic or political intercourse. Their advocates maintained that each State had the right to demand from other States that they receive its envoy or that they admit its nationals on their territory for the exercise of legitimate functions, especially economic ones. The second concept reflected the equal and independent rights of a State to maintain or establish economic or political relations with other States. According to its advocates each State enjoys the right to establish relations with other States which agree to that, while all other States are duty bound not to interfere with the establishment and maintenance of such relations.

The general concept of the right of a State to international intercourse appeared in the science of international law at a relatively late period, only in the 19th century. Till then the prevailing principle implied a separate consideration of both concepts of a State's position in international intercourse as applied to different spheres of international relations—political commercial or personal. Together with the theory of fundamental rights of States the 19th century has introduced in the science of international law the concept of the right of States to international intercourse in general.[2]

The problem of the right of States to international intercourse in general has not found, as yet, its full theoretical elaboration. The theoreticians of international law are dealing with the concept of such a right either within the framework of separate studies concerning the fundamental rights of States or refer to that right when examining the fundamental rights of States in manuals or systems of international law. Especially in the latter case one encounters very rarely attempts at a comparative presentation of various possibilities to deal with the right of States to international intercourse. The opinions expressed by the various authors on that fundamental right are most frequently sketchy and lacking in precision as far as its normative content is concerned. It is characteristic that

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[2] In the science of international law the right of States to intercourse in general is expressed by various terms—in English : *right of intercourse* (Oppenheim, Menon), *right to maintain intercourse* (Hall), *the right to commerce or intercourse* (Hershey) ; in French : *le droit au commerce international* (Cavaré, Pillet, Scelle), *le droit de mutuel commerce* (Rivier), *le droit aux communications international* (de Louter) ; in German : *das Recht auf Verkehr* (Bulmerincq, Sauer) *das Recht auf gegenseitigen Verkehr* (Heffter), *das Grundrecht auf Verkehr* (Verdross), *das Recht auf auswärtigen Verkehr* (Holtzendorff), *das Recht auf internationalen Verkehr* (Gareis) ; in Polish : *prawo do obrotu* [right to intercourse] (Berezowski, Cybichowski), *prawo do obrotu międzynarodowego* [right to international intercourse] (Makowski), *prawo do utrzymania stosunków wzajemnych* [right to maintain mutual relations] (Libera), *prawo do współżycia międzynarodowego* [right to international coexistence] (Namysłowski) ; in Russian : *prawo meždunarodnych soobščenij* (Martens), *pravo na obščenie* (Kazanskij, Uljanickij), *pravo na meždunarodnoe obščenie* (Zadrožnyj).

a fuller legal analysis of the concept of such a right can be found not in writings of its advocates but in the works of its opponents. It may also be mentioned that the majority of theoreticians does not include in the catalogue of fundamental rights the right of States to intercourse in general, while those writers who do otherwise put the right to intercourse at the bottom of the list.

When dealing with the concept of the right of States to international intercourse no clear distinction is made in the science of international law between the position of a State in intercourse as a duty to remain within the framework of international relations and as a right to establish and to maintain such relations.[3] The majority of authors, who make use of such a concept, has relatively very little to say about the essence of such a right as a right to intercourse in general, while being mainly concerned with the particular elements of that right, especially in the field of political or personal intercourse. The great majority of authors is approaching the concept of the right to intercourse from the point of view of the duty to remain within international intercourse. Hence some statements emphasizing that one should rather speak about the duty of a State to participate in international relations and not about its right in this respect.[4] The best proof of how strongly anchored in modern doctrine is the conviction that the concept of the right to intercourse reflects the opinions regarding the position of the State in international relations with the main emphasis on the duty to remain within intercourse is provided by the fate of the additional proposal regarding such a right presented at the International Law Commission on the occasion of the drafting of the Declaration of Rights and Duties of States. A draft proposal stating that each State has the right to conduct trade with all other States, to maintain with them diplomatic, consular and other relations as well as to enter into international agreements was rejected on the ground that there is no duty to maintain mutal international relations.[5]

The problem arises whether and to what extent it is possible to identify the second concept of the State's position in international intercourse with the right to intercourse in general. This concept reflects the attribute of the State establish and to maintain relations with other States. The development of the science of international law points to the vast possibilities

[3] See for instance M. LACHS, *O potrzebie konkretyzacji prawnych zasad współistnienia* [*The Need to Concretize the Legal Principles of Coexistence*], "Państwo i Prawo," 1963, No. 5–6, p. 784; L. A. MODŻORJAN, *Osnovnye prava i objazatel'nosti gosudarstv*, Moskwa 1965, pp. 153–154.

[4] See for instance W. A. ULJANICKIJ, *Meždunarodnoe pravo*, Tomsk 1911, p. 69.

[5] A proposal concerning *Jus communicationis* was submitted by Yepes and supported by Scelle. Its rejection was due mainly to the attitude of such theoreticians as J. L. BRIERLY, J. P. FRANÇOIS and J. SPIROPOULOS, UN Doc., A/CN4/25, p. 5.

of using such a concept when defining the situation of a State in economic and political intercourse. These possibilities have found their reflection in the concept of the right to commerce and in the concept of the rigth of legation. Recently the concept of the fundamental right of States considered from the point of view of the sovereign rights of States in international intercourse in general and defined by the traditional term of the right of States to intercourse, has made its appearance in the science of socialist countries and, especially, in the Polish science of international law.[6] Despite the fact that this concept is based on a different vision of the position of States in international relations than the concept which led to the definition in the course of the 19th century of the fundamental right of States to intercourse, this new approach to the right of intercourse is not accompanied by any attempts to take a broader view of all the problems of such a right. In particular, there is no explanation of the relationship between the new concept of the right to intercourse and the concept of the same right as it appears in the catalogue of fundamental rights of States formulated in the 19th century.

The appearance in the science of the socialist States of the concept of the right to intercourse in general as an attribute of the State is not accidental. It has been prompted by the new vision of the fundamental rights of the State seen as rights which determine the personality of such a State in the international legal order.[7] However, the new approach to the problem of the right to intercourse will be able to overcome the traditional views attached to that right in the science of international law only as a result of a fundamental analysis of all problems involved, both from the point of view of their historical development and their evolution in modern times.

The historical analysis should reveal the origin, content and application in the science of international law of the concept of the right to intercourse in general as one of the fundamental rights of States. Furthermore, it is necessary to examine the historical evolution of the opinions regarding the prerogatives of States to maintain international relations, especially in the field of commercial and diplomatic intercourse. The concept of the fundamental rights of States to international intercourse reflects to the fullest possible extent the position of States in intercourse, from the point

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[6] See for instance C. Berezowski, *Prawo międzynarodowe publiczne* [*International Public Law*], collective work, editor C. Berezowski, Warszawa 1967, p. 147 ; B. Jankovič, *Osnovi meždunarodov javonov prava* [*Principles of International Public Law*], Serajevo 1958, p. 151 ; L. Gelberg, *Zarys prawa międzynarodowego* [*Outline of International Law*], Warszawa 1967, pp. 90–91.

[7] See for instance G. P. Zadrožnyj, *Meždunarodnoe pravo*, joint edition, editor F. I. Koževnikov, Moskva 1964, pp. 155–156.

of view of their duty to remain within the framework of international relations. On the other hand, the concept of the right to intercourse as the State's attribute has found its fullest expression in the concept of the right of commerce and the right of legation. It is against the background of these historical considerations that the author will present the opinions on the subject of the right to intercourse as represented by modern theoreticians of international law. A comprehensive analysis of the problems of the right to intercourse will clarify the place and importance of the concept of such a right in modern science of international law.

The analysis of the State's right to international intercourse would, however, not be complete if it remained limited only to considerations based on the opinions of the theoreticians of international law. That is why the last chapter of this study will deal with the State's right to international intercourse as an institution of modern international law. Assuming that the generally accepted modern rules of international law have found their fullest expression in the Charter or the United Nations, the author will examine, before concluding this study, the concept of the right to intercourse in the light of the consequences which arise from the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations adopted by the General Assembly on 24 October, 1970.[8]

II. The Historical Development of the Concept of the Right to Intercourse in General as one of the Fundamental Rights of a State

The concept of the right to intercourse as a fundamental right of a State has been developed by the science of international law in the course of the 19th century. The origin and contents of that concept is inseparably linked with the concept of the international community, which emerged in the middle of the 19th century among the so-called civilized States as a result of the development of international relations. This international community was a continuation of the system of European States from the second half of the 18th century. Its main feature was the special legal order, the so-called international law of civilized States which presided over their mutual relations.[9] The right to intercourse as a separate concept emerged

[8] GA Res. 2625/XXV of 24 October, 1970, *Chronique mensuelle ONU*, 1970, No. 10, pp. 108–114.

[9] See A. HARTMAN, *Institutionen des praktischen Völkerrechts in Friedenszeiten*, 2nd ed., Hanower 1878, pp. 1–6 ; F. von LISZT, *Das Völkerrecht*, 11th ed., Berlin 1920, pp. 1–5 ; G. F. MARTENS, *Einleitung in das positive Europäische Völkerrecht auf Verträge und Herkommen gegründet*, Göttingen 1796, pp. 2–12 ; F. MARTENS, *Sovremennoe meždunarodnoe pravo civilizovanych narodov*, vol. 1, 5th ed. S. Petersburg 1904, pp. 182, 187, 1 ; A. RIVIER, *Principes du droit des gens*, vol. 1, Paris 1896, pp. 7–9, 14.

in the writings of only those 19th century theoreticians who were considering all or some fundamental rights as rights of States, members of the international community, to apply only to so-called civilized States. In order to introduce in a coherent way that right into the catologue of fundamental rights as rights of every State, it was necessary to accept the premise that each State has the right to acceed to the international community. The acceptance of such a premise could not but be followed by the recognition that the right to intercourse implies the obligation to recognize each State.[10]

The inseparable link between the right to intercourse and the concept of the international community limited only to the group of civilized States has determined the interpretation of the essence of that right in the 19th century from the point of view of the obligation to remain within the framework of international relations. For the general concept of the right to intercourse implied at first that a State establishing permanent and close contacts with other States creates *ipso facto* a situation whereby these States expect mutual intercourse. Hence, it is illegal to withdraw entirely from such intercourse without these States consenting.[11] This is how the concept of prohibition to withdraw entirely from the relations linking the Europeans States and later the civilized States took shape.

The prohibition to withdraw entirely from international relations has not immediately been given the form of a fundamental element of the right to intercourse as a fundamental right of a State. At first this prohibition was considered to be an imperfect norm or one of the rules of the so-called world Civil Law.[12]

In order to express the concept of such a prohibition in the concept of the right to intercourse it was necessary to connect it with concrete legal consequences, to introduce in the science of international law the term the State's right to international intercourse and to interpret it as a fundamental right of each State, member of the international legal community. The German science of international law went through all these stages in the cours of the 19th century.

The prohibition to withdraw from international intercourse could be followed by definite legal consequences because of the acceptance of the

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[10] See K. GAREIS, *Institutionen des Völkerrechts*, 2nd ed., Giessen 1901, pp. 63–65.

[11] See K. G. GÜNTHER, *Europäisches Völkerrecht in Friedenszeiten nach Vernunft, Verträgen und Herkommen*, vol. 1, Altenburg 1787, pp. 153–154.

[12] See H. OPPENHEIM, *System des Völkerrechts*, Frankfurt am Main 1845, p. 173; K. S. ZACHARIA, *Vierzig Bücher vom Staate*, vol. 5, Heidelberg 1841, pp. 236–237, 240–244, 248–249. The concept of "world civil law" is of German origin. It was expressed by such a term as *das Weltbürgerrecht* (see for instance the writings of such theoreticians as A. BAUER, J. G. FICHTE, K. S. ZACHARIA, F. ZEILLER).

principle that there is only one international legal order, namely the international law of civilized States. States not belonging to the community of civilized States were not bound by the norms of international law and could not ask for the application of such rules by other States to themselves.

Mutual international intercourse is the external mark of the participation in the international community. The legal relationships between independent States belonging to the European civilization are based on the principle of necessity of intercourse. Hence, a State withdrawing entirely from intercourse places itself outside the legal community and forgoes the right to enjoy the benefits of international law.[13]

The above mentioned concept of the prohibition to withdraw entirely form intercourse was, at first, interpreted as one of the principles applying to the community of civilized States. Its link with the definition of the right of a State to intercourse can be considered as Hefter's contribution. He was one of the first to employ the term "right to mutual intercourse." However, in spite of that Hefter failed to develop the content of the right to mutual intercourse from the point of view of the fundamental right of a State, limiting himself to the listing of the principles, on which mutual intercourse of civilized States should be based. At the same time freedom of intercourse is defined by him as a postulate.[14]

The right to intercourse as the fundamental right of a State found its final shape in the opinions of those German theoreticians, who built consistently the whole theory of such rights on a structure of rights indispensable for the existence and functioning of the international community, with the State viewed as a member of such a community.[15] According to these opinions the right to international intercourse is one of the basic elements and indispensable premises of the international legal community, one of the fundamental principles of international law, on which the community of States is founded, the prerequisite of the legal international personality of a State. This is not only a postulate or a rule not sanctioned by coercion but right linked to the obligation to agree to mutual international intercourse. The ensuing consequence is the right of a State to request from other States members of the international community to

[13] See R. MOHL, *Encyklopädie der Staatswissenschaft*, Tübingen 1859, pp. 402–404, 415–418, 424–428.

[14] A. W. HEFFTER, *Das Europäische Völkerrecht der Gegenwart auf den bisherigen Grundlagen*, 8th ed. edited by F. H. Geffcken, Berlin 1888, pp. 64, 79–81.

[15] See A. BULMERINCQ, *Völkerrecht oder internationales Recht*, Freiburg i.B., Tübingen 1884, p. 202; F. von HOLTZENDORFF, *Grundrechte und Grundpflichten der Staaten, Handbuch des Völkerrechts auf Grundlage Europäischer Staatspraxis*, joint edition, edited by F. von Holtzendorff, vol: 2, Hamburg 1887, pp. 48–49; F. von LISZT, *op. cit.*, p. 59.

remain within international intercourse. As long as a State wants to preserve its international legal personality it has the obligation to permit that other States maintain with it at least such a minimum relations as are determined by the requirements of international intercourse. As a matter of principle a State has the obligation to remain within the framework of international relations, but this fundamental obligation does not affect its right to refuse to enter into a specific relationship in each specific case.[16]

The theoreticians who in the German science of international law gave the fullest definition of the right to intercourse have not limited the content of that right exclusively to the concept of an obligation — prohibiting the complete withdrawal from intercourse. All of them were concerned with the much larger sphere of international intercourse, economic as well as political. They failed, however, to define clear criteria in accordance to which one may judge in which case and to what extent a State has the obligation to remain within the framework of international relations. Thus, for instance, Holtzendorff left open the question as to how define the scope of "minimum of intercourse determined by the requirements of international intercourse."[17] Also Liszt, according to whom the right to intercourse implies only a fundamental obligation, which does not apply in each specific case, gives no indication as to the extent of obligatory intercourse. At the same time Liszt links the right to intercourse to the prohibition to discriminate against a State when permitting mutual relations. He recognizes as a *casus belli* the refusal by a State to grant another State the *commercium* granted to all other States.[18]

The concept of the right to intercourse as a fundamental right of States can be considered to be a contribution of the development of the science of international law of the 19th century only to that extent which is related to the position of a State as a member of the international community, seen from the point of view of its participation in international relations in general. On the other hand, the development of the substance of that right in the specific fields of intercourse represents most often a continuation of the opinions prevailing prior to the 19th century regarding the freedom of personal, commercial or political intercourse. As a rule, such a continuity of views is apparent when a theoretician is trying to establish a relatively clear scope of obligations pertaining to the mutual relations of States. This is the line taken, in particular, by those concerned with personal and political intercourse. Commercial intercourse is, most

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[16] A. BULMERINCQ, *op. cit.*, pp. 206–207, F. von HOLTZENDORFF, *op. cit.*, pp. 60–61 ; F. von LISZT, *op. cit.*, p. 65.

[17] F. von HOLTZENDORFF, *op. cit.*, pp. 63–64 in connection with p. 61.

[18] F. von LISZT, *op. cit.*, p. 65.

often, dealt with from the point of view of the prohibition to withdraw entirely from international relations.[19]

The concept of the State's right to intercourse is meant, in the first place, to safeguard the freedom of personal intercourse. Such a freedom was for several centuries viewed as a consequence of the right of the individual to move freely around the world in order to satisfy his vital needs.[20] When the State began to be considered as a natural, independent person exercising full sovereignty over its territory, the obligations of States to admit foreigners were viewed as imperfect obligations and the freedom of intercourse became a fact of life, characteristic of the relations between the European territories of European States.[21] The science of international law of the 19th century, while accepting the principle that membership of the international community is best expressed in the freedom to personal intercourse, is striving to give legal status to that phenomenon. Already Heffter, when dealing with the principles related to the right to intercourse, expressed the view that "*kein Staat kann die gehörig legitimirten Unterthanen eines anderen befreundeten Staaten zuruckweisen* [...] *ohne bestimmte ihrer Regierung mitzuteilende Ursachen*".[22] On the other hand, in the concept of the right to intercourse accepted by Liszt particular stress is laid on "*die Erschliessung des Landes für die Angehörigen der übrigen Staaten und deren grundsätzliche Gleichstellung untereinander und mit den eigenen Staatsangehörigen*".[23] The extent of the freedom of personal intercourse arising from the State's right to intercourse is fixed in accordance with the criteria which emerged from the practice of European States ; this means that a State has the right to refuse to admit to its territory a foreigner if he is an undesirable person, whose presence may cause a prejudice.[24]

[19] See for instance F. von HOLTZENDORFF, *op. cit.* pp. 62–63 and V. von LISZT, *op. cit.*, p. 203.

[20] See the opinion of F. de VITORIA, *op. cit.*, p. 78 as compared with the opinion of R. von MOHL, contained in his work *Die Pflege der internationalen Gemeinschaft als Aufgabe des Völkerrechts*, "Staatsrecht Völkerrecht und Politik," vol. 1, Tübingen 1860, pp. 626–627.

[21] See for instance E. de VATTEL, *Le droit des gens ou principes de la loi naturelle, appliqués à la conduite et aux affaires des nations et des souverains*, Polish translation by B. Winiarski from the 1758 edition, Warszawa 1958, vol. 1, pp. 384, 388–389, 412–413.

[22] A. W. HEFFTER, *op. cit.*, p. 80.

[23] F. von LISZT, *op. cit.*, pp. 65, 100–109.

[24] On the question of the scope of freedom of personal intercourse see for instance J. J. MOSER, *Grundsätze des jetzt üblichen Europäischen Völkerrechts in Friedenszeiten*, Frankfurt a.M. 1763, pp. 365–366 ; G. F. MARTENS, *op. cit.*, pp. 94–95, F. SAALFELD, *Handbuch des positiven Völkerrechts*, Tübingen 1833, pp. 66–68, Th. SCHMALZ, *Das Europäische Völkerrecht in acht Büchern*, Berlin 1817, pp. 162–163 ; J. SCHMELZING, *Systematischer Grundriss des praktischen Europäischen Völkerrechtes*, vol. 2, Rudolfstadt 1819, pp. 212–214.

In the initial period of the development of the science of international law an important place in the consideration of the freedom of personal intercourse was taken by the institution of innocent passage through alien territory.[25] In the course of the 19th century the development of transports resulted in the replacement of that institution by the freedom of transit or the freedom to use communication roads. The majority of theoreticians who contributed to the development of the concept of the right to intercourse or have adopted that concept are linking it to the freedom to use communication roads. Some are even beginning to include into it the freedom to exchange information, mainly through postal and telegraph services.[26]

Prior to the 19th century there were two concepts regarding the obligation of States to remain within the framework of political intercourse in the science of international law. One limited the obligation of a State to receive and hear a foreign envoy, while the other maintained that a State must remain within permanent diplomatic relations with other States. The first started from the assumption that without a minimum of contacts States cannot fulfill their rights and duties.[27] The second, very often without being defined clearly as an obligation, arised from the practice of States and was the expression of normal relations between them, in particular between European States.[28] There are theoreticians, who while developing the substance of the obligations arising from the right of States to intercourse do not mention at all political intercourse and among those opinions which contributed to the development of the concept of the right of States to intercourse views can be found limiting the scope of obligatory political intercourse to the hearing of statements from abroad.[29] However,

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[25] See for instance A. GENTILIS, *De iure...* vol. 2, pp. 86–88 ; H. GROTIUS, *De iure...*, vol. 1, pp. 267–271, S. PUFENDORF, *op. cit.*, vol. 2, pp. 354–358 ; G. de REAL, *La science du Gouvernement*, Paris 1762, vol. 3, pp. 318–319 ; E. de VATTEL, *op. cit.*, vol. 1, pp. 411–412.

[26] See A. W. HEFFTER, *op. cit.*, p. 80 ; F. von HOLTZENDORFF, *op. cit.*, p. 63 ; R. von MOHL, *Encyklopädie...*, pp. 424–428.

[27] See for instance F. EGGER, *Das naturliche öffentliche Recht nach den Lehrsätzen des seligen Freyherrn E. A. von Martini*, in : *Das naturliche Völkerrecht*, vol. 2, Wien-Triest 1811, pp. 162–164 ; F. SŁOTWIŃSKI, *Prawo narodów naturalne połączone z praktyką państw europejskich* [*The Natural Law of Nations Linked to the Practice of European States*], Kraków 1822, pp. 133–136 ; E. de VATTEL, *op. cit.*, vol. 2, pp. 326–327, 332–333 ; Ch. WOLFF, *Jus gentium methodo scientifica pertractatum*, English translation by J. H. Drake from the 1764 edition, London 1934, vol. 2, pp. 526–530.

[28] See for instance J. J. MOSER, *op. cit.*, p. 241 ; S. RACHEL, *op. cit.*, pp. 194–195 ; G. de REAL, *op. cit.*, vol. 5, Paris 1764, pp. 36–38, 284–285 ; J. SCHMELZING, *op. cit.*, p. 99 ; R. ZOUCHE, *op. cit.*, vol. 2, pp. 17, 28, 94.

[29] See for instance A. BULMERINCQ, *op. cit.*, pp. 206–207 ; A. E. HEFFTER, *op. cit.*, pp. 79–81 ; R. de MOHL, *Encyklopädie...*, pp. 424–428.

in the most developed concepts of the right to intercourse the emphasis is on the larger scope. Holtzendorff considers that obligatory political intercourse implies hearing of statements, requests or complaints as well as receiving of envoys. Liszt, while developing the substance of the right to intercourse puts on the top of the list the maintenance of permanent diplomatic relations and then speaks about the obligation to maintain legal relations, as expressed in the conclusion of international agreements.[30]

The origin of the concept of the fundamental right to intercourse as well as the contents of that right defined from the point of view of the obligation to remain within the framework of international relations constituted the main reasons why such a right was not included in the catalogue of fundamental rights in the writings of those theoreticians, who viewed all fundamental rights of States as being the rights of each individual State arising from the very nature of the State treated sometimes like an individual. The result of such an assumption was the inclusion in the catalogue of fundamental rights of only such fundamental rights which were the expression of the independent sovereign position of a State. Hence the failure to consider such a position from the vantage point of the obligation to remain within the framework of international intercourse and the emphasis on the freedom of the State to decide whether or not to maintain international relations. Such a situation prevailed in the 19th century in the French [31] and English [32] doctrine of international law. For a very long time the majority of French and English theoreticians ignored totally the concept of the fundamental right to intercourse. When a theoretician dealt with the question of the obligations of States to remain within the framework of international relations he moved generally within the scope of those obligations which were developed by the science of international law prior to the 19th century. Furthermore, as a matter of

[30] F. von HOLTZENDORFF, *op. cit.*, pp. 61 ; F. von LISZT, *op. cit.*, p. 65.

[31] See for instance H. BONFILS, *Manuel de droit international public (droit des gens)*, 7th ed. edited by P. Fauchille, Paris 1912, pp. 140–142 ; F. DESPAGNET, *Cours de droit international public*, 3rd ed., Paris 1905, pp. 177 ff. ; T. Ortolan, *Règles internationales et diplomatie de la mer*, 2nd ed., Paris 1864, vol. 1, pp. 49–52 ; P. PRADIER-FODÉRÉ, *Traitè de droit international public européen et américain*, Paris 1885, vol. 1, pp. 306–307, 531–534 ; R. PIEDELIÈVRE, *Precis de droit international public*, vol. 1, Paris 1894, pp. 171 ff.

[32] See for instance W. E. HALL, *A Treatise on International Law*, 4th ed., Oxford 1895, pp. 45–46 ; W. B. LAWRENCE, *Commentaire sur les éléments du droit international et sur l'histoire des progrès du droit des gens de Henry Wheaton*, vol. 2, Leipzig, 1869, pp. 187–189 ; R. PHILLIMORE, *Commentaries upon international law*, 2nd ed., vol. 1, London 1871, pp. 184–185 ; T. TRAVERS, *The Law of Nations Considered as Independent Political Communities*, 2nd ed., Oxford 1884, pp. 7 ff. ; H. WHEATON, *Elements of International Law*, the literal reproduction of the edition of 1866, Oxford-London 1936, pp. 75–77.

principle, these obligations, especially as far as personal or commercial intercourse is concerned, were treated as imperfect obligations.[33] At the turn of the 19th century the concept of the right to intercourse was making its appearance in the science of international law of France, England or Italy. The great majority of theoreticians of these countries while refering to the concept of such a right denied its existence.[34] However, there are also views, concerning most often commercial intercourse, which emphasize the fact that no State has the right to withdraw completely from international relations.[35]

The concept of the right to intercourse as a fundamental right of States, in accordance with the assumptions presented above, could be accepted by those theoreticians who define some fundamental rights, and most often the right to intercourse, as an obligation arising from the State's membership of the international community. In that case the function of such a right consists mainly in limiting the freedom of States to decide on their international intercourse arising from the fundamental rights inherent in every State, because it is a State. The acceptance of such a reasoning was rather exceptional in Western Europe. Rivier, who is the exception, limits simultaneously the scope of the obligation to the absence of the right of a State to withdraw entirely from all international relations.[36] On the other hand, in Russia the decisive majority of theoreticians accepts the concept of the State's right to intercourse patterned on the German doctrine. This is so because in the Russian doctrine of international law the theory of fundamental rights as the rights of each State was merged with the theory of such rights as the rights of States belonging to the international community.[37]

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[33] See for instance W. E. HALL, *op. cit.*, pp. 58–59 ; H. W. HALLECK, *International Law or Rules Regulating the Intercourse of States in Peace and War*, 4th ed. thoroughly revised and in many parts rewritten by G. Sherston Baker, London 1908, pp. 485–487 ; P. PRADIER-FODÉRÉ, *op. cit.*, vol. 4, Paris 1888, pp. 23–31.

[34] See for instance A. CAVAGLIERI *Lezioni di diritto internazionale*, Napoli 1925, pp. 194, 197 ; A. CAVAGLIERI, *I diritti fondamentali degli Stati della societa internazionale*, Padova-Verona 1906 ; G. DIENA, *Diritto internazionale publico*, 4th ed., Milano-Genova-Roma-Napoli 1939, pp. 152–153 ; L. OPPENHEIM, *International Law, A Treatise*, vol. 1, London 1905, pp. 191–192 ; A. PILLET, *Recherches sur les droits fondamentaux des États*, RGDIP, vol. I, 1898, pp. 72–73.

[35] See for instance R. FOIGNET, *Manuel élémentaire de droit international public*, 11th ed., Paris 1921, pp. 152–153 ; A. S. HERSHEY, *The Essentials of International Public Law*, New York 1912, pp. 158–159 ; A. MERIGNAC, *Traité de droit public international*, vol. 1, Paris 1905, pp. 256–257.

[36] A. RIVIER, *op. cit.*, vol. 1, pp. 255–259, 262–264.

[37] See for instance F. KAZANSKIJ, *Učebnik meždunarodnogo prava publičnogo i graždanskogo*, Odessa 1902, pp. 14–19 ; F. MARTENS, *op. cit.* vol. 1, pp. 302–317 ; W. A. ULJANICKIJ, *op. cit.*, pp. 55–70.

When considering the concept of the fundamental right to intercourse and of its consequences the Russian science of international law brings into the foreground more or less distinctly two questions: the view that the right to intercourse is rather a reflection of the principle of the international community and not a specific range of rights and duties ; the opinion according to which the principle of community represents an important criterium determining the way a State should follow when exercising its independent judgment in the various fields of international intercourse. A specific obligation to intercourse does not follow from such a principle, only a limitation in the exercise by a State of its freedom when deciding on its international relations.

Uljanickij is closest to the German doctrine in his views on the right to intercourse. According to him the right to intercourse, or the right to permanent relations with the remaining members of the international community arises from the very fact of existence of an international community. International intercourse is the determining factor of a State's membership of such a community and opens the door to the benefits accruing from such membership. Although be accepts the principle that a State has the obligation to agree to normal relations with all States members of the international community, including diplomatic, legal, cultural, commercial and personal intercourse, Uljanickij does not explain the scope of the obligations arising from the right to intercourse. He considers simply that a State infringing upon the right to intercourse excludes itself from international intercourse, cannot be a member of the international community and a subject of international law.[38] On the other hand, Martens—a leading theoretician of international law in Russia at the turn of the 19th century—states clearly, that the right to intercourse "arises from the very nature of the international community and lays at the very basis of international law ; in the absence of international relations there would, obviously, be no legal rules applying to such relations."[39] This is tantamount to the adoption of the view that international intercourse determines the creation and existence of international law or of the international legal community as against the view that it is a result of a separate right.

Komarowski and Uljanickij as the co-autors of a treatise have identified the concept of "the right to intercourse" with the principle of community. Thus, the term of "the right to intercourse" disappears from their considerations, being replaced by a comprehensive examination of the principles which reflect the practical application of the principle of community. They

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[38] W. A. ULJANICKIJ, *op. cit.*, pp. 68–70.

[39] F. MARTENS, *op. cit.*, vol. 1, p. 315.

are defined from the point of view of the absence of the right of a State to cut itself off entirely from all intercourse.[40] The obligatory contents of the right to intercourse are dealt with very generally by Kazanskij. He considers that a State which has joined the international community has no right to withdraw from intercourse with the surrounding world. It has however the right to refuse to establish specific relations with other States if there are no specific obligations arising from the rules of international treaty law or from international customary law.[41]

Thus little remained in the Russian science of international law from the normative concept of the right to intercourse as an obligation to remain within the framework of international intercourse. This can be illustrated by still another fact. In the German doctrine the main importance in the contents of the right to intercourse was attached to the freedom to personal intercourse. On the contrary the Russian theoreticians oppose the deduction of the freedom to personal intercourse from the right to intercourse.[42]

When a writer expresses himself in favour of such a freedom he does so without reference to the concept of the right to intercourse and on the assumption that the problem is related to the limitation of the State's prerogatives arising from its territorial supremacy. The independence of the State in deciding about personal intercourse is not questioned.[43] In the Russian science of international law several authors accept the obligation of a State to maintain permanent diplomatic relations. Such an obligation is however deduced from the principle of community and not from the concept of the right to intercourse.[44]

In the course of the 19th century there were numerous cases of the use of force in order to open non-European States to commercial intercourse. The concept of the right to intercourse as developed in that period was not aiming at justifying such policies. As a matter of principle all theories of the fundamental right of States to intercourse which have their origin in the science of the 19th century are emphasizing prohibitions and obligations having legal effects exclusively in relation to States belonging to the international community. The relations with countries outside that community are governed by the principles of nature, the essence of which

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[40] L. A. KOMAROVSKIJ, W. A. ULJANICKIJ, *Meždunarodnoe pravo*, Moskva 1908, pp. 51–52, to be read in connection with pp. 34–35.

[41] P. KAZANSKIJ, *op. cit.*, p. 35.

[42] See for instance F. MARTENS, *op. cit.*, vol. 1, p. 316 ; I. NIKOLAEV, *Kratkij kurs meždunarodnogo prava*, S. Petersburg 1902, p. 56.

[43] See for instance L. A. KOMAROVSKIJ, *O dopuščenii i izgnanii inostrancev*, in : *Juridičeskij Vestnik*, Moskva 1889, pp. 520–522 ; W. A. ULJANICKIJ, *op. cit.*, p. 220.

[44] See F. MARTENS, *op. cit.*, vol. 2, S. Petersburg 1905, pp. 26–27 ; I. NIKOLAEV, *op. cit.*, pp. 104–105.

is the State's independence as far as intercourse is concerned with the ensuing right to withdraw from international intercourse.[45] That is why a theoretician trying to justify the right to use force in order to open to intercourse non-European States had no other way than to depart in his construction of the rights and duties of States from their definition as rights constituting the foundation of the international legal community. The specific rights and duties had to be bound together into such a legal order or such principles of international relations, from which it could be deduced that all States are equally subordinated to one universal phenomenon—the international intercourse. This purpose was most frequently achieved by the merger of the concept of the international legal community with the concept of the order governing humanity as a whole or by investing the individual with the qualities of a subject of international law.[46] The corresponding obligations of States to remain within the framework of international intercourse acquired thereby a universal character, for they were based on the right of the individual to move freely around the world in order to satisfy his legitimate needs. There was still another way leading to the same end, namely the subordination of the State, as far as international intercourse is concerned, to the principle of actual necessity, or the founding of the international community not on inter-State relations but on a broadly interpreted concept of interdependence.[47] Such arguments represented largely a reversion to those principles which served Vitoria in the 16th century in his attempts to prove that a State has the obligation to remain within the framework of commercial intercourse.

The concept of the right to intercourse as a fundamental right of States met immediately with strong criticism. At first it was criticised by German theoreticians and later, at the turn of the 19th century these theoreticians were joined by representatives of other national doctrines. The validity of the concept of the right to intercourse with the ensuing obligation to remain within the framework of international relations was questioned above all for its lack of precision, as far as the definition of the scope of obliga-

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[45] See A. BULMERINCQ, *op. cit.*, p. 207; F. MARTENS, *op. cit.*, vol. 1, pp. 316–137; A. RIVIER, *op. cit.*, vol. 1, pp. 262–263.

[46] See J. G. BLUNTSCHLI, *Le droit international codifié*, translated from German by M. C. Lardy, Paris 1870, pp. 25–26, 213–214; P. FIORE, *Nouveau droit international public, suivant les besoins de la civilisation moderne*, translated from Italian by P. PRADIER-FODÉRÉ, vol. 1, Paris 1868, pp. 285–286; P. FIORE, *Le droit international codifié et sa sanction juridique*, translated from Italian by Ch. Antoine, Paris 1911, pp. 108, 110–111; R. von MOHL, *Die Pflege...*, pp. 626–631 and footnote (1) on page 627.

[47] See K. GAREIS, *op. cit.*, pp. 33–34, 97; A. de LAPRADELLE, *La question chinoise*, RGDIP, 1901, pp. 272 ff.

tions arising from such a right and their legal basis are concerned.[48] The critics pointed out that these obligations are subject to so many conditions and reservations as well as so limited by the prerogatives of States to act in defense of their own interests that little remains of their contents after closer scrutiny. It is, especially, impossible to deduce from the right to intercourse the criteria which could assist in determining when such a right is being violated. Attention was also drawn to the absence of a legal basis for a rule, according to which a State enjoys the fundamental right to intercourse, this being understood as an obligation to maintain international relations. Some theoreticians saw no possibility of merging political and economic relations into one concept of the right of States to intercourse,[49] while others stated unambigously that all attempts at limiting the freedom of States, especially in the economic field must be considered as remaining in the sphere of postulates and wishful thinking. [50]

The importance of the concept of the right to intercourse as a fundamental right of States, as advocated in the science of international law of the 19th century and of the beginning of the 20th century, was further undermined by the criticism of the fundamental consequence arising from that right and namely the prohibition to withdraw entirely from intercourse. The development of international relations in the course of the 19th century was demonstrating the impossibility of such a withdrawal in actual practice. This explains why even those theoreticians who accept such an understanding of the concept of the right to intercourse have emphasized the theoretical character of such a prohibition.[51] Holtzendorff himself has recognized a complete withdrawal from intercourse as incompatible with the legal personality of States and the state of international relations.[52] This led to the conviction that the concept of the right to intercourse cannot be given normative status and that intercourse is a prerequisite of the existence of both international law and international community. Thus, international intercourse became the point of departure of an international legal order and the proof of the existence of an international community and not the result of the fundamental right to intercourse. The acceptance of these assumptions undermined decisively the legal importance of the concept of the right to intercourse as developed

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[48] See for instance P. HEILBORN, *Das System des Völkerrechts*, Berlin 1896, pp. 301–305; H. RETTICH, *Zur Theorie und Geschichte des Rechts zum Kriege*, Stuttgart 1888, pp. 53–57; A. ZORN, *Grundzüge des Völkerrechts*, Leipzig 1903, pp. 52–53.

[49] See P. HEILBORN, *op. cit.*, pp. 303–304.

[50] See A. LASSON, *Princip und Zukunft des Völkerrechts*, Berlin 1871, pp. 181–182.

[51] See F. MARTENS, *op. cit.*, vol. 1, pp. 315–316; A. RIVIER, *op. cit.*, vol. 1, p. 262.

[52] F. von HOLTZENDORFF, *op. cit.*, p. 60.

by the German science of international law of the 19th century. Such a point of view can be encountered in the critical appraisals of the right to intercourse not only in the writings of German theoreticians but also in the works of representatives of other national schools of thought.[53]

Before concluding these historical considerations regarding the concept of the fundamental right of States to intercourse it is worth while examining briefly whether and to what extent the concept of such a right has entered during the period under review into Polish science. In theory such concepts could develop thanks to the prevailing view that the advancement of international law must enhance the respect for the principle of the necessity of intercourse and emphasize the importance of intercourse for the international community.[54] Polish scholars have quite quickly familiarized themselves with the concept of the fundamental right to intercourse thanks to the writings of Rzesiński, who introduceed Heffter's opinions into Polish science.[55] However, for the first original Polish contribution to the development of the concept of the right to intercourse one had to wait till the beginning of the 20th century. It was presented in the works of Cybichowski.

The opinions of Cybichowski were marked by the lack of precision so typical of the concept of the right to intercourse seen from the point of view of the obligation to remain within the framework of intercourse. He links the element of necessity of international intercourse as a basis of international law with a vaguely defined normative content of an obligation to remain within the framework of intercourse. "The condition of international law is international life, which can only be if there is international intercourse. The Law of Nations cannot prohibit intercourse if it does not want to contradict itself. This law concedes to States the right to intercourse, which means that States have the right to request that other States do not close their borders to intercourse with them ; however by virtue of such a right it is not possible to require that a specific intercourse be permitted."[56]

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[53] See for instance A. CAVAGLIERI, *Lezioni...*, p. 197; P. HEILBORN, *op. cit.*, p. 303; L. OPPENHEIM, *op. cit.*, London 1905, pp. 191–192; A. PILLET, *op. cit.*, pp. 256–257.

[54] See for instance F. KASPAREK, *Usiłowania najnowsze około reformy prawa międzynarodowego* [*Latest Attempts at Reforming International Law*], Kraków 1873, pp. 3–9.

[55] J. H. S. RZESIŃSKI, *Wykład europejskiego prawa narodów według A. W. Heftera* [*A Course of European Law of Nations as Thought by A. W. Heffter*], Kraków 1864, pp. 100–102.

[56] Z. CYBICHOWSKI, *Prawo narodów (system prawa międzynarodowego)* [The Law of Nations (A System of International Law)], Lwów 1915, pp. 74–75.

III. The Historical Development of the Concept of the Right to Intercourse as an Attribute of a State, Especially in the Sense of the Right to Commerce and the Right of Legation

Within the framework of the theory of fundamental rights as defined by the science of the 19th century there was no general concept of the right to intercourse as a state's attribute arising from the equal and independent position of a State in international relations. Only few theoreticians when using the term of the right to intercourse—especially at the turn of the 19th century—have merged more or less consciously within its contents the concept of such a right as an attribute and as a duty.[57] At first such a situation may appear strange, especially when taking into consideration that the development of the theory of fundamental rights as the rights of each State examined from the point of view of the natural quality of a State as a person, offered theoretically large possibilities of a general treatment of the position of a State, as far as its right to participate in international intercourse is concerned.

The theory of fundamental rights as the rights of each State has blossomed fully in the French science of international law of the 19th century.[58] The English doctrine of international law was also based on such a theory of fundamental rights.[59] However, in this doctrine, as well as in some parts of the German doctrine, the functions of fundamental rights were performed by such principles as the principle of independence or sovereignty and such concepts as legal capacity or the personality of a State. Such an approach was closely related to the critical appraisal of the theory of fundamental rights of States, which was so characteristic of the prevailing mood at the turn of the last century.[60]

In the science of international law of the 19th century the French doctrine came closest to the general concept of the right to intercourse as the State's attribute. Already Pradier-Fodéré, who gave one of the first historical and systematic presentations of the theory of fundamental rights as the rights of each State, deduced from the principle of independence, while remaining within the system of such rights, the right to conduct

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[57] See for instance A. S. HERSHEY, *op. cit.*, pp. 158, footnote 34; P. KAZANSKIJ, *op. cit.*, pp. 32–34; A. RIVIER, *op. cit.*, vol. 1, p. 264.

[58] See footnote 31.

[59] See footnote 32.

[60] See for instance A. CAVAGLIERI, *Lezioni...*, pp. 194–198; G. JELLINEK, *System der subjektiven öffentlichen Rechte*, Freiburg i. B. 1892, pp. 302–303; L. OPPENHEIM, *op. cit.*, London 1905, vol. 1, pp. 158–160; E. ULLMANN, *Völkerrecht*, Freiburg i.B., Leipzig-Tübingen 1898, pp. 79–81; J. WESTLAKE, *Traité du droit international*, translated from English by A. de Lapradelle, Oxford 1924, pp. 321–324.

negotiations and to conclude treaties, comprising the right to maintain diplomatic relations as well as the right to participate in the natural freedom of trade.[61] Similarly, according to Bonfils and, later Fauchille, sovereignty implies, among other things, such rights as the right of legation, the right to conclude treaties, the right to wage war and the right to freedom of trade.[62] Other theoreticians, such as Piedelièvre, while dealing separately with the position of States in political and economic intercourse, consider the principle or right to sovereignty as the basis of the right to international trade as well as of the right to maintain normal relations with other States through diplomatic envoys.[63] Despagnet went the farthest towards one general concept of the right to intercourse. For not only did he deduce directly from the nature of a State the fundamental right to mutal trade as well as the right of representation, but what is more, while analysing the latter he emphasized that it shows a distinct analogy with the right to mutual trade.[64]

In the German doctrine of the first half of the 19th century one can encounter, on the occasion of discussions concerning the perfect or absolute rights of States, the concept of the fundamental right to permanent contacts and intercourse with other States.[65] However, the concept of such a right, viewed as an attribute, is being clearly limted to the position of a State in political intercourse. In this connection some theoreticians speak about the fundamental right of States to political personality from which they deduce a generally conceived right to unhampered activity both inside the State as well as in its relations with other States. Others are limiting the contents of such a right to the right of a State to send diplomatic envoys to other States.[66] Furthermore, the concept of personal rights of States appear in the German doctrine. These rights include the right to intercourse and the right to associate with other States within the framework of political relation.[67]

It must, however, be said that all these attempts did not lead to the acceptance by the German science of international law of a well-founded

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[61] P. PRADIER-FODÉRÉ, *op. cit.*, vol. 1, pp. 531–532, 534.

[62] H. BONFILS, *op. cit.*, p. 142 (the author is identifying the principle of sovereignty with the right to independence). The same thesis is repeated by. P. FAUCHILLE in his *Traité de droit international public*, Paris 1922, vol. 1, part I, pp. 454–461.

[63] R. PIEDELIÈVRE, *op. cit.*, pp. 470–471, 187.

[64] F. DESPAGNET, *op. cit.*, pp. 177, 238–239.

[65] J. SCHMELZING, *op. cit.*, vol. 1, p. 72.

[66] See for instance A. BAUER, *Lehrbuch des Naturrechts*, 3rd ed., Göttingen 1825, pp. 383–385; K. H. von GROS, *Lehrbuch der philosophischen Rechtswissenschaft oder des Naturrechts*, 5th ed., Stuttgart and Tübingen 1829, pp. 307–309.

[67] See for instance H. AHRENS, *Juristische Encyclopädie*, Wien 1855, pp. 791–792; R. von MOHL, *Encyclopädie...*, p. 422.

concept of the right to intercourse as a State's attribute in political intercourse. As can best be seen in the writings of Hegel, the adoption of such a concept was rendered unnecessary by the acceptance of the concept of sovereign qualities of a State as such, which in its external relations found their expression exclusively in the right to maintain diplomatic relations, in the right of war and peace as well as in the right to conclude treaties.[68] As a rule, the German science of international law of the 19th century does not link the concept of the right to commerce viewed as a State's attribute with the position of a State in intercourse. Certain references to such a concept reflect most often some residual ideas of preceding centuries, or arise from a consideration of the problems of economic intercourse from the point of view of the State sovereignty.[69]

The farthest removed from all attempts to formulate a general definition of the position of a State in intercourse from the point of view of the right to intercourse as an atribute of a State was in the 19th century the English doctrine, which reflects a distinct tendency to exclude economic relations from the scope of the international legal order. The situation of a State in this field is viewed as the reflection of its sovereignty or territorial jurisdiction, or arises from the right to the free use of all means which serve to consolidate and develop the State's existence.[70] This explains why, with the appearance in the English science of international law of that period of certain elements of the right to commerce viewed as an attribute, we are not confronted directly with the right to commerce but with the right to the free development of national resources through trade.[71]

The English theoreticians of the turn of the last century are devoting much attention to the importance of inter-State relations of a political nature. In the English science of international law we encounter a growing conviction that the concept of a State is inseparably linked with its capacity to act in international relations.[72] Despite of the adoption of such an approach there is lack of any reference to the specific term "right to intercourse." As stressed by the contemporary English doctrine, the concept of

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[68] G. W. F. HEGEL, *Naturrecht und Staatswissenschaft im Grundriss. Grundlinien der Philosophie des Rechtes*, Berlin 1821, p. 336.

[69] See for instance A. HARTMANN, *op. cit.*, p. 210; F. von LISZT, *op. cit.*, pp. 202–203; E. ULLMAN, *op. cit.*, pp. 288–289; A. ZORN, *op. cit.*, pp. 175–176.

[70] See for instance W. E. HALL, *op. cit.*, pp. 45–46; T. J. LAWRENCE, *The Principles of International Law*, London 1895, pp. 190 ff; W. N. OKE MANNING, *Commentaries on the Law of Nations*, London 1839, pp. 3–4; T. TRAVERS, *op. cit.*, pp. 257–258; T. J. WALKER, *A Manual of Public International Law*, Cambridge 1895, pp. 11, 45.

[71] R. PHILLIMORE, *op. cit.*, vol. 1, pp. 262–263 — "right to a free development of national resources by commerce."

[72] See for instance W. E. HALL, *op. cit.*, pp. 108, 312–313; R. PHILLIMORE, *op. cit.*, vol. 1, p. 81; T. J. LAWRENCE, *op. cit.*, pp. 258, 263–265, 284.

such a right is of a continental origin and took shape mainly because of the need to obligate States to preserve their mutal economic relations.[73]

As can be seen from what has been said above, the most established concepts of the right to intercourse as a State's attribute are, in the science of international law, the concepts of the right to commerce and the right of legation. The origin of these concepts is related to the first period of development of international law, when the most important problems were, on the one hand, the free access of all States to overseas trade and, on the other hand, equality of rights of each sovereign in the field of representation in international relations.

The concept of the right to commerce derives from the concept of freedom of trade, which was meant to reflect the equality of rights of all States in the conduct of trade, as well as to emphasize the independence of States in their commercial relations. Its father was Grotius, who wrote "no one has in fact the right to hinder any nation from carrying on commerce with any other nation at a distance." [74] This concept has found wide application in the science of international law as the principle of the natural freedom of trade. The classic definition by Vattel reads : "*Toute nation, en vertu de sa liberté naturelle, est en droit de faire le commerce avec celles qui voudront bien s'y prêter ; et quiconque entreprend de la troubler dans l'exercise de son droit, lui fait injure.*"[75]

In the origin of the right to commerce the main emphasis was on the principle of equality. As time went by, the concept of the right to commerce was increasingly interwoven with the elements of the State's independence to decide about its commercial relations. F. G. Martens, while speaking about the freedom of trade, which meant that when two States decide to maintain relations no third State has the right to oppose it, refers also to the right to commerce in the sense of the right of each State to decide in each specific case whether it wants to conduct trade with other States and under what conditions.[76] As stated by Hautefeuille there are

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[73] See for instance W. L. Gould, *An Introduction to International Law*, New York 1957, p. 455.

[74] H. Grotius, *De iure...*, vol. 1, p. 271 ; His concept of the right to commerce Grotius developed at great length in his treatise *Mare Liberum* (1st ed.—1609) ; cf. H. Grotius, *Wolność mórz czyli dysertacja o prawie jakie przysługuje Holendrom do handlu z Indiami* [*The Freedom of the Seas or a Dissertation on the Rights which the Dutch Enjoy to Conduct Trade with the Indies*], translated into Polish by R. Bierzanek, Warszawa 1955, pp. 77–81.

[75] E. de Vattel, *op. cit.*, vol. 1, pp. 334–335 ; (Quotation after French edition, Paris 1820, p. 260) ; see also M. A. Bouchaud, *Theorie des traités de commerce entre les nations*, Paris 1777, pp. 285–299 ; Ch. Wolff, *op. cit.*, vol. 2, pp. 105–107.

[76] G. F. Martens, *op. cit.*, p. 165; see also J. L. Klüber, *Europäisches Völkerrecht*, 2nd ed., Schaffhausen 1851, pp. 78, 82.

two principles involved in the concept of freedom of trade : the first implies that "*aucune nation ne peut être contrainte à faire des échanges qu'elle repousse*," while the second implies that "*lorsque deux peuples sont d'accord pour faire entre eux un commerce, quel qu'il soit, aucun autre n'a le droit d'intervenir, soit pour empêcher, soit pour modifier ou partager ce commerce.*" [77] Such an understanding of the freedom of trade, or of the right to commerce has determined the contents of the right of States to conduct trade, defined directly or undirectly as one of the fundamental rights of States in the science of the 19th century.

The concept of the right to commerce as an attribute of States, as defined by the science of the 19th century encompasses three elements : first, the right of each State to decide freely whether to remain, or not, within the framework of international commercial relations, each State determining alone what to trade, with whom and under what conditions to conduct trade, which implies that it is authorized to apply different rules and restrictions to such trade, that it has also the right to cease all commercial relations and that by isolating itself it does not breach international law ; second, the right to establish and to maintain commercial relations with other States without interference by third States, which does not involve any obligation to agree to mutual trade ; third, an obligation not to interfere in the establishment and maintenance of commercial relations between States, which agree to such relations.[78]

The concept of the right of legation has its origin in the legal and factual disputes about who has the right to send an envoy with the rank of ambassador, or envoys enjoying the rights and privileges granted by international law. The right to send such envoys is recognized to be an attribute of each independent State, "the most dignified sign of sovereignty." The concept of the right of legation is, at first linked to the position of the sovereign ruler, who rules over a specific State, expresses his "sovereignty, his "Majesty." [79] At the turn of the 18th century the right to diplomatic intercourse was being transformed into a right enjoyed by each sovereign

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[77] L. B. HAUTEFEUILLE, *Histoire des origines, des progrès et des variations du droit maritime international*, Paris 1869, pp. 28–29.

[78] See for instance H. BONFILS, *op. cit.*, pp. 169–171 — "*droit de libre commerce*"; Ch. CALVE, *Le droit international theorique et pratique*, 5th ed., Paris 1896, vol. 3, pp. 159–161 — "*droit de commerce;*" F. DESPAGNET, *op. cit.*, pp. 195–197 — "*droit de commerce mutuel;*" R. PIEDELIÈVRE, *op. cit.*, pp. 470–471 — "*droit de commerce international;*" P. PRADIER-FODÉRÉ, *op. cit.*, vol. 4, pp. 213–215 — "*le droit de participer à la liberté naturelle du commerce*" (vol. 1, p. 534).

[79] See for instance H. GROTIUS, *De iure...*, vol. 2, pp. 21–22; E. de VATTEL, *op. cit.*, vol. 2, pp. 326–327; A. de WICQUEFORT, *L'Ambassadeur et ses fonctions*, Haye 1724, vol. 1, p. 17.

and independent State, it belonged to the rights of the State's majesty, to its most perfect sovereign attributes.[80]

The origin of the right to maintain diplomatic relations as a right of a sovereign ruler hampers considerably the definition of the right of legation as the right of each State. Hence, on the one hand, we are confronted with the inclusion of the right of legatation into so-called conditional rights a State whose sovereignty is universally recognized and, on the other hand with the inclusion of the right of legation into so-called conditional rights of States, the rights the existence of which is determined by the fulfilment of specific conditions,[81] such as special political relations within a specific group of States.

In the course of the first half of the 19th century we are witnessing a development of the science of international law which leads to the evolution of the right of legation into an absolute right of each State. In German science such an evolution arises from the recognition of the external personality of States, from the idea, that each State possesses an inherent individuality and existence (das Für-sich-Sein).[82] In French science the right to maintain diplomatic relations is directly linked to the principle of sovereignty and independence, or with the corresponding fundamental rights of States. Some theoreticians consider even that the right to representation belongs to such fundamental rights.[83] In the second half of the 19th century the further development of the universal concept of the right of legation was hampered by those theoreticians, who limited the application of a legal order to the community of civilized States and who saw the foundations of the right of legation in the international personality or sovereignty as a quality enjoyed only by the member States of such a community.[84]

At the turn of the 19th century the term "right of legation" was universally used. The essence of the right of legation as an attribute of States derives above all from the fact, that it constitutes a prerogative of a State which meets all the conditions of a sovereign or independent State. In order to emphasize the high rank of that right such expressions as "sove-

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[80] See for instance J. L. KLÜBER, *op. cit.*, pp. 202–203; J. J. MOSER, *op. cit.*, p. 185; Ch. H. ROMER, *Versuch einer Einleitung in die rechtlichen, moralischen und politischen Grundsätze über die Gesandtschaften und die ihnen zukommenden Rechte*, Gotha 1788, p. 54; J. SCHMELZING, *op. cit.*, vol. 2, pp. 94–95; H. WHEATON, *op. cit.*, p. 243.

[81] See J. L. KLÜBER, op. cit., pp. 46, 137, 202–203.

[82] See A. BAUER, *op. cit.*, pp. 383–385; G. W. F. HEGEL, *op. cit.*, pp. 330, 336.

[83] See for instance H. BONFILS, *op. cit.*, pp. 142, 161; F. DESPAGNET, *op. cit.*, pp. 186, 238–239; P. FOIGNET, *op. cit.*, pp. 136, 143; P. PRADIER-FODÉRÉ, *op. cit.*, vol. 1, pp. 351–352.

[84] See F. von LISZT, *op. cit.*, p. 48.

reign right," "attribute or fundamental attribute of sovereignty" or merely "attribute" of every State endowed with an international legal personality are used. However, despite the high rank of the right of legation, science of international law is not studying closer its essence or the contents of the right and obligations it involves.[85]

The concept of the right of legation can be viewed in the same way as the right to commerce from the vantage point of the principle of equality and independence of States. However, in the science of international law this opportunity has been used in the examination of the right of legation to a much lesser degree than in the study of the right to commerce. As a rule, no opinions can be found, according to which the freedom to decide on the establishment of diplomatic relations derives from the very nature of the right of legation. Such freedom is generally deduced from the very foundation of the right of legation, this foundation being the independence or sovereignty of States in international relations. On the other hand some international law scholars express the view that there are similarities between the right of legation and the right to commerce in so far as both are based on the principle of equality. This means that the right of legation involves a prohibition to interfere with the establishment of diplomatic relations or with the maintenance of such relations by States wishing to do so.[86]

Throughout history there were some opinions which bear witness to the great possibilities to develop the normative contents of the concept of the right of legation. In the 18th century, Vattel branded as illegal and violating international law any action aiming at preventing other States from sending or receiving envoys. This he says : "*C'est attaquer une nation dans un de ses droits les plus précieux et lui disputer ce que la nature elle-même donne à toute société indépendante ; c'est rompre les liens qui unissent les peuples, et les offenser tous.*"[87] In the 19th century Phillimore considered any form of interference in the free exercise of the right of legation as a serious breach of the law, as a crime, which justified the intervention of all other States in the interests of the State whose freedom to evail itself of the benefits of the right of legation had been restricted.[88] However, such

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[85] See for instance L. ALT, *Handbuch des europäischen Gesandschafts-Rechtes nebst Abriss von dem Consulatwesen*, Berlin 1870, p. 3 ; B. HÜBLER, *Die Magistraturen des völkerrechtlichen Verkehrs (Gesandtschafts- und Konsularrechts) und die Exterritorität*, Berlin 1900, p. 20 ; R. PIEDELIÈVRE, *op. cit.*, vol. 1, p. 396 ; E. ULLMANN, *op. cit.*, p. 91.

[86] See for instance F. DESPAGNET, *op. cit.*, p. 239 ; G. Diena, p. 419 and footnote on p. 166.

[87] E. de VATTEL, *op. cit.*, vol. 2, p. 331; (Quotation after French edition, Paris 1820, p. 761).

[88] R. PHILLIMORE, *op. cit.*, 2, pp. 168–169.

opinions are rather exceptional. The development of the concept of the international legal personality of a State results in the definition of the right of legation as the expression of a certain competence and not in terms of an idependent right in itself. The State has such a competence, because, as a subject of international law, it has the capacity to act and to be represented in international relations.[89]

The historical analysis of the concept of the right of intercourse as an attribute of a State shows, that the concepts of the right to commerce and of the right of legation, despite some similiarities of origin and contents, have occupied, different places in the science of international law of the 19th century. The right to commerce was clearly related to specific rights and obligations, defined in accordance with the tradition which was established in the course of the 18th century. The 19th century linked this concept to the fundamental rights of States, but this is its unique contribution to the development of the concept of the right to commerce itself. At the same time the concept of such a right shows a distinct tendency to wither away. Its application is limited mainly to the French doctrine. On the other hand, the right of legation was, as a rule, not linked to a specific scope of rights and obligations. However, in the course of the 19th century the concept of the right to maintain diplomatic relations was breaking away from the assumption that the possession of such a right calls for a separate legal justification. The right of legation ceased to be a conditional right and the concept of such a right found its universal application in the science of international law.

Prior to the 19th century, when the position of a State in intercourse was viewed as following the pattern of the individual, special importance was attached to the rights in the sphere of economic intercourse. In the course of the 19th century a large section of the scientific community of international lawyers accepted the opinion that the position of a State had to be viewed only from the vantage point of its political personality. Within the framework of such a personality there was no place for the right to commerce, economic intercourse was transfered from the level of inter-State relations to the level of relations between individuals of various States. International law dealt with such intercourse exclusively through the provisions included in commercial treaties. In the course of the 19th century the European States lost their interest in the natural freedom of trade. This was replaced by a new concept of "equal freedom of trade", reflecting the principles of open door policy and of equal opportunities in overseas trade. This new concept of freedom of trade has nothing

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[89] See for instance V. von Liszt, *op. cit.*, p. 48 ; W. A. Uljanickij, *op. cit.*, pp. 60, 61 ; A. Zorn, *op. cit.*, pp. 40–41.

in common with the concept of natural freedom ; it derives from the provisions agreed upon in international treaties.[90]

The above mentioned differences in the meaning and importance of the concepts of the right to commerce and of the right of legation explain why in the course of the 19th century the concept of the right to intercourse as a State's attribute did not enter into the catalogue of the fundamental rights of States. However, it must be remembered that the criticism voiced against the concept of such a right in the sense accepted in the 19th century did not concern the right to intercourse as an attribute. Some scientists, while rejecting at the turn of the last century the then prevailing concept of the fundamental right to intercourse, pointed clearly at the possibility of defining such a right from the point of view of the principle of independence, seen as a State's attribute.[91]

IV. The Right to Intercourse in Modern Science of International Law

In modern science of international law the concept of the State's right to intercourse can be found, as a rule, in the doctrines of the majority of States. This is the result of the "internationalization" of the science of international law, inaugurated at the turn of the last century. However, taking into consideration the small importance of the concept of the fundamental right to intercourse in the doctrines of the preceding period, it is not surprising that in the 20th century relatively few scholars deal with the right of States to intercourse. The overwhelming majority of theoreticians ignore it and those who refer to it are doing so often only in order to criticise it or to emphasize its historical role as a concept inseparably linked to the science and international relations of the 19th century.[92] At the same time, a great part of the opinions reflecting the adoption of the concept of the right to intercourse differ, more or less distinctly, from the definition of that right in the science of the 19th century. For, as far as

[90] See for instance F. von HOLTZENDORFF, *op. cit.*, p. 63 ; T. NIEMEYER, *Völkerrecht*, Berlin-Leipzig 1923, p. 144 ; J. THOMSON, *An Essay toward Principles of International Law to Govern the Intercourse of Christian with Non-Christian Peoples*, Berlin 1876, p. 12 ; G. SCHWARZENBERGER, *International Law*, 3rd ed., vol. 1, London 1957, pp. 233–234.

[91] See for instance G. DIENA, *op. cit.*, pp. 152–153 ; A. ZORN, *op. cit.*, pp. 52–53.

[92] See for instance F. BERBER, *Lehrbuch des Völkerrechts*, München-Berlin 1960, p. 221 ; L. CAVARÉ, *Le droit international public*, Paris 1961, vol. 1, p. 150 ; J. MAKOWSKI, *Podręcznik prawa międzynarodowego* [*Manual of International Law*], Warszawa 1948, 4th ed., pp. 86–87 ; A. ROSS, *Lehrbuch des Völkerrechts*, Stuttgart-Köln 1951, p. 186 ; K. SKUBISZEWSKI, *Zarys prawa międzynarodowego* [*Outline of International Law*], joint edition, vol. 1, Warszawa 1955, pp. 161–162 ; W. WENGLER, *Völkerrecht*, vol. 2, Berlin-Göttingen-Heidelberg 1964, p. 1038.

modern science of international law is concerned it is familiar with the concept of the right to intercourse in general as an attribute of a State.[93] On the other hand, the same authors who follow the traditional concept of such a right seem to represent the view, that the old contents of such a right as a prohibition to withdraw entirely from all international relations should be replaced by a new definition adapted to the contemporary needs of international intercourse.[94]

The concept of a prohibition to cease entirely all international relations is not disappearing, however, completely from the modern science of international law. Some theoreticians refer to it more or less distinctly when dealing with the right of intercourse viewed in a larger perspective. Some emphasize that complete isolation, the cessation by a State of all relations with other States is contrary to international law or can be considered as a breach of international law.[95] Namysłowski is closest to the old concept of the right to intercourse. He considers that "the right and obligation to participate in international life excludes [...] the isolation of States as long as they are members of the international community." [96] Scelle is the most faithful advocate of the traditional views regarding the legal consequences of a full withdrawal from international intercourse. He considers that the refusal to participate in international exchanges is tantamount to self-exclusion from the community of nations and to a renounciation of the benefits arising from the law of nations.[97]

The increasingly rare views encountered in modern science of international law, according to which complete isolation puts a State outside the framework of the international community cannot be reconciled with the contemporary nature of such a community or with the modern substance of such a law. For, on the one hand the international community is, at present, a community of the States of the entire world and, on the other hand, the general rules of international law are being applied to all States without regard to their participation in international intercourse.

In contemporary science of international law several authors can be found who while accepting the existence of a right to intercourse use formulae implying that the concept of the right to intercourse as an obligation is devoid of normative content. As stated by Verdross : "*die Völkerrechts-*

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[93] See footnote 6.

[94] See E. WOLGAST, *Völkerrecht*, Berlin 1934, pp. 758–759.

[95] See for instance I. SEIDL-HOHENVELDERN, *Völkerrecht*, Köln-Berlin-Bonn-München 1965, p. 240 ; E. SAUER, *Grundlehre des Völkerrechts*, 3rd, ed., Köln-Berlin 1955, p. 134.

[96] W. NAMYSŁOWSKI, *Systematyczny wykład prawa narodów* [*A Systematic Course of International Law*], Olsztyn 1947, p. 29.

[97] G. SCELLE, *Droit international public*, Paris 1944, p. 91.

gemeinschaft ist ebenso wie jede andere Gemeinschaft ohne ein Mindestmass an Verkehr zwischen den Rechtsgenossen undenkbar." [98] Seidl-Hohenveldern thinks that "*zum Wesen des Völkerrechts gehört ein Minimum an gegenseitigem Verkehr und Austausch zwischen den einzelnen Völkerrechtssubiekten*".[99] Also Sauer, who presents one of the fullest analysis of the concept of the right to intercourse in modern science of international law considers that "*die Staaten in der VRgemeinschaft auf diplomatischen und Handelsverkehr miteinander angewiesen sind, weil dies der Natur menschlicher Betätigung entspricht.*" That is why the cessation of all intercourse must lead sooner or later to war.[100]

One of the characteristic features of the contemporary views accepting the existence of the right to intercourse is the absence of attempts to deduce from such a right some broader obligations regarding the maintenance of certain specific international relations such as political, economic and others. The majority of scholars view that right as a general principle and assume that the determination of an obligatory scope of intercourse and of the procedure of its implementation is outside the scope of universal international law.[101] Such an approach is very well conceivable, when taking into consideration that even in the course of the 19th century, when the concept of the right to intercourse developed as the expression of an obligation to remain within the framework of international relations, the obligations of a State deriving from the right to intercourse were not clearly defined. That is why all attempts aiming to attain that objective are beforehand doomed to failure, when based on the concept of the right to intercourse in the understanding of the 19th century doctrine. This can best be seen when considering the conclusions drawn by Namysłowski from his broad conception of the obligation of States "to maintain between them mutual relations, embracing, among other things, the exchange of material and cultural goods, including the obligation to maintain communication services." For this is being reduced to a statement, that "on the one hand, a State cannot isolate itself from other countries, in particular, it cannot close its borders and refuse the right of entry and residence on its territory to citizens of other countries as well as cease all exchanges of material and cultural goods, introducing thereby autarchy ; however, on the other hand, it has the right to determine its relation to and participation in the world economy and regulate accordingly its mutual intercourse".[102]

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[98] A. VERDROSS, *Völkerrecht*, 5th ed., Wien 1964, p. 239.

[99] I. SEIDL-HOHENVELDERN, *op. cit.*, p. 240.

[100] E. SAUER, *op. cit.*, pp. 134–135.

[101] See for instance E. SAUER, *op. cit.*, pp. 134–135 ; A. VERDROSS, *op. cit.*, p. 240.

[102] W. NAMYSŁOWSKI, *op. cit.*, p. 29.

In the contemporary science of international law some scholars, while accepting the existence of the concept of the right to intercourse as expressing a State's obligation, are introducing a clear distinction between their views and the concept of the fundamental right of a State to intercourse, as understood by 19th century doctrine. Some include within the contents of such a right the obligation to remain within the customary or normal scope of international relations.[103] However, even in such cases there are no clear criteria defining the obligatory scope of such relations. On the other hand, new legal justifications for the obligation to remain within the framework of international intercourse are being sought. Opinions are voiced according to which States which have granted recognition to one another are thereby accepting the obligation to remain within mutual international relations.[104]

Among theoreticians accepting a different concept of the obligation of States to establish mutual intercourse than that prevailing in the 19th century one can find scholars who favour the view that such an obligation is based on the rights of individuals. Of particular interest in this respect are the opinions of Scelle. Scelle negated the subjectivity of a State, and this lead to negating the right to intercourse as a subjective right of a State. Hence his view that the contents of what is being called right to intercourse covers first of all the competence of physical and legal persons as well as of national groups to take part in economic exchanges, which constitute the very basis of international social life. In accordance with "the right to intercourse" governments have the obligation to open their territories to intercourse ; they are also entitled to ask other governments to open their borders and even to resort to the use of force in order to achieve that objective.[105] As a matter of fact these opinions represent nothing new as far as the concept of the obligation of a State to remain within the framework of international intercourse is concerned ; they are rooted in the 16th century, in the views of Vitoria.

As had already been stated, the contemporary science of international law is familiar with the concept of the right to intercourse defined as an attribute of a State. Berezowski considers, that "the substance of the right to intercourse expresses the faculty to maintain relations with other States [...]."[106] Jankovic, for his part, thinks that States have the right to international intercourse, which means that they are free to establish and regu-

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[103] See for instance A. HOLD-FERNECK, *Lehrbuch des Völkerrechts*, Leipzig 1930, vol. 1, pp. 175–176, E. WOLGAST, *op. cit.*, pp. 758–759.

[104] See for instance A. HOLD-FERNECK, *op. cit.*, vol. 1, pp. 175–176.

[105] G. SCELLE, *op. cit.*, p. 91.

[106] C. BEREZOWSKI, *op. cit.*, p. 147.

late their relations with other States.[107] Libera, when writing about the right to intercourse, considers that "the right to maintain mutual relations is one of the most fundamental, essential and obvious attributes of particular States as subjects of international law."[108] The right to intercourse as the right enjoyed by each subject of international law is also being mentioned more and more frequently in the doctrine of international law of the Soviet Union.[109]

As a rule, all opinions concerning the right to intercourse as an attribute of a State are attaching that attribute to a very broad spectrum of international relations and cover not only political relations but economic, social and cultural as well. A certain exception to the rule are the opinions of Gelberg. He considers that the right to intercourse covers, in particular, the right "to maintain diplomatic relations, to conclude international agreements with other subjects of international law, to join international organizations, etc."[110]

The basic shortcoming of all views concerning the right to intercourse as an attribute of a State is the lack of an appraisal of the main idea on which a right to intercourse, so defined, is based as well as the lack of a comparative study of that idea as opposed to the traditional concepts, to which the term of the right to intercourse is linked in the science of international law. These views have, however, one common feature, namely, that they are not pointing at the obligation of a State to remain within the framework of international relations.

The right to intercourse as an attribute expresses the State's personality and implies a certain scope of rights, which a State can exercise in its foreign relations. Only exceptionally do some scholars state emphatically, that the nature of such rights is enshrined in the independence of the State which can decide about its participation in international relations.[111] As a rule, no scholar accepting the concept of the right to intercourse as an attribute refers to the consequences which arise from such a right with regard to other States.

In accordance with the tradition attached to such concepts as the right to commerce or, partially, to the right of legation, the right to intercourse as an attribute ought to imply, no matter whether this is stated explicitly

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[107] B. JANKOVIĆ, *op. cit.*, p. 151.

[108] K. LIBERA, *Zasady międzynarodowego prawa konsularnego*, [*Principles of International Consular Law*], Warszawa 1960, p. 120.

[109] See for instance C. P. ZADOROŻNYJ, *op. cit.*, pp. 155–156; in a joint edition *Meždunarodnaja pravosubektnost' (nekotorye voprosy teorii)*, Moskva 1971 mention is made i.a., of "*pravo na snošenija s drugimi subëktami*", p. 29.

[110] L. GELBERG, *op. cit.*, pp. 90–91.

[111] See B. JANKOVIĆ, *op. cit.*, p. 151.

or not, the obligation prohibiting States to force other States to maintain mutual relations, as well as the obligation not to interfere with the way a State wishes to participate in international intercourse. A very important element of the latter obligation is the prohibition to prevent or to hamper the mutual relations between States which want to maintain such relations.

The modern science of international law, faithful to the trends of its historical development, is clearly indicating that the concept of the right to intercourse as a duty of a State to maintain international relations has no foundation in the rules of universal international law. The majority of scholars seems either to reject or to ignore altogether the concept of the right to intercourse. Some authors consider, quite rightly, that the law in force fails to justify the existence of a fundamental right of States to intercourse. Some emphasize that only the provisions of international treaties can provide the basis for the obligation to maintain mutual relations. According to certain scholars a close scrutiny of the concept of the fundamental right to intercourse will reveal that its contents can be reduced mainly, to the right to innocent passage through territorial waters and to the right of free navigation on the open seas.[112]

One of the most comprehensive critical appraisals of the concept of the right to intercourse as a duty to maintain international relations with other States can be found, in the modern science of international law, in the writings of Makowski. He considers that the way in which a State is exercising its territorial supremacy indicates, that this alleged right is an empty shell without content, a concept contradicted incessantly by actual practice. "The opening of the States of the Far East for trade by force is no proof of the existence of such a right. For this was merely an act of violence, which would have remained without legal consequences if China had the means to respond to such acts of violence by force." Makowski, writing later about *ius commercii* expresses the view that" this is perhaps a postulate *de lege ferenda*, but not a positive norm. When there are import and export prohibitions, prohibitive and protective customs duties, passport, exchange, emigration and other restrictions [...] it is, to say the least, to early to speak about a right to intercourse."[113]

What can be seen as a characteristic proof that the concept of the right to intercourse as developed in the science of the 19th century is unacceptable as a concept of normative contents in modern science of in-

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[112] See for instance F. BERBER, *op. cit.*, p. 221 ; A. ROSS, *op. cit.*, p. 186 ; W. L. GOULD, *op. cit.*, p. 438 ; K. STRUPP, *Eléments du droit international public universel, européen et américain*, 2nd ed. Paris 1930, pp. 138–139 ; W. WENGLER, *op. cit.*, vol. 2, p. 1038.

[113] J. MAKOWSKI, *op. cit.*, ed., 1922, p. 224, ed., 1948, p. 86.

ternational law is the fact, that both its advocates and opponents are saying the same thing about it. As emphasized earlier, some authors who accept the existence of the right to intercourse as a duty consider, that the substance of that right can be reduced to the importance of intercourse for the existence of international law and the international community. Even Scelle, while defending in the International Law Commission the concept of the right to intercourse, went no further but pointed out simply that *"les relations entre les États sont à la base du droit international et si le 'jus communicationis' n'existait pas, il n'y aurait pas de droit international possible."*[114] On the other hand, the opponents of the right to intercourse are negating its existence, because they consider the phenomenon of intercourse to be not a consequence of the right to intercourse but a indispensable element of international law and international relations. For instance Cavaré considers that *"le droit au commerce international constitue un phenomène général qui est plutôt la cause de l'existence du droit des gens que son effet."*[115]

The analysis of the opinions concerning the right to intercourse as a duty of States expressed by contemporary scholars of international law indicate clearly that the concept of the fundamental right to intercourse as understood by 19th century science had only historical importance. A contemporary theoretician, wishing to consider in a coherent way the duties arising from the right to intercourse, must modify basically the nature of such duties. These duties can be approached as prohibitions to interfere with the manner in which a State participates in international relations. This, however, implies the adoption of the concept of the right to intercourse as a State's attribute. It can also be said that from the right to intercourse one can deduce the duty to act in accordance with the rules of international law.[116] However, in this case we will be confronting not a separate concept of an obligation to maintain international relations but an obligation to observe the rules of international law as applied to the existing scope of international intercourse.

The rejection of the right to intercourse as a duty does not mean that modern science of international law negates the possibility to found the obligation to maintain international relations on the basis of the universally accepted rules of international law. Such a possibility still exists, however, the above mentioned obligation cannot be based on the right to intercourse.

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[114] UN Doc. A/CN4/25, 26 V 1949, p. 5.

[115] L. CAVARÉ, *op. cit.*, vol. 1, p. 150 ; see also : Ch. G. FENWICK, *International Law*, New York—London 1924, p. 176 ; L. OPPENHEIN, *op. cit.*, 8th ed. by H. Lauterpacht, London 1955 ; R. QUADRI, *Diritto internazionale pubblico*, 2nd ed., Palermo 1956, p. 549.

[116] See H. U. SCUPIN *Wörterbuch des Völkerrechts*, vol. 1, Berlin 1960, joint edition K. Strupp and H. J. Schlochauer, p. 725.

The views of Dahm and Libera can serve as an example of a new approach to the problem of a State's duty to remain within the framework of international intercourse. Dahm considers that one of the basic principles of the international legal community is the duty to act in conformity with the requirements of the social activity; such a duty includes the duty to participate in intercourse with other States. Libera for his part, considers that "in order to cooperate each State has, under normal conditions of peaceful intercourse [...], the duty to maintain relations with other States irrespective of their political, economic or social structure. This is a fundamental condition of peaceful coexistence."[117]

Contemporary science of international law pays little attention to the problem of the right to intercourse as an attribute. It can be said that, generally speaking, more work on that subject has been advanced in the socialist countries; in particular Polish scholars have dealt with the right to intercourse as an attribute. The acceptance of such a concept on a world-wide scale depends on the way one looks at the position of a State in intercourse. If the right to participate in international intercourse will be defined as a separate legal concept and not as an expression of the capacity to act, then it will be possible also for the science of the capitalist States to formulate a new concept of the right of States to intercourse.

In view of the definition by the science of the socialist States of the fundamental rights of States as rights reflecting their legal personality, they had to include also the right to maintain relations with other countries. Following the assumption that the legal personality of a State is being expressed in its political as well as economic intercourse, the right to intercourse as an attribute could encompass in its contents diplomatic as well as commercial prerogatives. However, this merger was not pursued till its final conclusion, mainly because of the lack of a link-up with the traditional concept of the right to commerce.

V. The Right to Intercourse as an Institution of Contemporary International Law

The contemporary international legal order is an order encompassing all States of the world, without exception. Hence the world-wide character of the modern international community. Under such conditions and in accordance with what has been said above, there can be no place in contemporary international law for the concept of the right to intercourse as

[117] G. DAHM, *op. cit.*, vol. 1, pp. 191–192—"*die Pflicht zu gemeinschaftsmässigem Handeln*" and "*die Pflicht zur Teilnahme am int. Verkehr mit anderen Staaten*"; K. LIBERA, *op. cit.*, p. 121.

a prohibition to withdraw completely from all relations with other States. For, the state of full autarky is as unrealistic as the sanctions brought about by the violation of such a prohibition. Whatever the policy of a State in the field of its participation in international relations, it is not possible to withdraw from the international community or to escape the impact of the universal rules of international law.

The principles upon which the modern international legal order is based have found their fullest reflection in the Charter of the United Nations. It is in the light of these principles that the two concepts of the position of a State in international relations must be viewed : namely the right to intercourse as an attribute and the right to intercourse as a duty to remain within the framework of mutual relations with other States.

The right to intercourse as an attribute has its foundation in the personality of a State and expresses the capacity of that State to act in the field of international relations. The substance and contents of that right derive from the principle of sovereignty and equality. These are principles which have developed throughout history leading to the principle of sovereign equality of States.[118]

The principle of sovereign equality of States introduced into the institutions of international law by the provisions of the Charter of the United Nations is the most important principle of the contemporary legal order.[119] To this principle is inseparably associated the principle of non-intervention in matters within the domestic jurisdiction of any States.[120] In so far as the right to intercourse is concerned, the latter principle implies the prohibition to interfere with the prerogatives arising from the right to intercourse as an attribute of a State.

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[118] In view of the historical connection with the principle of sovereignty and equality the principle of sovereign equality of States is often considered to be the oldest principle of the international legal order. See the opinion of the representatives of Italy (Monaco) expressed during the discussion at the VI Committee of the XVIII session of the General Assembly, UN Doc. A/C. 6/SR821.

[119] All representatives of socialist States taking part in the discussion at the VI Committee of the XVIII session of the General Assembly on the subject of the principle of sovereign equality of States, viewed the juridical foundation of that principle in the provisions of the United Nations Charter and, consequently, considered it to be one of the most recent principles of the international legal order. See for instance the statements of the representative of Czechoslovakia — Doc. A/C.6/SR.802 and Cuba Doc. A/C.6/SR.820.

[120] During the discussion at the VI Committee of the XVIII session of the General Assembly the representatives of various States stressed the connection between the principle of sovereign equality of States and the principle of non-intervention. See for instance the statement of the representative of the United Kingdom—Doc. A/C.6/SR.822, Panama—Doc. A/C.6/SR.824, and Syria—Doc. A/C.6/SR.812.

In the course of the preparatory work on the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, the question of the right to intercourse as an attribute was rised on many occasions. There were opinions, voiced mainly by representatives of socialist States, that the principle of the sovereign equality of States implies also the right to participate in international relations or international life. Some emphasized that what is at stake is the right to take part in international relations or in the activities of the international community on the basis of equality and non-discrimination.[121]

Such formulae refelect a broadly conceived idea of the right to intercourse as an attribute of a State. However the majority of views expressed was rather in favour of limiting the concept of the right to intercourse to the right to take part in multilateral conventions and international organizations. It was also pointed out that this is meant to cover such situations, which are of direct concern to a particular State.[122] Relatively rare were the instances when a general unqualified right to enter international agreements or a right to establish diplomatic relations with other States was deduced from the principle of sovereign equality.[123]

The concept of the right to intercourse as an attribute of a State, as far as diplomatic intercourse is concerned, was raised, in particular in connection with the discussion concerning the principle of non-intervention in matters within the domestic jurisdiction of any State. Both the representatives of the socialist and capitalist States were in favour of that concept. According to the representatives of the socialist States each State has the sovereign right to establish diplomatic relations.[124] On the other

[121] The concept of such rights was advanced already during the discussion at the VI Committee of the XVIII session of the General Assembly. See for instance the statement of the representative of Czechoslovakia—"the right of every State to equal participation in international relations, international organisations and multilateral treaties,"—Doc. A/C.6/SR.802 ; of the representative of Ghana—"the right to take part in the activities of the international community on an equal footing,"—Doc. A/C.6/ /SR. 815 ; of the representative of Roumania—"Equal right to participate in international life"—Doc. A/C.6/SR.815. The opinions of the Polish and Czechoslovak governments contained for instance the concept of "the right of each (every) State to participate in international relations (to take part in international relations) on the basis of equality and non-discrimination." (Doc. A/5725/ADD.1 and ADD.3).

[122] Cf. in particular "Written proposal concerning the principle of sovereign equality of States submitted by Czechoslovakia"—Doc. A/AC. 119/L.6/.

[123] The representative of Cuba came closest to such a general concept when he mentioned "the right to establish diplomatic relations with any country" and "the right to entry into international agreements."—Doc. A/C.6/SR.820.

[124] See for instance the statements by the representative of Czechoslovakia, Poland and the Soviet Union in the Special Committee at the session in Mexico in 1964—Doc. A/AC/119/SR.25, 28, 31, 32 ; see also the statement of the representative of Nigeria,

hand, the representatives of the capitalist States considered that each State enjoys the right to be the sole judge whether it wants to maintain diplomatic relations with other States or not.[125] The final text of the principle of sovereign equality of States as well as the principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State in accordance with the Charter of the United Nations contains no direct statement on the right to intercourse as an attribute of a State. The question may be asked why. This has not been caused by the negation of the concept of the right to participate in international intercourse, for no State has expressed itself against the principle according to which a State has the right to decide freely about the international relations it wishes to maintain.

The failure to include the concept of the right to intercourse as an attribute in the contents of the principle of the sovereign equality of States can be explained by the following circumstances. The main reason is the omission of a definition of such concepts as : State, full sovereignty, personality of a State. The concept of a State as well as the concept of the personality of a State cannot be explained at present without reference to the concept of the rights or capacity of a State to participate in international life or intercourse.[126]

The second reason is the victory of the view represented by a substantial number of States, in particular capitalist States, that the development of the contents of the principle of sovereign equality must be based on the interpretation given to that principle in 1945 in San Francisco during the preparatory discussion preceding the adoption of the United Nations Charter.[127] This was tantamount to the adoption of a general formula concerning

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who considered that "the establishment or severance of diplomatic relations" are "manifestations of sovereignty and that the exercise by a State of its sovereign rights should not be subject to any pressure whatever."—Doc. A/C119/SR.28.

[125] See for instance the statements of the representatives of the United Kingdom, France, Holland and the United States made at the session of the Special Committee in Mexico in 1964—Doc. A/AC. 119/SR. 28, 29, 30, 32. According to the representative of France every sovereign State enjoyed the right "to be the sole judge of the way it chose to conduct its diplomatic relations."—Doc. A/AC. 119/SR. 28.

[126] This is borne out by one of the rare attempts to define by convention the concept of the State undertaken in the relations between the American States. Article one of the Convention on the rights and duties of States, while defining the State as a subject of international law, considers one of its attributes to be "the capacity to enter into relations with other States." (*Treaty Series of the League of Nations*, vol. 165, No. 3802).

[127] See for instance the opinions of the governments of the United Kingdom and Canada (Doc. A/5470), on the interpretation accepted at the San Francisco Conference—see *United Nations Conference on International Organizations*, Commission I, 1 June, 1945, vol. 6, p. 717.

the principle of sovereign equality of States and to the renounciation of all attempts aiming at a definition of the rights arising from such a principle.

The third and last reason why the concept of the right to intercourse as an attribute was omitted is related to the very question of the position of a State in international intercourse. Those who advocated the inclusion into that principle of the concept of the right of States to participate in international relations made very often no distinction between such a concept as an attribute and such a concept as a duty. They considered that the right to participate in international relations implies specific mutual obligations, such as non-discrimination in trade, admission to international organizations or to participation in multilateral treaties.[128] This resulted in the establishment of a link between the principle of sovereign equality of States and the concept of the obligation to remain within the framework of intercourse, which—in accordance with the analysis of the fundamental concepts of the position of a State in intercourse—has no legal justification in the contemporary legal international order.

The absence of a clear definition of the concept of the right to intercourse as an attribute, as related to the principle of sovereign equality of States, could not fail to affect the way, in which the problem of the position of a State in intercourse was defined in connection with the duty not to intervene in matters within the domestic jurisdiction of any State.[129] In place of a clear statement that a State shall not interfere with the manner in which another State exercises his right to take part in international relations, a general prohibition to intervene directly or indirectly, for any reason whatever in the internal or external affairs of a State was adopted.[130]

Let us now consider what conclusions can be drawn, as far as the position of a State in international intercourse is concerned, from the formulae concerning the principle of sovereign equality of States and the duty not to intervene in matters within the domestic jurisdiction of any State. The text of the first principle in accordance with the Declaration of the General Assembly of the United Nations of 24 October, 1970, is based on a general

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[128] See in particular the opinions of the governments of Poland and Czechoslovakia (Doc. A/5725 ADD. 1 and ADD. 3).

[129] The work of the Special Committee did not result in a new definition of "the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter of the United Nations." The text of that principle finally adopted by the General Assembly represents an adaptation of the provisions contained in Res. 2131 (XX) of 21 December, 1965 on the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty.

[130] See text of the Declaration, *Chronique Mensuelle ONU*, No. 10, 1970, p. 112.

statement that all States enjoy sovereign equality. In accordance with the general interpretation of that formula, sovereign equality implies equality of rights and duties as well as equal rights of States as members of the international community, irrespective of their political, social, economic and other differences. A larger interpretation of that principle includes within the sovereign equality of States such elements as: the equality of all States from the juridical point of view, the enjoyment of rights inherent in full sovereignty, the duty to respect the personality of other States, the territorial integrity and political independence of all States.[131]

The principle of sovereign equality of States, in so far as it means full sovereignty and territorial or political independence, has grounded as a obligatory rule of contemporary international law the freedom of States to decide on the establishment and maintenance of international relations in both the political and economic sphere. At the same time, full sovereignty over its territory gives each State, as a matter of principle, an unlimited right to refuse to admit aliens. On the other hand, the principle of juridical equality and the duty to respect the rights arising from the personality of other States implies, first, that all States have equal rights to decide about their international intercourse and second, that any limitation of the freedom of States to decide about their participation in international relations constitutes a breach of international law. Hence no State can be forced to accept mutual intercourse or to accept intercourse based on principles which have been imposed by illegal means. It is also prohibited to interfere with the establishment and maintenance of relations by third States.[132]

The interpretation of the principle of sovereign equality, as based on the formula adopted by the Declaration, means that each State is free to decide about its participation in international intercourse and is not bound to agree to mutual intercourse. Such a freedom is as a real phenomenon contained in the concept of full sovereignty, however, as a legal frame it takes the shape of one of those prerogatives which can be found in the concept of the personality of a State. The recognition of the freedom of a State to decide about its participation in international intercourse as one of the prerogatives which are included in the concept of the personality of a State has two important legal consequences. On the one hand, the right to decide whether to remain within the framework of international relations acquires the quality of an attribute of a State and can be defined by the concept of "the right to intercourse." On the other hand, the placing on

[131] *Ibid.*, p. 113.

[132] See in particular the statement of the representative of Cuba—"The principle of the sovereign equality of States required that every State should be free to participate in all aspects of international life without being subjected to pressure or coercion from any other State." (Doc. A/C.6/SR. 820).

an equal footing of such a defined right to intercourse with the remaining elements of the State's personality means that no State has the right to interfere with the manner in which another State takes part in international life. Therefore all States are duty-bound to refrain from such actions which may limit the rights arising from the right to intercourse as an attribute. The contents of such rights represent, first of all, a generalization of the hitherto prevailing concept of the right to commerce.

Some formulae contained in the text of the principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State confirm certain conclusions which arise from the principle of sovereign equality for the position of States in international intercourse. The prohibition to intervene in the external affairs of other States as well as the prohibition to use whatever means in order to force a State to change the manner in which it exercises its sovereign rights implies a duty to refrain from encroaching upon the rights of States as far as their exercize of the right to intercourse as an attribute is concerned.[133]

The contemporary international legal order includes, as stated above, in its contents the right to intercourse as an attribute. Its essence implies that States have no obligation to remain within the framework of international relations. Hence, there is no place in that international order for the subjective concept of the right to intercourse as an obligation. This means also, that there is no possibility to deduce directly from the right to intercourse, as a right of a member State of the international community, an obligation to agree to mutual intercourse with other States.

The obligation to remain within the framework of mutual international relations cannot have its juridical basis in the right of a State to intercourse, viewed as a special institution of universal international law. This is corrobarated by the actual state of contemporary science of international law. The legal basis of such an obligation must be sought in other juridical constructions, such as the duty to live in peace, the duty to preserve peace and security, the duty to cooperate. The Charter of the United Nations has given all these constructions the character of universally binding juridical rules.[134] They have also found their reflection in the Declaration Concerning the Principles of International Law Governing Freindly Relations and Cooperation Among Nations in Accordance with the Charter of the United Nations. The duty of States to cooperate with one another was even formulated as one of the seven principles contained in the Declaration.

The obligation of States to cooperate with one another has been defined in the Declaration in a very general form. It is stated simply that

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[133] See text of the *Declaration, op. cit.*, p. 112, assuming that the right to intercourse is included as an attribute in the sovereign rights of States.

[134] See Arts. 1, 2 and 55 of the United Nations Charter.

States have the duty to cooperate irrespective of the differences which may arise from their political, economic or social systems. Such cooperation is of a universal character and includes all fields of international intercourse. Its purpose is the maintenance of international peace and security as well as the promotion of stable international economic relations and its progress, general welfare and international cooperation free from discrimination based on above mentioned differences. The more specific interpretation of that duty includes, among otherthings, the duty to cooperate in the maintenance of international peace and security as well as the duty to conduct international relations in the economic, social, cultural, technical and commercial fields in accordance with the principle of sovereign equality and nonintervention.[135]

The general definition of the principle of mutual cooperation of States makes it difficult to deduce what specific legal consequences derive from that principle with regard to the position of a State in international intercourse. However, at least two rules of international law can be ascertained : the duty of a State to maintain mutual relations, in so far as this is indispensable to the maintenance of international peace and security, and the principle that the duty to remain within the scope of international relations cannot violate the principle of sovereign equality and non-intervention. The former limits the duty to maintain mutual relations to extraordinary situations, while the latter subordinates the duty to cooperate to the consequences which derive from the freedom of a State to decide about remaining within the scope of mutual international intercourse.

The principle of mutual cooperation, as formulated in the Declaration offers little, as far as the establishment of criteria for the definition of the scope of the obligation to maintain international relations is concerned. True enough, the refusal to maintain the minimum of contacts necessary to the maintenance of peace and security can be considered as a breach of international law. But nothing specific can be said about the legality of other actions by a State which exercises its freedom to decide whether to remain within the framework of international intercourse or not. It may be pointed out that in connection with that principle there are only very rare references to the problems of the right to intercourse in the science of international law as well as in the comments of States.[136]

The final content of the principle of mutual cooperation of States cor-

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[135] See text of the *Declaration, op. cit.*, p. 112.

[136] See for instance B. Bystrycky, *On the Principle of Obligatory Cooperation of States*, in a joint edition *The Legal Principles Governing Friendly Relations and Cooperation among States in the Spirit of the United Nations Charter*, Leyden 1966, pp. 104, 105 ; M. Lachs, *op. cit.*, pp. 783–788 ; see also the opinions of the governments of Poland and Czechoslovakia. (Doc. A/5725/ADD. 1 and ADD. 3).

responds basically to the majority opinions which have been expressed in the course of its drafting. All States were unanimous in their statements about the necessity of cooperation in the modern world, while recognizing the provisions of the United Nations Charter as the legal basis of the duty of States to cooperate with one another. It was emphasized that without international cooperation States would not be able to fulfill their obligations arising from the Charter, in particular the obligation to maintain international peace and security and the obligations in the field of international economic and social cooperation.[137] However, at the same time the majority of views expressed was so general in nature that nothing could be deduced as to what specific actions by a State can be considered as a violation of the duty of States to cooperate with one another. Certain statements contained a clear indication that it would be very difficult, if not impossible, to define specific obligations arising from the duty to cooperate.[138]

The general definition of the principle of mutual cooperation of States offers no ground for the establishment of specific criteria which would permit to appreciate the attitude of States as far as their international intercourse is concerned. However, some important conclusions can be drawn for the problems arising from the right to intercourse from the very fact, that this principle has been recognized as one of the basic principles upon which the contemporary legal order as expressed in the Charter of the United Nations is founded. For it is obvious that the duty to cooperate would be totally irrelevant if States did not maintain mutual relations. This principle implies therefore, on the one hand, a general duty to remain within the scope of international relations and, on the other hand, the absence of a right to such an exercise of the attribute to intercourse as would be contrary to the duty of States to cooperate with one another. This means that in the present-day legal order a State, while enjoying the right to decide about its participation in international intercourse has no unlimited freedom in this respect. A substantial step forward has thus been made in the direction of establishing an obligation to remain within the scope of international intercourse. However the practical importance of such an obligation will depend on the definition of universally accepted criteria, which would enable to judge whether a specific decision of a State concerning its remaining in intercourse constitutes a breach of international law or not.

In this connection a very important question arises as to whether the contemporary international legal order makes it possible to define criteria

[137] See for instance the opinions of the governments of Argentina, Czechoslovakia, the Philippines, Poland, Roumania, Hungary. (Doc. A/5725 and ADD. 1, 3, 6).

[138] See for instance the opinion of the government of Cyprus. (Doc. A/5725).

of a general nature for the establishment of the scope of mutual relations which States ought to maintain if they want to act in accordance with their obligation to remain within the framework of international intercourse. Such a question must be answered in the affirmative, for the starting point of considerations regarding such criteria can be the duty of each State to live in peace with other States. This duty has been explicitly mentioned in the Declaration as one of the elements of which the principle of sovereign equality of States is made up.[139] Two specific legal consequences derive from that duty. First, there is another confirmation of the rule, according to which a State enjoys no unlimited freedom in its exercise of the right to intercourse. In this specific case it means, that it has to use its attribute without violating its duty to live in peace with other States. Second, it means that a legal criterium can be defined in order to determine the obligatory scope of mutual intercourse. The obligation to live in peace implies an obligation to maintain a specific state of normal relations among States. By determining what is the scope of mutual intercourse which characterizes normal, peaceful relations between States, it will be possible to define the scope of mutual relations which States have the duty to maintain with one another.

A broader study of the scope of mutual relations characteristic of normal peaceful relations cannot be undertaken at this juncture. That is why the closing remarks will be concerned mainly with those opinions represented in the science of international law, from which the existence of an inherent link between the freedom of international intercourse and the maintenance of peaceful relations can be deduced.

The development of the science of international law throughout history has on many occasions stressed the importance of the maintenance of mutual relations among States as a factor of the preservation of peace. The criticism of the theory of fundamental rights of States and the substitution of subjective rights by principles, which States have the duty to respect in their mutual relations, was accompanied by the replacement of the function of such rights by principles, which States respect when living in peace and which they must respect if they wish to live in peace. Among these principles figures prominently the principle of mutual maintenance of normal relations among States.[140]

The first theoreticians of the Law of Nations were already making a distinction between normal events occurring in relations among States and the principles of the law of nature which are being applied when con-

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[139] See text of *Declaration, op. cit.*, p. 113.

[140] See Th. FUNCK-BRENTANO, A. SOREL, *Précis du droit des gens*, 3rd ed., Paris 1900, p. 47.

flicts arise. The principles applied in normal relations implied the admission of aliens for the purpose of commerce or the reception of a foreign envoy. On the other hand, relations characterized by a state of conflict were followed by the limitation or cessation of intercourse without justification.[141] In particular, friendly relations were, at that time, identified with the freedom of commercial intercourse. Zouche considered that in times of peace rulers and nations view each other as friends and allies, and friendship implies *ius commercii*. This implies also freedom of access, residence and trade on a foreign territory, freedom to transact deals and conclude contracts as well as freedom to conduct trade in some or all goods among two States.[142]

Special emphasis was laid on the freedom of diplomatic, personal and commercial intercourse as signs of normal peaceful relations by the theoreticians of the European law of nations at the turn of the 18th century. In the field of diplomatic intercourse such relations were reflected in the universal practice of permanent embasies. The refusal to accept a specific person as envoy occurred only on serious grounds. An equaly important sign of normal peaceful relations was the freedom of personal and commercial intercourse. In times of peace such intercourse was free, as a rule, between the European territories of European States. The applied restrictions resulted only from the need to protect the security of the State and the welfare of its citizens. The closing of borders and the cessation of intercourse were exceptional and followed only a state of conflict, in particular a state of war. Taking as a point of departure a comparison of peaceful relations with hostile relations the theoreticians of European law of nations recognized more or less explicitly the freedom of international intercourse as a principle of positive law, while treating the unlimited right of a State to decide whether to remain in international intercourse as a rule of the law of nature, which has no application under normal peaceful conditions.[143]

The second half of the 19th century witnessed a rapid and many-sided growth of mutual relations among States, in particular in the economic sphere. Normal relations between States were characterized by a universal freedom of personal intercourse. On the territory of particular States the

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[141] See for instance F. SUAREZ, *Tractatus de legibus ac deo legislatore*, Coimbra 1612, excerpts translated by J. B. SCOTT, *The Spanish Conception of International Law and Sanctions*, Washington 1934, pp. 85–87.

[142] R. ZOUCHE, *op. cit.*, vol. 2, pp. 5–6.

[143] See for instance J. J. MOSER, *op. cit.*, pp. 241, 365–366 ; G. F. MARTENS, *op. cit.*, pp. 94–95 ; 222 ; F. SAALFELD, *op. cit.*, pp. 67–68, 109 ; SCHMELZING, *op. cit.*, vol. 1, pp. 212–214, vol. 2, pp. 98–99, in conjunction with the general views of these scholars on the sources of law and variety of legal orders.

rights of aliens to conduct trade were equal to those of nationals.[144] However, the doctrine of international law is undergoing a substantial modification, as far as the link between mutual relations of States and peaceful relations is concerned. Although several scholars consider their maintenance as a reflection of peaceful relations,[145] the majority considers intercourse to be a fact of life which compels States to maintain mutual relations, irrespective of their importance for the preservation of peace. The large scope of free international intercourse, so characteristic of the end of the 19th century, was viewed by that majority not as a consequence of peaceful relations which were binding States but, mainly, a result of the development of international relationships, which ruled out the possibility of a State exercising its full independence when deciding about the maintenance of mutual relations with other States, especially in the economic field.[146] The science of international law of that period is therefore of limited use as far as the determination of the scope of mutual relations characteristic of peaceful intercourse is concerned.

The 20th century with its First and Second World Wars has been marked by far reaching limitations of the freedom of international intercourse, in particular of personal and commercial intercourse. The policy of States with regard to other States in the field of economic intercourse became differentiated, which gave rise to the important problem of discrimination. The contemporary science of international law could not ignore that phenomenon. This, in turn, led to the establishment of a much closer connection than hitherto between the freedom of intercourse and the state of peaceful normal relations, and to the treatment of discrimination as a reflection of hostile or unfreindly relations.[147]

Contemporary international relations are marked by a continuous process of liberalization of economic intercourse. However, restrictions and discriminatory practices, especially between States with different political,

[144] See A. CAŁUS, *Prawa i obowiązki państwa w dziedzinie międzynarodowego obrotu osobowego* [*Rights and Duties of States in the Field of Personal Intercourse*], Warszawa 1970, pp. 179–199.

[145] See for instance L. NEUMAN, *Grundriss des heutigen Europäischen Völkerrechtes*, 3rd ed., Wien 1885, pp. 26–27.

[146] See for instance L. A. KOMAROVSKIJ, W. A. ULJANICKIJ, *op. cit.*, p. 107; F. STROERK, *Staatsuntertanen und Fremde, Handbuch des Völkerrechts auf Grundlage Europäischer Staatspraxis*, joint edition edited by F. von Holtzendorff, vol. 2, Hamburg 1887, p. 640; E. ULLMAN, *op. cit.*, p. 248.

[147] In connection with the policy of States in international personal intercourse this problem has been refered to by such scholars as: P. FEDOZZI, *Introduzione al diritto internazionale*, Padova 1933, p. 343; E. ISAY, *De la nationnalité* "Recueil des Cours," Academie de Droit International, vol. 5, 1924, p. 451; L'HUILLER, *Eléments de droit international public*, Paris 1950, p. 484; J. C. STARKE, *An Introduction to International Law*, 4th ed., London 1958, pp. 257–258.

economic and social systems are still in use. In connection with this an important practical question arises as to whether such practices are compatible with the obligation to live in peace.

The above mentioned connections between mutual intercourse and the state of peaceful relations can provide the basis for two conclusions which are of importance in the process of determining the scope of mutual relations which States have the duty to maintain, in accordance with contemporary international law :

— first, the absence of mutual relations or the limitation of such relations can be justified only on very serious ground, which should be determined by objective criteria.

— second, a withdrawal from intercourse, or the restriction of intercourse with a specific State must be considered as illegal, if arising from practices, which can be qualified as discriminatory.

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Materials Used in the UN Practice of International Law-Making

by KAROL WOLFKE

The twenty five years' long activity of the United Nations in the field of progressive development of international law and its codification deserves thorough and extensive analysis, since there are numerous important aspects of this activity which can be explored thanks to the experiences gathered at the regulation of certain branches of international law.

To illustrate the potentialities of such investigations in this article only one aspect will be considered : the importance of certain materials used in the international law-making process, such as treaties, precedents, resolutions, judicial decisions, teachings of eminent publicists, etc. Of the numerous international organs which participate in the practice of law-making only two most important have been investigated, that of the International Law Commission and of the diplomatic conferences organized by the United Nations for the final elaboration and acceptance of draft conventions.

First, however, the question should be answered whether the factors involved in the two functions, progressive development and codification can be dealt with jointly or, in other words, if it is in practice possible to separate these functions at all.

In theory, codification and development of law constitute two essentially different activities. This follows already from the very definition included in Article 15 of the Statute of the International Law Commission, which reads :

"In the following articles the expression progressive development of international law is used for convenience as meaning the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States. Similarly, the expression 'codification of international law' is used for convenience as meaning the more precise formulation and systematization of rules of international law in fields where there already has been extensive practice, precedent and doctrine."[1]

[1] Statute of the International Law Commission and other Resolutions of the General Assembly Relating to the International Law Commission, Doc. A/CN. 4/4.

There are even different procedures foreseen for both functions (see Arts 16–24). It is, however, notorious that in practice it is very difficult to draw a border line between them. In fact, the organ undertaking codification never limits itself to faithful reconstruction of the law already in force, but always introduces certain new elements *de lege ferenda* in order to adapt the old rules to new, existing or expected in the next future, conditions.

In case of rules which have been already formulated in words in agreements, judicial decisions or by publicists, that is, when a kind of codification already exists, they can be theoretically transferred into multilateral law-making treaties without change, by widening their range of validity.

The situation is different when a true customary rule, that is, live practice accepted as law—unformulated so far in the writing even in the doctrine—is to be codified in a multilateral law-making treaty. Such a true codification of a virgin custom must of necessity constitute something new, a practically speaking new rule consisting only in a more or less precise generalization of the just mentioned live practice.

As far as the difference of procedure is concerned, in practice it has not found application because it has proved impossible to eliminate the element of law-making, even in the cases of apparently pure codification. For instance, in the final draft of the Law of the Sea the Commission "has become convinced that, in this domain at any rate, the distinction established in the Statute between these two activities could be not maintained."[2]

It should be added yet that in the big majority of cases the articles of conventions allegedly merely codifying well settled customary rules, in fact deeply modify them—hence they constitute examples of progressive development of international law.[3]

In connection with the materials used in the activity of development and codification of international law, it should be reminded that some of them have been mentioned already in the Statute of the International Law Commission : in the above Article 15—State practice, precedent and doctrine, in Article 16(c) it is stipulated in general terms that the Commission "shall circulate a questionnaire to the Governments, and shall invite them to supply (within a fixed period of time) data and information relevant to items included in the plan of work."

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[2] "Yearbook of the International Law Commission" (further cited as YILC), 1956, vol. 2, pp. 255–256, see *ibid.*, pp. 256, 277 ; Cf. H. W. Briggs, *The International Law Commission*, Ithaca-New York 1965, pp. 299–300.

[3] See the present author's, *Rozwój i kodyfikacja prawa międzynarodowego. (Wybrane zagadnienia z praktyki ONZ)* [*Development and Codification of International Law. (Selected Problems from the UN Practice)*], Wrocław 1972. p. 165.

In paragraph (e) of the same article one speaks of "consultation with scientific institutions and individual experts"; (f)—of "drafts proposed by the Raporteur;" (h)—of "Comments of Governments."

Article 17 recommends the Commission (in para. 1)

"to consider proposals and draft multilateral conventions submitted by members of the United Nations, the principal organs of the United Nations other than the General Assembly, specialized agencies, or official bodies established by inter-governmental agreement to encourage the progressive development of international law and the codification."

In paragraph 2(b) again the comments by the bodies enumerated in paragraph 1 are mentioned.

Article 18 on the procedure of codification foresees a survey of the whole field of international law with a view to selecting topics for codification, "having in mind existing drafts whether governmental or not". Article 19 obliges the Commission, through the Secretary General to address to Governments

"a detailed request to furnish the text of laws, decress, judicial decisions, treaties, diplomatic correspondence and other documents relevant to the topic being studied and which the Commission deems necessary."

Moreover, according to Articles 25 and 26, the Commission

"may consult with any of the organs of the United Nations and with any international or national organizations, official or non-official."

As we see, the number and variety of materials already mentioned in the Statute of the International Commission is considerable. Noteworthy is that they are not limited to official documents but embrace also private institutions and individual views of scholars.

In the preparatory work at the elaboration of the Statute and, e.g., in the comment by Briggs there is no information how the drafters of the Statute contemplated the utilization of the above mentioned materials by the Commission. Neither has this problem found yet wider consideration in the writings on the development and codification of international law.

Certain indications on this subject may be, however, found in the reports of the Commission's first two sessions in connection with Article 24 of its Statute.

"The Commission shall consider ways and means for making evidence of customary international law more readily available, such as the collection and publication of documents concerning State practice and of the decisions of national and international courts on questions of international law, and shall make a report to the General Assembly on this matter."

Although, as has been stressed in the Memorandum of the Secretariat of the United Nations,[4] the task of the Commission, according to the just

[4] *Ways and Means of Making the Evidence of Customary International Law More Readily Available*, Preparatory work within the purview of Article 24 of the Statute of the International Law Commission, Doc. A/CONF. 4/6 of 7 March 1949, p. 10.

mentioned article, does not concern directly the activity of development and codification, the way it has been dealt with by the Commission, especially the views expressed at this occasion, throw some light on the value which the Commission intends to ascribe to particular "evidences of customary international law," i.e., also to the factors to which such rules owe their emergence or content in the course of development and codification of international law.

It has been emphasized in the Commissions's report that the enumeration in Article 24 of the two sources of international law : the State practice and the decisions of municipal and international courts on international questions,

"does not preclude the consideration of other ways and means nor excludes other sources"[5]

nor

"is it practicable to list all the numerous types of materials which reveal state practice on each of the many problems arising in international relations."[6]

In this connection, "only for convenience" certain items have been enumerated as evidence of customary law or only State practice :

A. texts of international instruments ;
B. decisions of international courts ;
C. decisions of national courts ;
D. national legislation ;
E. opinions of national legal advisers ;
F. practice of international organizations.[7]

Among national legislations all kinds of legislative acts are numbered stressing that "no form of provision of regulative character issued by public authority is excluded." As far as diplomatic correspondence is concerned, the opinion has been expressed that it "should provide abundant evidence of customary international law".[8] The growing practice of international organizations may in the Commission's opinion be considered as evidence of customary law in respect to relations between States and organizations.[9]

The provisions of the Statute of the International Law Commission and the opinions of this organ on the utility of various kinds of evidences of customary law give at least a general idea of the kinds of materials which can be used in the activity of development and codification of international law and about the extent to which the Commission intends to base itself on them.

[5] YILC, 1950, vol. 2, p. 367.
[6] *Ibid.*, p. 368.
[2] *Ibid.*, pp. 368–372.
[8] *Ibid.*, pp. 370–371.
[9] *Ibid.*, p. 372.

Much more interesting will be to investigate how in practice the various kinds of materials have been utilized and, in particular, what has been their contribution to the content of the elaborated draft articles. Here, of necessity only a few examples will be considered to illustrate the potentialities of such investigations.

One of the most fundamental concepts which always appears in the activity of progressive development and codification of international law is *practice*. It does not seem possible to determine exactly its scope. At any rate, it is wide since it embraces all kind of acts of behaviour of States and international organs, with the exception, however, of single acts, which most often are termed "precedents." In other words, practice consists of precedents.

In the proceedings of the International Law Commission most often special kinds of practice in the form of agreements, judicial decisions, municipal legislation, etc., have been referred to.

There are, however, also relatively numerous cases when the general term "practice" or other equivalent ones with additional adjectives have been used. For instance, in the Commission's Comment to Article 3 of the draft of the law of the sea we read :

"First of all, the Commission had recognized that international practice was not uniform as regards the traditional limitation of the territorial sea to three miles."[10]

Whereas in Comment to Articles 22 and 23 of the Draft the Commission followed the rules of the Brussels Convention of 1926 concerning the Immunities of Government Ships, because these provisions "followed the preponderant practice of States".[11]

There are, however, cases where practice has been expressly combatted, for instance, that of double nationality of ships, which in the opinion of the Commission should not be tolerated.[12]

Many instances of quoting practice can be found at the elaboration of the Conventions on Diplomatic Relations and especially that on Consular Relations as evidence of customary rules. For example, in the Commission's Comment to Article 36 of the Draft on immunity from custom duties we read :

"It is the general practice to accord to members of the diplomatic staff of a mission the same privileges and immunities as are enjoyed by heads of missions, and it is not disputed that this is a rule of international law. But beyond this there is no uniformity in the practice of States [...]. In these circumstances it cannot be claimed that there is a rule of international law on the subject apart from that already mentioned."[13]

[10] YILC, 1956, vol. 2, pp. 265–266.

[11] *Ibid.*, p. 276.

[12] *Ibid.*, p. 280.

[13] YILC 1958, vol. 2, p. 101.

In the same Comment on custom duties, not levied on articles intended for the personal use of the diplomatic agent and his family, there is an interesting example of emergence of a legal rule based on international comity :

"In general, custom duties are likewise not levied on articles intended for the personal use of the diplomatic agent or of the members of its family [...] This exemption has been regarded as based on international comity. Since, however, the practice is so generally current, the Commission considers that it should be accepted as a rule of international law."[14]

Sometimes contradictory practice has been the ground for relinquishment the regulation of a problem by the Commission. For instance, in the Comment to Article 11 of the Draft (12 of the Convention) on Consular Relations we read :

"The only controversial question is whether a State which refuses the exequator ought to communicate the reasons for the refusal to the government concerned [...]. In view of the varying and contradictory practice of States, it is not possible to say that there is a rule requiring the States to give the reasons."[15]

Also in the Comment to the Draft Convention on the Law of Treaties the concept of practice often appears under various terms. As a typical example one might quote the Comment to Article 2 concerning the terminology saying that treaty in simplified form "is very common, and its use is steadily increasing."[16] In the Comment to Article 8 on the acceptance of the text :

"The Commission felt all the more justified in proposing this rule, seeing that the use of a two-thirds majority for adopting the text of multilateral treaties is now so frequent."[17]

More important seems the fact that emphasis is put on recent practice. For instance, in the Comment to Article 12 on accession the Commission has been of the opinion that

"an examination of the more recent treaty practice shows that in practically all modern treaties which contain accession clauses the right to accede is made independent of the entry into force of the treaty [...]."[18]

The way of quoting practice by the Commission confirms that this concept embraces all forms of State behaviour. Practice is obviously the most essential material in the development and codification of international law, considering only that it constitutes the raw material of international customary law. The numerous instances, of which only a couple has been quoted, are good illustration of how the Commission utilized the broadly conceived concept of practice as a means of ascertaining the already valid

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[14] *Ibid.*, p. 100.

[15] YILC, 1961, vol. 2, p. 101.

[16] YILC, 1966, vol. 2, p. 188.

[17] *Ibid.*, p. 195, para. 5.

[18] *Ibid.*, p. 199.

or only emerging rules of international law. The Commission has not cared so much for settled, traditional practice as for the latest one. This is another argument that of the two principal activities, development and codification, the first has been considered as more important.

Beside practice, as material for progressive development of international law and its codification single facts of behaviour, that is, *precedents* have also frequently been quoted. Like practice, precedent is very broadly conceived. And so have been called conventions or even their single provisions. For instance, the Brussels Acts of 1890[19] or Article 36.2 and Article 38.1a of the Statute of the International Court of Justice. The latter has been described as a "fact" which

"serves to confirm that the use of the term 'treaty' [...] to embrace all international agreements is perfectly legitimate."[20]

Whereas the quotation of single precedents as evidence of a whole practice or trend is rather notorious, stricking are the cases when one precedent has been a sufficient motive for the Commission to include a special provision into the draft in anticipation that this fact may be symptomatic of a future practice, and therefore, deserves consideration beforehand.

An interesting example of such a regulation based on one precedent is given by the so-called *Behrman* case mentioned in the first report by Professor François "as a certain variant of the right of pursuit, which arose a few years before in Indonesia".[21]

The problem consisted in the question whether a vessel arrested in the territorial sea convoyed to a port for examination may consider itself as liberated if the route to the port leads across the high sea.[22] As result of long discussion the final answer of the Commission has been negative and a special provision, Paragraph 6 of Article 23 of the High Seas Convention, has been inserted.[23]

Another, an even more interesting, example may be quoted in connection with the problem of the nationality of ships of international organizations. At the seventh session of the International Law Commission the Rapporteur François nead a letter addressed by the Legal Adviser of the United Nations Stavropoulos to the Secretary of the Commission Liang in which the former asked to inform the Commission about a certain in-

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[19] YILC, 1956, vol. 2, p. 284 : "The Commission felt that it should follow this practice."

[20] YILC, 1966, vol. 2, p. 188.

[21] YILC, 1950, vol. 2, p. 44.

[22] *Ibid.*, pp. 44–45.

[23] *United Nations Conference on the Law of the Sea*, Official Records, Summary Records of Meetings and Annexes, vol. 2, p. 67 and 138.

cident "which may be of interest to the Special Rapporteur and other members of the Commission." It was the case of delivery to Korea of ten fishing vessels built in Hong Kong ordered by the UN Reconstruction Agency. The question arose of what flag should be flown and what registry used. Since the registration of no country could be obtained, the Legal Adviser saw no alternative but to undertake the function of registration himself, and to navigate the vessels under the United Nations flag. The Legal Adviser concluded that "in view of the possible occurence of future cases of this kind [...] it would seem to me desirable that the Commission's draft should at least not exclude the possibility of such an organization's registering its vessels [...].[24]

This letter and the case described in it initiated, too, a long discussion in the Commission and later at the Conference of Geneva. Finally, a special provision had been inserted in the High Seas Convention as Article 31.[25]

These two cases constitute an additional evidence that the Commission and the Conferences concentrated their attention on the latest trends and not on the ancienty or generality of the practice in question.

In the report of the Commission on the Ways and Means of Making the Evidence of Customary International Law More Readily Available as first international treaties have been mentioned. Undoubtedly, treaties, especially multilateral ones, belong to important evidence of practice and its acceptance as law. Tacit obedience to their provisions by third States is often a sufficient ground for a presumption or even definite statement that the provisions have been accepted by those States as binding them. Disregarding the rather infrequent cases when treaties regulate fully a certain field of international relations and thus codification is unnecessary, most often treaties have only a limited range of validity or, being obsolete, require adaptation to new conditions.

There are numerous examples where development or codification has been based, i.a., on existing treaties, bilateral or multilateral. In fact, treaties or even their drafts, have always been quoted wherever they refer to the branch of international law in question. For instance, in the Law of the Seas there are cases where certain provisions have been entirely or in part based on the stipulations of existing treaties.[26]

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[24] YILC, 1955, vol. 1, p. 224.

[25] *United Nations...*, pp. 20–21.

[26] E.g., Art. 21 of the Convention on Territorial Sea is based on the Brussels convention of 1926, LILC, 1954, vol. 1, p. 158; *ibid.*, 1955, vol. 1, p. 141 and 258; *United Nations...*, vol. 2, p. 66. On the same convention is based Art. 11 of the Convention on the High Seas, YILC, 1951, vol. 1, p. 23, *United Nations...*, vol. 2, p. 21; Art. 26 and 27 of the Convention on the High Sea are based on the convention of 1884, YILC, 1956, vol. 2, pp. 293, 294.

Moreover, they have been quoted by the rapporteurs, the members of the Commission as well as by State representatives as arguments for the existence of a certain practice and even of a ripe rule of international law. For instance, the sovereignty of the State over its territorial sea (Comment to Art. 1 of the Law of the Sea) is a principle underlying a number of multilateral conventions which treat the territorial sea in the same way as the other parts of State territory, such as the Air Navigation Convention of 1919 and the International Civil Aviation Convention of 1944 [27].

Presenting the compromise draft of Article 3 on landlocked States the representative of Switzerland called on the fact that the proposed text "corresponds to the Geneva Statute of 1923." This draft met with general approval. One reproached only that the other conventions, especially bilateral, have not been quoted.[28]

The role of treaties in the development and codification of international law depends of course primarily on whether and to what extent the given field of international relations has already been subject to conventional regulation. This is best exemplified by two different branches of international law : the diplomatic and the consular relations and immunities. Whereas in the first we have nearly exlusively to do with non-conventional practice (except the Vienna Regulation of 1815 and the regional Havana Convention of 1928), in the latter case, on the contrary, the consular law has been, so far, based mainly on bilateral treaties. Here then perforce the role of treaties is much greater than in the former case. This has been expressly confirmed in the "general considerations" to the final draft of the Commission.[29] An interesting comment should be quoted in this connection :

"(30) An international convention admittedly establishes rules binding the contracting parties only, and based on reciprocity; but it must be remembered that these rules become generalized through the conclusion of other similar conventions containing identical or similar provisions, and also through the operation of the most-favoured-nation clause. The Special Rapporteur's analysis of these conventions revealed the existence of rules widely applied by States, which if incorporated in a draft may be expected to obtain the support of many States."[30]

Among the articles of the Consular Convention based on existing treaties, Article 5 may be mentioned. In paragraph 5 of the Commission's Comment it has been stressed that

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[27] YILC, 1956, vol. 2, p. 265.

[28] *United Nations*..., vol. 7, pp. 45–50.

[29] "The subject is regulated partly by customary international law and partly by a great many of international conventions which constitute the principal source of consular law." YILC, 1961, vol. 2, pp. 90–91.

[30] *Ibid.*, p. 91.

"the right to appoint consular officials and emploes to a consulate is expressly provided for in certain recent consular conventions."[31]

In the comment to draft Article 31 the Commission stated that "the principle of the inviolability of the consular premises is recognized in numerous consular conventions."[32]

The International Law Commission has not always strictly followed the conventional practice, however. In the Comment to Article 49 on the exemption from taxation it has been mentioned among other things:

"(5) Bilateral consular conventions usually make the grant of exemption from taxation conditional on reciprocity [...]. The Commission did not think it necessary to include such reciprocity clause in a draft multilateral convention [...]. It was of the opinion that the purpose which a multilateral convention should seek to achieve, i.e., the unification of the practice of States will be more rapidly attained if no reservation regarding reciprocity is included."[33]

Whereas consular intercourse is to a large extent already regulated by means of bilateral conventions, which constitute therefore already a kind of half-finished codification, in the case of the law of treaties the significance of treaties is entirely different. Here treaties constitute merely raw material from which by means of generalization one can infer what is the practice of concluding treaties, their implementation, termination, etc. Since there are no binding conventions (neither multilateral nor bilateral) regulating these questions, of necessity, the codification work of the law of treaties has mainly been based on the analysis of the virgin practice composed of so far concluded treaties. Naturally, not exclusively, since there exist already a comparatively rich judicial practice and literature.

Here are a few examples illustrating the role of treaty practice in the development of the law of treaties. For instance, the use of the very term "treaty" has been justified by the Commission by the use of this term in the Statute of the International Court of Justice.[34] The relinquishment of the requirement that a treaty should constitute one document has been explained by the fact that in modern practice international agreements are frequently concluded not only by less formal instruments but also by means of two or more instruments.[35]

Even sporadic practice has sometimes been considered; e.g., in the Comment to Draft Article 14.2 (Article 17.2 of the Convention), which speaks of treaties permitting a choice between differing provisions, we read that this paragraph

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[31] *Ibid.*, p. 95.
[32] *Ibid.*, p. 110.
[33] *Ibid.*, p. 121.
[34] YILC, 1966, vol. 2, p. 188.
[35] *Ibid.*, p. 189.

"takes account of a practice which is not very common, but which is sometimes found, for example, in the General Act for the Pacific Settlement of International Disputes [...]."[36]

Inconsistency of conventional practice has been the reason for relinquishment by the Commission to regulate a matter. For instance, as regards the amendment of multilateral treaties (Draft Articles 35 and 36) we read in the introduction to the Comment of the Commission :

"The variety of clauses makes it difficult to deduce from the treaty practice the development of detailed customary rules regarding the amendment of multilateral treaties; and the Commission did not therefore think it would be appropriate for it to try and frame a comprehensive code of rules [...]."[37]

Interesting, on the other hand, is the example showing that an inconsistency of conventional practice has not always been considered by the Commission as a sufficient ground for neglecting an important principle, in this case that a party should be consulted in regard to any amendment or revision of a treaty :

"The fact that this has not always happened in the past is not a sufficient reason for setting aside a principle which seems to flow from the obligation assumed by the parties to perform the treaty in good faith."[38]

The way of adducing treaties in the process of development and codification of international law enables certain conclusions enriching our knowledge of the mechanism of this process.

Treaties, whether bilateral or multilateral, being first rate material have always been considered in this activity. One should however discern three different kinds of occasions for it depending on the function treaties play in each case. The first occasion, rather rare, is when multilateral conventions already regulate, at least in part, the given branch of international law. In this case, depending on the actuality and perfectness of such a regulation, either one has relinquished codification altogether, or one has taken over the ready provisions without, or with only slight, modifications.

Most often, however, one has accepted only some general principles or introduced changes in order to adapt the existing provisions to new needs of the whole community of nations.

For the inclusion of existing regulations decisive has been their solid drafting by specialists, the agreement with latest trends, or the fact that they embody the existing international law.

The second opportunity for referring to existing treaties has arisen when a given branch of law had already been regulated but only in bilateral

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[36] *Ibid.*, pp. 201–202.

[37] *Ibid.*, p. 232.

[38] *Ibid.*, p. 233.

relations. In this case the utilization of such treaty practice has consisted mainly in its generalization.

The third occasion for utilizing treaties as material for development and codification of international law arises when international treaties do not constitute yet a ready regulation but only raw practice which can be used as material for generalization, e.g., in the law of treaties. In this case the decisive factor for the Commission of International Law has been uniformity and, above all, novelty. As has been demonstrated on a few examples, the Commission, however, has not considered itself excessively bound by the practice. In certain cases it even neglected it altogether.

Decisions of international and municipal courts have always played an important role in the development and codification of international law, though formally, according to Article 38.1(d) of the Statute of the International Court of Justice, they constitute only a "subsidiary means for the determination of rules of law."

In the enumeration of the means and ways of making the evidence of international customary law more available the International Law Commission mentioned judicial decisions in the second place, after international agreements. Such a high rank is warranted by the fact that the courts, especially the Hague Courts of 1920 and the present one, belong to those few existing organs which *ex officio* ascertain most objectively and thoroughly the rules of international law at the occasion of settling disputes or giving opinions. Although quantitatively yet poor, their authority is already very high. The Hague Courts have contributed to this high standing by quoting their own decisions almost like positive law.[39] One should also remember that the majority of the judges of these courts are most competent specialists in international law, most often famous publicists.

At the elaboration of the conventions on the law of the sea a particular role has been played by the judgments in the *Lotus* case and *Fisheries* case. At the drafting of the conventions on diplomatic and consular intercourse and immunities there has not been any opportunity to call upon judicial decisions, since there are practically speaking no international judicial precedents on these matters.

Otherwise in the case of the Law of Treaties. The comments attached to the final draft by the International Law Commission, which in this case are relatively detailed, throw sufficient light on the wide extent to which the Commission based itself on such decisions and why. Among the instances where a judgment has explicitly contributed to the content of a provision one might quote the *Legal Status of Eastern Greenland* case in

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[39] See the present author's *Custom in Present International Law*, Wrocław 1964, p. 73.

connection with Article 6 of the Draft Convention (Article 7 of the Convention) on the special position of foreign ministers. In the Commission's Comment we read :

"In the case of Foreign Ministers their special position as representatives of their State for the purpose of entering into international engagements was expressly recognized by the Permanent Court of International Justice in the *Legal Status of Eastern Greenland* Case."[40]

A particularily important role has been played, for instance, by the advisory opinion on the Genocide Convention in the regulation of the reservations to treaties. In the Comment to Article 16 the Commission explicitly states that

"the article [...] adopts the Court's criterion as a general rule governing the formulation of reservations not provided for in the treaty."[41]

Most often the jurisprudence of the Hague Courts has been quoted together with other materials, such as the conventional practice or that of international organizations. There is no doubt, however, that the statements of the Courts occupy a privileged position. The Commission widely presents their stand with numerous quotations from their decisions and opinions. Like in the case of conventional practice, this does not mean, however, that the International Law Commission based itself on the Courts' opinions indiscriminately. It sometimes questioned the representative importance of such opinions or even departed from them basing itself even on separate opinions instead. For instance, in the Comment to Article 28 of the Draft Convention on the Law of Treaties referring to interpretation the Commission based itself on several decisions of the Hague Courts but refused to accept the stand of the Court in *Territorial Jurisdiction of the International Commission of the River Oder* case where the latter excluded from its consideration the *travaux préparatoires*.[42]

An interesting illustration of the method of utilizing judicial decisions is given in the Comment to Article 45 on error. It is stated there that

"The effect of error was discussed in the Legal Status of *Eastern Greenland* case [...] and again in the *Temple of Preah Vihear* case. The terms in which the exception is formulated are drawn from those used by the Court in the sentence from its judgment in the *Temple* case. The Commission, however, decided to omit certain words which are so wide as to leave little room for the operation of the rule."[43]

An example of basing a provision on the separate opinion may be found in the Comment to Article 56 of the draft on the Law of Treaties where we read :

"The wording of the two clauses in par. 1 is based upon the language used by Judge

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[40] YILC, 1966, vol. 2, p. 193.

[41] *Ibid.*, p. 207.

[42] As it is stated in the Commission's comment: "The Commission doubted whether this ruling reflects the actual practice." *Ibid.*, p. 223.

[43] *Ibid.*, pp. 243–244.

Anzilotti in his separate opinion in the *Electricity Company of Sofia and Bulgaria* case."[44]

Whereas the opinions of the Hague Courts have been fully considered by the International Law Commission and by the Conferences, the role of other tribunals, arbitral and municipal, has been much smaller. The reason for this fact lies in the inferior authority of such judicial organs, and in the fact that their desisions were often obsolete or have been already widely considered by the Hague Courts and the doctrine.[45]

Among the modern materials of development and codification of international law an important place is occupied by the *preparatory work* done by various conferences and international organizations. It suffices to note that among them are precisely the General Assembly of the United Nations with the International Law Commission and the Legal Committee, the Secretariat of the United Nations and the diplomatic conferences organized for the final elaboration of the codification conventions.

Such material played a particular role in the drafting of the conventions on the Law of the Sea. Striking is, for instance, the considerable importance of the drafts of the allegedly unsuccessful Hague codification conference of 1930. At all the stages of its work on the Law of the Sea the International Law Commission took into account the material gathered by this conference ; in several cases it even directly based itself on the draft articles elaborated there.[46]

As far as fisheries are concerned, an important preparatory work has been done by the international technical conference at the Headquarter of the United Nations Food and Agricultural Organization in 1955.[47] At the drafting of the Convention on Continental Shelf yet the Inter-American Specialized Conference on Conservation of National Resources of Continental Shelf and Ocean Waters held at Ciudad Truillo in 1956 should be mentioned. This conference introduced the famous exploitation criterion in the continental shelf.[48]

Similarly to international conferences, various forms of the activity of international organizations have served as valuable material for the development and codification of international law. Particular attention should be devoted here to the enormous preparatory work done by the United

[44] *Ibid.*, p. 253.

[45] The present author's *Rozwój...* [*Development...*], p. 103.

[46] *Ibid.*, pp. 104–108.

[47] *Ibid.*, pp. 108–109.

[48] In its comment to Art. 67 of the draft the Commission stated among other things that the conference "arrive at the conclusion that the right of the coastal State should be extended beyond the limit of 200 meters, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the seabed and subsoil [...]", YILC, 1956, vol. 2, pp. 296–297.

Nations Secretariat, which gathers, elaborates and publishes various data relating to the international practice, jurisprudence, internal legislation, etc. Often also the activities of certain specialized agencies and regional organizations have been utilized. For instance, in the Comment to Article 10 of the Draft of the Law of the Sea as regards reasonable labour conditions, the Commission refers to the convention prepared under the auspices of the International Labour Organization.[49] Also at the drafting of the law of treaties a certain role has been played by the practice of the League of Nations. Interesting in this connection is the content of the comment to Article 12 of the Draft on accession where the practice of the Secretariat of the League of Nations has been quoted.[50]

At the drafting of Article 72 (Article 77 of the Convention) concerning the functions of the depositary the Commission stated that "it gave particular attention to the Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements."[51] This is an example of the creative influence of the practice of international organizations. It deserves special attention as it points to a new phenomenon consisting in the contribution of the United Nations practice to the creation of rules of general international law. One should also mention here the participation of observers in international organizations. Initially this participation had no repercussions in the proceedings codification conferences. But, for instance, already at the Vienna Conference of 1961 on the request of the Plenary Commission, the Vice-Director of the International Labour Office gave a longer declaration of the character of an expert opinion on the subject of exemptions of diplomatic mission from social security.[52]

In connection with the contribution of international organizations in the development and codification one should point to the growing importance of the work done by the International Law Commission itself. This may be seen from the big and ever growing percentage of draft articles prepared by the Commission which have been finally accepted, without or only with slight modifications. The average of rejected draft articles amounted to scarcely 2 per cent and the total number of new articles introduced by the diplomatic conferences did not exceed 6 per cent. In this connection one might quote the opinion expressed by the Polish representative at the Conference of 1961, who praised the efficiency of the International Law Commission. He said that "The discussion had only increased his high opinion of the International Law Commission's draft. In many

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[49] *Ibid.*, pp. 280–281.

[50] YILC, 1966, vol. 2, p. 199.

[51] *Ibid.*, p. 269.

[52] *United Nations Conference on Diplomatic Relations and Immunities, Official Records*, (A/CONF. 20/14/Add. 1), vol. 1, pp. 162–163.

instances during the Conference its long debates had ended in the conclusion that the Commission's text was best."[53]

Although the *participation of States* in the development and codification of international law is indispensable and obvious, since this law is made by the States and the organs like the International Law Commission are created by States and function under their supervision, it seems interesting to learn to what extent, in comparison with other factors, the content of draft provisions is determined by the governments. Disregarding the indirect influence by electing the members of, for instance, the International Law Commission or by furnishing information, the contribution of governments in the codification work consists above all in sending their remarks considered by the rapporteur in the elaboration of the final draft (Article 16(h) and (i) and 21.2 of the Statute of the International Law Commission). The comments of the governments have been in practice considered by the Commission and, where it deemed it well grounded, appropriate corrections have been introduced to its draft. The authority of the government opinions at this stage of preparatory work has not been decisive, however. Much more attention has been paid to other materials, e.g. to treaties or judicial decisions. The reason should be sought in that only a comparatively small number of governments have forwarded full replies to the Commission's questionnaires and, therefore, such material cannot be considered as sufficiently representative.

The contribution of States to the development and codification is also made by way of their *municipal law*. It has a fundamental significance in the evolution of those branches of international law where this law itself refers to municipal law. For instance, the status of the territorial sea is almost entirely determined by the coastal States. In order then to ascertain the rules of international law in this domain it is necessary to base oneself primarily on the consistent State practice expressed in the internal regulations.

As far as the law of the sea is concerned, there are only few references to such provisions in the comments of the International Law Commission. It used such material rather indirectly from the replies of governments or the drafts and conclusions contained in the elaborations by the Secretariat of the United Nations or by other institutions.

Most visible is the influence of municipal law in negative examples, that is, when excessive divergence of such law made it impossible to ascertain, respectively create, a general principle of international law. For example, in its Comment to Article 29 of the draft (Art. 5 of the Convention) on the nationality of ships the Commission stated :

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[53] *Ibid.*, p. 126.

"[...] existing practice in the various States is too divergent to be governed by few criteria adopted by the Commission [...] the Commission accordingly thought it best to confine itself to enunciating the guiding principle that [...] there must be a genuine link between the ship and the state granting permission to fly its flag."[54]

The importance of internal legislation is evidenced also by the fact that the Commission requests the governments to give information on their internal regulations. E.g. in its reply to such a questionnaire the Polish delegation in its note of 7 January, 1950 sent the texts of laws, regulations and other documents referring to the law of treaties, arbitral procedure and the regime of the open seas.[55]

As symptomatic for the present trends may be considered the quoting of Islamic law by El Khoury at the discussion on the width of the security belt round the installations on the shelf.[56] It is doubtful if this argument had any bearing on the final draft of the Convention on the continental shelf. It is, however, an illustration of how the representatives of the legal systems which so far had not played any role in the emergence of general international law strive to acquint the world opinion with such systems and, as far as possible, induce the drafters to take them into consideration at the occasion of development and codification of international law.

For the same reasons as in the case of the law of the sea, municipal law played a considerable role at the codification of the consular intercourse and immunities, whereas in the law of treaties, on the contrary, there was no occasion to refer to municipal law, as has been expressly stated in the comment of the Commission.[57]

In conclusion it may be stated that the role of municipal law as material of development and codification of international law depends mainly on the branch of international relations under regulation.

Among the numerous aspects of the role played by States of special interest seems to be, at present, the *role of newly independent States*, in connection with the process of decolonization and the resulting almost tripling of the number of States since the last war. The stand of those States, especially of the so-called developing countries, deserves special analysis.

It is taken for granted, for instance, that those States are rather distrustful to the traditional international law. This attitude manifests itself among others things in their reservation to the judicial settlement of international disputes. They are also advocates of modernization of inter-

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[54] YILC, 1956, vol. 2, pp. 278–279.

[55] YILC, 1950, vol. 2, p. 221 ; cf. also *ibid.*, pp. 52–63, 151–156, 196–221.

[56] *Ibid.*, vol. 1, p. 234 and *ibid.*, 1951, vol. 1, p. 284. Cf. also YILC, 1958, vol. 1, pp. 150, 189.

[57] YILC, 1966, vol. 2, p. 189.

national law in the spirit of progress, equality and consideration of the legal traditions of their often very old and rich cultures.

At the diplomatic conferences where these States have the best opportunity to represent their opinions, one might quote numerous pronouncements attesting the above mentioned distrust, bitter realism and, at the same time, firm demand for their specific interests to be appropriately considered also in the field of development and codification of international law.[58]

Extremely interesting and reassuring, though certainly yet exceptional, in this connection is the successful initiative of a small Asiatic landlocked State, Nepal, at the Geneva Conference on the Law of the Sea. The delegate of this country said: "Nepal was known as the land of Guatama Budha, who was famous for his consideration and kindness toward animals. No code of rules [...] should ignore the humanitarian, ethical and moral aspects of the problems to which it related. The purpose of his delgation's proposal [...] was to enjoin on those pursuing the creatures of the sea, particularly whales, not to inflict any unnecessary suffering on them."[59]

This project backed by Burma and Mexico has been finally accepted in the form of a resolution under the title "Humane Killing of Marine Life".[60]

The peculiar position of newly established States has been stressed on various occasions. For instance, at the conference on consular intercourse and immunities the representative of Upper Volta pointed to the difficulties encountered because of the underdeveloped means of communication in such countries.[61] The representative of Iran explained the reluctance of these States to grant unlimited right of using radio transmitters by diplomatic missions.[62]

Noteworthy is the evolution of the stand of the newly established States at the two sessions of the Conference on the Law of Treaties. Beside the ever growing numerical strength of such States at such conferences and, since 1961, in the International Law Commission, one can observe a changing tone in their pronouncements. E.g., although at the mentioned conferences there were certainly abundant occasions for criticism and anxieties on the part of the newly emerged States, no more signs of distrust and bitterness can be found in the records. Striking is, however, the

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[58] See the present author's, *Rozwój...* [*Development...*], pp. 132–135.

[59] *United Nations...*, vol. 5, p. 99.

[60] *Ibid.*, vol. 2, p. 144.

[61] *United Nations Conference on Consular Relations, Official Records*, (A/CONF. 25/16/Add. 1), vol. 1, p. 137.

[62] *United Nations Conference on Diplomatic Intercourse and Immunities, Official Records* (A/CONF. 20/14 Add.1), vol. 1, p. 173.

still very small number of projects and amendments proposed by the new States, and the even more drastic small number of such projects finally accepted by the conferences.[63]

The reasons of this fact are not difficult to trace. The deficiency of highly qualified representatives, of well equipped libraries and archives which are indispensable for the elaboration of such proposals may be mentioned among them. Naturally, multifarious other factors come into play, such as prejudice against new and small States, neglect of their opinions if they are not backed by powerful sponsor-States. It is doubtful whether it would be possible to pin-point such impoderabilia scientifically. At any rate it would require multifarious investigations. One thing seems, however, undisputable. The participation of newly emerged States in the development and codification of international law is rising rapidly. The confirmation of this fact may be found in the pronouncements by the representatives of these States praising the work done by the International Law Commission.[64]

Among the traditional materials of international law-making one should mention yet the *role of international scientific institutions and of individual publicists.* In fact, the contribution to the development and codification of international law by a few most famous of such institutions like the Institute of International Law, the International Law Association or by some specialists has not been much less than that by the official international organs. Their drafts, resolutions and opinions have determined the content of numerous provisions finally accepted by States and inserted into conventions.[65] True, in the case of individual experts their role is rather behind the scene. Similarily as the International Court of Justice, the International Law Commission or the conferences have rarely called upon the authority of scholars. E.g., in the comment to the draft of the law of the seas publicists are mentioned only twice in reference to piracy.[66] One should consider, however, that the organs preparing the development and codification are themselves composed mainly of eminent specialists. For instance, at the Geneva Conference on the Law of the Sea more than one-fourth of the delegations included university professors. Among the representatives of France was Professor Gidel, the greatest authority in

[63] They do not exceed 6 per cent of the total number of accepted projects and amendments. See the present author's *Rozwój...* [*Development...*], p. 140.

[64] See e.g. the pronouncements by the delegates of the United Arab Republic and Iran at the Conference of Vienna on Diplomatic Relations and Immunities (*op. cit.*, p. 54) and those of Nigeria, Cyprus and Liberia at the Sixth Committee of the General Assembly (17th Session, 741 Mtg), pp. 37, 36; 21st Session, 912 Mtg., p. 65).

[65] See the present author's *Rozwój...* [*Development...*], pp. 142–147.

[66] The Commission's comment to Art. 39 of the draft convention.

the Law of the Sea. The fundamental document constituting the starting point for the work of the International Law Commission on the regime of the open sea has been prepared by this celebrity. This fact, however, has not been revealed anywhere.[67] The referring to the opinions of publicists takes place not only in the first stages of codification work, as subsidiary means for the determination of the *lex lata*. There are numerous instances where scholars, personally or by means of their publications, contributed to the drafting of new provisions. It is also noteworthy that ancient and modern publicists like Bartolus, Kent, Gidel, Waldock have been acknowledged as authorities by the representatives of various States, irrespectively of their ideological background, political block, etc.[68]

One should mention yet the role of experts. The International Law Commission has based itself in a few cases on the opinion of a committee of experts.[69] At the diplomatic conferences the role of experts has been played by the rapporteurs of the Commission, for instance, at the Conference of Vienna on the Law of Treaties, among others by Professor Waldock.[70]

The above survey of a few types of materials used in the progressive development and codification of international law proves that their investation can give interesting information about the mechanism of the international lawmaking process.

Primarily, it should be noted that in such an analysis separate consideration of development and codification is practically impossible. Impossible is also *in abstracto* a full enumeration of such materials and factors determining the content of draft provisions. In general, one may say that their number and relative importance depends on the branch of international relations under regulation. For instance, treaties play a preponderant role in the relations already regulated mainly by agreements (e.g. consular law), whereas municipal law constitutes principal material where international law itself refers to it (e.g., territorial sea).

Among the traditional materials striking is the still very high authority enjoyed by the decisions of the Hague Courts of 1920 and 1946, even among States which do not conceal their reserve or distrust towards the International Court of Justice as a means of settling disputes. Unexpectedly

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[67] See MYRES S. MCDOUGAL, William T. BURKE, *The Public Order of the Oceans. A Contemporary International Law of the Sea*, New Haven and London, 1962, p. XXI.

[68] See e.g. *United Nations...*, vol. 3, pp. 37, 38, 49, 68, 111, 118, 135; *ibid.*, vol. 4, pp. 73, 74 and 97.

[69] See e.g. YILC, 1956, vol. 2, pp. 268–269, 271, 300.

[70] *United Nations Conference on the Law of Treaties, First Session, Official Records* (A/CONF. 39/11), p. XXIII.

important, though rather behind the scene, has proved the role of publicists and scientific institutions. Individually and collectively, personally and through their works, scholars considerably contribute to the formulation and creation of international law. One may even speak of a revival of their importance, since the rapid development of multifarious intergovernmental organs brings about, on the one hand, a growing demand for learned assistance of experts, on the other hand, creates ample new opportunities for scientific thought to influence the world opinion.

Among the new materials and institutions which participate in the process of international law-making above all the drafts and, in general, the practice of international organizations deserve mentioning. A comparison of the number of drafts prepared by the International Law Commission with the finally accepted texts of conventions shows a high and ever rising authority of the former. Perhaps even more interesting is the growing participation of the practice of, e.g., the Secretariat of the United Nations in the shaping of general international law. Finally, one should note the growing role of the newly emerged States in international law-making. Beside their rapidly rising numerical strength, interesting are the first, though still modest, achievements in influencing the content of general international law. In general, one may say that if their share in the development and codification of international law is still out of proportion to their number and significance, this fact is at present due mainly to various objective conditions and is changing rapidly to the advantage of these States.

The general conclusion which may be reached here is that a thorough analysis on a larger scale of the experience in international law-making should be undertaken, since it would certainly enable better understanding of many theoretical and practical problems of the present international life in general.

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The Competence of State Organs to Denounce a Treaty
Some Internal and International Legal Problems

by MARIA FRANKOWSKA

Introduction

In contradistinction to the copious records and very extensive literature on internal and international legal problems concerning the treaty-making power,[1] both source materials and studies relating to the treaty-terminating power are relatively modest, diffuse and incomplete.[2] Presumably this state of affairs is not the result of any disinclination to recognize the fact that a decision to denounce a treaty is, from the viewpoint of a State's treaty policy, of no lesser importance than a decision to make a treaty ; for, as is well known, both kinds of decisions determine to the same extent the scope of international rights and obligations. Moreover, a decision to denounce a treaty may sometimes bring about very serious political consequences. This apparent neglect of the problem of the treaty-terminating power, therefore, may be more realistically ascribed to the fairly common opinion that the denunciation of a treaty simply constitutes an *acte contraire* to the making of the treaty,[3] with the rules relating to the treaty-

[1] Of the most recently published works, the following are of special importance : H. BLIX, *Treaty-Making Power*, Uppsala 1960 ; K. HOLLOWAY, *Modern Trends in Treaty Law*, London 1967 ; L. WILDHABER, *Treaty-Making Power and Constitution*, Basel-Stuttgart, 1971 ; See also the literature of the subject listed in the above-mentioned monographs.

[2] This gap has been partly closed by the monograph by H. W. BAYER, *Die Aufhebung völkerrechtlicher Verträge*, Köln-Berlin 1969, which also contains valuable, remarks on comparative law.

[3] Cf., for instance, Ch. ROUSSEAU, *Droit international public*, Paris 1970, vol. 1. p. 210 ; J. DEHAUSSY, *Les traités, Juris classeur de droit international*, Paris 1960, vol. 1, Fasc. 12D, p. 21. According to K. HOLLOWAY, "It is generally accepted that treaties can only be terminated or abrogated in accordance with the same procedures as those required for their conclusion," *op. cit.*, p. 158.

making power applying to the resolution of all legal questions connected with the exercise of the treaty-terminating power.

In principle, there is no way to shake this point of view. The very act of abrogating a treaty constitutes, as it were, a derivative act with regard to the making of a treaty. It would seem evident that the organ that makes a treaty, having the power to determine its duration by introducing a relevant provision as a part of the treaty (for instance, lapse-of-time clause or a resolutive condition), also has the power to terminate a treaty.

On the other hand, however, it seems that there are not a few exceptions to this essentially correct conception, in the domain both of the domestic law of various States and of international law. These exceptions would, in our opinion, justify a separate treatment and study of the treaty-terminating power.

This paper constitutes a contribution to such a study. It concentrates on only a few questions without pretending to discuss all the problems connected with the competence of State organs to denounce treaties.

Part I: Internal Legal Problems Relating to the Treaty-Terminating Power

The competence to denounce treaties in the majority of States is based on more or less firmly established rules which have been shaped by practice. As a matter of fact, constitutional provisions dealing with the denunciation of treaties are still rather rare.

These provisions appeared later than those concerning the treaty-making power. Apart from the then exceptional provision of the Norwegian Constitution of 1814, which entrusted the treaty-terminating competence to the King, it is the provision of Article 18 of the Danish Constitution of 1915 that has, as it were, opened the way for the modern regulation of this competence. This Article envisaged the participation of Parliament in decisions involving denunciation of treaties. (Cf. below p. 290).

The provisions in question appear more often in constitutions adopted after World War II. At this point we may draw attention to the fact that on the whole the problems of the treaty-terminating power have largely found their expression in the constitutions of the socialist States, especially in those recently adopted or amended. Despite some progress, however, the necessity of constitutional regulation of the competence to denounce treaties is still rather insufficiently taken into account, for the constitution of the United States and Latin-America, as well as of several west-European constitutions (i.e., those of Austria, the FRG and Italy), leave this problem unregulated. Moreover, no provisions of this kind have been introduced into the constitutions of the African States.

The present paper deals with the question of the treaty-terminating power both with regard to States with constitutions explicitly regulating this power and with regard to the States which regulate it by practice. In principle, our description embraces only existing law and practice, but we have repeatedly turned to the past to examine the evolution of the solutions which have been adopted.

The paper include references to the United States, to several west-European capitalist States, and to the east-European socialist States. In other words, the paper includes States with fundamentally different political, economic and social structures. A thorough analysis of the existing differences between these States, however, seemed to be beyond the scope of a paper that examines a rather narrow subject-matter. The author assumes that the reader of this paper is fully aware of all those differences that give a different meaning to apparently similar legal institutions.

Capitalist States

The United States of America

The United States Constitution, though it devotes much attention to international treaties, is silent with regard to their denunciation.[4] The competence to denounce treaties was not discussed by the Constitutional Convention in Philadelphia (1787). It seems rather doubtful that the Founding Fathers of the Constitution ever perceived this problem.[5] It was solved by subsequent practice.

There was never any doubt that the President, "being the voice of the nation in direct dealings with other nations,"[6] was the organ excusively competent for communicating the will of the State to foreign States in this matter. The eminent international jurist and Legal Adviser to the Department of State, G. H. Hackworth, stated in his opinion that "when a foreign Government receives a notice from this Government of the latter's desire to terminate a treaty, it is entitled to rely upon such notice without inquir-

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[4] A. J. PEASLEE, *Constitutions of Nations*, The Hague 1970, vol. 4, p. 1195 ff.

[5] Cf., for instance E. M. BYRD Jr., *Treaties and Executive Agreements in the United States*, The Hague 1960, pp. 16–65.

[6] Cf. Memorandum of the Deputy Legal Adviser for Treaty Affairs, Whiltington, Termination of Treaties; International Rules and Internal United States Procedures, February 10, 1958 — quoted after M. WHITEMAN, *Digest of International Law*, Washington 1970, vol. 14, p. 461.

ing into the constitutional authority of the President to speak for the nation in such matters."[7]

It has been a matter of controversy, however, whether the President may make the relevant decision alone, or only with the participation of the Senate, the House of Representatives, or both Houses of Congress.

There is no way to explain this controversy without recalling certain well-established rules in the US practice concerning the making of treaties. The basic provision dealing with treaty-making competence is formulated in Article II, Section 2, of the Constitution, and states that the President "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur."

However, apart from this constitutionally envisaged way of concluding those international agreements that are defined as "treaties" in US domestic law, there also exist different ways of concluding other international agreements that are termed "executive agreements."

According to the type of organs which participate in the decision-making process involved in concluding an agreement, we can discern the following basic categories of executive agreements:

(1). Congressional-Executive Agreements, concluded by the Government with the participation of Congress. This participation may be realized by a prior authorization permitting the executive power to undertake specific measures aimed at the conclusion of agreements or by the aproval of the agreements after they have been made.

(2). Presidential Agreements concluded by the President pursuant to his authority under the Constitution—in particular, agreements concluded in relation to his functions of the Commander-in-Chief of the US Armed Forces.[8]

The existence of diversified procedures for adopting decisions involving binding treaties on behalf of the United States and, at the same time, the lack of any explicit legal regulation concerning decisions to denounce treaties, have created wide possibilities for interpretation.

Almost 150 years after the adoption of the Constitution, the Department of State's Legal Adviser, Hackworth, stated in his memorandum on the denunciation of treaties that "the practice of this Government has by no means been uniform" and that "no settled rule or procedure has been followed."[9]

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[7] Cf. Memorandum of the Legal Adviser of the Department of State on Abrogation of Treaties, 27 Jan., 1936—quoted after G. H. HACKWORTH, *Digest of International Law*, Washington 1943, vol. 5, p. 327.

[8] Detailed remarks on this differentiation, cf. G. M. BYARD Jr., *op. cit.*, p. 123 ff.

[9] Cf. G. H. HACKWORTH, *op. cit.*, pp. 327–328.

In practice the decision to denounce a treaty may be effected in the form of[10]

— an executive action pursuant to a prior authorization or direction of Congress ;[11]

— an executive action pursuant to a prior authorization or direction by the Senate ;[12]

— an executive action without a prior specific authorization or direction, but with the subsequent approval of Congress or by the Senate ;[13]

— an executive action without a prior specific authorization or direction, and without the subsequent approval of either Congress or the Senate.[14]

Here attention must be drawn to the fact that the rule of parallelism, known in French doctrine as *"le principe du parallélisme de forme"*[15]—is

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[10] They are enumerated by the Deputy Legal Adviser for Treaty Affairs in his Memorandum, cf, note No. 6.

[11] This method was used, for instance, in denouncing (fully or partially) 23 treaties concluded with 17 states in connection with the authorization and directive of the Seaman's Act of 4 March, 1915—cf. G. H. HACKWORTH, *op. cit.*, pp. 309–314. The same procedure was applied in 1951 when denouncing certain provisions of some treaties and executive agreements between the US and the socialist States in virtue of the Trade Agreements Extension Act of 1951—cf. M. WHITEMAN, *op. cit.*, pp. 454–455.

[12] This procedure conforms most to the parallelism of form principle : treaties concluded on the advice and with the consent of the Senate are denounced in the same way. It has been described in the American doctrine as "the most logical"—cf. S. S. RIESENFELD, *The Power of Congress and the President in International Relations : Three Recent Supreme Court Decisions*, "California Law Review," 1937, p. 660. It was, for example, applied in connection with the denunciation of the 1824 Trade Agreement with Denmark—cf. W. M. MCCLURE, *International Executive Agreements*, New York 1941, p. 21, and also in denouncing the Sanitary Convention of 3 Dec., 1933—cf. G. H. HACKWORTH, *op. cit.*, p. 322.

[13] This procedure was applied, for instance, in connection with the denunciation on 18 Dec., 1832, of the Treaty with Russia. Having been informed by the US Government that it had denounced the Treaty, the Congress passed a joint resolution which "adopted and ratified" the notification of the denunciation—cf. G. H. HACKWORTH, *op. cit.*, p. 322.

[14] This procedure, used first of all when denouncing executive agreements, was also applied in connection with the denunciation of treaties. Denounced in this way, for instance, were the Convention with Mexico of December 23., 1925, and the Geneva Convention of November 8., 1927—both being, according to American law, agreements on a treaty level—cf. G. H. HACKWORTH, *op. cit.*, p. 329. According to E. Plischke, this method of deciding on the denunciation of treaties is used rather rarely. The President's independent decisions are justified in such a case by the existence of a denunciation clause, to which the Senate had agreed before the ratification—cf. E. PLISCHKE, *Conduct of American Diplomacy*, New York 1950, p. 340.

[15] Cf. J. DEHAUSSY, *op. cit.*, p. 21.

absent from the practice of the United States. Treaties concluded with the advice and consent of the Senate need not be denounced with the participation of this organ; Congressional-Executive Agreements need not be denounced with the participation of Congress. Nonetheless there is some relation between the kind of an agreement and the manner of its denunciation. The authors writing in this area are fairly unanimous in the view that from the standpoint of domestic law, it is relatively easier to denounce executive agreements than treaties[16] and, furthermore, that the freedom of the Executive in denouncing Presidential Agreements is the most far-reaching one.[17]

The choice of procedure to decide on denouncing a treaty seems to depend on a number of factors. It is influenced by the importance of the treaty in question and the possible consequences of its denunciation, by the Executive's preferences,[18] and also to a great extent by the relationship between the President and Congress. According to Elmer Plischke, "in order to maintain cordial relations with Congress, the wise President refrains from arbitrary action and secures legislative approval preferably in advance of his denunciatory action."[19]

We may well recall here that under Article VI of the Constitution treaties, as far as domestic law is concerned, are as binding as the Constitution and the legislation ensuing therefrom. Thus, in practice, the relation between treaties and domestic law is shaped according to the principle of *lex posterior derogat legi priori.* All questions arising from the application of this principle are, under Article III, Section 2, of the Constitution, entrusted to the judicial power. Thus, Congress may deprive a treaty of its effectiveness within the domestic legal sphere by adopting a law inconsistent with the treaty. An action of this kind would undoubtedly influence the Executive's decision on whether or not to denounce a treaty, but this action, as such, could not be recognized as having nullified the treaty which, albeit ineffective would still be binding upon the contracting parties.

It appears that the power of Congress is not sufficient to order the Executive to denounce a treaty.

When Congress in 1920 authorized and directed President Wilson, in accordance with the Merchant Marine Act, to denounce certain "treaties or conventions to which the United States is a party" within ninety days after the Act became law, the President categorically refused to comply with this decision. The Department of State officially stated that it "has

[16] Cf. E. PLISCHKE, *op. cit.*, p. 341.

[17] Cf. E. M. BYRD JR, *op. cit.*, pp. 176–177.

[18] Cf. G. H. HACKWORTH, *op. cit.*, p. 319.

[19] Cf. E. PLISCHKE, *op. cit.*, p. 340.

been informed by the President that he does not deem the direction, contained in Section 34 of the so-called Merchant Marine Act, an exercise of any constitutional powers possessed by the Congress."[20] In a later statement by Secreatary of State, Charles E. Hughes, the view was expressed that "[...] as a part of the domestic law, treaties may be annuled [...] by legislation of the Congress [...]. But such action by the Congress does not of itself destroy a treaty as a contract binding upon the Nation from an international standpoint [...]."[21]

On the other hand one cannot ignore the opinion, that whenever the President "is called upon to terminate provisions of treaties inconsistent with an act of Congress [...] it might well be urged that the duty to terminate inconsistent treaty provisions exists in such cases, apart from any provisions of the act calling upon the President to take such action, in view of the requirement in the Constitution that the President "shall take care that the Laws be faithfully executed."[22]

In concluding the above-presented reflections, it may be stated that the denunciation of a treaty carried out by the Executive is always effective (if, of course, it is based on the right of denunciation). It deprives the treaty of its effectiveness within the scope of both international and domestic law regardless of the procedure applied, i.e. with or without the participation of Congress or the Senate.

On the other hand, however, the American Congress may influence the Executive to denounce a treaty by introducing a law which makes the treaty ineffective in the realm of domestic law.

Belgium

Article 68 of the Belgian Constitution of 7 February, 1831,[23] still in force in its original version, is—apart from Article II, Section 2, of the United States Constitution—the oldest regulation concerning the treaty-making power. It provided a model solution for the constitutions of many States (i.a. for France under the Third Republic).[24] According to this Article, the

[20] Cf. Department of State Press Release of 24 September, 1920 quoted after G. H. HACKWORTH, *op. cit.*, p. 323.

[21] Cf. Memorandum prepared by Secretary Hughes for President Harding, 8 October, 1921—G.H. HACKWORTH, *op. cit.*, p. 325.

[22] Cf. Memorandum of the Legal Adviser of the Department of State, 1936—quoted after G. H. HACKWORTH, *op. cit.* p. 328.

[23] Cf. Laws and Practices concerning the Conclusion of Treaties, *United Nations Legislative Series*, New York, 1953, p. 14.

[24] Such a solution has been described by B. MIRKINE-GOUTZEVITCH as *"une grande étape dans l'évolution constitutionnelle de l'Europe"*—cf. *La technique parlementaire des relations internationales*, "Recueil des Cours," 1936, vol. 56, p. 260.

making of peace treaties and treaties of alliance and commerce lies within the competence of the King, whereas the conclusion of commercial treaties and those involving finance, or imposing a financial burden upon individual Belgians, as well as those concerning territorial changes, require the consent of the Chambers.

This has been always interpreted as meaning that, with the exception of a specific category of treaties requiring the participation of the legislative body, all matters concerning Belgian foreign relations have been placed within the exclusive competence of the King. Thus the consent of the Chambers is required in cases when the State is being put under obligation, but not in cases when it is being absolved from it. According to this interpretation, the denunciation of a treaty rests exclusively within the executive power.[25]

In principle, the Chambers do not participate in terminating of international treaties. Although some exceptions have occurred, they have not been taken as precedents.[26] In the course of recent work on the revision of the Constitution, a proposal was put forward to supplement Article 68 with a clause providing that treaties concluded with the participation of the Chambers could be denounced only after the granting of parliamentary approval. According to a commentary submitted with the proposal, the authors wanted to apply the theory of *acte contraire*.[27]

The proposal, however, did not get beyond the discussion in scientific circles. No official report either of the *Commission pour la réforme des institutions* or of the Government mentioned the problem of denouncing international treaties.[28]

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[25] Cf. J. MASQUELIN, *Traités internationaux*, "Répertoire pratique de droit belge," 1953, vol. 14, p. 43.

[26] Thus, for instance, on May 6, 1882 the Parliament passed a law authorizing the Government to acceed to the International Convention for Prevention of the Extention of Phylloxera Epidemics, signed in Berne on November 3, 1881 stating i.a. that "*Le Gouvernement est autorisé* [...] *de se dégager, selon le mode prévu à l'article 13, des obligations résultant de son adhésion, si cette mesure semble utile aux intérets belges*".—"Pasinomie. Collection complète des lois, décretes, arrêtés et réglements généraux qui peuvent être invoqués en Belgique", Bruxelles 1876, p. 362. Equally exceptional was the adoption on June 29, 1876 of the "*loi qui autorise le Gouvernement à rapporter la dénonciation du traité de commerce et de navigation conclu le 9 Avril 1865 entre la Belgique et l'Italie*"—"Pasinomie . . .," 1882, p. 180.

[27] This was proposed by two internationalists, Paul de Visscher and Paul F. Smets, in May 1965—Cf. P. F. SMETS, *La conclusion des accords en forme simplifiée. Étude de droit international et de droit constitutionnnel belge et comparé*, Bruxelles 1969, p. 226 ff and p. 235.

[28] Cf. *Révision de la Constitution 1967–1971. Textes et documents*, ed. by R. Senelle, Bruxelles 1972, pp. 82–85.

Switzerland

The Constitution of 29 May, 1874 (repeatedly modified) is silent concerning the denunciation of treaties.[29] The treaty-making competence of the Federal authorities is excercised by the executive organ with the participation of the legislature. (As is well known, only few types of treaties may be concluded by the Cantons.) In principle, the Constitution does not envisage exception to the requirement of parliamentary participation in treaty-making (Art. 85 of the Constitution). In accordance with a long-standing practice, however, the Federal Council concludes many kinds of treaties on its own.[30] Among them are treaties that impose no new obligations upon the State.

Another well-established practice corresponds to this rule : namely that the denunciation of international treaties also belongs to the autonomously exercised competence of the Federal Council. According to Swiss author L. Wildhaber, "the Federal Council [...] is competent to denounce treaties because the denunciation implies no new obligations."[31] It may be added, that some authors of an older school have derived the Executive's exclusive competence to denounce international treaties through another interpretation. They based their view on the fact that the representative organ had not been explicitly vested with this competence.[32] There were also some opinions supporting the recognition of the competence of the joint Federal Assembly and Federal Council to denounce international treaties, but they were few and practically devoid of any influence, as their theoretical construction had been based on the *acte contraire* conception which had no justification in practice.[33]

France

The Constitution of the Third Republic (16 July, 1875) introduced a treaty-making procedure modeled on the Belgian Constitution.[34] Although the legislative organ had ample powers to undertake international obliga-

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[29] Cf. *Laws and Practices* ..., pp. 98–100.

[30] *Ibid.*, p. 101. Cf. also L. WILDHABER, *op. cit.*, p. 119 ff. According to K. HOLLOWAY, "in practice the Federal Council has, by a series of exceptions, exercised quasi-exclusively the treaty-making competence since the beginning of the twentieth century"—*op. cit.*, p. 185.

[31] Cf. L. WILDHABER, *op. cit.*, p. 121.

[32] Thus, for instance, J. SCHELLENBERGER, *Bundesverfassung der Schweizerischen Eidgenossenschaft 1905*, p. 165—quoted after W. H. BAYER, *op. cit.*, p. 224.

[33] This viewpoint, propagated by F. Fleiner and H. Gut, were discussed by W. H. BAYER, *op. cit.*, p. 244.

[34] The text in the collection of J. B. DUVERGIER, *Collection complètes des lois, décrets, ordonnances, réglements*, vol. 75, Paris 1875, p. 250 ff.

tions, it did not participate in decisions absolving the State from such obligations.[35] The lack of any constitutional stipulation on the denunciation of international treaties was interpreted as implying an exclusive competence of the executive in this area.

Such an interpretation was expressly confirmed by the well-known 28 January, 1926, decision of the Paris Court of Appeal, in the case of the *Renault et Société des Usines Renault* v. *Société Rousski Renault*. The decision stated that the denunciation of treaties in constituting an *acte gouvernemental*, lies within the competence of the President of the Republic, with the exclusion of the legislative power.[36]

The Constitution of 27 October, 1946 introduced a very interesting and entirely original approach to the regulation of the treaty denunciation.

First, a separate article devoted to the denunciation of treaties (Art. 28), having placed "diplomatic treaties duly ratified and published" above domestic law, stated that they may be denounced, modified or suspended only through a denunciation duly communicated through diplomatic channels.[37] The aim of this regulation—according to the interpretation given it by the French Government in a memorandum submitted to the UN Secretariat—was to secure for the executive organ, which possess the competence to create contractual international norms, the additional right to decide on their shape, or rather on their fate within the State.[38] These norms, then, could not be made ineffective by any action of any organ other than the executive one. More specifically, reducing the whole problem to its essentials, these international norms could not be infringed upon by a law passed by the Legislature.

[35] This provision was discussed repeatedly in the doctrine, cf., for example, Ch. ROUSSEAU, *Principes généreaux de droit international public*, Paris 1944, vol. 1, p. 225 ff; also B. MIRKINE-GUETZEVITCH, *op. cit.*, p. 263 ff.

[36] This decision, concerning the denunciation of the Hague Conventions of 1896 and 1908, states with regard to the President's competence: *"que l'est aussi à lui seul, qu'il appartient dans la plénititude de ses attributions propres, et à l'exclusion du pouvoir législatif, en vertu de la clause résoulutoire qui est expresse ou sous-etendue dans les traités, de les dênoncer* [...] *quand l'intéret du pays le lui commande"*; and further *"que le Président de la Rêpublique agit en la matière comme chef du pouvoir exécutif; qu'il peut déléguer son droit au gouvernement et specialement au ministre des affaires étrangères"*—cf. "Recueil Sirey," 1927 vol. 2, p. 1. See also A. Ch. KISS, *L'éxtinction des traités dans la pratique française*, "Annuaire Français de Droit International," vol. 5, 1959, p. 790.

[37] It stated: *Les traités diplomatiques regulièrement ratifiés et publiés ayant une autorité supérieure à celle des lois internes, léurs dispositions ne peuvent être abrogées, modifiées ou suspendues, qu'à, la suite d'une dénonciation regulière, notifiée par voie diplomatique. Lorsqu'il s'agit d'un des traités visés à l'article 27, la dénonciation doit être autorisée par l'Assemblée nationale, exception faite pour les traités de commerce"*—cf. *Laws and Practices*..., p. 53.

[38] *Laws and Practices*..., p. 54.

Second, Article 28 also formulated the rule that treaties concluded with the consent of the National Assembly (as envisaged by Art. 27) could be denounced only with the approval of the Assembly. Only one exception was foreseen: namely, commercial treaties.[39] In practice, however, this stipulation has been treated almost as a dead letter, and the executive organ has consequently ignored the requirement of Article 28 with regard to the participation of the Parliament in denouncing international treaties.[40] Thus the lack of any provision in the Constitution of 4 October, 1958 relating to the participation of the National Assembly in denouncing treaties only confirms the previously existing practice.[41]

Such a change in attitude towards the regulation of treaty-denunciation is without precedent in constitutional law. As we shall see, evolution has taken mostly the opposite direction elsewhere, that is the legislative organ tends to become more involved in the process of denouncing international treaties.

The Netherlands

The treaty-making and treaty-terminating competence occupies a special place in the history of constitutional law in the Netherlands. Much attention was devoted to these problems during subsequent changes of the basic law. The regulation of the treaty-making and treaty-terminating powers was constantly improved and democratized.[42]

Initially, that is from 1814, the treaty-making competence was vested exclusively in the executive organ, but gradually—after the introduction of changes in 1848 and 1887—was subjected to restrictions in favour of the States-General. Then the changes introduced on 27 December, 1922, were meant to secure a considerable influence for the representative organ in matters connected with the treaty policy of the State. Thus according to Article 58, all "treaties" required legislative approval before they were ratified by the King and their renunciation could be effected only by

[39] Thus Art. 28 secured the participation of the Parliament in denouncing treaties concerning international organizations, peace treaties, agreements imposing financial burdens on the State, agreements concerning the status and propietary rights of French nationals when abroad, agreements altering internal legislation and agreements concerning changes of state boundaries.

[40] It was applied rather exceptionally in 1950 when the National Assembly, through a law passed on January 4., 1950, authorized the President to denounce the 3 May, 1929 Convention for the Protection of Human Life at Sea and to ratify in its place the Convention of June 10., 1948—cf. *Laws and Practices...*, p. 54.

[41] The text in "Journal Officiél," 1958, p. 9151.

[42] For a detailed discussion of this matter see two articles of J. H. F. van PANHUYS: *The Netherlands Constitution and International Law*, "American Journal of International Law," vols 47 and 58. See also K. HOLLOWAY, *op. cit.*, p. 179 ff.

virtue of a prior law. This regulation, however, was considerably weakened in its democratic tenor[43] by the introduction of the category of "other agreements," the making of which were to be, "as far as possible, communicated to the States-General". In view of the lack of a concrete criterion for the division into "treaties" and "other agreements," the role of the Parliament was in fact determined by the Government, which, by choosing a convenient form of an agreement, could avoid the ratification clause.[44]

The existence of two categories of international treaties also contributed to the restriction of parliamentary participation in the treaty-denouncing processes. In practice the provision envisaging legislative decisions on the denounciation of treaties has been applied only in exceptional cases.[45]

The regulation introduced by Article 58 of the Constitution was strongly criticized, and after World War II was felt to be unsatisfactory. This led to successive alterations (on 23 May, 1953 and 23 August, 1956) which resulted in a newly conceived system for making and denouncing international agreements.[46]

Thus according to Article 64 of the Constitution, as it reads after the change in 1956, the provisions establishing a detailed procedure for making international agreements, also apply, *mutatis mutandis*, to the denunciation of such agreements. As many as three extensive articles regulate this procedure. Article 60, vesting in the executive organ the competence to undertake external obligations, stipulates that international agreements shall not be ratified by the King until they have been approved by the legislative body. Article 62 envisages which international agreements do not require legislative approval. Their detailed enumeration seems to be essential, as — in accordance with Article 64 — the denunciation of agreements belonging to this category may be effected by the executive power on its own. Thus, parliamentary approval is not required :

(1). If the agreement is one with respect to which this has been laid down by law ;

(2). If the agreement is exclusively concerned with the implementation of an approved agreement, in so far as the Act of Approval did not otherwise stipulate ;

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[43] Cf. J. H. F. van PANHUYS, *op. cit.*, AJIL, vol. 47, p. 537.

[44] See the verdict of the Netherlands Supreme Court of December 10., 1954 in the case *Institut Nationals des Appelations d'origine des Vins et Eaux-de-vie* v. *Mettes*, "International Law Reports," 1954, p. 166.

[45] The denunciation of the Berne Convention for Prevention of the Extension of Phylloxera Epidemics of November 3, 1881, effected by a law of 23 May, 1961, constituted such an exceptional case—cf. H. W. BAYER, *op. cit.*, p. 229.

[46] Cf. A. J. PEASLEE, *op. cit.*, 1968, vol. 3, p. 652 ff.

(3) If the agreement does not impose any considerable pecuniary obligation on the Kingdom and if it has been concluded for a period not exceeding one year ;

(4) If in exceptional cases of a cogent nature it would definitely conflict with the interests of the Kingdom that the agreement could not enter into force until approval was been given.

An agreement concluded in accordance with the terms of point (4) shall be submitted as soon as possible to the States-General for approval ; in the absence of such an approval, the agreement "shall be terminated as quickly as legally possible," and, what more, the agreement shall contain a denunciation clause stipulating the right to denounce it, should parliamentary approval not be forthcoming, unless such a clause would "manifestly conflict the interests of the Kingdom."

The Constitution of the Netherlands also introduced the procedure of tacit parliamentary approval as an important element of the treaty-making and treaty-terminating system. In accordance with Article 61, the approval of an international agreement by the States-General, or—under Article 64—of its denunciation, may be given either expressly by an Act of Parliament or tacitly. It is understood that approval has been given if within thirty days after the text has been submitted to both Chambers of States-General neither chamber (nor at least one-fifth of the members of either Chamber) has expressed the wish that the approval bo given in an express form.

* In practice, it is this form that is used by the Parliament of the Netherlands to express its approval of the denunciation of international agreements.[47]

Norway

In Norway, in conformity with the still binding Constitution of 17 May, 1814 (amended on 4 May, 1964) the competence to make and denounce treaties is conferred upon the King. Article 26 stipulates that

"The King shall have the right [...] to conclude and denounce treaties."[48]

The participation of the Parliament is required in connection with the

[47] Cf. K. HOLLOWAY, *op. cit.*, p. 182. This procedure was first applied in connection with the denunciation of the agreement concerning temporary application of a few tariff conventions, concluded on 16 June, 1949. The Government submitted to the States-General its motion to denounce this agreement, requesting that the decision be formulated till 27 May, 1960. Parliament did not seize the opportunity to deliver its opinion in this matter *expressis verbis*. The Government, assuming that the consent had been expressed tacitly, denounced the agreement on 15 October, 1960—cf. W. H. BAYER, *op. cit.*, p. 231.

[48] See A. J. PEASLEE, *op. cit.*, 1968, vol. 3, p. 689 ff.

conclusion of two categories of international treaties: namely, treaties necessitating a new law and treaties of special importance. There is, however, no provision in the Constitution envisaging the participation of the legislative organ in denouncing treaties of this kind.

In practice, the absence of an appropriate provision has been interpreted as implying that the participation of the Parliament in denouncing international treaties is not required. The memorandum submitted by the Norwegian Government to the UN Secretariat states explicitly that "the abrogation of a treaty does not require consent by the Storting."[49]

Denmark

In Denmark the problem of the denunciation of international treaties was dealt with for the first time in the Constitution of 5 June, 1915. According to Article 18, the King could not

"declare war or make peace, conclude or terminate an alliance or conclude or denounce a commercial treaty"

without the consent of Parliament.[50] It appears that this provision established for the first time in the history of constitutional law a treaty-terminating system which safeguarded the participation of the representative organ in denouncing international treaties.

Similar provisions are to be found in the Danish Constitution of 5 June, 1953. Article 19, paragraph 1 of this law states that the King cannot denounce a treaty without the consent of the Folketing if it has been concluded with the consent of this organ. In this way, the principle of parallelism of form has been formulated very clearly and without envisaging any exceptions.[51]

Some other West-European States

The Basic Law of the Federal Republic of Germany (22 May, 1949) establishes only the competence to conclude international treaties. Article 59, paragraph 2, vesting this competence in the President, stipulates at the same time the participation of Parliament in decisions on the ratification of treaties which regulate political relations of the Federation or refer to matters of federal legislation.[52] The absence of an explicit stipulation regarding the denunciation of treaties is interpreted, both in German

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[49] Cf. *Laws and Practices*..., p. 92. See also K. HOLLOWAY *op. cit.*, p. 188.

[50] Cf. *Laws and Practices*..., p. 40.

[51] Cf. A. J. PEASLEE, *op. cit.*, 1968, vol. 3., p. 253 ff.

[52] Cf. A. J. PEASLEE, *op. cit.*, 1968, vol. 3, p. 361 ff.

practice and literature as leaving the competence in this respect exclusively to the executive organ.[53]

The absence of any such stipulation in Italy's Constitution of 22 December, 1947 is also interpreted similarly.[54] It may be noted, however, that—in contradistinction to the uniform Italian practice—Italian doctrine sometimes maintains the viewpoint that Article 80 of the Constitution, which regulates the participation of the Parliament in concluding certain types of international treaties, may also apply to the denunciation of those treaties.[55]

In the United Kingdom, in accordance with the unwritten Constitution, the treaty-making power resides in the Crown, that is, in the Monarch acting upon the advice of Her Ministers.[56] In this respect, K. Holloway states that, "in accordance with a well-established practice treaty-making power is a purely executive function."[57] In principle, the British Parliament does not participate in concluding international treaties. But ever since 1924 the practice has been introduced, of submitting to both Houses of Parliament those treaties which, according to their provisions, require ratification.[58] This practice is connected with the well-established principle in the British parliamentary system, according to which international treaties that are to be applied *pro foro interno* require the enactment of a law in order to be effective.[59]

The existing British system of concluding international treaties also explicitly determines the treaty-terminating power,[60] which resides exclusively within the executive organ. There is no legal need to make exceptions to the rule that the Executive has the exclusive right of exercising *ius contrahendi*, such exceptions being justified in cases where specific types of international treaties are concluded.

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[53] A detailed analysis of the law and practice, as well as of German doctrine has been made by Bayer in the above quoted monograph, p. 201 ff.

[54] Cf. A. J. Peaslee, *op. cit.*, 1968, vol. 3, p. 496 ff.

[55] This viewpoint, propagated *inter alia* by C. Ceretti, is quoted by W. H. Bayer, *op. cit.*, p. 234.

[56] Cf. A. D. McNair, *The Law of Treaties*, Oxford 1961, p. 68, see also *Laws and Practices* ..., p. 120.

[57] Cf. K. Holloway, *op. cit.*, p. 191.

[58] A treaty is submitted to the Parliament after signature and before possible ratification, for a period of 21 days, to allow for a debate on its provisions. The Parliament's consent is expressed tacitly (this is the so-called Ponsonby rule)—for more about this matter see *Laws and Practices* ..., pp. 124–125; also F. Dehousse, *La ratification des traités*, Paris 1955, p. 127 and lately L. Wildhaber, *op. cit.*, pp. 29–30, who expresses the opinion, that "it may perhaps still be premature to maintain that the Ponsonby rule has become an acknowledged constitutional convention."

[59] Cf. A. D. McNair, *op. cit.*, pp. 81–101.

[60] Cf. W. H. Bayer, *op. cit.*, p. 233.

Socialist States

Poland

None of the Polish Constitutions preceding the Constitution of 22 July, 1952, mentioned the competence to denounce international treaties.

Article 49 of the Constitution of 17 March, 1921, dealt only with the making of international treaties. It vested the President of the Republic with appropriate competence and set up a few categories of treaties requiring the consent of the Seym before ratification.[61]

Similarly the provisions of the Constitution of 23 April, 1935, covered only treaty-making. Under this Constitution both the Seym and the Senate had the right to express, in the form of a law, their consent for specified categories of international treaties slightly different than these envisaged in the March Constitution, to be ratified by the President.[62]

This right did not extent to the expression of consent to denouce such treaties. As in other States, the absence of specific provisions permitting the legislative organ to denounce international treaties led to the undertaking of this task by the executive organ alone.

The constitutional laws of 1944 did not, from a formal point of view, introduce anything new with respect to the denunciation of international treaties. The law of 11 September, 1944, on the organization and scope of activities of the People's Councils confined itself in Chapter 5, Article 26 to stating that the scope of the activities of the National People's Council covered, *inter alia*, the ratification of commercial and tariff agreements imposing constant financial burdens upon the State (para. 7), and international State treaties introducing legal provisions binding upon Polish nationals or changing the State frontiers (para. 8).[63]

The law of the same date, dealing with the competence of the Chairman of the National People's Council mentioned in Article 3 only his right to conclude treaties with other States (point (e)).[64]

Also the Constitutional Law passed on 19 February, 1947, accepting the treaty-making system established by the March Constitution, left unsolved the problem of the denunciation of international treaties.[65]

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[61] See "Dziennik Ustaw" ["Journal of Laws"], 1921, No. 44, item 267.

[62] *Ibid.*, 1935, No. 30, item 227; for more see J. MAKOWSKI, *O zawieraniu umów międzynarodowych* [*On Conclusion of International Treaties*], Warszawa 1937, pp. 40–41.

[63] See "Dziennik Ustaw", 1944, No. 5, item 22.

[64] *Ibid.*, 1944, No. 5, item 23.

[65] *Ibid.*, 1947, No. 18, item 71. The regulation of the competence to conclude international treaties, as established in the first years of the existence of the Polish

With the passing of the new Constitution of 22 July, 1952, the situation underwent a change.[66] Article 25, paragraph 1, of the Constitution stated that the Council of State "ratifies and denounces international treaties". Accordingly, the competence of the Council of State is confined in principle to ratified treaties. Besides ratified treaties, this Article also embraces treaties acceded to by Poland in a way equivalent to ratification from the viewpoint of domestic law, that is, by a decision taken in the form of a resolution of the Council of State.

The competence of the Government to exercise *ius contrahendi* was not established by the July Constitution explicitely. According to established practice, however, it is accepted that the Council of Ministers has the right to conclude and denounce international treaties. The constitutional source of this competence is seen as stemming from Article 32 which states that

"the Conucil of Ministers exercises general control in the field of relations with other States."

The legal situation with respect to denunciation of international treaties has been finally settled by the 28 December, 1968, resolution of the Council of State and Council of Ministers on the making and denunciation of international treaties.

The resolution defined the Council of State's competence to denounce treaties (vested in this organ in accordance with Art. 25 of the Constitution), stating in paragraph 20 that "a ratified treaty is denounced by the Council of State". The notion of a ratified treaty embraces, according to the above-mentioned resolution, all "State treaties" and all ratified "governmental treaties."

State treaties include, from the formal standpoint, treaties signed on behalf of the Council of State (para. 2 of the resolution). The same resolution also indicates their concrete scope, as paragraph 2 envisages that the following treaties are "concluded as State treaties :

"(1). treaties of basic importance, to which belong in particular : (a) peace treaties as well as treaties of friendship, cooperation and mutual assistance ; (b) other political treaties, and (c) treaties on matters to be regulated by law or containing provisions distinct from the existing law ;

"(2). Other treaties, if Poland has agreed to it in view of legal requirements of the other party or if both contracting parties have so agreed in view of special circumstances".

People's Republic is thoroughly analyzed by L. ANTONOWICZ, in his article *Ratyfikacja umów międzynarodowych jako instytucja prawa PRL* [*Ratification of International Treaties as Legal Institution of the PPR*], "Sprawy Międzynarodowe," 1959, No. 1, pp. 33–45.

[66] See "Dziennik Ustaw", 1952, No. 33, item 232.

According to the above-quoted paragraph 1 of the resolution, governmental treaties are treaties signed on behalf of the Council of Ministers. Agreements of this kind require ratification, and are thus denounced by the Council of State, if, as envisaged by paragraph 6 of the resolution, they "have basic importance" and if they "explicitly envisage ratification or allow ratification in circumstances that would justify it—for instance, when a negotiated treaty is to abrogate or alter a ratified treaty."

Thus the above-cited types of treaties—that is those ratified by the Council of State—may be denounced only by this organ. There are, however, also other types of treaties which are denounced by the Council of State. In conformity with paragraphs 21 and 22 of the resolution, the Council of State may also, as we have pointed out before, denounce multilateral treaties acceeded to by Poland as a result of a decision of this organ, that is, when the document of accession has been issued on behalf of the Council of State. Moreover, the Council of State may undoubtedly denounce treaties ratified before the entering into force of the July Constitution, that is, for instance those ratified on behalf of Poland by the President before the war or under the so-called Small Constitution (1947–1952) or by the Chairman of the National People's Council in the 1944–1947 period.

The denunciation of conventions concluded under the auspices of the International Labour Organization is subordinated to a special procedure. As is known, these conventions require ratification and thus their denunciation belongs to the competence of the Council of State. However, the Council of State does not act alone in such cases; in the denunciation decision the Council of Ministers also participate. It is the Council of Ministers that empowers the Minister of Foreign Affairs to submit a motion to the Council of State that a given convention be denounced. Only after a special authorization has been received by the Minister of Foreign Affairs may he submit a motion to the Council of State that a denunciation be effected.

Paragraph 20 of the above-mentioned resolution, being of basic importance with regard to the competence and procedure of the denunciation of international treaties, also regulates the competence of the Council of Ministers in these matters. The scope of the competence of this organ embraces governmental agreements which have not been ratified, that is, all agreements concluded by governmental approval or by signature on behalf of that organ. Essentially, the agreements in question, though of basic importance, are those concluded without ratification and, further, those that in view of their subject-matter belong to the competence of two or more ministers, as well as those within the competence of one minister, but concluded in this way because it was so agreed by the contracting parties (para. 3 of the resolution).

An interdepartmental agreement, that is, an agreement concluded by a competent minister or on his behalf (para. 1 of the resolution) and concerning matters within the competence of one minister (para. 4 of the resolution) may be denounced under paragraph 20 by the "competent minister". He cannot, however, make the denunciation decision independently if the agreement has been approved by the Council of Ministers or the Chairman of the Council of Ministers. In such cases it is necessary to obtain beforehand an authorization from the Council of Ministers or the Chairman of the Council of Ministers respectively.

The resolution does not envisage the possibility of a denunciation of agreements by the Chairman of the Council of Ministers, albeit he has the right to approve international treaties. He approves certain interdepartmental agreements which, as has been already mentioned, are then denounced by the competent minister.

The resolution of the Council of State and Council of Ministers of 1968 establishes a detailed procedure for denouncing international treaties. According to paragraph 20 of the said resolution, denunciation is effected on a motion of the competent minister. However, such a motion cannot be forwarded without the consent of the ministers concerned and in any case not without the consent of the Minister of Foreign Affairs.

When the motion is aimed at the denunciation of a State treaty or intergovernmental agreement, the competent minister should direct it to the Minister of Foreign Affairs who gives it due course. In the case, however, when the consent is to be granted to renounce an interdepartmental agreement accepted by the Council of Ministers or its Chairman, the motion is submitted to one of these organs.

The denunciation of treaties ratified by Poland is published in the "Dziennik Ustaw" ["Journal of Laws"] of the Polish People's Republic. The publication is ordered by the Chairman of the Council of State on the motion of the Minister of Foreign Affairs (para. 19 of the resolution). The denunciation of intergovernmental agreements, which do not require ratification, may be published in the "Journal of Laws." This is decided upon by the Chairman of the Council of Ministers on the motion of the Minister of Foreign Affairs, submitted in consultation with the competent minister.

The denunciation of treaties, to which Poland is a party, by another State is published in the "Journal of Laws" on the motion of the Minister of Foreign Affairs.

Against this background the question may arise what is the role of the Seym in taking a denunciation decision.

This problem, being rather of theoretical importance, has not been dealt with by Polish doctrine very extensively. However, some light may

be shed by a discussion which took place in Polish legal circles on the participation of the Seym in the ratification of international treaties.[67]

It seems beyond any reasonable doubt that in the absence of a constitutional provision subjecting the renunciation of treaties to the prior consent of the Seym, the Council of State may and should act on its own as its competence is not subordinated either to a prior or posterior approval by the Seym. The Seym is bound by the provisions of the basic law transferring decisions on the denunciation of treaties to the Council of State, which excludes from the Seym's competence the denunciation of any such treaties on its own of, even less, against the will of the Council of State.

On the other hand, however, a very special position of the Seym within the structure of State organs, due to the fact that it represents the "supreme expression of the will of the working people of the cities and villages," may justify a certain form of its participation in decisions on the renunciation of international treaties, though both the structure of the Council of State and the principle of the functional dependence of the Council of State on the Seym serve as warrant that the activities of the Council of State will also be in agreement with the will of the Seym in this domain. It seems that there would be no obstacle to the Council of State submitting to the Seym the question of whether a specific treaty should be renounced or not, and consequently to the Seym's making a decision that would be binding on the Council of State.[68] But it must be stressed first that in the light of the existing constitutional system, such participation is dependant on a free decision by the organs vested with the competence to denounce treaties and, second that there are no provisions restricting this freedom.

The Soviet Union

There were no provisions in the Soviet Union's Constitution of 31 January, 1924 stipulating which organ is competent to denounce interna-

[67] See, *inter alia*, D. ANTONOWICZ, *op. cit.*, p. 49 ff; L. GELBERG, *Z problematyki umów międzynarodowych (na tle praktyki polskiej)*, in. *Księga pamiątkowa ku czci J. Makowskiego z okazji 50-lecia pracy naukowej* [*Some Problems of International Treaty-Making in the Light of the Polish practice* in: *the Festschrift in Honour of Professor J. Makowski on the Occasion of the 50th Anniversary of his Scientific Work*], Warszawa 1957, p. 131 ff; K. SKUBISZEWSKI, *Sejm i zawieranie umów międzynarodowych* [*The Seym and the Conclusion of International Treaties*], "Państwo i Prawo," 1959, No. 3, p. 500 ff; A. GWIŻDŻ, *Kontrola parlamentarna polityki zagranicznej* [*Parliamentary Control of International Policy*], "Sprawy Międzynarodowe," 1967, No. 7/8, p. 126 ff.

[68] In particular the Seym's Commissions have an important role to play here. They have actively participated in the ratification by Poland of the Agreement on the Treaty of 7 December, 1970 with the FRG. The whole problem is discussed by

tional treaties.[69] This gap was later closed by the provisions issued by the Central Executive Committee (CEC) and the Council of People's Commissars (CPC) "On the Implementation of the Resolution concerning the Manner of Concluding and Ratifying International Agreements."[70]

According to these provisions, the competence to denounce treaties was divided between the Central Executive Committee and the Council of People's Commissars. The CEC, which according to Article 1 of the 1924 Constitution had acquired the right to ratify international treaties, was vested with the competence to renounce ratified treaties, whereas the CPC was authorized to denounce treaties which it alone had accepted. It may be added here that the 1924 Constitution did not explicitly establish the CEC competence to accept international treaties. It was vested in this organ only by the above-mentioned provisions of 1927.

The provisions "On the Implementation of the Resolution [...]" established the types of treaties requiring ratification. They were: peace treaties and treaties concerning changes in the frontiers of the Soviet Union, as well as agreements requiring ratification under the law of the other party to the agreement. It was these types of agreements that were subject to denunciation by the CEC. In the intervals between sessions, the competence of this organ could be exercised by the CEC Presidium.[71] Thus the CEC Presidium also had the competence to denounce ratified agreements.

At present the denunciation of treaties is regulated by Articles 14, 18(a) and 49 of the Consitution of 5 December, 1936, and by the Law on the Procedure of Ratification and Denunciation of International Treaties, passed by the Supreme Soviet on 20 August, 1938.[72]

Article 14 of the Constitution states that the denunciation of treaties with other States belongs to the

"scope of matters of the Soviet Union embodied in the highest organs of State power and in the organs of the State administration";

and Article 49 grants this right to the Presidium of the Supreme Soviet (PSS).

The Law of 1938 has made this right explicit by stating that the Presidium of the Supreme Soviet has the competence to denounce ratified treaties. According to this Law the following treaties require ratification:

W. Sokolewicz in his article *Aktualne kierunki zmian w strukturze i działalności organów przedstawicielskich* [*Present Changes in the Structure and Activities of Representative Organs*], "Problemy Rad Narodowych," 1973, No. 25, pp. 95–96.

[69] Cf. *Sovetskie konstitucii*, Moskva 1963, p. 171 ff.

[70] Cf. *Sbornik Dejstvujuščih dogovorov*, Moskva, 4th edition, p. 10.

[71] Cf. *Podręcznik prawa międzynarodowego* [*Textbook of International Law*], ed. by Durdenjewski and S. B. Krylov (translation from Russian), Warszawa 1950, pp. 440–441.

[72] Cf. *Vedomosti Verhovnovo Soveta USSR*, 1938, No. 16.

peace treaties, treaties of mutual defence against agression, non-aggression pacts and treaties which, according to the will of the contracting parties, shall undergo this procedure. Thus, the type of treaties requiring denunciation by the PSS has also been established indirectly in this way. The Law of 1938 also stipulated that a decision of the PSS on the denunciation of a treaty (as well as that on ratification) must take the form of a decree.

We may note as an example here the Decree of 8 September, 1955, on the denunciation of the 1929 Convention for the Protection of Human Life at Sea.[73]

There are two more questions that seem to require discussion : first, whether the competence to denounce ratified treaties is exclusively vested in the PSS or whether it may also be exercised by the Supreme Soviet, second, which organ may denounce treaties other than those ratified ?

According to Article 31 of the Constitution, the

"Supreme Soviet of the USSR exercises all rights of the USSR in conformity with Article 14 of the Constitution, unless these rights by virtue of the Constitution belong to the competence of the following Soviet organs reporting to the Supreme Soviet of the USSR : The Presidium of the Supreme Soviet, the Council of Ministers of the USSR, Ministries of the USSR".

As Article 49 grants the PSS the competence to denounce treaties, the very tenor of the provisions seems to indicate that the Supreme Soviet has no such competence.

The question of whether the competence of the Supreme Soviet and that of the PSS are confluent with one another has been widely discussed in Soviet doctrine in connection with the competence to ratify treaties. The idea that the Supreme Soviet in view of its supreme position, has the competence to ratify treaties and may always exercise this competence when it deems it appropriate has probably been encouraged by the fact that the Supreme Soviet has carried out some ratifications on its own.[74]

On the other hand, the Supreme Soviet has never displaced its Presidium by denouncing an international treaty.[75] So the whole question seems to remain open.

As far as the second question is concerned, that is of the competence to denounce other than ratified treaties, the situation does not differ from the commonly accepted principles in the practice of States. Although nei-

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[73] Cf. *Ibid.*, 1955, No. 16.

[74] Cf. A. TALALAEV, *Meždunarodnye dogovory v sovremennom mire*, Moskva 1973, p. 190 ; also O. L. POLENTS, *Ratifikacija meždunarodnyh dogovorov*, Moskva 1950, pp. 34–35, A. Ch. MAHNENKO, who is in favour of the Supreme Soviet competence with regard to ratification, states that as a rule the socialist parliament may take over the functions of the organs subordinated to it. Cf. *Verhovnye organy narodnogo predstavitel'stva socialističeskih stran*, Moskva 1972, Chapter I.

[75] Cf. A. N. TALALAEV, *op. cit.*, p. 190.

ther the Constitution nor the Law of 1938 explicitly envisages the Government's competence to exercise *ius contrahendi*, the Government makes and denounces international treaties on behalf of the Soviet Union. It may thus appear that in this domain of Government activity the special provisions of 1927 "On Implementation of the Resolution [...]" are still in effect.[76]

There is, however, one question left in connection with Soviet practice in regard to the denunciation of international treaties. As is known, according to Article 18(a) introduced into the Constitution of 1936 eight years later

"every Soviet Republic has the right to enter into direct relations with foreign States and to conclude agreements and exchange diplomatic and consular representatives with them."

Only the Ukrainian and Byelorussian Republics have exercised this right. The right of both these Republics to conclude agreements with foreign States undoubtedly embraces the right to denounce such agreements. It is the Presidia of the Supreme Soviet of those Republics that are empowered to denounce international treaties which they have concluded.

Albania

The Constitution of 4 July, 1950 entrusts the Presidium of the People's Convention with the power to ratify and denounce international treaties.[77] Article 58 paragraph 9 envisages, however, that the Presidium may consider it necessary that ratification or denunciation should be effected by the People's Convention itself. At least one case is known where the Presidium transferred—in accordance with Article 58—its competence to denounce international treaties to the People's Convention. This happened in connection with the denunciation of the Warsaw Treaty by the Albanian People's Republic. An appropriate law was passed and "made immediately effective" on 12 September, 1968.

Bulgaria

The Constitution of the Bulgarian People's Republic of 4 December, 1947, following the Soviet pattern, vested the competence in question in the organ exercising the functions of the head of State, the Presidium of the People's Assembly. Article 35 stated *inter alia* :

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[76] *Ibid.*

[77] Cf. *Laws and Practices* ..., p. 3.

"The Presidium of the People's Assembly [...] ratifies and denounces international treaties" [...].[78]

The meaning of this formulation may be reduced to the principle that only the Presidium may denounce treaties which it ratifies.

The Constitution of 16 May, 1971, introduced important changes into the existing system of making and denouncing international treaties.[79]

First, the People's Assembly has been included in the decision-making process relating to the international treaty relations of the State. According to Article 78, "[...] the People's Assembly [...] ratifies and denounces international treaties". The identically formulated competence was also vested in the Council of State. Article 93 states that "the Council of State [...] ratifies and denounces international treaties". The provisions of the Constitution do not establish clearly whether the types of treaties requiring the consent of the legislative organ for their ratification or denunciation are identical to those mentioned in Article 93.

Second, the Bulgarian Constitution of 1971 introduced a novelty into the treaty-terminating system in the form of Article 103. It explicitly establishes the competence of the Council of Ministers to denounce treaties. It states that

"the Council of Ministers [...] accepts and denounces international agreements which do not require ratification."

In the light of the regulation presently in force there is no doubt that the Government has no power to denounce a treaty which has been ratified. A strict relationship has been established between the process by which the State enter into external obligations and by which it terminates such obligations ; but—from the material point of view—the barrier dividing treaties into those to be ratified, and those that may be concluded by the executive power on its own, has not yet been established. Thus no scope of competence to denounce international treaties has been established for the representative organ, the Council of State or the Council of Ministers.

Czechoslovakia

The Constitution of 9 June, 1948, contained no provisions with regard to the competence to denounce international treaties.[80] Article 74 stated only that the competence to ratify treaties is vested in the President of the Republic and mentioned treaties requiring approval by the National Assembly prior to ratification. This situation underwent no change as

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

[79] Cf. *Constitution de la République Populaire de Bulgarie*, Sofia Press, 1971.

[80] Cf. *Laws and Practices* ..., pp. 39–40.

a result of the new Constitution of 11 July, 1960, or of the constitutional Law of 27 October, 1968, regulating problems of the treaty-making power.[81]

German Democratic Republic

The GDR Constitution of 7 October, 1949,[82] did not explicitly envisage the competence to renounce international treaties. Two articles concerning the conclusion of treaties established only the following :

— first, the participation of the People's Chamber in concluding treaties (Art. 63 stated generally that the competence of the People's Chamber included the approval of treaties), and

— second, the competence of the President of the Republic to enter into treaties with foreign States (Art. 105).

On the other hand, the competence to denounce treaties was regulated clearly and with precision by the Constitution of 6 April, 1968 as amended on 7 October 1974.[83] It vested the competence to denounce treaties with the organs which participated in concluding particular treaties thus accepting the principle of parallelism of form. According to Article 51,

"The People's Chamber approves the state treaties of the German Democratic Republic and other international legal agreements in so far as they alter the laws passed by the People's Chamber. It decides on the termination of these treaties."

Thus the consent of the representative organ is required to denounce a treaty when the treaty has altered an existing law passed by the People's Chamber and has been, as such, concluded with the participation of this organ.

Article 66, paragraph 2 which states that

"the Council of State [...] ratifies and terminates State treaties and other international treaties, for which ratification is envisaged."

The competence of the Government to make and denounce international agreements has also been clearly established. In conformance with Article 79, paragraph 3,

"the Council of Ministers decides upon the conclusion and termination of agreements of international law concluded in its name."

Roumania

The Roumanian Constitution of 13 April, 1948, conferred the competence to denounce international treaties upon the Presidium of the Grand

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[81] Cf. A. J. PEASLEE, *op. cit.*, 1966, vol. 3, p. 225 ; and Sbirka Zakonu Československe Socialisticke Republiky, Nov. 4, 1968, No. 41, item 144.

[82] Cf. *Laws and Practices* ..., p. 54.

[83] Cf. The Constitution of the German Democratic Republic, Berlin 1968 ; amended version in *Gesetzblatt der Deutschen Demokratischen Republik*, 1974, Teil 1, No. 47.

National Assembly ; it was also given the competence to ratify treaties. Article 44, paragraph 13, stated that the Presidium shall

"on a motion by the Government ratify or denounce international treaties."[84]

Thus the Presidium had the competence to denounce ratified treaties. Such a regulation of this question was typical for the constitutions of People's Democracies of that period. According to the then existing pattern, the Roumanian Constitution also did not settle clearly the Government's competence to exercise the treaty-making power on its own.

The new Constitution (of 21 August, 1965)[85] has vested the respective organ with extensive competence with regard to the international treaty relations of the Republic. According to Article 43,

"the Grand National Assembly [...] ratifies and denounces international treaties which bring about a change of laws."

On the other hand, Article 63 stipulates that

"the Council of State [...] ratifies and denounces international treaties, except those which are to be ratified or denounced by the Grand National Assembly".

As in the Bulgarian Constitution of 1971, the activities of the legislative organ and those of the Council of State have been envisaged in the same manner ("ratifies and denounces") ; the legislative organ, however, expresses its consent to a ratification or denunciation which is to be effected by the Council of State. On the other hand, unlike the Bulgarian Constitution but like the GDR Constitution, the Roumanian Constitution clearly states which treaties require the consent of the Grand National Assembly prior to their conclusion or denunciation, namely treaties bringing about a change of laws.

Unlike the other new constitutions of the socialist States, the Roumanian Constitution has not explicitly vested the competence to conclude and denounce international treaties in any governmental organ. In accordance with Article 70, the Council of Ministers shall only "undertake measures to conclude international treaties."

Hungary

The Hungarian Constitution of 20 August, 1949, while recognizing in Article 20 the competence of the Presidential Council to "conclude international treaties on behalf of the Hungarian People's Republic" (para. 1(e)) and to "ratify international treaties" (para. 1(g)), did not mention the competence to denounce such treaties.[86]

According to a viewpoint within the Hungarian doctrine, the Hungarian Government, in the light of this regulation, had no right to denounce

[84] Cf. *Laws and Practices* ..., pp. 95–96.

[85] Cf. A. J. PEASLEE, *op. cit.*, 1966, vol. 3, p. 767.

[86] Cf. *Laws and Practices* ..., p. 62.

international treaties. This viewpoint was formulated in connection with the denunciation of the Warsaw Treaty in 1956 by Imre Nagy, the then acting Prime Minister and Minister for Foreign Affairs.[87]

The Constitution of 19 April, 1972, also says nothing about the denunciation of international treaties.[88] Paragraph 19, stipulating the right of the National Assembly to approve an unspecified category of international treaties, paragraph 30, vesting the Presidential Council with the right to conclude and ratify international treaties and finally paragraph 35 granting the competence to conclude and approve international agreements to the Council of Ministers, all remain silent about the competence of these organs to denounce international treaties.

Generally, according to Professor G. Haraszti, an eminent Hungarian lawyer and expert on these problems, the Presidential Council decides on the denunciation of treaties.[89]

Part II: International Legal Problems of the Treaty-Terminating Power

Among the various questions that arise in connection with the treaty-terminating power, three appear to have a special importance.

First, whether in accordance with international law only that organ that has concluded a treaty on behalf of the State is competent to denounce this treaty, or, in other words, whether denunciation is to be regarded as an *acte contraire* in relation to the conclusion of a treaty.

Second, which organs of the State are recognized by international law as competent to terminate international treaties.

Third, whether the provisions of domestic law concerning the competence of State organs to denounce international treaties are effective in the realm of international law, i.e., effective in the sense that the infringement of these provisions may lead to the nullifying of a treaty-terminating act.

The theory of *acte contraire* was discussed during the work on the codification of the law of treaties in connection with the termination of treaties. According to the suggestion put forward by the Special Rapporteur Sir Humphrey Waldock, in his Second Report of 1963 (Art. 19, commentary),[90] the International Law Commission stated in its final Draft

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[87] See G. Haraszti, *Some Fundamental Problems of the Law of Treaties*, Budapest 1973, pp. 250–251.

[88] Cf. *Constitution de la République Populaire Hongroise*, Budapest 1972.

[89] Cf. G. Haraszti, *op. cit.*, pp. 250–251.

[90] Cf. "Yearbook of the International Law Commission," 1963, vol. 2, p. 71, later quoted as YILC.

of 1966 on the Law of Treaties (Art. 51) that "a treaty may be terminated or a party may withdraw from a treaty [...] at any time by consent of all the parties".[91] However, no formal requirements to make such joint consent effective were established. This was explained by the International Law Commission in its commentary to the above-quoted Article as follows: "The theory has sometimes been advanced that an agreement terminating a treaty must be cast in the same form as the treaty which is to be terminated or at least constitute a treaty form of equal weight. The Commission, however, concluded that this theory reflects the constitutional practice of particular States and is not a rule of international law. In its opinion, international law does not accept the theory of *acte contraire*. The States concerned are always free to choose the form in which they arrive at their agreement to terminate the treaty. In doing so, they will doubtless take into account their own constitutional requirements, but international law requires no more than that they should consent to the treaty's termination."[92]

Consequently, an identical formulation has been introduced into Article 54 of the Vienna Convention on the Law of Treaties adopted on 22 May, 1969.[93]

It reflects, seemingly in an adequate manner, the existing legal situation with regard to this problem. Indeed, in the light of accepted rules of the law of treaties, it would be very difficult to find any justification for the theory of *acte contraire*. Its acceptance is prevented, first, by the lack of formalism in international law, and second, by the lack of a hierarchy of legal acts resulting from this very lack of formal criteria.[94]

As is well known, from the standpoint of international law all international treaties have the same legal value whether they have been concluded in the form of a solemn treaty ratified by the Head of State, in the form of an intergovernmental agreement approved by the Governments concerned, or in the form of an interdepartmental agreement concluded at the lowest level of governmental organs capable of international activities.[95] Consequently, there are no legal obstacles to terminate, for instance,

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[91] Cf. Reports of the International Law Commission, General Assembly Official Records, XXI Session, Suppl. No. 9, p. 77.

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

[93] Cf. Official Records of the UN Conference on the Law of Treaties, Doc. A/CONF. 39/27.

[94] Cf. Commentary to Article 1 of the Draft Articles on the Law of Treaties—Reports of the ILC, *General Assembly Official Records*, XXI Session, Suppl. No. 9, p. 21.

[95] See remarks of Professor M. Lachs in his article *Some Reflections on Substance and Form in International Law*, in : *Transnational Law in a Changing Society, Essays in Honour of P. C. Jessup*, 1972, W. Friedmann, L. Henkin, O. Lissiitzyn, eds., pp. 99–112, in particular 110.

an agreement concluded in the form of a solemn treaty through a resolution formulated in an agreement concluded on a lower level.

Thus there are no obstacles to prevent an agreement from being denounced by an organ different from the one which expressed the will of the State in concluding it.

In reference to the first part of this paper, however, it must be added that in the light of the domestic law of not a few States such an action would not be legally possible, but in any case the whole matter remains beyond the scope of international law.

Now, we may go on to the question of which State organs are recognized by international law as being competent to denounce international treaties.

The authors have not devoted much attention to this problem. However, in considering possible solutions, we may refer—seemingly without fear of committing an error—to the viewpoints formulated in connection with the competence of State organs to conclude international treaties, for both questions are closely interlinked.

Here the opinions of the authors are manifestly divided. Generally speaking, we may distinguish between the partisans of two theories: the constitutional theory and the internationalist theory.

According to the first theory, international law leaves it to the internal law of each State to determine the organs which are competent to speak in the name of the State and to bind it by a treaty. The constitutionalists maintain that internal law provisions relating to the power of State organs are to be considered part of international law. The consent of a State to be bound by a treaty, if given with disregard for constitutional provisions, is void on the domestic as well as on the international plane.

On the other hand, the followers of the internationalist theory maintain that international law determines the conditions under which the various categories of State organs will be recognized as competent to commit the State. Failure to comply with constitutional regulations does not affect the essential validity of the treaty.

Both these theories have been presented in various versions, but none has achieved common acceptance.[96]

Taking these viewpoints into account within the scope of our deliberations, we could state that according to one possible theory a treaty may be denounced only by organs which possess appropriate competence under domestic law, while according to the other theory—by organs recognized

[96] For a detailed discussion on doctrinal opinions in this matter see, i.a. H. BLIX, *op. cit.*, p. 370 ff; K. HOLLOWAY, *op. cit.*, p. 119 ff; and lately W. WILDHABER, *op. cit.* p. 146 ff.

directly by international law as competent to undertake such action—without reference to domestic legal regulations.

Professor Ch. Rousseau seems to belong to authors inclined to accept the first of the above-mentioned theories. He maintains that "*c'est au droit interne de chaque Etat qu'il appartient de determiner quel organe etatique sera investi de la competence necessaire a l'effet de denoncer les engagements internationaux.*"[97] Similar opinions are held by the Soviet author—Professor Talalev[98] and by Professor Haraszti, who has formulated this view most explicitly.

The latter, beginning with an assumption that "international law does not bring under regulation the question of who is entitled to denounce a treaty," states that the only proper standpoint resulting from this fact would be "to accept the provisions of domestic law as normative at the establishment of competence of the organ making the relevant declaration."[99]

On the other hand, the Special Rapporteur of the International Law Commission, Sir Gerald Fitzmaurice, pronounced himself—during the work on the codification of the law of treaties—in favour of the internationalist theory with regard to the denunciation of international treaties.

In his second report, submitted to the Commission in 1957, he stated (Art. 25) i.e. as follows :

"The act and process of terminating or withdrawing from a treaty by any party is an executive one, and, on the international plane, the function of the executive authority of the State".[100]

The position of the last Special Rapporteur of the Commission, Sir Humphrey Waldock, was also similar. By proposing in his second report (submitted to the Commission in 1963) to subordinate the "authority to annul, denounce, terminate, withdraw from or suspend a treaty" to the rules established for the regulation of the treatymaking power by Article 4 of the First Report of 1962, he indirectly expressed the opinion that it is Heads of States, Heads of Governments and Ministers of Foreign Affairs that are to be recognized as competent to denouce international treaties.[101]

At its 1963 session the Commission introduced certain changes into Article proposed by Sir Humphrey Waldock by relating its provisions not so much to the regulation of competence as to the regulation concerning the evidence to be furnished by specific persons to show that they are vested with appropriate full power to conclude international treaties. Ar-

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[97] See Ch. ROUSSEAU, *Droit International Public*, Paris 1970, vol. 1, p. 210.

[98] Cf. TALALAEV, *op. cit.*, p. 189.

[99] Cf. G. HARASZTI, *op. cit.*, p. 250 and 252.

[100] Cf. YILC, 1957, vol. 2, p. 54.

[101] Cf. YILC, 1963, vol. 2, p. 85, Art. 23 and commentary.

ticle 49, adopted by the Commission in 1963 and entitled "Authority to denounce, terminate or withdraw from a treaty or suspend its operation," stated :

"The rules contained in Article 4 relating to evidence of authority to conclude a treaty also apply, *mutatis mutandis*, to evidence of authority to denounce, terminate or withdraw from the treaty or to suspend its operation".[102]

Article 4 mentioned in this provision, adopted by the Commission a year earlier, vested the right to conclude international treaties in Heads of States, Heads of Governments and Ministers of Foreign Affairs, without the necessity of furnishing any evidence of competence. Other persons had in principle to produce appropriate full powers.

The final Draft Articles on the Law of Treaties of 1966 and the almost identically worded provisions of the Vienna Convention of 1969 concerning the questions discussed here have abandoned the construction envisaging the extension of the provisions connected with the competence to conclude treaties to the competence to denounce them.

Article 7 of the Convention (Art. 6 of the Draft) formulates the competence to conclude international treaties in the following way :

"(2). In virtue of their functions and without having to produce full powers, Heads of State, Heads of Governments and Ministers of Foreign Affairs are considered as representing their States for the purpose of performing all acts relating to the conclusion of a treaty;

"Any other person might be considered as representing a State for the purpose of expressing the consent of the State to be bound by a treaty if he produces appropriate full powers or it appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to dispense with full powers."

The problem of the competence to denounce international treaties has been regulated by Article 67 of the Convention (Art. 63 of the Draft). This Article, relating to the instruments for declaring invalidity, termination, withdrawal from or suspension of the operation of a treaty, provides i.a.:

"If the instrument is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers".

This Article indirectly indicates that in the light of international law as codified by the Convention, the three mentioned State organs are always competent to denounce international treaties.

The question may be asked whether the catalogue of organs has been exhausted by this Article. Undoubtedly not. There is no mention anywhere that full powers produced by the representative of the State notifying a denunciation are to stem from any of the enumerated organs. According to Article 2 paragraph 1 (i) the only requirement is that full powers emanate "from the competent authority of a State".

[102] *Ibid.*, pp. 213–214, Art. 49.

What is more, the Convention explicitly envisages the possibility of dispensing with full powers by the States concerned, for Article 67 does not require the possession of full powers (in cases other than those mentioned), giving the other party only the right "to call upon to produce full powers" by the State representatives.

It may be noticed that, since Article 7 envisages—at least in certain cases—the conclusion of a treaty without the producing of full powers by persons other than the Head of State, Prime Minister and Minister of Foreign Affairs, the denunciation of a treaty may also be effected without those other persons producing full powers. In particular, we may mention here the heads of departments entrusted with the concluding and terminating of interdepartmental agreements.

We may now pass to the third question mentioned at the beginning of this part of the article, namely, that of the effectiveness within the realm of international law of domestic law provisions regulating the competence to denounce international treaties.

The most important consequence of accepting the constitutional theory or the internationalist theory is, in the first case, the recognition of the effectiveness of domestic law provisions in the sphere of international law and, in the second case, of the ineffectiveness of these provisions. The whole issue, has been discussed very widely in the doctrine in the context of rules regulating the treaty-making power, but without devoting much attention to the subject-matter of this paper. As with other questions, however, the viewpoints of the doctrine concerning the treaty-making power shed much light on the problem of the treaty-terminating power.

It is worth mentioning two variants of these theories, both of which try to weaken the consequences of accepted assumptions. The opinion that not all relevant provisions of domestic law may be considered effective in the sphere of international law has gained not a few followers among the constitutionalists. According to this view, good faith requires that only notorious constitutional regulations with which other States can reasonably be expected to acquaint themselves should be taken into account. Thus Lord McNair writes : "A State which contests the validity of a treaty that purports to have been made on its behalf may only invoke [...] provisions of its constitution or constitutional law [...] if they are notorious or could easily have been ascertained by inquiry."[103]

Similar in its practical effects to this formula is the point of view propagated by some followers of the internationalist theory that the ineffectiveness of internal law provisions cannot be invoked in cases where the other contracting party is actually aware of the failure to comply with

[103] Cf. A. D. McNair, *op. cit.*, p. 77.

relevant internal law provisions or where the lack of constitutional authority is so evident that the other contracting party must be deemed to have been aware of it.

The problem of the effectiveness of internal law provisions concerning the treaty-terminating power on the international plane—to which little attention has yet been devoted[104]—has been discussed by Haraszti, who has drawn far-reaching conclusions from his constitutional standpoint. According to him, "a declaration made in violation of essential provisions of competence of internal law should be considered, in general, null and void, whether it was intended for the conclusion of a treaty or for its denunciation." Then he states eleswhere : "the denunciation of a treaty cannot be considered valid unless it has been made by the State organ authorized to this effect in conformity with the relevant constitutional provisions."[105]

The problem of whether internal law provisions concerning the treaty-terminating power are effective in the sphere of international law received only passing attention during the work on codification of the law of treaties. The issue was raised during the discussion on the Second Report submitted by Sir Humphrey Waldock in 1963 in connection with Article 23 dealing, as mentioned above, with the "authority to annul, denounce, terminate, withdraw from or suspend a treaty". The point in question was how to connect this provision with Article 5 of the report concerning constitutional limitations of the treaty-making power. In this article Sir Humphrey Waldock, unlike his predecessor Sir Gerald Fitzmaurice,[106] presented the stand of the followers of the internationalist theory who admit limitations to the general rule of irrelevance of internal provisions. According to paragraph 4, this general rule would not apply

"if the other interested State or States or the depositary were in fact aware at the time that the representative lacked constitutional authority to establish his State's consent to be bound by the treaty, or if his lack of constitutional authority to bind

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[104] Rather exceptional in this respect are remarks made by W. H. BAYER, *op. cit.*, pp. 52–61. These remarks, however, were described by H. AUFRICHT as "not very fruitful" in a review in "American Journal of International Law," 1970, vol. 64, pp. 729–730.

[105] Cf. G. HARASZTI, *op. cit.*, pp. 252-253.

[106] In his report of 1958 Sir Gerald Fitzmaurice, recognizing that a failure by the State concerned, or its authorities, to observe the correct constitutional process as required by the domestic law is irrelevant on international law plane, motivated his standpoint as follows : "[...] because States have no choice but to accept as internationally authentic the acts of the legitimate executive authority of another State, carried out on the international plane in an apparently regular manner, so also are they entitled to rely on the authenticity of such acts, which may not subsequently be denied by the State from whence, through its executive authority, they have emanated." Cf. *Third Report*, Art. 10, YILC, 1958, vol. 2, pp. 33–35.

his State was in particular circumstances manifest to any representative of a foreign State dealing with the matter in good faith."[107]

At one of the sessions of the Commission S. Rosenne suggested that this Article be associated with Article 23.[108] He was supported by de Luna who at the same time reminded the Commission that anything relating to the procedure for amendment, denunciation, termination, withdrawal from or suspension of a treaty raised exactly the same problems as the constitutionality of treaty-making power and the international effects of a breach of internal law on that subject. He suggested accordingly that either the article itself or the commentary should say what were the international effects of the national authority excessed by the organs in question.[109] Although Sir Humphrey Waldock replied that the question would require some thought,[110] the matter has never come up again.

The regulation of constitutional limitations on the treaty-making power has been carried out according to Sir Humphrey Waldock's proposals. In 1963 the Commission adopted a provision according to which the consent of a State to be bound by a treaty could be invalidated in cases where the violation of its internal law regarding competence to enter into treaties was manifest (Art. 31 of the 1963 Draft[111]). There was no mention anywhere that this provision should also relate to constitutional limitations on the treaty-terminating power.

The provision survived the criticism of some members of the Commision, as well as the critical comments of some Governments on the ILC Draft[112] and found its way, in a slightly altered form, into the final Draft Articles on the Law of Treaties of 1966 (Art. 43).

After rather a broad discussion at the Vienna Conference, which brought about some alterations in the text of this Article,[113] the Vienna Convention formulated the question discussed as follows

"(1). A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance. (2) A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith." (Art. 46).

The question arises whether there is any justification for stating that

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[107] Cf. YILC, 1965, vol. 2, pp. 41.

[108] *Ibid.*, vol. 1, p. 164.

[109] *Ibid.*

[110] *Ibid.*

[111] *Ibid.*, vol. 2, p. 190.

[112] *Ibid.*, 1965, vol. 2, pp. 67–71.

[113] See S. ROSENNE, *The Law of Treaties. A Guide to the Legislative History of the Vienna Convention*, Leyden 1970, pp. 168–169.

this provision can also apply to internal law provisions regulating the treaty-terminating power.

It appears that there are more arguments against such a statement than in favour of it.[114]

Applying the rules of interpretation set up by the Vienna Convention itself, and specifically the general rule of interpretation contained in Article 31 according to which

"a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose",

we have to accept, first of all that Article 46 exclusively refers, in accordance with its title, to "provisions of internal law regarding competence to conclude treaties". The text of the said Article mentions only the "consent to be bound by a treaty." Thus it would be difficult to maintain that in accordance with the ordinary meaning of these terms we may also extend the provisions of Article 46 to the provisions of internal law regarding competence to terminate treaties and to the expression of the will of a State to terminate a treaty. Second, the very text of the Vienna Convention also speaks against the extension of the scope of Article 46. The Article in question has been put in the section concerning the "invalidity of treaties" and the application of its provisions to the problems connected with the termination of treaties would seem to be against the intentions of the contracting parties.

What is more, as we have mentioned before, the idea of jointly regulating the competence of State representatives to conclude a treaty and to terminate a treaty has been abandoned. These questions have been regulated by different articles in various parts of the Convention and not identically. There are no reasons to assume that these questions were again intended to be dealt with jointly in Article 46.

Third, our conviction that Article 46 cannot be applied to constitutional provisions on the treaty-terminating power is also confirmed by the preparatory work of the treaty, as a supplementary means of intepretation, to which recourse may be had, according to Article 32,

"in order to confirm the meaning resulting from the aplication of Article 31".

No State raised at any stage of the codification work the problem of making the provisions on the treaty-terminating power internationally effective. There is no reason to believe that this resulted from neglect. It was simply the intention of the authors of the Vienna Convention not to

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[114] It may be noted, however, that according to W. H. BAYER, Art. 43 of the Commission's Draft, reflecting as he described it *"Evidentztheorie"* was relevant in case of the limitations upon the treaty-terminating power of the internal law origin—W. H. BAYER, *op. cit.*, pp. 60–61.

invest internal law provisions concerning the treaty-terminating power with effectiveness in the realm of international law.

Such a position seems to be completely in accordance with the hitherto practice of States. In vain we may expect it to corroborate the other view. Even Professor Haraszti himself admits that his viewpoint has received no support either in State practice or in judgements of international courts and tribunals.[115]

Conclusions

From the foregoing survey, however incomplete, of the internal law and practice of States certain conclusions may be drawn which seem to be important to international legal considerations on the competence of State organs to denounce treaties.

Seemingly, the observation that a decision to denounce an international treaty is not commonly recognized by domestic law as an *acte contraire* to the decision on the conclusion of an international treaty may be considered of some importance. This observation stems from the practice of States which have accepted the procedure of allowing the legislative organ to participate in decisions with regard to the making of international treaties, but have not explicitly established in their constitutional law the right of this organ to participate in decisions to denounce these treaties. As a rule, in these States the Parliament does not participate in denouncing international treaties. This does not mean, however, that the same procedure is not sometimes applied to the denunciation of a treaty that has been applied to the making of the treaty. The point is that when there are no explicit provisions to the contrary, the *acte contraire* principle is not recognized as binding.

This state of affairs is reflected in international law. Though based on premises other than lack of uniform regulation in the domestic law of individual States, international law does not require that the denunciation shall constitute an *acte contraire* with regard to the conclusion of a treaty.

A second observation suggests itself in connection with the comparison of the practice of the States which have adopted the procedure of parliamentary participation in decisions on the denunciation of international treaties with the practice of those States in which the Parliament, though participating in the process of the conclusion of treaties, has no right to participate in their denunciation. This comparison leads to a rather unex-

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[115] Cf. G. Haraszti, *op. cit.*, pp. 251–252.

pected conclusion : namely, that in both cases practice is nearly the same. For, on the one hand, despite the absence of an explicit legal basis, it happens that Parliament may act as the co-originator of a decision to denounce a treaty (for instance, in the United States and Belgium) ; on the other hand, however, even where such a legal base exists, the Parliament may be permitted only rarely to make use of its rights (for instance, in Holland, and above all in France under the IV Republic).

This phenomenon may be seen as a concrete expression of the divergence between the written constitution and the existing practice so often mentioned by authors. It may be also viewed as demonstrating, against all formal stipulations, the well-known trend in the modern State (visible not only in the realm of international relations) towards the strengthening of the executive organ at the expense of the legislative organ. This trend is reinforced by the well-known practice of concluding agreements in simplified form, that is by the executive power alone.[116] The scope of matters regulated in this way is being constantly extended, and undoubtedly this exerts its negative influence on the participation of the Parliament in denouncing treaties—if, of course, any such participation is envisaged at all.

From our comparison another conclusion may also be drawn ; namely, that the internal legal regulation of the competence to denounce treaties does not explicitly determine the practice the States do in fact resort to.

As it is, it would be difficult to maintain that internal legal provisions concerning the treaty-terminating power are effective in the sphere of international law. Everything seems to speak in favour of adopting the internationalist theory which recognizes the competence of the executive authority to decide on the termination of international commitments.

In the existing situation, only this theory is able to secure the stability of international transactions and to protect States from inconvenient and improper inquiries into their constitutional laws by other States. It may be added that should a State try to establish whether a decision on denouncing a treaty has been made in accordance with the internal law of the contracting party, it would ordinarily have to accept the interpretation given to it by the very officials of the State whose competence it questions. In practice inquiries into the internal law regulating the treaty-terminating power have never been undertaken.

It seems that this trend is gaining momentum without meeting any serious obstacles on the international level. According to H. Blix, "the

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[116] From among very extensive literature on this problem we may quote, for instance, K. HOLLOWAY, *op. cit.*, p. 65 ff ; P. F. SMETS, *op. cit., passim* ; L. WILDHABER, *op. cit.*, pp. 106–145.

international community has not yet developed to the point where its members recognize a mutual interest in the upholding of constitutional rules generally, or of constitutional rules relating to democratic control in particular. Indeed, the very reverse seems true, for it appears that only very specific mutual needs translate themselves into international custom and conventions."[117] In short it should be stated that it seems that constitutional provisions regulating the treaty-terminating power enjoy no protection under international law. Infringement of these domestic provisions has no legal effect in the realm of international law.

[117] Cf. H. BLIX, *op. cit.*, p. 394.

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Civil War and Merchant Shipping of Third States

by ZBIGNIEW ROTOCKI

Civil war operations, though in principle of an internal character, may affect the freedom of navigation and trade of third States not only on the high seas, but all the more on the territorial waters of the State engaged in such a war. This results from the authority of the contending parties who may—in certain circumstances—exercise the right of visit, search and capture, as well as that of blockade. To ascertain the scope of this authority, the civil war operations may be classified into instances in which the insurgents are (a) unrecognized as belligerents by anybody ; (b) recognized as belligerents by their parent country or by third States ; and (c) recognized as belligerents by their parent country and third States. And if to this enumeration is added the instance in which insurgents acquire the "recognition of insurgency," we will obtain all possible variants of civil war from the international law point of view.

Since the scope of our subject-matter, and especially belligerent rights affecting the vessels of third States, is hitherto based exclusively on customary international law—if we take no account of the Havana Convention on Duties and Rights of States in the event of Civil Strife concluded at the Sixth Pan-American Conference in Havana in 1928, which because of its merits and limited scope of application has left the above-mentioned civil war problems unsolved—our description will be quite naturally founded first and foremost on the practice accepted by States and judicial decisions, and to some extent on the doctrine of international law. In this we are fully aware that the content of norms binding upon parties affected by a civil war is decisively influenced by the practice of States, a practice which was and is far from uniform ; moreover, in most cases it is formulated not explicitly, but by way of indirect activities, tacit consent or, in exceptional cases only, by declarations of neutrality. And in view of the Anglo-American supremacy over the high seas in the 19th century and the first half of the 20th century, we will have to examine first of all the

British and US practice and judicial decisions supplemented by doctrinal deliberations of the theoreticians of international law. In conclusion it may be assumed that the body of these customary norms was first shaped into a coherent system at the beginning of the 20th century, finding its theoretical and legal reflection in the set of rules adopted at Neuchatel in 1900 by the Institute of International Law, and concerning "The Rights and Duties of Foreign States in case of Insurgency", as well as in a classical work by Antoine Rougier—*Les guerres civiles et le droit des gens.* The next step in the evolution of this system has been made as a result of the 1936–1939 Spanish Civil War, which interrupted the almost half-a-century lack of interest in these problems, and of the French military operations on the Mediterranean connected with the 1954–1962 Algerian National Liberation War. The practice established by States in both these wars has created new precedents and exerted a certain influence on customary international law. Thus, taking into account all these factors, we shall try to examine, basing ourselves on the above-mentioned variants, the influence that the civil war operations exert on the freedom of navigation and trade of third States.

A. Insurgents Unrecognized as Belligerents either by Their Parent State or by Third States

1. In a situation of this kind the insurgents cannot exercise the right of visit and search both on the high seas and in their territorial waters. In this respect both the practice and the doctrine are unanimous. As far back as the American Civil War, the British informed the United States Government that they had recognized the Confederates as belligerents forced by necessity to establish whether or not the vessels of the South should be treated as pirates. And during the Spanish Civil War (1873–1874) the British Admiralty and Government issued instructions ordering to treat the vessels of Spanish insurgents attacking British vessels as pirates.[1] As for British judicial decisions, we may quote an opinion of the Attorney General in the case of the Peruvian insurgent ironclad "Huascar," which was explicitly censured for stopping British vessels on the high seas and taking from them supplies of bunker coal.[2] As a classical example from the US practice may serve a letter (of 30 January, 1894) directed by the commander of the US Navy in the Rio de Janeiro bay, Admiral Benham,

[1] H. LAUTERPACHT, *Insurrection et Piraterie*, RGDIP, vol. 46, 1939, p. 516.

[2] *Parliamentary Papers*, 1877, vol. 52 ; H. W. HALLECK, *International Law*, London 1893, vol. 1, p. 1086 and H. WEHBERG, *Huascar Fall in Strupp-Schlochauer*, "Wörterbuch des Völkerrechts," Berlin 1960, vol. 1, pp. 799–800.

to the leader of the insurgents, Admiral da Gama, in which he had warned him that "Until belligerent rights are accorded you, you have no right to exercise any authority whatever over American ships or property of any kind. You cannot search neutral vessels or seize any portion of their cargoes, even though they be within the class which may be clearly defined as contraband of war, during hostilities between two independent Governments. The forcible seizure of any such articles by those under command would be, in your present status, an act of piracy." The decisions of the American courts took the same line of conduct towards the vessels "Ambrose Light" and "The Tree Friends."[3]

Within treaty law Article 2 of the Convention On Duties and Rights of States in the Event of Civil Strife, adopted at the Sixth Panamerican Conference in Havana, as well as article 957 of the Queens Regulations and Admiralty Instructions for the Government of Her Majesty's Naval Service (H. M. Stationery Office, London 1953), permit men-of-war of third States to seize men-of-war of unrecognized insurgents, which exercise as against vessels sailing under third States flag the right of visit and search, and bring them to justice.

The doctrine is in this respect almost unanimous. And so Dana, Wiesse, Rougier, Calvo, Kunz, McNair, Gidel, O'Rourke, Briggs, Padelford, Pitt-Cobbet, Lauterpacht, Colombos, Gelberg, Wehberg and Castren[4] speak against the admissibility of exercising the right of visit as against alien vessels by the men-of-war of insurgents which are unrecognized as belligerents.

To sum up it may be said that the men-of-war of insurgents unrecognized as belligerents have no authority to exercise the right of visit and search

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[3] J. B. Moore, *A Digest of International Law*, Washington 1906, vol. 2, p. 1119.

[4] H. Dana, in : H. Wheaton, *Elements of International Law*, Oxford 1936, p. 30 ; C. Wiesse, *Le droit international appliqué aux guerres civiles*, Lausanne 1898, pp. 220, 309 ; A. Rougier, *Les guerres civiles et le droit des gens*, Paris 1903, p. 309 ; C. Calvo, *Droit International*, Paris 1870, (2 ded.) vol. 1, p. 391 ; J. L. Kunz, *Die Anerkennung der Staaten im Völkerrecht*, Stuttgart 1928, p. 212 ; Mc Nair, in : "Law Quaterly Review," vol. 53, 1927, p. 471 ; G. Gidel, *Le droit international public de la mer*, Chateauroux 1932–34, vol. 1, p. 325 ; V. A. O'Rourke, *Recognition of Belligerency and the Spanish War*, AJIL, vol. 31, 1937, p. 398 ; H. Briggs, *The Law of Nations*, New York 1938, p. 749 ; N. J. Padelford, *International Law and Diplomacy in Spanish Civil War*, New York 1939, p. 25, P. Cobbett, *Cases on International Law*, London 1947 (6th ed.) vol. 1, p. 321 ; H. Lauterpacht, *Recognition in International Law*, Cambridge 1947, pp. 278, 309 ; J. Colombos, *The International Law of the Sea*, London 1954 (3rd ed.), p. 355 ; L. Gelberg, *Piractwo na morzach chińskich* [*Piracy on the Chinese Seas*], Warszawa 1956, p. 86 ; H. Wehberg, op. cit., p. 800 and E. Castrén, *Civil War*, Helsinki 1966, p. 127. For a different view see only C. Hyde, *International Law*, Boston 1922, sec. 233 and R. Sandiford, *Diritto marittimo*, Milano 1960, p. 641.

of merchant vessels of third countries either on the high seas or in the territorial waters of their parent State. And as to insurgent men-of-war hoisting the flags of other States, the flag States may seize these men-of-war and bring them to court, even if they did not endeavour to interfere with their vessels. But it must be kept in mind that the very recognition of belligerency on the part of third States is as facultative as the exercise of their rights in the opposite case.[5] The not too distant past once more confirmed this principle in its extreme and hitherto unparalleled form when insurgents unrecognized as belligerents were attacking the vessels of third States, though no organization was backing their operations. We refer here to the "unknown submarine" operations during the Spanish Civil War which led on 4 September, 1937 to the conclusion of the Nyon Agreement.[6] Stressing the ban on exercising the right of visit and search by insurgents unrecognized as belligerents, and particularly on sinking by them the vessels of third States, the Agreement permitted to attack and destroy those "unknown" submarine units by the men-of-war of the States being parties to the Agreement. By an additional protocol of 17 September, 1937, the Agreement was extended to men-of-war and aircraft acting in the same way as the submarines. At the same time the right of the participating States was preserved "to take such action as may be proper to protect its merchant shipping from any kind of interference on the high seas".

Apart from applying to a specifically new situation the customary principle banning the exercise of the right of visit by insurgents unrecognized as belligerents, the Agreement has created, for the first time, an instrument for combating such lawless activities not by unilateral but by collective decisions of the States concerned.

However, as to the possibility of proclaiming a blocade of ports of the parent State by the naval forces of unrecognized insurgents, the practice as well as the doctrine do not assume an uniform attitude. In most cases, however, they speak in favour of the viewpoint that a blockade declared by insurgents unrecognized as belligerents has no binding power on the vessels of the States which did not recognize the insurgents as belligerents.

To illustrate this, many examples may be quoted from the 19th-century American practice. For instance, in the course of the American Civil War, the Chilean Revolution of 1891, the insurrection in Brazil of 1893–1894 and the rebellion in Haiti of 1902, American Secretaries of State and Commanders of the US Navy had explicitly stated that blockades of such kind

[5] *Mr Fish, Secretary of State, to Mr Bassett, Minister to Haiti, No. 11, September 14, 1869*, in : J. B. MOORE, *op. cit.*, vol. 2, p. 1085.

[6] *League of Nations Treaty Series 1937–38*, vol. 181, No. 4185, pp. 136–148 and AJIL, vol. 31, October 1937, Supplement, pp. 179–181.

would not be respected by the United States.[7] As to the American judicial decision, we may quote here the well-known case of the vessel "Ambrose Light" in which judge Brown decided that "in the absence of recognition of belligerent rights [...] in blockading ports which all nations are entitled to enter, they attack the rights of all mankind, [...] that such acts are therefore piratical."

During the Civil War in Brazil (1893–1894) the British took a similar position.[8] Then, after the British Government had recognized in 1950 the People's Republic of China and the Chaing Kai-shek armed forces had become for Great Britain insurgents unrecognized as belligerents, the attempts of these forces to impose blockade on Continental China and detain British vessels in Chinese territorial waters were met by protests of the British Government.[9] From the British judicial decisions supporting such a viewpoint, we may quote the case of the *Spanish Government* v. *North of England Steamship Company* and the case of the *Tatem* v. *Gamboa*.[10]

The opinion of the socialist States in support of this position results from their reaction to the activities of the Kuomintang armed forces in the Chinese territorial waters.[11] Having recognized *de iure* the People's China Government and refused to recognize the Chiang Kai-shek forces as belligerents, the socialist States took an unambigous position. Thus the Soviet Government stated in its note to the USA Government (of 24 June, 1954) that with regard to the detention of the tanker "Tuapse" it "cannot overlook such inadmissible acts and will be compelled to undertake appropriate steps towards safeguarding the security of the Soviet merchant

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[7] J. B. MOORE, *op. cit.*, vol. 1, p. 184, *Ibid*, vol. 2, pp. 1109, 1118 and *International Law Situation*, US Naval War College, 1902, p. 82. See also the attitude of the USA and Great Britain in relation to the blockade of Continental China proclaimed by the Chinese Nationalist Government, cited in L. H. WOOLSEY, *Closure of Ports by the Chinese Nationalist Government*, AJIL, vol. 44, 1950, pp. 350–356 and J. COLOMBOS, *op. cit.* (4th ed.), 1961, p. 391.

[8] Instruction of Earl Rosebery sent to the British Ambassador in Rio de Janeiro in "Correspondence relating to the Revolution in Brazil 1893", p. 17, cited in H. LAUTERPACHT, *op. cit.*, p. 275.

[9] Declarations in the House of Commons by Anthony Eden, in LLOYD's *List and Shipping Gazette*, 25 September, 1954 and the Foreign Under-Secretary Turton, cited in L. GELBERG, *op. cit.*, p. 109. *Ibid.*, pp. 102–110 examples of illegal actions of the Chinese Nationalists against British ships. See also L. H. WOOLSEY, *op. cit.*, pp. 350–356 and J. COLOMBOS, *op. cit.*, (4th ed.) 1961, p. 391.

[10] *Annual Digest and Reports of Public International Law Cases 1938–40*, Cases No. 30 and No. 31.

[11] V. J. VALENTINOV, *O narušenijah svobody moreplavanija v rajone kitajskih morei*, SGP, 1955, No. 8, p. 113 ; E. Korovin, *Narušenija principa svobody morei Soedinënnymi Štatami Ameriki*, "Meždunarodnaja Žizn'," 1955, No. 3, pp. 61–65 and L. GELBERG, *op. cit.*, pp. 111–124.

vessels," and the Polish Government raised in its note to the United States (of 26 October, 1958) the question of the vessel by stating that "the assault on the Polish vessel "Praca" undoubtedly constitutes a part of the policy directed towards imposing actual and unlawful blockade of the People's Republic of China." Supporting this position, Professor Korowin writes : "Even if we assume, against commonly known facts, that the Chiang Kai-shek clique is an insurgent organization engaged in a civil war against the legal Chinese Government, nobody has ever recognized the right of insurgents to impose a blockade binding in any way upon third States".[12] There are several scholars who speak in favour of this standpoint, as Rougier, anonimous author in RGDIP, Le Fur, Garner, Scelle, Cassin, McNair, Wehberg, Colombos, Gelberg and Castrén.[13]

The adversaries however quote the recognition by Great Britain of a blockade imposed by the pretender to the Portuguese throne, Don Miguel, of Pôrto and Azores, through he had not been recognized as belligerent by the British Government.[14] Then they point out that the British Government tolerated the 1891 blockade of the Valparaiso port by the insurgents and refused to escort into this port the ships of the firm of Smith and Service.[15] As for the US practice, they quote the statements of the US Secretary of State, Gresham, in the matter of the blockade of Rio de Janeiro in 1893, and of the US Secretary of Navy, Knox, in the matter of the blockade of Greytown by the insurgents in Costarica in 1909.[16] Among well-known authors this adverse position is supported by Moore, Hershey, Genet and Dahm, and according to Colombos, the "practice in the matter has ot been uniform, but it seems to be increasingly recognized that insurgents who have sufficient forces at their command to prevent

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[12] E. KOROVIN, *op. cit.*, p. 61.

[13] A. ROUGIER, *op. cit.*, p. 303 ; Le Fur, *La guerre civile d'Espagne et le droit international*, "Revue politique et parlementaire," 1936, p. 385 ; J. GARNER, *Questions on International Law in the Spanish Civil War*, AJIL, vol. 31, 1937, p. 71 ; G. SCELLE, R. CASSIN, *Le blocus de Bilbao et le droit des gens*, "Europe Nouvelle," Paris, mai 1937, pp. 437–439 ; Mc NAIR, in : LQR, vol. 53, 1937, p. 487 ff ; H. WEHBERG, *La guerre civile et le droit international*, RdC, 1938–I, vol. 63, p. 48 ; J. COLOMBOS, *op. cit.*, (3rd ed.) 1954, p. 335 ; L. GELBERG, *op. cit.*, p. 100 and E. CASTRÉN, *op. cit.*, p. 101, n.l. See also Memorandum of the Solicitor for the Department of State (Hyde) January 18, 1924—"according to American official opinion, the privileges of blockade [...] nor are they yielded to an internationally irresponsible military force capable of barring access to a particular place [...]. Insurgents not recognized as belligerents are not likely to possess such qualification," cited in G. H. HACKWORTH, *Digest of International Law*, Washington 1943, vol. 7, p. 170.

[14] G. A. SMITH, *Some Problems of the Spanish Civil War*, BYIL, 1937, p. 19.

[15] *State Papers*, 1892–Chile, vol. 95, No. 1, p. 8.

[16] J. B. MOORE, *op. cit.*, vol. 2, p. 1113 and G. H. Hackworth, *op. cit.*, vol. 7, p. 169.

the exit or entrance of merchant vessels to a port have the right to stop supplies from reaching their domestic enemy."[17]

Of course, even those who accept the admissibility of a blockade by insurgents unrecognized as belligerents, limit its application to the territorial waters of a given country and exclude the possibility of treating a neutral vessel as an enemy vessel, whose cargo may be seized or destroyed. In this way they confine in practice the activities connected with the blockade to preventing a given vessel from entering a port and unloading.[18] It seems, however, that the acceptance of the blockade in such a stage of civil war operations would be rather untimely. First, as the justification for the blockade based upon unstable criteria and differently evaluated facts of the case opens the way to arbitrary decisions. Second, as activities of this kind recognized by one State, and unrecognized by other, would create a state of legal uncertainty and undermine the legal criteria of the blockade as such. And finally, as the granting of such powers to insurgents, who—being unrecognized as belligerents—are not considered a subject of international law by third States, would amount to an explicit intervention in their favour and constitute a hostile act against legal authorities.

In any case, however, as the operations on the waters of the Rio de Janeiro port (1893) have clearly demonstrated, the vessels of third States have no right of entering the territories under the fire of belligerents or interfering with their war operations.[19]

2. What are the powers of a parent State in such a situation with regard to the vessels of third states ? In this respect the practice as well as

[17] J. B. MOORE, *op. cit.*, vol. 2, pp. 1085–1086 ; G. G. WILSON, *International Law*, 1910, p. 47 ; W. E. HALL, *A Treatise on International Law*, Oxford 1924, (8th ed.), sec. 5(a), A. L. HERSHEY, *Essentials of International Public Law and Organization*, New York 1927, p. 203 ; R. GENET, *The Charge of Piracy in the Spanish Civil War*, AJIL, vol. 32, 1938, p. 254 ; G. DAHM, *Völkerrecht*, Stuttgart 1958, vol. 1, p. 190 and J. Colombos, *op. cit.* (4th ed.) 1961, p. 392.

[18] Secretary of State Hay, to Secretary of the Navy, November 15, 1902, in : *International Law Situations*, US-Naval War College, 1902, p. 79—"in no case would the insurgents be justified in treating as an enemy a neutral vessel navigating the internal waters, their only right being as hostiles, to prevent the access of supplies to their domestic enemy. The exercise of this power is restricted to the precise end to be accomplished. No right of confiscation or of destruction of foreign property in such circumstances could well be recognized".

[19] "Thus during the naval revolt in Brasil on November 6, 1893 the foreign naval commanders had informed admiral Mello that they did not recognize the right of the insurgent forces to interfere with commercial operations conducted anywhere except in the actual lines of fire of the batteries of the land fortifications", cited in J. B. MOORE, *op. cit.*, vol. 2, p. 1116. The same in *International Law Situations*, US-Naval War College, 1902, p. 30—"on the other hand, American ships on their part cannot expect protection when they invite disaster by crossing in the line of fire or taking other provocative actions".

the doctrine are unanimous. The vessels of a legitimate government on the high seas are neither in a better nor in a worse position than those of the insurgents. This is exemplified by the USA policy in the course of both Cuban revolts[20] and the British policy during the Spanish Civil War (1936–1939).[21] Besides, the Nyon Agreement explicitly states in the preamble : "without in any way admitting the right of either party to the conflict in Spain to exercise belligerents rights or to interfere with merchant ships on the high seas." Among the representatives of the doctrine this position is represented, *inter alia*, by Dana, Moore, Padelford, Kunz, Korowin and Castrén.[22] Hence the French Navy operations in the Mediterranean between 1956 and 1961, which consisted in detaining and searching the vessels of third States (i.a. the Polish ones) on the high seas under the pretext of preventing the supply by sea of military supplies for the Algerian National Liberation Front, were illegal, though supposedly carried out in the exercise of the right of "selfdefence."[23] As neither the French Government, nor the flag States of the detained vessels had recognized the NLF as a belligerent, France had no right to visit and search on high seas the vessels of third States.[24] It was not until the new Algerian Government had been recognized (1961–1962) by Yugoslavia, the USSR, Czechoslovakia, Roumania, Bulgaria and Poland, that France gave up its control over the sea access to Algeria ; since the middle of 1961 no vessel of any State bound for Algeria has been detained by a French man-of-war.

A different situation arises when we consider the parent State powers in relation to the third State vessels entering its territorial waters. In such a case, specifically in view of the precedents of the last Spanish Civil War, it may be admitted that the legal government has the right to control the navigation and any other activities of alien vessels on these waters

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[20] *Mr Fish, Secretary of State, to Mr Borie, Secretary of the Navy, May 18, 1869*, in : J. B. MOORE, *op. cit.*, vol. 1, p. 193, and *"Alliança" case 1895*, in : J. B. Moore, *op. cit.*, vol. 2, pp. 908–911.

[21] In particular Sir John Simon's declaration, cited in : N. J. PADELFORD, *International Law and Diplomacy in Spanish Civil War*, New York 1939, pp. 12–13.

[22] DANA, in : H. WHEATON, *op. cit.*, p. 30 ; J. B. MOORE, *op. cit.*, vol. 2, p. 1120 ; N. J. PADELFORD, *op. cit.*, p. 28 ; J. L. KUNZ, *op. cit.*, P. 185 ; E. KOROVIN, *op. cit.*, p. 62 ; and E. CASTRÉN, *op. cit.*, p. 100.

[23] Z. ROTOCKI, *Międzynarodowoprawne aspekty wojny narodowowyzwoleńczej w Algierze w zakresie problematyki morskiej* [*Algerian War of National Liberation From the Maritime Point of View*], "Zeszyty Naukowe U. Ł.", No. 38, 1965, pp. 51–68 ; M. FLORY, *Algérie et droit international*, AFDI, 1959, p. 833 ; M. FLORY, *Algérie algérienne et droit international*, AFDI, 1960, p. 982 ; M. FLORY, *Négotiation ou dégagement en Algérie*, AFDI, 1961, p. 842 and L. LUCCHINI, *Un aspect des mesures de surveillance maritime au cours des opérations d'Algérie*, AFDI, 1962, pp. 925–926.

[24] M. FLORY, *op. cit.*, p. 833—*"La position de la France est donc délicate sur le plan juridique"*.

and to confiscate goods seized on the vessels which have voluntarily or on purpose entered its territorial waters, if these vessels are owned by a national of the country involved in a civil war or are carrying supplies for insurgents, enabling them thereby to continue their military operations. Moreover, the legitimate government may, in exercising its police regulations over the whole of its State territory, introduce an embargo on the import of specified objects and punish transgressions of such an embargo, as well as exercise all its rights resulting from its jurisdiction over the territorial waters. Any abuse of these rights, and especially bombarding of vessels on this territory must be recognized, like similar insurgent activities, as piracy by analogy. This standpoint is supported in the doctrine by O'Rourke, Smith, Padelford, Wynen Thomas and A. J. Thomas.[25]

The legality of a blockade declared by a government combating insurgents unrecognized as belligerents should be examined as the problem of whether and to what extent it is authorized to close the access to ports, which are occupied by insurgents, by means of internal regulations or an effective blockade, though without proclaiming it oficially as this would constitute an indirect recognition of insurgents as belligerents—and, for obvious reasons, any legitimate government would rather try to avoid it.

First of all it should be stated that the legitimate government has undoubtedly every right to close by an internal regulation the ports which are under its control.[26] In practice however, the closure of ports being under control is of no great significance to the State faced with the danger of insurrection. It may be, however, a matter of great concern in the opposite situation, when such a State is trying, by proclaiming appropriate regulations, to close the ports held by the insurgents. In this case, however, contrary to the closure of ports held by lawful authorities, both the practice and the doctrine grant the parent State no right to close ports being under the occupation of rebellious forces. Such was the position of the USA Government on the closure of ports occupied by insurgents in the course of the Mexican (1836) and Colombian (1885) Civil Wars, and the

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[25] V. A. O'ROURKE, *op. cit.*, p. 398 ; H. A. SMITH, *Some Problems of the Spanish Civil War*, BYIL, 1937, pp. 23, 25 ; N. J. PADELFORD, *Foreign Shipping during the Spanish Civil War*, AJIL, vol. 32, 1938, p. 264, and A. van WYNEN THOMAS, A. J. THOMAS Jr., *The Civil War in Spain*, in : R. FALK'S, *The International Law of Civil War*, Baltimore 1971, p. 163. The same in : *International Law Situations*, US-Naval War College, 1902, p. 79. For a different view see H. WEHBERG, *op. cit.*, p. 48.

[26] Article 3 of the rules adopted by the Institute of International Law at its Stockholm meeting of 1928 and the opinion of the Law Officers of the Crown from July 15, 1869 cited in : H. LAUTERPACHT, *op. cit.*, p. 220 and the same E. CASTRÉN, *op. cit.*, p. 103.

Mexican (1912) and Brazilian (1932) revolutions.[27] Also identical was the position of the USA Government on the blockade of the "nationalist" ports by the Spanish legal government, as well as in relation to the blockade of the People's China ports proclaimed by Chiang Kai-shek.[28] This practice has also found its reflection in the judgement of the Mixed Arbitration Commission in the case of the *Oriental Navigation Company* v. *the United States* (3 October, 1928).[29] Similar was the British practice as was shown by the well-known refusal by Lord Russell to recognize the blockade declared by the New Granada Government in 1861 with regard to its ports occupied by insurgents, as well as by the decision of the British-Venezuelan Mixed Commission in the case of the Companie Générale des Asphaltes de France (13 February, 1903).[30] Among the representatives of the doctrine, the following are in favour of such a viewpoint: Perels, Graft-Wilson, Dickinson, Wehberg, Lauterpacht, Colombos and Castrén.[31]

Thus it might be assumed that it is inadmissible to close the ports of a parent State by means of internal regulations in the course of insurgency. Since this measure is inapplicable and since legal authorities are rather disinclined to proclaim and give effect to a blockade, other measure comes into prominence, namely, regulations imposing the closure of ports combined with attempts at a partial blockade. In such a situation third States permit the exercise of the right of visit and search with regard to their vessels lying off the ports, which are closed in virtue of internal regulations, by the men-of-war of the legitimate government.[32] Of course their authority is limited to the ban on unloading, and does not embrace either

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[27] J. B. Moore, *op. cit.*, vol. 7, pp. 804, 808–813 and F. Wharton, *Conditions auxquelles le blocus peut être reconnu dans les relations internationales*, "Journal du droit international privé," vol. 13, 1886, p. 179.

[28] Secretary of State Hull in Department of State, *XV Press-Release issue August 27, 1936*, No. 371, p. 361 and L. H. Woolsey, *op. cit.*, p. 350.

[29] Claims Commission—US and Mexico, *The Oriental Navigation Company* v. *United States*, cited in AJIL, vol. 23, 1929, p. 436.

[30] Lord Russell's opinion in *Hansard Debates*, vol. 163, p. 1646 and the case of *Compagnie Générale*, in: J. B. Moore, *op. cit.*, vol. 7, p. 819.

[31] F. Perels, *Das internationale öffentliche Seerecht*, Berlin 1882, sec. 57; G. Grafton-Wilson, *Insurgency and Maritime Law*, AJIL, vol. 1, 1907, p. 58; E. D. Dickinson, *The Closure of Ports in Control of Insurgents*, AJIL, vol. 24, 1930, pp. 62–78; H. Wehberg, *op. cit.*, p. 50, H. Lauterpacht, *op. cit.*, p. 194, J. Colombos, *op. cit.*, (3rd ed) p. 337 and E. Castrén, *op. cit.*, pp. 103–104. The same opinion by an anonimous author in RGDIP, vol. 10, 1903, p. 324. Different view only by N. Politis, *Le problème de limitations de la souveraineté*, RdC, 1925-I, vol. 6, p. 94.

[32] The case *Gaston* in Claims Commission US and Mexico, *The Oriental Navigation Company* v. *United Mexican States* (Docket No. 411) cited in AJIL, vol. 23, 1929, p. 436.

the seizure and confiscation of goods, or the imposing of sanctions for the breach of such a blockade.

In general it may be said that, while insurgents remain unrecognized as belligerents, the legitimate government may exercise the right of visit and search of the vessels of third States only in modest proportions and only within its territorial water. As for the insurgents they have even no such rights, and the only right which is claimed for them is the right of exercising an effective blockade against the vessels of their enemy. But even this right finds neither support in most of the doctrines, nor application in the practice.

On the high seas, however, such rights do not exist at all, and any attempts at their exercise whether by a lawful government or insurgents would constitute an infringement of international law and violation of the freedom of the open sea.

B. Insurgents Recognized as Belligerents by their Parent State or by a Third State

1. A parent State which has recognized insurgents as belligerents has a right to apply to third States regulations concerning blockade, visit, search and prize jurisdiction, as well as other rules resulting from the laws of naval warfare both in its territorial waters and on the high seas. In this last case, however, in view of the specificity of civil war, these rights are to be exercised in regions not too remote from the theatre of war operations.[33] The practice of States and the opinion of the doctrine are in this respect almost unanimous. In the same spirit were made the statements of Lord Russell on the American Civil War, as well as those of the Law Officers of the Crown in the case of the blockade of Haitian ports.[34] This position also finds its expression in judicial decisions[35] and in almost unanimous opinions of international lawyers such as Bluntschli, Twiss, Rougier, Wiesse, Bonfils-Fauchille, Moore, Hall, Kunz, O'Rourke, Briggs and Lauterpacht.[36]

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[33] F. PERELS, *Manuel de droit maritime international*, Paris 1884, p. 314 and P. HIGGINS, *Le droit de visite et de capture dans la guerre maritime*, RdC, 1926-I, p. 80.

[34] J. B. MOORE, *op. cit.*, vol. 1, p. 190 and H. LAUTERPACHT, *op. cit.*, p. 210.

[35] *The Three Friends* (166. US (1897) 1, 63) and *Rose* v. *Himely* (4 Cranch 239, 272).

[36] J. L. BLUNTSCHLI, *Opinion impartiale sur la question de l'Alabama*, RdDI et LC, vol. 2, 1870, p. 460, T. TWISS, *Law of Nations*, (2nd ed.) 1875, p. 500 ; A. ROUGIER, *Les récentés guerres civiles de la Colombie et du Vénézuéla*, RGDIP, vol. 11, 1904, p. 198 ; C. WIESSE, *op. cit.*, pp. 33, 35 ; H. BONFILS, *Droit international public*, (3th ed.), Paris

A blockade to be recognized must be effective, that is, not merely limited to a formal closure of ports by internal decrees, and must be notified to third States.[37] Thus in the course of the Spanish Civil War, the USA Government in reply to the Spanish Government notification of the blockade of certain ports held by General Franco, declared that it might recognize the blockade only after if had been declared oficially and carried out effectively.[38]

In such a situation insurgents obtain similar rights. Here as classic examples may serve, first, the position of Great Britain which recognized the Southern States as belligerents once it had been done in 1861 by President Lincoln after he had proclaimed the blockade of the South and, second, the position of the Law Officers of the Crown during the Civil War in Venezuela (1871) and in Haiti (1883).[39] A similar position was taken by the USA Supreme Court in the case of the vessel "Ambrose Light" and by the USA Government in its dispute with Denmark on a compensation for transferring to the British authorities of a vessel captured by Paul Jones.[40] In summing up it may be said that insurgents recognized by their governments as belligerents have in relation to the vessels of third States the same right as the legitimate government, that is, they may blockade ports held by their parent State and confiscate vessels breaking the blockade, if it is effective, and exercise the right of visit and search as against all vessels both within the territorial water and on the high seas in combating the enemy contraband, as well as submit the seized vessels to the jurisdiction of their prize courts.

2. When insurgents are recognized as belligerents by the governments

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1905, p. 592 ; J. B. MOORE, *op. cit.*, vol. 1, p. 165, W. E. HALL, *op. cit.*, pp. 39–40 ; J. L. KUNZ, *Die Anerkennung* ..., p. 185 ; V. A. O'ROURKE, *op. cit.*, p. 402 ; H. BRIGGS, *op. cit.*, p. 732 and H. LAUTERPACHT, *op. cit.*, p. 194. However L. OPPENHEIM, *International Law*, London 1958, (7th ed), vol. 2, p. 660 "The question [...] is controversial", and E. CASTRÉN, *op. cit.* p. 165 maintains that "this question has been left open".

[37] *US Supreme Court*, inre : *The Amy Warwick, (1862) 2 Black 635*, cited in : H. WHEATON, *op. cit.*, p. 315, and *Hiavatha, ibid.*, also Judge Grier in *The Prize Cases—US Supreme Court 1862, 2 Black, 635* and judicial decision in the case of *Ford* v. *Surget* (97, US, 610). See also the British practice during the Spanish, Portuguese and South-American revolutions in the 19th century, in *Record Office*, paper F. O. 9747, No. 222, opinion of September 10, 1871, and H. A. SMITH, *Great Britain and the Law of Nations*, vol. 1, 1932, p. 321 and also the opinion of the Law Officers of the Crown and Dr Deane to the Earl of Derby of 6 May 1876, cited in : H. LAUTERPACHT, *op. cit.*, p. 210. US practice see in J. B. MOORE, *op. cit.*, vol. 7, p. 803 and G. H. HACKWORTH, *op. cit.*, vol. 7, p. 166. See also L. OPPENHEIM, *op. cit.*, vol. 2, p. 145, n.l.

[38] *Proceedings of the American Society of International Law*, 1937, p. 149.

[39] H. LAUTERPACHT, *op. cit.*, pp. 202–203.

[40] *The Ambrose Light*, in : J. B. MOORE, *op. cit.*, vol. 2, p. 1099 and the case of the American privateer Paul Jones, ibid., vol. 1, p. 169.

of third States and assuming that the recognition is binding only *inter partes*,[41] relations between the recognizing third State and the contending parties (insurgents and the lawful government) differ from those between other third States and the contending parties. Relations between the recognizing third State and the legitimate government and insurgents recognized as belligerents are subordinated to normal rules of naval warfare, including the right of blockade and prize, the right of visit and search, and the right of prize as well as the obligation of the recognizing State to abide by the principles of neutrality in relation to both adversaries in a civil war.[42] So, for example, France acquired a theoretical right to visit merchant vessels hoisting the flag of the States which had after 1958 recognized the Provisional Government of the Algerian Republic as the government of Algeria.

However, relations between other third States, that is those which did not recognize insurgents as belligerents, and insurgents and their legitimate government the situation remains unchanged and is identical with the lack of recognition by the legitimate government and third States.

C. Insurgents Recognized as Belligerents by Their Parent State and Third States

Such a situation represents the logical outcome of the very existence of a civil war, the extent of which, duration, and especially repercussions with regard to the economic and maritime interests of third States compell them to take an appropriate position. In practice, however, third States are rather disinclined, even against evident facts, to recognize the parties to civil war as belligerents, trying to avoid the consequences of recognizing the rights of belligerents to visit and search, as well as the right of prize, in relation to their merchant vessels. In place of neutrality, they prefer to maintain the state of more or less actual non-intervention. The recognition of both parties to civil war as belligerents leads to authomatic equalization of their rights to conduct war operations, whereas the recognition only of insurgents as belligerents would constitute an open intervention. Thus it has been commonly accepted that the recognition of insurgents as belligerents extends simultaneously the same rights to the legitimate govern-

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[41] J. L. KUNZ, *op. cit.*, p. 204 and H. WEHBERG, *op. cit.*, p. 97.

[42] The case of *The Alabama*, in: Ade LAPRADELLE, N. POLITIS, *Recueil des arbitrages internationaux*, vol. 2, 1924, p. 891 and A. MCNAIR, *International Law Opinions*, Cambridge 1956, vol. 3, p. 171 ff.

ment. But first of all by such a recognition the status of insurgents undergoes a change as they obtain the rights of "quasi-State."[43] In this connection they acquire the rights and duties of a State in conducting naval war operations with regard to third States, but nothing more, and only for the duration of hostilities. Thus they have the right of visit search and capture, blockade, etc. This was explicitly stressed by the USA Supreme Court in the case of the vessel "Three Friends" by stating that "the recognition of insurgents as belligerents confers upon them an international status with respect to the actually existing warfare, and consequently the right to visit and search merchant vessels on the high seas, to seize contraband articles and to establish valid blockades."[44]

As we have already mentioned, the parent State possesses the same rights, which automatically impose the obligation of neutrality upon third States. From the practice of States we may quote here the British Proclamation of Neutrality of 13 May, 1861 which stated that "Great Britain [...] recognizing the persons in rebellion as belligerents and both "the contending parties" as having the rights of belligerent against neutrals—declares strict neutrality and non-intervention," and the Message of the US President, McKinley, of 1897.[45] From judicial decisions we may quote decisions in the case of the vessels "Josefa Segunda" and "Santissima Trinidad."[46] In the above-mentioned situation both contenders engaged in a civil war may exercise with respect to the vessels of third States the rights of naval warfare, both in their territorial waters and on the high seas, till the end of hostilities, provided that they should limit their activities to regions not too remote from the theatre of war operations and abide by the formalities and procedure set forth for such kind of operations. This position is supported by the whole doctrine of international law, i.a. by Rougier, Anzi-

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[43] W. E. HALL, *op. cit.*, p. 30, P. FAUCHILLE, *Traité de Droit International*, Paris 1922, vol. 1, p. 310 and D. ANZILOTTI, *Corso di diritto internazionale*, Roma 1923, p. 101—"*Col riconoscimento l'organizzacione insurrezionale diviene subietto di diritto internazionale rispetto agli Stati che l'hanno riconosciuto, per quanto circonscritta possa essere la capacità di diritto, dato il contenuto e lo scopo del rinoscimento e per quanto incerta ed inconstituente possa apparire la durata*".

[44] *The Three Friends*, 166. US (1897), 1, 63, see also the case of *Brown* v. *Hiatts* cited in : J. B. MOORE, *op. cit.*, vol. 1, pp. 191–192. The same in the messages of the American Presidents concerning the non-recognition of the Cuban belligerency, *ibid.*, pp. 194–200. See, for instance, President Grant's Message of June 13, 1870, *ibid.*, p. 195.

[45] *British Proclamation of Neutrality*, in : H. WHEATON, *op. cit.*, p. 167 and *President Mc Kinley's Message*, in : J. B. MOORE, *op. cit.*, vol. 1, pp. 198–200.

[46] The case of *The Josefa Segunda* (1820, vol. 5, H. WHEATON, *op. cit.*, p. 338) and the case of *The Sanctissima Trinidad* (1822, vol. 7, H. WHEATON, *op. cit.*, p. 283) and also the verdict in the case of *Captain Voorhees*, cited in J. B. MOORE, *op. cit.*, vol. 1, pp. 178–182.

lotti, Kunz, Padelford, Wehberg, Briggs, Pitt-Cobbett, Colombos, Lauterpacht, Scheuner, Castrén and Q. Wright.[47]

Of course, such far-reaching powers of the parties to civil war create certain difficulties for third States too. Hence the most recent practice shows an inclination to replace the recognition of insurgents as belligerents by an ordinary "recognition as insurgents". This decisively limits the rights of insurgents as against the vessels of third States, and is at the same time more advantageous to the parties concerned. Moreover, such a solution makes easier for third States to interfere with the issues of civil war, which has been never unimportant for the practice of imperialist powers.

D. Insurgents and the "recognition of insurgency" status.

This new institution has been created by the United States in the 19th century in connection with the two Cuban insurrections (1868–1878 and 1895). On the one hand the United States did not want to recognize insurgents as belligerents in order to prevent Spain from exercising the right of visit and search on the high seas and, on the other, out of political symphaties to the insurgents, they wanted to treat them better than ordinary criminals and at the same time to acquire a basis for introducing an internal neutrality legislation. Similarly, during the revolution in Chile (1891) and struggles in Brazil (1893–1894), the great powers, though unwilling to recognize the contending parties as belligerents, consented to the exercise by them of certain rights possessed by parties recognized as belligerents in a civil war.[48]

The problem of the recognition of insurgency has been first described theoretically by Grafton-Wilson who tried to establish conditions for such a recognition.[49] However, the "recognition of insurgency" had been considered by European States and among lawyers to be a regional institution,

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[47] A. ROUGIER, *op. cit.*, p. 244, D. ANZILOTTI, *op. cit.*, p. 101, J. L. KUNZ, *op. cit.*, p. 204, N. PADELFORD, *Foreign Shipping during the Spanish Civil War*, AJIL, vol. 32, 1938, p. 264 ; H. WEHBERG, *op. cit.*, p. 85 ; H. BRIGGS, *op. cit.*, p. 728, P. COBBETT, *op. cit.*, vol. 1, p. 58 ; J. COLOMBOS, *op. cit.*, p. 339 ; H. LAUTERPACHT, *op. cit.*, p. 224 ; U. SCHEUNER, *Durchsuchungsrecht* in : K. STRUPP-SCHLOCHAUER, *op. cit.*, vol. 1, p. 408 ; E. CASTRÉN, *op. cit.*, p. 197, and Q. WRIGHT, *The American Civil War*, in : R. FALK, *op. cit.*, p. 105.

[48] J. B. MOORE, *op. cit.*, vol. 2, p. 1119, *ibid.*—"In recent times the word 'insurgency' has found its way into the terminology of law and diplomacy, as a term denoting the existence of a state of domestic hostilities, without recognition of belligerency".

[49] G. GRAFTON-WILSON, *Insurgency and Maritime Law*, AJIL, vol. 1, 1907, p. 51, but this idea was first advanced by R. ROLIN-JACQUEMYNS, in : RdDI et L. C., vol. 2, 1870, pp. 307–308—"*N'y-a-t-il* [...] *aucun terme moyen, aucune étape à marquer entre la non-reconnaissance absolue et la reconnaissance* ?"

specifically American, and entirely superflous in view of the existing rule that unrecognized insurgents cannot be treated as pirates if their activities are politically motivated. But the outbreak of the Spanish Civil War and the application by Great Britain and France to the contending parties of the "recognition of insurgency" formula, though everything had favoured a recognition of belligerency demonstrated that the "recognition of insurgency" had also found its way to the practice of European States.[50] Hence, we ought to try to establish what rights and duties may be exercised by the contending parties within his type of recognition. First of all, it must be stated that there exists no explicit "recognition of insurgency" status with beforehand established rights and duties of the parties, but only such a set of rights and duties as is accorded to the contending parties. Only such rights are binding between the parties as have been explicitly accorded or agreed upon (and third States preserve the freedom of action and may retract their recognition), and their scope may range from the ordinary recognition that the insurgents are neither bandits nor pirates, to almost the recognition of rights possessed by a legitimate government.[51] In the domain of naval activities, however, the scope of accorded rights is farly limited and—as in the Cuban, Chilean and Brazilian civil wars, as well as in the Spanish Civil War—embraces only certain rights with regard to alien merchant vessels within the territorial waters.

Thus in such a situation neither the lawful government, nor the insurgents, has any right to detain and visit the vessels on the high seas.[52] The ban on visiting and searching the vessels of third states on the high seas, when the recognition of insurgency has been granted, is supported by all scholars examining this problem, i.a. by Kunz, Lauterpacht, Padelford, Pitt-Cobbett, Colombos and Sibert.[53]

On the other hand, both the practice and the doctrine are in agreement as to the exercise of supervision over the movements of the vessels of third

[50] H. WEHBERG, *op. cit.*, p. 53, H. LAUTERPACHT, *op. cit.*, p. 272, P. COBBETT, *op. cit.*, vol. 1, p. 58, A. MCNAIR, in : "Law Quarterly Review," October 1937, pp. 484 ff., 492 ff. and E. CASTRÉN, *op. cit.*, p. 210. But on the other hand Ch. ROUSSEAU, *Droit international public*, Paris 1953, p. 302 claims that recognition of insurgency has never occurred in Europe.

[51] R. A. FALK, *op. cit.*, p. 12, and K. BOALS, *The Internal War in Yemen*, in : R. A. FALK, *op. cit.*, p. 313.

[52] the case of *The Alliança* in : J. B. MOORE, *op. cit.*, vol. 2, p. 910, Instruction to Rear-admiral Brown given to him by Secretary of the Navy, Mr Tracy, cited, in : J. B. MOORE, *op. cit.*, vol. 2, p. 1108. Instructions for the French fleet, April 22, 1937, in : "The Times," August 23, 1937 and the opinions of the British Government, cited in : "The Times," November 24, 1936 and of August 25, 1937.

[53] J. L. KUNZ, *op. cit.*, p. 217 ; H. LAUTERPACHT, *op. cit.*, p. 278 ; N. PADELFORD, *op. cit.*, p. 26 ; P. COBBETT, *op. cit.*, vol. 1, p. 58 ; J. COLOMBOS, *op. cit.*, p. 616 and M. SIBERT, in : RGDIP, vol. 40, 1933, p. 194.

States on the territory of maritime belt by the contending parties which have been recognized as insurgents.[54] Of course, the right of supervision over navigation in the territorial waters does not empower the contending parties to armed attacks against the vessels of third States, unless they sail into the sphere of close fighting or give help to the armed forces of enemy, and to the abuse of power by transgressing accepted norms and infringing the customary exercise of the right of visit and search. They may, however, apply in full the right of seizure of goods owned by the nationals of contending parties, as well as of the war contraband, but their ultimate confiscation should depend on the prize courts decisions.[55]

The recognition of insurgency entitle the legitimate goverment to exercise the right to blockade the ports, provided that the blockade is effective and motified, and the effects of its possible breaking do not reach beyond the territorial waters.[56] Thus in practice the legitimate government may close the insurgent ports only by means of an effective blockade, and has no right to punish alien merchant vessels for attempts at breaking such a "*quasi-blockade*".

No such right, however, is accorded to rebells "recognized as insurgents". In the course of a revolt in Rio de Janeiro (1893) the representatives of France, Germany, Portugal, the United States, Italy and Great Britain notified on 6 November, 1893 to Admiral Mello that "they do not recognize the right of the insurgent forces to interfere in any way with commercial operations in the bay of Rio de Janeiro."[57] And during the Spanish Civil War the decrees of insurgents on the blockade of Barcelona (17 December, 1936) and of Bilbao (9 April, 1937) caused an adverse reaction on the part of the governments of third States. Consequently also the British courts did not attach any legal importance to such decrees.[58]

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[54] *The Declaration of the French Government*, cited in the "New York Times," November 25, 1936, and the *Declaration of the British Government in the House of Commons*, in : "Parliamentary Debates," Commons, vol. 321, § 1726, both concerning the acceptance of the right of visit and search of their vessels within the territorial waters of both contending parties, and N. PADELFORD *op. cit.*, p. 50 ; V. A. O'ROURKE, *op. cit.*, p. 403 ; H. SMITH, *op. cit.*, p. 26, and H. WEHBERG, *op. cit.*, p. 46.

[55] Spanish Nationalists established such a prize court on January 22, 1939, to confirm the seizure of ships and cargoes within the Spanish territorial waters and to determine the question whether the capture was lawful—for details see the "New York Times," January 23, 1939.

[56] The instruction of the Secretary of State to the American Ambassador in Madrid, cited in the New York Times, August 27, 1936, and a statement of Sir J. Simon in August 1936, cited in : N. PADELFORD, *op. cit.*, pp. 12–13.

[57] J. B. MOORE, *op. cit.*, vol. 1, p. 203.

[58] Judge Lewis in the *Spanish Government* v. *North of England Steamship* ((1938) 54 TLR, 852), in : *Annual Digest 1938–40*, the case No. 40 and judge Goddard in the case *Tatem* v. *Gamboa* ((1939) JKB, 132), in : *Annual Digest* [...] *1938–40*, case No. 31.

Also the doctrine does not recognize the right of rebells "recognized as insurgents" to proclaim a blockade. To the representatives of this viewpoint belong i.a. Kunz, Padelford, Lauterpacht, P. Cobbett, H. A. Smith, Wynen Thomas and A. J. Thomas Jr.[59]

To sum up it may be said that in a situation when rebells are "recognized as insurgents", their right, as well as that of the legitimate government, to visit and search the vessels of third States is limited to the territorial waters whereas the possibility of closing the ports by means of an effective blockade is reserved for the parent State only.

Concluding Remarks

Winding up the above considerations it may be stated that, as result of regular practice based on precedents created by mutifarious civil wars waged especially on the American continent, the turn of the 19th century saw the emergence of certain customary rules of maritime law concerning the operations of insurgents and of the parent State both in their mutual relations and as against third States. We may accept them as "classic" rules of international law with respect to civil wars at sea and state at the same time that they have undergone no basic changes notwithstanding the practice of States with regard to the last two great civil wars, that is, to the Spanish Civil War of 1936–1939 and the Algerian National Liberation War of 1954–1962. For in both those conflicts the actions of States departing from these rules were undoubtedly illegal and could not create law-making precedents in this matter.

However, the Spanish Civil War constituted a turning point with respect to the attitude of third States towards the recognition of insurgents as belligerents. It had acquired a pattern, confirmed later during the Algerian National Liberation War, which had previously become manifest only by the 19th-century attitude of the USA towards Cuban insurrections. It consisted in abstaining by the parent State from recognizing insurgents as belligerents notwithstanding the evident facts (for instance the extent of the insurrection), which indicated the necessity of doing so, preventing thereby the insurgents from maritime operations against the vessels of third States ; and these, for their part, abstained from recognition to protect their aid to the insurgents from the danger of control by the legitimate government. Of course, such a practice, though motivated by opportunism, was not illegal in view of the facultative character of the recognition of

[59] See J. L. KUNZ, *op. cit.*, p. 217 ; N. J. PADELFORD, *op. cit.*, pp. 9–12 ; H. LAUTERPACHT, *op. cit.*, pp. 274–276 ; P. COBBETT, *op. cit.*, vol. 1, p. 58 ; H. A. SMITH, *op. cit.*, p. 25, and A. van WYNEN THOMAS, A. J. THOMAS Jr, in : R. A. FALK, *op. cit.*, p. 163.

belligerency both by the parent State and third States. It may, even in relation to civil wars of a national-liberation character become a usage, which will in turn grow into customary international law in this our era marked by the processes of decolonization. After all, this trend is furthered by the growing and multifarious interdependence of States as well as by ideological motivations in the assessment of international events.

And what is more, the last two great civil wars have shown clearly enough how dangerous are the attempts at exercising during a civil war the supervision over the navigation of third states on the basis of customary and mostly vague regulations in this matter, or the supposedly existing right of selfdefence, as well as through possible widening of the maritime belt (France) or even operations of a piratical character (Spanish Civil War).

In this situation of *de lege ferenda,* the conclusion seems to be evident. We are faced with the necessity of limiting to the minimum the exercise of the right of visit and search with respect to vessels of third States on the high seas by the contending parties in a civil war and, last but not least, of reviewing and codyfying the bulk of provisions relating to the laws of naval warfare.

OBITUARY * NOTICE NÉCROLOGIQUE

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Kazimierz Julian Libera

Professor Kazimierz Julian Libera died in Warsaw on 3 April, 1975.

Born on 8 October, 1905 in the town of Radom in Central Poland he completed his secondary education in Kielce and began to study law at the Law Faculty of the University of Dijon in France, where he graduated in 1927. During his studies he won twice the prize of the Law Faculty. In 1929 he received his degree of doctor of law at the Law Faculty of the University of Dijon having successfully defended a dissertation entitled *Le régime juridique de la Vistule et du Niemen.*

After graduation he worked for several years as legal editor at a publishing house in Paris. In 1933 he returned to Poland and took charge of the post of Deputy Secretary of the University of Warsaw. In 1936 he was appointed Secretary of the Warsaw University. Two years later, after he had got the nostrification of his doctorate received at the University of Dijon, he was appointed senior research worker at the Chair of International Law of the Warsaw University, headed by professor Cezary Berezowski. In 1939 he began to lecture on international public law at the Higher School of Journalism.

During the Nazi occupation of Poland he took an active part in the activities of the underground University of the Western Territories and of the underground Faculty of Law of the Warsaw University, giving lectures on international public law in both universities in Warsaw up till the Warsaw Uprising in August 1944.

In 1945, after the liberation of the country he entered the Ministry of Foreign Affairs as Head of the Consular Section of the Polish Military Mission in Berlin with the rank of General Consul. From 1947 to 1950 he was in charge of important posts in the Ministry of Public Administration.

In 1950, the Council of the Faculty of Law of the Warsaw University awarded him the degree of Dozent (assistant professor) and he became Associate Professor at the Central School of Foreign Service in Warsaw, where he gave lectures on international public law and consular law. From 1952 to 1954 he was dean of the Diplomatic and Consular Faculty of that School.

From 1954 to 1975 Professor Libera was teaching international law at the Faculty of Foreign Trade of the Central School of Planning and Statistics in Warsaw. It is here that he was appointed in 1958 professor extraordinary and in 1966 full professor. In the years 1954–1958 he was Dean of the Foreign Trade Faculty and in the years 1963–1967 he was Deputy President of the School.

Professor Libera was active in several scientfic and professional organizations such as the Polish Association of Lawyers, the Polish Branch of the International Law Association, the Polish Society of Political Sciences, the Polish Teachers' Union. His particular interests lay in the field of international movement of persons and tourism. From 1960 to 1974 he was vice-president of the Council for Tourism at the Central Committee of Physical Culture and Tourism in Poland. From 1957 he was president of the Editorial Committee of the scientific review "Ruch Turystyczny" [Tourist Movement]. From 1960 to 1967 he presided over the work of the Scientific and Research Commission of the International Union of Official Travel Organization (IUOTO). From 1967 to 1970 he headed the International Center for Advanced Tourism Studies in Torino, Italy. From 1961 to 1970 he was one of the two editors of the "Bulletin d'Etudes Touristiques—Travel Research Journal." He spent a year in Beirut as director of the Lebanese Tourism Institute, under assignment by the International Labour Organization.

The scientific and research interests of Professor Libera centered mainly around two topics : consular law and legal problems arising from tourism and international movement of persons. He was an eminent expert in the field of both theory and practice of consular law. His work *Zasady międzynarodowego prawa konsularnego* [*Principles of International Consular Law*), Warszawa 1960, is one of the most comprehensive and original monographs concerning consular law. Among his numerous contributions devoted to legal problems of tourism one may mention, in the first place, his comprehensive and highly original book *Międzynarodowy ruch osobowy* [*International Movement of Persons*], Warszawa 1969. Professor Libera was also doing research in the field of history of international law, as witnessed by his accurate and beautiful translation of the *Consolato del Mare,* made from the Barcelona edition of 1494.

He has published many articles in foreign reviews, such as : "Revue Générale de Droit International Public," "Revue Héllenique de Droit International," "Revue de Tourisme". He lectured at the Institut des Hautes Études Internationales in Paris in 1959, at the University of Lyon in 1960, at the University of Stockholm in 1961, at the Universities of Dijon and Grenoble in 1962, at the University of Aix-en-Provence in 1963 and at the Universities of Prague and Budapest in 1964.

His teaching activities and his work with students and post-graduate students he cherished most. He spared no time and effort in discussing with them their problems being always available for advice and comment. No wonder that his authority among students was so high.

We lost a man of great ability and wisdom, an ardent patriot and eminent international lawyer, a valued author of many scientific works in the field of international law, a talented administrator and meritorious educator of the younger generation.

Remigiusz Bierzanek

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Andrzej ABRASZEWSKI, *Koordynacja działalności organizacji międzynarodowych w systemie Narodów Zjednoczonych [The Coordination of the Activities of International Organizations within the UN System]*, Warszawa 1973, Polski Instytut Spraw Międzynarodowych, 252 pp.

The United Nations system is a huge complex embracing also the UN specialized agencies, the so-called UN programmes and 13 international organizations acting in various fields. All these institutions while playing an independent role belong to what is called the UN family. They have a similar membership, lively mutual contacts, they exchange information and observers and even establish joint bodies. The United Nations system is built in accordance with the principle of decentralization. It can function properly provided its members act in harmony. That is why the problem of coordination within the UN system is of such lasting importance.

It has to be said that experience in this field is not very encouraging. In spite of many detailed and many-sided instructions concerning the coordination process, such coordinations is exercised rather in the sphere of administration and organization, while coordination of substantial activities leaves much to be desired. The lack of proper coordination leads to some negative effects, such as a growth of bureaucracy, a hypertrophy of reports, not always most needed, and the like. The wisdom of the concept of decentralization of the UN system is now questioned not only because it is increasingly difficult to control its growing activity but also because many hopes (also of a political nature) which the proponents of decentralization placed in the system have not been fulfilled.

There are even opinions favouring increased centralization within the UN system. Such trends can be noticed also in the so-called Jackson report from 1968, which called for a reduction of the powers of the specialized agencies in the field of assistance to developing countries and for the centralization of such powers within the Economic and Social Council.

A too far reaching centralization would, no doubt, produce certain negative and even dangerous effects for the cooperation of sovereign States. That is why I do not think that we are moving towards a fundamental change of the basic principles upon which the whole UN system is based. However, the system needs improvement through application of better and more efficient methods of coordination both within the UN (UN and specialized agencies) and between the organizations themselves.

Such thoughts arise in particular after the reading of the reviewed book. The author concentrates his attention on the problem of vertical coordination, or the relations between the UN Organization and the specialized agencies, including the IAEA and GATT.

The first part of the book is devoted to the definition of the concept of coordination of the activities of international organizations under contemporary international law. The author starts with some semantic considerations and tries, later, to determine the elements of co-

ordination as an institution of administrative law. Projecting these elements into the field of international law, he defines coordination as one of the types of inter-organizational relationships, in which the coordinating organization disposes, *vis-à-vis* other organizations whose activities being coordinated, of legal means and protections prowide for the compliance with established criteria and the implementation of fixed objectives. Legal means having, by their very nature, a mandatory character, the efficiency of coordination measures is thereby weakened.

The author follows the generally accepted division of coordination into a negative and positive one. Negative coordination which prevents overlapping of activities permits, among other things, the elimination of double or multiple competence which may occur in a system embracing such a great number of organizations. On the other hand, positive coordination aimed at harmonizing activities and, in particular, its highest degree of concerted action, insures greater efficiency.

One may argue whether the author has adopted the right approach while dealing with the various problems. It seems to me that too much attention is paid to the problem of coordination as an institution of administrative law. It would have been sufficient to quote the definition elaborated by administrative law and to concentrate on the specific features of the concept of coordination under international law. Furthermore, the arguments in favour of coordination seem somewhat scanty, especially in view of their rather theoretical nature. Some practical examples of the negative effects of the lack of coordination would have shown the real dimensions of the problem.

In the second part of his book the author discusses the sources of the legal norms regulating the problem of coordination of the activities of the organizations belonging to the UN system. He presents a detailed analysis of the provisions contained in the UN Charter and dealing with the coordinating authority of the UNO, of the provisions contained in the charters of the specialized agencies and the IAEA, and of the agreements concluded by the specialized agencies and the IAEA with the UN. As a conscientious researcher he studied the rules of procedure and the internal administrative provisions of the various organizations and arrived at the conclusion that, as compared with the treaties which he considers to be the main source of legal norms concerning coordination, they are of secondary importance. In passing he mentions the specific relations between the UN and GATT, established—to quote his words—"in an extra-statutory and empirical way." However, this is a very interesting example of formation of customary law in international relations and can serve as a basis for the inclusion of the norms of customary law among the sources of coordination rules, for—as the author himself points out later—some forms of coordination between the UN and GATT have acquired permanent features.

In the third part of his book A. Abraszewski discusses the model of coordination, with its organs and means of action. With his usual conscientiousness he analyses the coordinating authority of the UN organs. At the first place he figures, of course, the Economic and Social Council and its permanent auxiliary organ the Programming and Coordination Committee of 21 members. He reviews also the activities of the specially created administrative coordinating bodies, composed of representatives of the UN Secretariat and the specialized agencies.

The chapter closes with very interesting proposals put forward by socialist States, Western States and developing States aimed at simplifying and strenghtening coordination. A more thorough analysis of this problem with special

emphasis on the coordination of the activities of international organizations viewed in the light of the political and economic interests of various States and their groupings, would perhaps exceed the limits of inventigation which the author set to himself, but would have, no doubt, enhanced the value of his book.

The largest and most interesting chapter deals with means of coordination. The author quotes many examples from the practical activities of various organizations and advances his own views as to the effectiveness of specific coordination methods, the prospects of their future development or of their decay. First and foremost, he advocates communication techniques (observers, liaison missions and officers) and next action by agreement, reporting and implementation of direct recommendations. He thinks that the latter, despite their high formal rank, are not an efficient instrument, in view of the great diversification and specialization of the activities of the interested organizations.

The author puts forward two series of conclusions. First, he accepts the formal and legal solutions regarding coordination adopted by the UN system and considers coordination as modelled by the UN to be a fully developed institution of international law. On the other hand, he gives a critical appraisal of the way the model functions. He is of the opinion that the principal reason of all shortcomings is the absence of a major coordinator. Such a role could, in his view, be played by the Economic and Social Council, which is at present discharging its coordinating functions in an insufficient manner. However, in the last resort, the imporovement of coordination depends on the attitude of member States. This conclusion, although quite correct seems to be divorced from the general contents of the book, in which the author has dealt with the organizational machinery of coordination leaving aside the political mechanisms affecting the coordination process.

The book is written in a clear and simple style and has a very logical structure, which is probably due to the fact that its first version was presented as a doctoral dissertation. In preparing it Abraszewski has studied an impressive amount of documents of international organizations, a part from the whole literature on the subject. In spite of the wealth of details the author has avoided mistakes and errors thus demonstrating his high conscientiousness.

A study of the problem of coordination of the activities of international organizations, as presented by A. Abraszewski, was no doubt a timely undertaking. Together with the increasing role of coordination, the machinery of coordination is also changing. It is difficult to forecast the outcome because the process of change is still under way. But it is clear that the main trend is towards increased effectiveness of the coordinating machinery within the whole UN system.

Ewa Butkiewicz

Jan BALICKI, *Dyskryminacja rasowa w świetle prawa międzynarodowego* [*Racial Discrimination in the Light of International Law*], Wrocław 1972, Ossolineum, 294 pp.

A Resolution of the General Assembly of the United Nations declared year 1971 as the International Year of Struggle Against Racism and Racial Discrimination. The reviewed work concerns therefore a problem which is not only topical but recognized also by the international community as a very important one.

The book is based on international instruments, mainly treaties worked out within the framework of the United Nations Organization. It deals also with some acts of specialized and regional bodies. As a rule, the author is not presenting the various forms of activities carried out by different commissions and

committees working under the aegis of the United Nations Organization. This is a problem requiring special study and exceeding the limits set by the title of that monograph.

The reviewed book contains XVII chapters. In the introductory part (chapter I) the author deals with the questions of race, racism and racial discrimination. In chapters II and III he discusses the legal situation before world war II and the actions undertaken during the war in behalf of the international protection of human rights. In chapters IV to VIII he presents the provisions of the United Nations Charter, the Nürenberg Principles, the Universal Declaration of Human Rights, the Geneva Convention on the Protection of the Victims of War, and in the subsequent chapters IX and X—the problem of decolonization, *apartheid* and other contemporary forms of racial discrimination. In chapters XI and XII the author deals in fragmentary form with the activities of the specialized and regional organizations. Chapter XIII contains a review of the constitutions of some selected countries. Finally, in chapters XIV and XV the author analyses the Declaration and Convention on the Elimination of All Forms of Racial Discrimination, and in chapter XVI the Covenants on Human Rights. The book closes with some considerations concerning the implementation of these various interhational instruments and some conclusions arising therefrom.

The various international instruments are dealt with, as a rule, in a chronological order. We can thus follow the evolution of the opinions of the international community and the successive stages which led to the banning of racial discrimination in international law. More relevant from the scientific point of view would have been the application of a comparative method, although as far as the study of human rights is concerned such a method cannot be easely used, because of the magnitude and variety of materials—treaties, declarations, resolutions, protocols of preparatory commissions and committees, decisions of international bodies in individual cases and, finally, doctrine. On the other hand we would have received a selected material, which could become the basis for conclusions and appraisals. A chronological treatment of problems makes repetitions unavoidable when one attempts a comparative study. For example, the author, while presenting the provisions of various conventions, discusses the means of international control provided for in these conventions. In my view it would be better to treat this problem in one chapter and in a comparative form.

It seems that the author has set to himself the task of discussing or, at least, of mentioning all conventions concerning human rights and containing a prohibition of racial discrimination. If this is the case he should have mentioned the Convention Relating to the Status of Refugees (Art. 3), adopted in 1951 and the Convention Relating to the Status of Stateless Persons from 1954 (Art. 3). All the more, that as far as these categories of persons are concerned the problem of racial discrimination is particularly acute in many countries.

The formula of "racial discrimination," which sets to some extent the limits of the author's considerations, has no uniform meaning neither in doctrine nor in the instruments of international law. The same applies to the term of "race" which modern science suggests should be replaced by the concept of ethnic group. It seems therefore that it would have been advisable to devote more space to the discussion of the Declarations Concerning Racism and Racial Prejudice adopted under the auspices of UNESCO. True enough, the Declarations contain no norms of international law, however they represent a synthesis of modern thinking on the subject. They were no doubt inspiring the law makers and directing their work.

The author pays no proper attention to the fact, that "racial discrimination" in the meaning of the Convention, embracing discrimination due to race, color of skin, birth, national or ethnic origin (Art. 1) is a wider concept than discrimination due to race, which appears in other international instruments. That is why I consider that the provisions of the Declaration and Convention on the Elimination of All Forms of Racial Discrimination should be the starting point of all further considerations. The effect of their placing in a chronological order is to blur the importance and the specific functions of these documents, as compared with other international instruments.

The prohibition of discrimination, including racial discrimination, which appears in various international conventions constitutes a general rule, a guideline in the interpretation of the remaining provisions, and not a "norm of a higher order," as considered by the author in his analysis of the Convenants on Human Rights (p. 232). These Covenants impose on States the legal obligation under international law to guarantee to all persons under their jurisdiction (or to their citizens only) a specific set of rights without discrimination. On the other hand, the convention directed against racial discrimination performs another function : it lays on States the duty to take action, which would lead to the removal of racial discrimination or to its prevention (Arts 2, 3, 4,). Furthermore, it contains a catalogue of rights, which the State must guarantee (Art. 5) without discrimination. It seems to me that such difference in function which exists between the convention against racial discrimination on the one hand, and the other conventions concerning human rights on the other, ought to be clearly emphasized.

The quality of the book is, in my opinion, unequal. The best written are chapters V to X, containing a wealth of factographic material presented in an interesting form as well as many original opinions and appraisals by the author. There is a broad discussion of the Convention on the Prevention and Punishment of the Crime of Genocide and the Nurenberg Principles. The author stresses with good reason the role which this convention can play in the struggle against racial discrimination. For very often such crimes were committed from racist motives. There is also a detailed analysis of international instruments aiming at the liquidation of *apartheid.* The same problems were already dealt with by the author in one of his previous monographs.[1] The author relates the policy of *apartheid* to the question of liquidation of colonialism and to the prevention of various forms of neocolonialism. He points out that *apartheid* can be under certain circumstances qualified as a crime against mankind and can also constitute a threat to world peace.

The book contains however many theses giving rise to certain doubts. It is on them that I wish to concentrate my attention.

In chapter XIII (State constitutions) the author quotes several instances of constitutional formulae containing a ban on racial discrimination. He mentions furthermore many constitutions with similar provisions. The differences between the constitutions of the democratic capitalist States and the socialist States are, in principle, not great. An analysis of the constitutional provisions and, eventually, of the relevant part of the legislation of those States where the problem of racial discrimination really exists, or in the so-called multiracial States, or finally in states with an exceptionally elaborate anti-racist legislation,[2] would

[1] J. BALICKI, *Apartheid. Studium polityczno prawne rasizmu w Afryce Południowej [Apartheid. A Political and Legal Study of Racism in South-Africa]*, Warszawa 1967.

[2] For instance the Constitution of Sierra Leone, which the author mentions only, or the legislation of the State of South Australia, where the Prohibition of Discrimination Act was adopted in 1966.

have been of much greater interest. It would be interesting to know whether and to what extent the legislation of such States, or of any particular State is in accord with the provisions of the Anti-Racist Convention.

The author points out, quite rightly, that there is "a difference between the protection against racial discrimination as well as discrimination due to national or ethnic reasons and the protection racial, national or ethnic minority groups" (p. 25). However the difference can not be limited only to the fact that in the case of a minority "[...] one deals with individuals and groups who want to maintain their identity and who ought to be treated as far as human rights are concerned on an equal footing with the other inhabitants of the country" (p. 26). For this is only one of the elements of minority protection, which consists in providing special quarantees enabling the minority group to maintain its identity, such as the right to use one's own language, to possess one's own schools, associations, cultural institutions, social organizations, the right to form one's own political parties.

The attitude of the author is not quite clear when he writes that "as a result of minority treaties individuals belonging to minority groups did not acquire direct rights." (p. 26) The thesis is being supported by the argument that only big powers and member States of the League of Nations could act in the name of minorities. Is this supposed to mean that conventions providing for the right of petition are according to individuals remaining under the jurisdiction of states ratifying the convention "direct rights" ? The problem of self-executing international conventions concerning human rights as well as the problem of the individual as a subject of international law are widely discussed without unanimity of views in sight. It would be difficult to embark upon a broader consideration of that question at this juncture. It must, however, be borne in mind that the problem of self-executing conventions concerning human rights must be discussed on two levels : first, it must be seen whether the norms of internal law of the country concerned provide for the possibility of direct application of the convention in internal law, and second, whether the provisions of the convention are detailed enough and drafted with the necessary precision so as to make their direct application possible. Taking the above under consideration, the same provisions of an international convention may be self-executing in one State and non self-executing in another.

Some doubts arise also in connection with the author's discussion of regional conventions. It is not true that the American Convention on Human Rights has not yet been signed. The Interamerican Human Rights Commission had a well defined status as an autonomous entity of the Organization of American States and the author's doubts about its legal position are unfounded (p. 163) ; The Commission has been created in order to promote respect of Human Rights and not for their protection. That is why it was never vested with the authority to consider petitions and the procedure applied when a petition is being presented is more or less the same being used by the United Nations system.

Informations concerning the European Convention on Human Rights are sketchy and sometimes erroneous. There is no clear indication that the members of the Commission of Human Rights are sitting in their individual capacity (p. 158). The difference between a complaint lodged by a State and an individual petition lays not only in the fact that in the first instance it is possible to charge with the violation of "any provision of the convention" and in the second with "the violation of human rights specified in the convention" (p. 159) ; The basic difference lays in the fact that a complaint can be lodged by

any State whereas an individual petition can be presented only by a person "claiming to be victim of a violation by one of the Contracting Parties of the rights set forth in this Convention" (Art. 25). Thus, a State can charge another State with the violation of human rights set forth in the convention even though it has suffered no moral or material loss in this connection. By the same token human rights have been recognized as values in the respect of which all States are interested. And this was certainly worth mentioning in the book.

The assertion of the author that the European Court of Human Rights can establish that "there was a violation of the convention but has no authority to present recommendations to States" is also open to question. (p. 160). Article 50 states clearly that the decision of the Tribunal can afford just satisfaction to the injured party. There is a vast literature on the subject and the prevailing view is that the decision of the Tribunal about the violation by a State of the provisions of the convention ought to be accompanied by a decision on redress.

The reader has the impression that in the author's view a system of international control is of great importance as a means of insuring the implementation of the Anti-Racist Convention. (chap. XVII). Such a view has many partizans, especially among Western writers, who attach particular importance to complaints by States and to individual petitions. A similar tendency can also be registered in the United Nations, where the proposal to set up a High Commissioner of the United Nations for Human Rights was widely discussed. The author confers a special place to reports from States parties to the convention and considers such reports to be the best method of international control. However, the opinion is not very well substantiated, for if there is a danger of such reports not being absolutely objective (p. 249) their publication is hardly likely to constitute an effective sanction. Neither does the material gathered in the book justify the contention that if the socialist and newly established States of the third world accepted "the application of a system of far reaching control [...] it is very likely that the capitalist States would have lost interest for such a system" (p. 243).

When discussing the problem of implementation of the Anti-Racist Convention more space should have been devoted to the means of international control provided for in the convention. There is no adequate explanation of the author's thesis, according to which "the Nurenberg Principles can be considered to be measures of implementation of the Anti-Racist norm" (p. 254).

The debate opposing those who favour conventions of a regional character to those who prefer universal ones has a long history. However, contrary to the contention of the author, this can not be linked exclusively to the possibility of applying means of international control and to their effectiveness. What is at stake is the real chance and possibility of reaching agreement on a catalogue of rights and such an agreement can more easely be obtained among States of the same political and social system, of the same stage of social and economic development, of the same ideology, religion, customs, etc.

The author views with pessimism the chances of an early entry into force of the Covenants on Human Rights (p. 237). while emphasizing at the same time that "the need to specify [...] an anti-racist norm was stronger and more evident in the opinion of the States of the world than the need of codifying human rights" (p. 237). The need of an international codification of basic human rights has been recognized as early as 1946 when the Commission of Human Rights was established with the mandate of preparing, among other things, draft covenants on human rights. True enough, these

covenants have, as yet, not gathered the necessary number of ratifications for their entry into force and this is understandable when one takes into consideration the fact that the catalogue of rights included in these covenants is much broader compared with the right guaranteed by the legislation of modern States. Furthermore, the number of ratifications required in this case is very large, compared with the number of ratifications needed for the entry into force of specific human rights conventions. If ratification has to be more than a merely formal act, than States must preceed such ratification with a series of measures in the field of their internal legislation.

The literature concerning international protection of human rights is very extensive and it is understandable that the author had to make a selection in presenting various theories and opinions. The book contains many references to Polish and foreign works concerning international protection of human rights. To a much lesser extent the author makes use of works concerning racial discrimination as such. It may also be regretted that the author devotes so little attention to various forms of activity of international bodies, which were not crowned by the adoption of a convention or a declaration, but non the less should not be overlooked. This applies, in the first place to the activities of the Sub-commission on Prevention of Discrimination and Protection of Minorities or carried out under its auspices. Various forms of operational activities of the United Nations Organization have been dealt with only in connection with *apartheid* and decolonization, which enhances greatly the value of the presentation.

I have the impression that since the author has ignored many theoretical discussions concerning the problems of racial discrimination and the means of its elimination his presentation is sometimes to descriptive and his comments and appraisals sometimes to sketchy and not enough substantiated.

The reviewed book is the first monograph dealing with international protection of human rights in Polish literature, although its title speaks only of racial discrimination. Till now only a dozen or so articles have been published and the problem itself did not attract much attention as worthy of theoretical consideration. The book represents therefore, despite certain shortcomings and controversial assertions, an interesting and valuable contribution. It may also be hoped that it will inaugurate a broader discussion on the subject of international protection of human rights.

Anna Michalska

Sławomir DĄBROWA, *Ludność cywilna w konfliktach zbrojnych* [*Civil Population Armed Conflicts*], Ministry of National Defence Publishers—MON, Warszawa 1974, 368 pp.

Dr. Sławomir Dąbrowa has published a book which belongs topically to the domain of the law of war, called at present more and more frequently the law of armed conflicts. This most important field of international public law is developing extensively, for—on the one hand—the use of force in international relations has not, alas, become a disappearing phenomenon, and—on the other hand—new forms of armed conflict, progressing civilization, development of military technology and of methods of waging war, compel us to adapt our legal norms and concepts.

The publication of yet another book dealing with the law of war has been greeted with satisfaction, all the more so that in Poland, just as in other countries, it is useful to disseminate knowled-

ge about the laws of armed conflicts, and especially of the humanitarian provisions of such laws. A book devoted to the legal protection of civilian population during armed conflicts was particularly needed, both in view of the importance of the problem and the large amount of potential readers, including practically all adult persons. The initiative taken by MON Publishers must therefore be considered as most timely.

The author, a member of the Polish diplomatic service, is one of the most competent Polish experts on the matter. He participates in the process of amending international humanitarian law applicable in times of armed conflict, he has his hand in the elaboration of Polish proposals and represents Poland at international conferences. The book starts with a concise introduction containing some interesting observations on the place of humanitarian law in international law of armed conflicts. Humanitarian law is one of the most developing branches of the law of wars. However, the author's opinion that the main purpose of the latter is to ease the destructive effects of wars and to improve the lot of its victims sounds too categorically. The fundamental objective of the law of wars seems to be an attempt at subjecting the highly complex phenomenon of war, which was hitherto limited only to international armed conflicts but which must also include at present the conflicts remained outside the classic framework of political and legal concepts, such as the so-called national-liberation wars, to the rule of law.

The book is divided into three parts and contains altogether 15 chapters.

Part one, relatively small in volume, bears the characteristics of an introduction. It contains a historical review of the beginnings of the protection of the civilian population as well as of the international treaties and other legal documents on the subject. The author recalls the humanitarian principle, which is together with the principle of military necessity, one of the two main foundations of the whole system of the law of armed conflicts. The author considers the second principle as being of a subordinate nature and this may give rise to some arguments. For the principle of military necessity constitutes the very legal basis of military action. Of course it has no unlimited validity and not all actions can be justified by military necessity. There is here some analogy to other legal rules permitting to take action which is otherwise prohibited, such as, for example, to the institution of self-defence, which has also its limitations; this however would hardly justify the contention that the institution of self-defence must be placed at a lower or higher level than for instance the institution of necessity, or the institution closer to military necessity, namely the institution of acting in the exercise of law, permitting under circumstances specified by the law to deprive somebody of his liberty or to seize his property, although under different conditions such actions would have represented a flagrant violation of the law and even a grave offense.

This part of the book calls for still another remark. The author seems to attach greater importance to written international law than to customary international law. The debate as to the role of the two parts of law in force has a very long history and the precedence given to one or the other was very often the reflection of political preferences. It may be emphasized that precisely as far as international law is concerned, with the absence of effective means of enforcement of its rules in international intercourse, the rules which are rooted in generally accepted and respected customs have the greatest chances of being adopted and applied in practice.

The second part of the book represents its core. It deals with the legal situation of the civilian population during

armed conflicts in the light of the rules of international law now in force.

International law has not yet arrived at a final definition of civilian population. The same goes for the most recent legislative work undertaken on the international scene after the publication of the reviewed book. It led only to the formulation, for the purposes of international humanitarian law, of a draft definition containing a negative formula mentioning such persons who are excluded from the concept of civilian population. The civilian population would thus be composed of all persons not belonging to the armed forces. The author proposes a similar definition. A person enjoying the protection due to the civilian population must therefore meet two basic conditions :

(a) have civilian status, i.e. not be part of regular or irrregular armed forces, and

(b) have non-combatant status i.e. not participate actively in military operations. The definition has therefore one feature worth mentioning, namely it sanctions the exclusion from civilian population groups of so-called illegal cambatants, or persons who participate directly in armed operations without acquiring the rights to be included in regular or irregular armed forces because they fail to meet the conditions set forth in Article 4 of the II Geneva Convention of 1949.

In this part of the book the reader will find a full and clear presentation of several concepts important for the understanding of contemporary humanitarian law of armed conflicts. These concepts and related legal institutions have been hitherto explained in our publications and studies in a rather incomplete or too traditional manner, without due consideration of the contribution of legal thought in other countries and without appropriate attention to the experience of contemporary armed conflicts.

At this juncture a remark seems in order in connection with the reviewed book, which may be of some importance for the systematic presentation of the law of armed conflicts and concerns terminology. It has hitherto not been possible to unify basic terminology in Polish legal literature, which is partly due to the fact that the main international multilateral acts have been drafted in foreign languages and this opens the way to discrepancies in translation and interpretation. Here are some examples of the kind of encountered difficulties : the entire population of a State is divided into armed forces and civilian population. The trouble starts with the attempt at dividing the members of armed forces into such persons who actually participate in military action and those who while forming part of the armed forces are not fighting, such as for instance the personnel of the military medical corps. The terms used by the author who follows Article 3 of the so-called Hague Rules of 1907, namely combatants (first group) and non-combatants (second group) can not be accepted nowadays without reservation. Indeed the author employes in a further part of his book the second term to designate certain groups of civilian persons. This inconsistency confirms the need of a unified Polish terminology in the field of international law of armed conflicts.

Among the general problems discussed in the book special attention must be drawn to the so-called theory of double presumption which acts in favour of persons of doubtful status. According to this theory a person actively engaged in armed combat but whose status as member or non-member of the armed forces can not be determined with accuracy must be treated, when falling into enemy hands, as a war prisoner ; furthermore, attacking forces must treat every person whose status is in doubt as belonging to the civilian population. These presumptions apply till such time when the existing doubts have been cleared up by the competent authorities. The author examines

also the difficult problem of distinguishing between military and civilian targets. He emphasizes that the civilian population has no obligation of wearing distinctive marks. The obligation to be distinguishable rests with the second, combatant group.

The author discusses in detail the problem of protection of the civilian population in the light of the dangers inherent in the use of weapons of mass destruction and in the use of repraisals, which—while being condemned by public opinion, governments of many countries and many legal scholars—have not been hitherto prohibited categorically and unequivocally by law, although their inherent inequity (repraisals affecting innocent people) is not questioned by anyone.

A separate chapter deals with the situation of the civilian population. Quite superfluos seems the inclusion in this part of the book of some remarks concerning international terrorism, which may occur also in times of armed conflict or in connection with occupation, but which—as demonstrated by the events of the past few years—is not a phenomenon mainly or exclusively connected with such events.

Numerous groups of the civilian population enjoy in times of armed conflict special status. This applies to sick and wounded. It may be recalled that during the Korean conflict the number of victims among the civilian population was twice as high than the number of victims among combatants, the proportion being even higher during the Vietnam war. Several legal provisions, especially those contained in the IV Geneva Convention of 1949 strenghtens the protection of women and children during armed conflicts. There is a special status for the civilian medical personnel and for the self-defence personnel. Journalists enjoy special privileges; the problem of improving their safety in the performance of their dangerous missions is now the subject of legislative work on the international scene.

A separate chapter deals with the situation of various groups of foreigners, who found themselves in the territory of a belligerent State at the moment of outbreak of hostilities. The very interesting views offered by the author in this part of the book merit special recommendation.

Even a short discussion of all chapters of part two would exceed the limits of this review. I will therefore only mention that they deal with:

— the status of some civilian objects, including unprotected localities and open cities, medical installations, cultural goods, sea going vessels;

— the penal and civil responsibility for crimes committed against civilan population;

— the influence of an armed conflict, depending on whether it is an international or non-international conflict on the situation under international law of the civilian population and its protection; here attention must be drawn to some very interesting remarks by the author on national liberation wars, which he considers rightly as having an international though not always an inter-State character.

Part three of the book deals with the latest trends in the development of the law of armed conflicts with respect to the protection of the civilian population. The author sees the necessity of further legislative work on an international scale because of the growing dangers for the civilian population and its property which have become so manifest in the course of contemporary armed conflicts. One may mention in this connection the figure of over 100 conflicts, international and civil wars which took place since the end of World War II.

These legislative activities are being carried out on two levels. The first concerns the United Nations Organization. Several important studies and, above all,

several resolutions adopted by the General Assembly (some are dealt with by the author in more detail) have placed permanently on the international agenda the problem of limiting the efects of armed conflicts, of prohibiting the use of specific methods and means of combat and of strenghtening the protection of the civilian population which suffers most during wars fought in present times.

The interest in these problems is not only the result of growing humanitarian feelings. For there is an increasing awareness that the protection of the civilian population, just as the protection of the human natural environment, is indispensable to maintain our civilization to insure that the human race is not placed in jeopardy by the unbridled use of the existing and future ever more deadly means of combat.

The second level concerns work carried out for the past several vears by the International Committee of the Red Cross or under its eagis. These works have been intensified particularly since 1965. They resulted in the elaboration of two legal acts called modestly "additional protocols" to the four Geneva Conventions of 1949; their main purpose is to strenghten and to widen the protection of the civilian population and of some categories of persons in case of armed conflict. The signing and entry into force of these protocols is a matter of the may be not too distant future; this, however, cannot detract from the merits of the International Committee of the Red Cross and of the groups of international experts working on these problems.

The reviewed book belongs to the important publications in Polish legal literature. The author has succeeded in allying scientific precision with conciseness and clarity of style. The book will be of great assistance to everybody, who in the performance of his professional duties or social work has to deal with the vaste problem of the protection of the civilian population and of self-defense in times of armed conflict.

Marian Flemming

Organy organizacji miedzynarodowych. Studium porownawcze [Organs of International Organization. A Comparative Study], Warszawa 1973, 147 pp., Polski Instytut Spraw Miedzynarodowych, Biblioteka Spraw Miedzynarodowych Series, No. 49.

Kazimierz Kocot

Volume 7 pages 350-353

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Jan KOLASA, *Głosowanie w powszechnych organizacjach międzynarodowych [La procédure de vote dans les organisations internationales universelles]*, Wrocław 1973, Wydawnictwa Uniwersytetu Warszawskiego, 159 pages, rés. en anglais.

L'auteur estime à juste titre qu'à partir de la parution des oeuvres, à l'heure actuelle déjà classiques, de C. A. Riches[1] et de Wellington[2], consacrées à la procédure de vote dans les organisations internationales, aucun ouvrage n'a paru dans la littérature du droit international qui aurait traité ce problème d'une manière générale. Cependant, dans l'entretemps, les organisations internationales sont entrées dans une étape tout à fait nouvelle de leur développement, et ont aussi enrichi leurs problématique juridique et l'expérience politique.

La monographie de Jan Kolasa vise donc à combler une lacune non seulement dans la littérature polonaise du droit international, mais également dans la littérature mondiale de cette matière. Pourtant l'auteur a limité d'une manière consciente sa tâche, afin de la faire plus exécutable et afin de concentrer son attention sur les phénomènes importants du point de vue de la pratique et nouveaux dans l'évolution des organisations internationales contemporaines.

Il ne traite dans son ouvrage que des problèmes des organisations internationales universelles dans le cadre du système des Nations Unies, et ce sont seulement celles qui, en respectant totalement l'égalité souveraine des États membres, basent leurs systèmes de vote sur le principe « un État — une voix ». Donc, la monographie en question ne s'occupe pas d'organisations régionales qui sont régies, dans un certain sens, par les lois séparées, qui ont dans leurs rangs les États liés par la conformité relativement considérable des intérêts et qui démontrent une cohésion intérieure considérable. De même, la monographie passe sous silence la problématique des organisations au sein desquelles il est appliqué le système du vote pondéré qui constitue le phénomène exceptionnel dans la société internationale contemporaine où les États souverains sont toujours des unités principales.

Dans la première partie de l'ouvrage l'auteur analyse le droit de vote des États membres et les moyens de garantir ce droit par les actes juridiques des organisations internationales. L'auteur y discute les dispositions des statuts et des règlements intérieurs des organisations internationales concernant le droit de vote des membres dans les différents organes. Il soumet aussi à une analyse des situations particulières des membres associés et des territoires non autonomes autorisés à voter dans certaines organisations internationales.

Dans le chapitre suivant l'auteur s'occupe des problèmes liés au droit de vote dans les organes ayant une composition restreinte des membres. Dans la sphère de l'activité des organisations universelles, le rôle de tels organes accuse, comme on le sait, une tendance

[1] C. A. Riches, *The Unanimity Rule and the League of Nations*, Baltimore 1933 ; idem, *Majority Rule in International Organizations*, Baltimore 1940.

[2] Wellington Koo, *Voting Procedure in International Political Organizations*, New York 1947.

croissante. La réalisation du droit de vote, donc du droit à une participation formelle au processus de la prise de décision, y est aussi liée à la sélection des membres d'un organe ayant une composition restreinte des membres. Le pouvoir d'exercer une influence efficace sur la composition de tel organe permet aux États membres qui, à un moment donné, ne peuvent y assister, d'assurer au sein de tel organe une représentation indirecte par l'intermédiaire des États faisant partie du même groupe régional et ayant par ce fait les intérêts rapprochés. L'auteur présente donc, dans cette partie de l'ouvrage, les problèmes d'importance exceptionnelle en ce qui concerne la démonstration des liens et rapports réels entre les États membres ainsi que du déroulement réel des processus de la prise de décision au sein des organisations internationales.

Enfin, dans cette partie de l'ouvrage, ont été discutées les limitations formelles du droit de vote résultant d'une suspension des membres dans l'exercice de ce droit.

C'est après avoir fait une analyse des questions générales relatives au droit de vote que l'auteur passe, dans la seconde partie de son ouvrage, à l'examen détaillé de l'ensemble des problèmes portant sur la procédure de vote. Il présente et analyse les différentes exigences de la validité des décisions prises : différentes sortes de majorités, donc, une majorité simple des présents et votants, une majorité absolue, une majorité qualifiée. Il examine la procédure de vote au sein des organes de différentes sortes, donc, dans les organes pléniers et dans les organes ayant une composition restreinte des membres. Il analyse enfin les différents principes de détermination de la majorité requise dans les différents organes, en considération particulière de l'exigence de *quorum*.

L'auteur se limite seulement à analyser les principes juridiques. Il n'entre pas dans les détails de la réalité politique des processus de la prise de décision au sein des organisations internationales, puisque cela l'aurait entraîné dans le domaine la politologie. C'est pourquoi, par exemple, il ne s'occupe pas de l'influence réelle des États et des groupes d'États sur la formation des décisions prises par les organes internationaux, influence qui dépend de plusieurs facteurs politiques, et, en règle générale, de la volonté réelle des États respectifs exprimée dans le domaine donné des relations internationales. Pourtant, il a passé sous silence également cette procédure de vote qui s'est établie dans la pratique des organisations internationales dans les conditions de l'équilibre relatif des forces et dans l'atmosphère du réalisme politique — à savoir la prise de décision basée sur le *consensus*, donc sans recourir à la procédure du vote formel.

Néanmoins, une analyse comparative des différentes procédures de vote, telles qu'elles sont prévues par les statuts et les règlements intérieurs des organisations universelles contemporaines, suffit à l'auteur pour faire des observations justes et intéressantes. L'auteur constate, par exemple, qu'il n'est plus possible, à l'heure actuelle, de fermer les yeux sur les différences du potentiel politique, économique ou militaire des États, lesquelles, même dans les solutions juridiques portant sur les principes de vote, trouvent leur expression malgré une reconnaissance formelle de l'égalité souveraine des États. « L'égalité des voix, proclamée d'une manière un peu ostentatoire dans les statuts des organisations internationales universelles, ne signifie point, dans la pratique, une égalité complète à ce égard. En tout cas, elle ne peut pas être interprétée dans ce sens que tout État membre, dans tous les organes d'une organisation donnée, jouit du droit de participer à la procédure de vote sur le pied d'égalité aves d'autres membres » (p. 139). Il s'agit ici du statut des membres associés. Mais surtout il s'agit du fait de limiter une composition des organes et

de leur imposer une responsabilité de plus en plus grande pour l'activité des organisations internationales.

L'ouvrage de Jan Kolasa mérite une haute appréciation en tant que réalisation scientifique importante. L'auteur exploite toute la littérature de la matière examinée qui existe en langues internationales. Il fait une analyse comparative des dispositions des statuts et des règlements des principales organisations internationales universelles. Bien que plusieurs de ces dispositions aient été récemment modifiées, notamment en ce qui concerne le nombre de membres des organes ayant une composition restreinte, les conclusions formulées par l'auteur au sujet des tendances et relations générales qui se manifestent parmi les facteurs jouant le rôle des paramètres du processus de la prise de décision dans les organisations internationales, restent toujours actuelles.

La monographie sur la procédure de vote dans les organisations internationales universelles peut être aussi utile aux praticiens, puisqu'elle met en ordre et explique plusieurs problèmes juridiques qui se révèlent dans l'activité desdites organisations. Elle est le produit de la recherche consciencieuse et peut servir de modèle d'un bon travail juridique.

Wojciech Morawiecki

Jerzy MAKARCZYK, *Finansowanie rozwoju gospodarczego w systemie Narodów Zjednoczonych (IBRD, IFC, IDA)* [*The Financing of Economic Development in the United Nations System — IBRD, IFC, IDA*], Wrocław 1974, Ossolineum, 254 pp.

The reviewed book deals with legal problems arising from the structure and functions of the organizations which, within the framework of the United Nations system, are called upon to finance economic development of the developing countries, namely the International Bank for Reconstruction and Development, the International Finance Corporation and the International Development Association. These problems have hitherto attracted little attention on the part of international lawyers of the socialist States. This is, no doubt, in part due to the fact that these States are not, as yet, members of the above mentioned organizations.

The task, which the author has set to himself, has been defined in the introduction in the following terms: to analyze the Charter of the Bank, its internal regulations and the agreements concluded by the Bank and to determine the real legal situation of the recipient States as members of the Bank and as its clients. (p. 19) The author is aware, of course, that financing of economic development is, above all, an economic problem, part of the wider question of international action to assist developing countries; none the less he thinks that it must remain within the sphere of interest of international lawyers, for it is impossible nowadays to point at a specific field of international relations of exclusive concern to laweyrs, or economists or political scientists. A laweyr dealing with such matters must have the ability to appraise their economic and political aspects, especially, the ability to judge what is or is not possible from the political point of view.

Having adopted such an approach the author devotes much attention to economic and political problems in the United Nations system.

A thorough and complex analysis of the structure and functions of the three above mentioned organizations led the author to the disclosure of several highly interesting relationships and to formulating several new and original remarks and conclusions. He notes in the activities of the IBRD a distinct trend aimed at departing from generally applied rules of international law by the inclusion in

the agreements concluded with recipient countries of special clauses as well as a tendency to act independently of the UN organs and the dominating aspirations prevailing there. Such a state of affairs is largely due to the fact that the decision making powers in the IBRD, IFC and IDA rest with the Western powers which provide the financial means; this decision making authority has been sanctioned by a weighted voting system, which relates voting powers to the share of each State in the capital of these institutions. The author notes also that in its actual practice the IBRD has, to a large extent, departed from its statutory principles adopted in 1944 in Bretton Woods and is applying in its relations with the recipient States conditions violating the principle of legal equality, dictating credit terms and interfering in their internal matters. Thus, the system developed by the Bank and the two financial institutions attached to it, sanctions and consolidates an undoubted fact, namely the inequality among States. It can be said that inequality is a fact of life, but there is a difference between noting certain economic and political facts and adapting to these facts some legal solutions in the name of expediency, and lifting the *de facto* inequality to the rank of a *de iure* inequality (p. 239).

Much space has been devoted in the reviewed book to the problems related to the attitude of the socialist countries, and especially Poland, to the three financial institutions belonging to the UN family. The author presents a legal and political analysis of the decision to withdraw from the institutions created in Bretton Woods, pointing at the differences in the motivation of Poland and Czechoslovakia in that matter. He discusses extensively various aspects connected with the possible membership of the socialist States in the International Monetary Fund and the International Band for Reconstruction and Development. In his view the access of the socialist States to these two organizations would have been advisable and useful because it could influence the activites of these organizations. The presence of socialist States would, most probably, lead to the removal of the anachronism reflected in the refusal by the IBRD to submit to any influence of the United Nations organs.

In the closing chapter of his book dr Makarczyk argues against a thesis of a more general character represented by some Western scholars, especially by W. Friedmann in his article *Droit de coexistence et droit de coopération* ("Revue Belge de Droit International"), according to which the IBRD, the IFC and the IDA represent a perfect example of what international law of cooperation ought to be. At the same time it is being pointed out that these financial organizations are playing now a crucial role in providing developing countries with financial means for their economic development and have a bright future in prospect. The author argues quite rightly that the contention that the IBRD, the IFC and the IDA being a sort of example to be followed by other international organizations cannot be accepted for both legal and political reasons. He points to the negative effects of such a model on the future system of international economic relations and, hence, on the future shape of international law. He expresses fears that such a model could affect adversely future relations between international organizations and member States. Newly established States, for which contacts with financial institutions acting under the UN flag offer very often the first occasion to get in touch with international organizations, are immediately confronted with the organs of these institutions in which—even if they are directly represented—they have practically no say, because these organs decide arbitrarily in all matters arising from membership and in all conflicts arising from interpretation of the agreements.

Finally attention must be drawn also to such qualities of the reviewed book as the use of extensive source materials, official documents and books in several languages, its clear and fluent style, its conscientiously compiled bibliography.

It has to be regretted that no summary in one of the international languages has been included, for the problems dealt with by the author are, no doubt, of interest also to foreign readers.

Remigiusz Bierzanek

Jerzy RAJSKI, *Odpowiedzialność za szkody wyrządzone przez obiekty kosmiczne* [*International Liability for Damages Caused by Space Objects*], Warszawa 1974, PWN, 193 pp.

Progress in modern science and technology has widened considerably the possibilities of human action, creating at the same time new relationships which must be subjected to the rule of law. Furthermore, in view of the growing interdependence of States, these relationships must be subjected to the rule of international law. This applies also to relations arising from man's invasion of space.

The book by Professor J. Rajski contains a thorough legal analysis of the problem of liability for damages caused by space objects, which was the subject of an international convention prepared within the framework of the United Nations and signed in Moscow, London and Washington on 29 March, 1972. The most significant feature of the reviewed book is the author's approach to the problem. Professor Rajski treats his subject against a broad background of the great human competitive race embracing all countries and continents, accelerated by the rythm of continuous social, economic, scientific and technical progress; however, this development is accompanied by growning hazards which may jeopardize not only the interests of individuals and societies but also the entire natural human environment. Hence—as rightly pointed out by the author—the increasing role of law as an instrument of controling human activity. Law should not be a factor hampering the further progress of States and societies, it can and should rationalize progress so as to remove all hazards to men. Consequently, the legal regulation of the problem of liability for damages caused by space objects has been considered as a possible pattern which might be followed when regulating the problem of liability for damages caused in connection with other spheres of human activity which may entail the possibility of heavy damage on the environment.

Having presented the history of preparatory work which preceded the adoption of the Convention in 1972 (chapter I), the author proceeds with a legal analysis of the application of the Convention embracing not only States but also international governmental organizations (chapters II and III). He devotes particular attention to the discussion of the premisses of liability and of the principles on which the obligation to compensate for damages are based (chapters IV and V). At the very basis lays the principle which the author defines as "almost absolute liability," for although the convention uses the term „absolute" it admits the possibility of a State being released from such liability in case of a damage resulting from a flagrant negligence or wilful fault in the State claiming compensation or in the legal and physical persons which the State represents. The principle of almost absolute liability concerns actions causing damages, which remain in accord with international law. However, in cases when the State responsible for the damage violates international law its liability is absolute and there can be no release from the obligation to compensate. Finally, in case of

damages caused by space objects on the earth's surface or to persons and property on board of a plane liability is based on the principle of fault. The final chapters deal with the problem of compensation of damages and with the procedure for presentation and settlement of claims for compensation (chapters VI and VII).

Describing the system of international liability for damages introduced by the Convention of 1972, Rajski states that this represents the most modern, overall regulation of the problem in a convention open to all states. The system includes the following significant features :

(a) a wide scope of liability embracing, in principle, all damages which may arise in connection with the launching of space objects ; hitherto the tendency was in favour of separate rules on liability for damages caused by various types of objects (for instance, liability for damages caused in connection with the use of atomic energy) ;

(b) a differentiation of the liability depending on the character of the damage caused with due consideration of the degree of hazards which a given activity involves for the environment ;

(c) the adoption of the principle of full compensation whatever its amount, this representing a departure from the practice of fixing so called "ceilings" of liability ;

(d) the establishment of a system of settlement of disputes insuring a prompt and effective settlement of claims for compensation.

Thus, the Convention introduces several new elements in international law, contributing to its further development, it constitutes an important event in the field of codification of international law and enhances both the role of the United Nations in this field and the role of multilateral international treaties, which are the principal source of modern international law.

The author points out quite rightly that the Convention fails to deal with the problem of liability for damages caused to mankind—on earth, in the atmosphere and in space—by the pollution of seas and oceans not subject to State jurisdiction and to the pollution of space and cellestial bodies. This is part of a wider problem confronting our world, namely the problem of environmental protection. Professor Rajski expresses the hope that the further development of the trend towards widening of the scope of liability will embrace the whole field of liability for damages caused to man's natural environment and to space.

Remigiusz Bierzanek

Remigiusz RYBICKI, *Status prawny Berlina Zachodniego* [*Le statut juridique de Berlin-Ouest*], Warszawa 1973, Państwowe Wydawnictwo Naukowe, 214 pages.

La litérature polonaise de droit international relative à l'Allemagne d'après-querre est déjà, il est vrai, très abondante, mais le problème de Berlin-Ouest y occupait, jusqu à l'heure actuelle, une place relativement peu importante. Le livre de R. Rybicki comble donc une grave lacune dans ce domaine. La prise en considération de la problématique de l'accord quadrilatéral du 3 septembre 1971 fait que la parution de ce livre est bien actuelle.

L'ouvrage en question se compose de cinq chapitres suivants : 1) L'occupation de l'Allemagne dans les actes juridiques liés à la Seconde Guerre mondiale, 2) Les fondements juridiques de l'occupation de Berlin, 3) Le statut juridique de Berlin, 4) Les quatre puissances et Berlin et 5) Les deux États allemands et Berlin. Les

trois accords internationaux relatifs à la question de Berlin ainsi que la bibliographie de la matière y sont annexés.

L'auteur a justement fait d'examiner son sujet dans le contexte du problème de l'Allemagne en tant qu'une unité. En effet, Berlin-Ouest ne s'est pas constitué tout d'un coup en tant qu'une unité géopolitique séparée. La problématique panallemande est en règle générale traitée dans l'ouvrage dans des proportions appropriées. Le lecteur y trouve des informations non seulement sur les faits, mais aussi des opinions sur les questions qui sont discutables dans la doctrine du droit international. Il s'agit surtout de la thèse bien connue de la conservation de l'État allemand en tant que sujet du droit international malgré la capitulation inconditionnelle signée en mai 1945 (pp. 31–32), de même que de la thèse du caractère non souverain des deux États allemands dans les années 1949–1955 (pp. 121 et 164).

Dans le titre de l'ouvrage analysé il faudrait pourtant employer l'expression « le statut de droit international » au lieu de « statut juridique », ce qui préciserait d'une manière plus exacte le caractère du livre. L'expression « le statut juridique » est entendue par l'auteur d'une manière très large : elle englobe en principle l'ensemble de la problématique juridique, ou plutôt celle de droit international. Une telle conception a diminué, par nécessité, l'attention accordée à la question principale, à savoir à ce que constitute Berlin-Ouest au regard du droit international?

Il convient de souligner que ladite question est bien compliquée pour deux raisons au moins. Premièrement, le statut de droit international de Berlin-Ouest est sans précédent dans l'histoire des relations internationales. Secondement, le statut en cause n'est pas basé sur le fondement uniforme de droit international, et ce défaut n'a pas été éliminé même par la conclusion de l'accord quadrilatéral précité du 3 septembre 1971.

Remigiusz Rybicki se prononce aussi sur la question de savoir qu'est-ce que constitute et qu'est-ce que ne constitute pas Berlin-Ouest au regard du droit international. L'auteur écrit que Berlin-Ouest, bien qu'il soit situé à l'intérieur du territoire de la République Démocratique Allemande, ne constitue pas, du point de vue juridique, son territoire (p. 149). Cette constatation peut paraître, à l'heure actuelle, tout à fait évidente, néanmoins elle est utile, car dans la littérature socialiste consacrée au droit international, la question du rapport de Berlin-Ouest à l'égard de la R.D.A. n'était pas toujours traitée ainsi. Selon l'auteur, Berlin-Ouest n'est pas non plus le pays de la République Fédérale d'Allemagne, l'attitude prise par trois puissances occupantes étant selon lui essentielle à ce sujet (pp. 152–153). Cette opinion est complétée par l'avis que les puissances occidentales ont le droit de prendre toute décision autoritaire qui n'est pas contraire au droit international (p. 159). Cette dernière réserve est assez importante car, bien que les attributions d'occupation exercées à Berlin-Ouest ne relèvent que de trois puissances occidentales, celles-ci ne sont pas capables de modifier légalement son statut sans avoir obtenu le consentement de la quatrième puissance responsable de l'Allemagne en tant qu'une unité — de l'Union Soviétique.

La délimitation positive du statut de droit international de Berlin-Ouest s'exprime dans l'avis de l'auteur que nous avons affaire à une unité politique et juridique séparée à l'égard de laquelle a été maintenu, sur le plan du droit international, l'état d'occupation exercé par trois puissances occidentales dans le cadre des garanties juridiques quadrilatérales (p. 81). Cette définition paraît être juste bien que, par la nature des choses, elle soit assez générale. Dans l'ouvrage se fait sentir l'absence des considérations approfondies au sujet des éléments particuliers de cette définition. Il faudrait surtout s'occuper d'une manière plus large de la

question des relations étrangères de Berlin-Ouest. L'auteur discute la division actuelle de la représentation étrangère de cette ville entre les trois puissances occidentales (les questions de sécurité et de statut) et la R.F.A. (p. 91), mais il n'analyse pas le caractère juridique de ladite représentation. Cela résulte probablement du fait qu'il commente les actes juridiques particuliers en renonçant d'une manière consciente aux considérations théoriques (pp. 30, 32, 73, 119, 126 et 155). Sous ce rapport, la définition de la mission militaire paraît être très résussie, définition étant une généralisation convaincante du matériel normatif approprié (p. 115).

Le livre de R. Rybicki peut être reconnu pour une contribution utile à la théorie des unités géopolitiques non souveraines dans le droit international.

Lech Antonowicz

Julian SUTOR, *Przywileje i immunitety międzynarodowe* [*International Privileges and Immunities*], PWN, Warszawa 1973, 305 pp.

The history of international relations has witnessed the development of numerous and various international privileges and immunities. They vary according to person, object, place and time. Some—in the first place the privileges and immunities of diplomatic and consular representatives as well as to some extent also those enjoyed by international civil servants—have been extensively treated by Polish scholars in numerous articles and separate book chapters, while others were only the subject of fragmentary analysis undertaken on the occasion of studies concerning privileges and immunities of specific categories of persons.

Hence the need not only on the part of the narrow circle of specialists but above all on the part of those engaged in practical activity of a broader study containing an analysis of all kinds of privileges and immunities applied in international relations. The demand is being met by the book of J. Sutor, a well-known specialist with not only theoretical background but with extensive practical experience in the diplomatic service as well. In contrast to many books in this field the author proceeds not only with a theoretical and legal analysis but he confronts theory with practice and adds very pertinent and original thoughts inspired by actual practice of international relations. In other words, the book contains a distinct, many-sided analysis. The various problems are dealt with care and precision. The book as a whole stands out by the clarity and coherence of its structure.

The first two chapters are of an introductory character. The first chapter deals with the historical development of privileges and immunities. In this connection one may draw the attention to the author's rather extensive description of the Polish diplomatic and consular practice. The second chapter discusses in detail the legal foundations of the privileges and immunities. The author repeats with good reason the often advanced request for the codification in one legal document of all acts concerning the privileges and immunities applied in Poland, at present scattered in numerous acts. This would be of great assistance to all those engaged in practical activity (members of the foreign service, employees of the ministry of foreign trade, members of the judiciary) as well as to all those who, in Poland, are covered by privileges and immunities, and finally to persons engaged in the study of problems related to privileges and immunities.

The subsequent chapters are devoted to an analysis of specific types of privileges and immunities: diplomatic, consular, immunities of international organ-

izations and their employees, privileges and immunities of special missions (*ad hoc* diplomacy) and finally privileges and immunities of troops stationed on foreign territory. It is regretable that the author omits to deal—or deals only in passing—with the privileges and immunities of permanent representatives of States to international organizations, of permanent observer missions of States to international organizations, of delegates and observers of States to organs of international organizations and conferences called by such organizations and of members of international interparlamentary bodies such as the European Parliament of the European Communities, the Consultative Assembly of the Council of Europe, etc.

The privileges and immunities of the above mentioned groups of persons are discussed following a similar pattern (the international legal basis, the persons involved, the time, place, object, jurisdictional immunity, the problems of personal immunity, the inviolability of residence, tax privileges, customs privileges, the problem of freedom of movement and communication and finally the specific privileges and immunities of certain groups of persons). Such an approach adds clarity and coherence enabling the reader to grasp immediately the differences between the various types of privileges and immunities.

The author discusses in detail the provisions of international agreements concerning privileges and immunities and emphasizes the importance of international customs, which still play a great role. He points out the different attitude of the socialist States in some questions of privileges and immunities as opposed to the attitude of the capitalist ones (for example regarding commercial representatives, privileges and immunities of ships) and the contribution of socialist legal science to the development of that institution.

The book is dealing quite extensively with all problems concerning the implementation of privileges and immunities. In the era of peaceful coexistence of States with different social and political systems the strict observance of the basic principles of international law, including the application of all international privileges and immunities, is of great importance for insuring normal intercourse and peaceful relations among nations. Therefore, it can only be noted with satisfaction that the author has devoted so much space to the problem of practical implementation of the institution of privileges and immunities with special reference to the situation of the representatives of socialist States and other nationals of socialist States enjoying special types of international privileges and immunities.

While dealing with the privileges and immunities of employees of international organizations J. Sutor, unlike the majority of authors discussing the same subject, takes into consideration not only the material of universal international organizations but also the material of many other international organizations. We are thus provided with a complete picture of the situation in this field, which is much more diversified than it is usually believed. It may be regretted that the author offers no clear presentation of the position of international experts, who have been treated as a category of international civil servants. Therefore, the difference between the privileges and immunities of such experts and the privileges and immunities of employes of international organizations are not clearly visible. It seems to me also that the immunities and privileges of international organizations have been dealt with in a too general manner.

The book closes with a chapter devoted to privileges and immunities in times of armed conflict—to a problem which has not been widely discussed in Polish literature of international law.

The book by J. Sutor is the first Polish monograph dealing exclusively with

international privileges and immunities. It represents a serious analysis of all relevant aspects of the problem and constitutes a mojor step in the direction of a better understanding of the subject.

Zbigniew M. Klepacki

Andrzej Tomasz WERNER, *Europejskie wspólnoty. Szkice o integracji Europy Zachodniej 1815–1972.* [*Les communautés européennes. Esquisses de l'intégration de l'Europe occidentale 1815–1972*], Warszawa 1972, Książka i Wiedza.

La littérature polonaise concernant l'intégration de l'Europe occidentale ne cesse de croître. C'est compréhensible, car il n'y a pas de doute que le processus de cette intégration constitue l'un des plus importants événements de l'époque contemporaine.

En dehors des travaux détaillés consacrés aux aspects particuliers de ce processus, paraissent aussi des ouvrages ayant le caractère synthétique. Au nombre de tels ouvrages peut être également compté l'ouvrage analysé.

L'auteur a déjà un acquis important dans le domaine de la problématique de l'intégration de l'Europe occidentale. En 1966 a paru son livre sur l'attitude des États-Unis envers la Communauté Économique Européenne et sur les divergences à l'intérieur de cette Communauté[1]. En 1969, il a publié un article bien intéressant sur les éléments nouveaux apportés à la théorie de l'État par l'intégration de l'Europe occidentale[2].

L'ouvrage analysé constitue, comme il a été déjà mentionné plus haut, l'essai de synthèse du phénomène de l'intégration de l'Europe occidentale. Le trait caractéristique en est de présenter cette synthèse dans le large contexte des processus historiques et des tendances dans la politique mondiale.

Dans le chapitre I, l'auteur discute les tendances intégrationnistes en Europe du XIX[e] s. (1815–1914), en attirant l'attention des lecteurs sur les antécédents de l'intégration. A la différence de Z. Kwilecki qui s'intéressait, en règle générale, à l'histoire des idées[3], A. Werner a mis l'accent essentiel sur les phénomènes du domaine de la politique internationale des États de ce temps-là. Il souligne que les tendances « intégrationnistes » faisaient partie de la politique menée par certaines grandes puissances.

Le chapitre II comprend des considérations relatives aux tendances intégrationnistes dans les années 1917–1943, notamment dans le contexte de la politique française.

Le chapitre III (1944–1949) aborde la question du changement essentiel des aspirations intégrationnistes, notamment en raison de l'inclusion du slogan d'« intégration » ouest-européenne dans les conceptions fondamentales de la politique étrangère des États-Unis. De ce point de vue la politique de la guerre froide, l'anticommunisme et les tentatives visant à la rémilitarisation de l'Allemagne avaient de l'importance particulière.

Le processus principal de l'intégration a commencé en 1950 au moment de l'institution de la Communauté Européenne du Charbon et de l'Acier. Dans le chapitre IV, l'auteur discute d'une manière détaillée la constitution, les buts et l'importance de cette communauté dans l'histoire de l'intégration ouest-européenne. Dans le même chapitre l'auteur soumet à une analyse les causes pour les-

[1] *Wielka próba sił USA—EWG—NRF* [*Grande épreuve de force : les États—Unis—la C.E.E.—la R.F.A.*], Warszawa 1966.

[2] *Integracja gospodarcza a państwo burżuazyjne* [*L'intégration économique et l'État bourgeois*], « Państwo i Prawo », 1969, n° 1, pp. 109–119.

[3] A. KWILECKI, *Idea zjednoczenia Europy. Polityczno-socjologiczne aspekty integracji zachodnioeuropejskiej* [L'idée d'une Europe unie. *Les aspects socio-politiques de l'intégration de l'Europe occidentale*], Poznań 1969.

quelles d'autres formes d'intégration (politique, militaire) ont subi un échec, de même que les raisons de la limitation du processus de l'intégration à « six ».

Le chapitre V est consacré à la naissance, aux buts et aux principes de la Communauté Économique Européenne. L'accélération du processus d'intégration grâce au Traité de Rome de 1957, qui a institué la C.E.E., a été présentée dans le chapitre VI. Le chapitre VII traite de l'impasse de l'intégration dans les annés 1965–1968, et le chpitre suivant s'occupe des causes d'extension de la C.E.E. Enfin, dans la conclusion de l'ouvrage, l'auteur présente sa propre appréciation des tendances, de l'évolution et des perspectives des communautés européennes.

A l'ouvrage est annexée une large bibliographie de la problématique abordée qui, en principe, ne comprend pas d'ouvrages concernant les aspects détaillés de l'intégration particulière de l'Europe occidentale.

Selon l'avis de l'auteur, il n'y a pas d'harmonie entre les buts des États qui, dans la période d'après-guerre, visaient à réaliser l'intégration de l'Europe occidentale ou l'ont appuyée (comme les États-Unis), et l'idéologie de la fédération ou de la confédération des États de l'Europe occidentale (pp. 8–9). L'auteur indique que l'attitude des gouvernements envers ces problèmes était pragmatique (p. 110). Ils cherchaient à développer leurs pays grâce à l'intégration plutôt qu'à créer une organisation supranationale (p. 111). Les États traitent les communautés non pas comme le but et l'instrument de l'unification politique et étatique, mais comme le moyen de réalisation de leurs propres tâches nationales et étatiques qui s'excluent parfois (p. 176). L'auteur attire l'attention sur l'attitude négative à l'égard de la « supranationalité » et sur la pratique de la prise des décisions principales par voie de *consensus* et non pas par la majorité des voix (p. 177).

En révélant les buts véritables de l'« idéologie européenne » (p. 112 et suiv.), l'auteur souligne pourtant son « attractivité » et son rôle dans la formation de l'opinion publique.

L'auteur estime que la tendance vers l'intégration internationale est, à l'heure actuelle, un phénomène de caractère objectif (p. 179). Il constate aussi qu'elle a fourni aux pays de l'Europe occidentale plusieurs avantages économiques et constituait une aide pour les gouvernements des pays participant à la réalisation des tâches découlant des fonctions étatiques, la sphère de la politique intérieure y comprise (p. 179). Par son mécanisme d'association, elle constituait aussi l'instrument de l'expansion extérieure (p. 180). D'autre part, l'auteur fixe son attention sur les limites de l'intégration, en soulignant que les processus de l'intégration économique de la C.E.E. veulent et peuvent poursuire leur propre politique intérieure et d'évolution nettement limitées (p. 11).

L'auteur souligne qu'en dépit de l'idéologie européenne, les États membres de la C.E.E. veulent et peuvent poursuiore leur propre politique intérieure et étrangère.

En bref, l'ouvrage de A. Werner constitue un essai intéressant de faire le bilan du processus de l'intégration de l'Europe occidentale et une esquisse des perspectives de celle-ci. Une certaine faiblesse de l'ouvrage analysé est de traiter d'une manière assez restreinte les conséquences de ce processus pour d'autres États et régions, et notamment le problème des relations entre la C.E.E. et le C.A.E.M. Il est vrai que cette dernière question n'est avant out devenue actuelle qu'après la parution de l'ouvrage en question.

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