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THE POLISH YEARBOOK OF INTERNATIONAL LAW

I

1966/67

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INSTITUTE OF LEGAL SCIENCES OF POLISH ACADEMY OF SCIENCES
POLISH BRANCH OF INTERNATIONAL LAW ASSOCIATION

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CONTENTS

ARTICLES

I

II

BOOK REVIEWS

CHRONICLE

BIBLIOGRAPHY

FOREWORD

For quite a long time international jurists in Poland have felt a lack of a special periodical devoted to the problems of international law. To meet, at least partly, this demand for a tribune for scholarly publications in the field of international law, the Polish Institute of International Affairs, the Institute of Legal Sciences of the Polish Academy of Sciences and the Polish Branch of the International Law Association have recently taken up the initiative of starting a joint publication of yearbook devoted exclusively to international law. Every effort has been made to assemble around this new publication the widest possible milieu of scholars of both older and younger generation and in this respect the editors have been successful to a very great extent.

At the same time it has been also felt that writings published in the Polish language would not be easily accessible abroad to all those who might be interested in the development of the science of international law in Poland and in the legal thinking of the Polish authors.

True enough, in the troubled world of ours international law and the role it may play in international relations are sometimes underestimated or even neglected. But the fact is that almost each and every proposal for the settlement of an international conflict refers to international law and one can hardly conceive a constructive handling of major international controversies of our time without due respect to the rights of others and without compliance with the principles and norms of international law as an important element of peaceful relations between states irrespective of their social system. The progressive development of international law, based on a wide consensus of states with different legal traditions and different social systems, seems to be a prerequisite to the active role the international law may play and to the viability of its norms. In this process of the progressive development of international law scholarly legal thinking is a factor of importance and this seems to hold true also for an exchange of scholarly ideas in this field which might contribute to a better mutual knowledge and understanding. Therefore it has been thought that—especially in this field of science as concerned with international problems—a language barrier should be avoided and, consequently, it has been decided to publish the yearbook in English as a language accessible to a great number of international jurists all over the world.

It must be added in all frankness that the way from the inception of the "Yearbook" to the appearance of its first volume in print has been rather lengthy and this protracted way of preparation of the "inaugural" volume is somehow reflected in the topics dealt with.

For it has been and it will be also for the future the intention of the editors to publish in the "Yearbook" articles and notes elaborating on the legal problems and legal aspects of the problems posed by the development of contemporary international relations rather than to concentrate on topics of purely academic interest.

The book reviews section is intended to allow for presentation of all books on international law published by Polish authors. However, due to an accumulation of material and to a limited space, not all the books that have been published in the recent years are reviewed here. The editors hope to fill up this gap in the next volume which is under preparation now. Besides book reviews the readers will find in each volume full bibliography of legal articles in Polish periodicals for a given period.

To meet the interests of practicing lawyers, a series of abstracts from the decisions of Polish courts involving international element has been included in the "Yearbook" as a separate section.

Having in mind the prominent part of international organizations in present day international relations and also in the process of the formation of international law—special section of notes is devoted to Poland's position on selected matters involving legal issues and dealt with by international organizations, especially by the United Nations and its specialized agencies.

The chronicle contains miscellaneous information on scientific life in Poland in the field of international law.

The editors are fully aware that their first attempt is not perfect. But they hope that this volume will stimulate the readers' interest in the next ones which they intend to enlarge and modify in some sections. It is in this spirit that they submit this volume to Your attention and would welcome any critical remarks.

THE EDITORS

A R T I C L E S

ON THE IMPORTANCE OF INTERNATIONAL LAW IN A DANGEROUS WORLD

by MANFRED LACHS

The reader of this new publication — which is meant to offer a conribution of lawyers of socialist Poland towards a better understanding of international law and relations in the world of to-day—may be surprised to find on its opening pages comments and reflections on a subject quite familiar to him. Yet, written as they are, in the shadow of strife, conflict and acts of lawlessness while mistrust and suspicion becloud relations among states, they seem timely a reminder of the role law and lawyers could and should play in international relations.

It is obvious that the fundamental processes determining the cavalcade of contemporary events are the great political, economic and social changes of our days. The birt of the firsth and then of a whole system of socialist states has changed the face and structure of world forces. These changes constitute the source of confrontation between East and West—of states of different political and economic systems; between what is called North and South—the rich and the poor. The structure of the international community has been seriously altered by scores of new states having entered the international arena and having begun to build a new life on what were hitherto colonial empires. Many more nations are on the move, claiming free and independent existence. All this is closely linked with the process of modern science revolutionizing our life. Its achievements are translated into practice by striking technological feats. Mastery over matter and technical progress have become political factors ever more decisive to social progress and economic development within a society and in relations among nations. "The most amazing thing about science", it has been said, "and the most surprising and exciting fact about our world is this astonishing connection between highly abstruse theoretical ideas and the matter of fact."[1]

[1] Sir George Thomson in his presidential address to the British Association for the Advancement of Science, 31 August 1960.

There is, indeed, nothing new in it. A careful reader of history will easily discover that great achievements in science have always been linked with great social changes, setting in motion further important developments in other fields of interhuman relations. Newton and Darwin are but two striking examples. Nor can their impact on the social sciences be ignored. Here again ample illustration is offered by examples from the past. What is new today is the quality of the changes, the far reaching interdependence of events, thus raising them to the level of a twofold revolution.

The past and present, practice and theory have brought home the truth that the world of nature, our globe and the whole universe are subject to the operation of definite laws. Man's knowledge of them is still very limited, many remain covered by the veil of secrecy. But those that are accessible offer enough evidence of the mutual dependence between what is happening in the world of nature and in the world of man, of the impact of science on the development of society and on relations among nations. The discovery that the universe behaves in an orderly manner leads to a better understanding of the laws guiding inter-human relations. It was about hundred twenty years ago when Marx suggested: "History itself is a real part of the history of nature, the formation of nature of man. Eventually natural science will include the knowledge of man to the same extent as the knowledge of man will include the natural science: they will become one." And only recently one of the great scientists of our days submitted that science "has much more in common with the social sciences than we have thought in the past." All this justifies the need for further and deeper study of the mutual relationship between nature, science and society. It would be futile to hide today behind what is called lack of adequate historical experience or the alleged "impotence" of the social sciences. It is of no use to await a new Newton in this field. On the teleological level better knowledge and further penetration of the laws guiding nature pave the way to the possibility of utilizing them in the interest of man and for his well-being. Can there be any doubt that this should be our main concern?

In the light of these considerations one may turn to a more specific sphere of enquiry concerning relations among nations and states. The basic problem we face here is not only to ascertain the ways and by-ways of history but also to answer the question: where does it lead? To ask this does not amount to a "metaphysical" approach or an "infatuation with natural science."[2] It is the logical consequence of past experience, of the fact that the clock of history does not strike evenly, that its laws do not operate automatically. Hence the task of man is to help shape events in the interest of man.

To begin with, the present has to be faced not as the total of haphazard

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[2] See I. Berlin, *Historical Inevitability*, Oxford 1953, p. 13.

events, but as a consequence of yesterday, the last link in the chain of events accessible to our generation. Only by appreciating this fact properly can proper solutions be found for the issues it poses. Only then will tomorrow not catch us unprepared.

The key issue which continues to confront us is obviously that of peace and war. It remains true, as we stated earlier, that our generation is witness and victim of conflicts that break out in various parts of the world, each of them carrying within it the seeds of a wider conflagration. Yet it may be said that there are real and practical possibilities for barring war from relations among states. This is so today, forty years after war was outlawed as an instrument of national policy. This is so contrary to the views of those who insist on its inevitability and those who by their actions increase the risk of its outbreak, apparently seeking inspiration in the words of the poet of ancient Rome: *Jura negat sibi nata nihil non arrogat armis.* However, to achieve this objective a serious effort is required by all concerned, states big and small. A new approach.

After the failures of the years between the wars and the disaster of the global conflict, humanity embarked on a new venture. It implied that no dispute between states—whatever its nature or dimension—justified the use of force. No ready formula was offered, no precise directive for the solution of particular problems was given. But it implied that all states were bound to make every effort to seek peaceful solutions and methods for the settlement of their problems. It was meant to bind all states, irrespective of their political and economic systems; it commended a common effort on their part to protect the security of each of them. Leaving to states the inalienable right of self-defence, it aimed at preventing the abuse or deformation of this right. Its great value and main function was prevention. For reasons well known these efforts failed. They have been replaced by a new situation, that of today.

One can hardly argue that the armaments race and its inevitable consequences offer a reply to the pressing needs of the world, that there is something inherently good and constructive in them. The way to peaceful co-operation is blocked. The world lives in the shadow of war. All this, far from increasing security, produces chain reactions and drives the world in a vicious circle from one crisis to another. Risks increase with every new incident. The area of the conflict may be limited, and so may be the aims of the parties to the conflict. But it is the difficulty of limiting the means of war in a nuclear age which carries with it the danger of a major catastrophe. Apart from this, local conflicts become contageous, they serve as bad examples, lead to miscalculations, encourage "solutions" by force.

A generation which has had the unique experience in history of witnessing great triumphs of human genius and has shared the great achievements in the conquest of what has been hitherto unattainable—is bound to reject this approach. The responsibility is not only ours. For, indeed, man has acquired the power

of destruction without limit. Thus too much is at stake to leave humanity to the hazards of power politics, as there is an obvious disproportion between the lessons offered by history, the methods employed today and the dangers they imply for tomorrow.

Under these circumstances the great discoveries of our age offer no guarantee that our knowledge will not lead to the destruction of mankind.

With all this in mind we are bound to conclude that the new approach to the basic issues of our age must be commensurate with what is at stake. In the new international environments there is no room for a revival of the patterns of the past. Neither the treaties of Utrecht nor Paris, the Congress of Vienna nor the Versailles Treaty. Neither a Concert of Europe nor the division of the world into spheres of influence can today produce conditions of durable peace. Gone are the days when Alberoni, representing the Queen of Spain, could say at the Congress of Utrecht: "They cut and pare states and kingdoms as if they were Dutch cheeses." Nor can the practices of today be continued. There is no question of choice between the two; there is an imperative need to open a new road leading to the organization of international relations on the sound foundations of peaceful co-existence.

The notion is not new, it has frequently been put forward in the past when different and frequently conflicting interpretations were attached to it. Even today it is distorted and abused, surrounded by clouds and suspicion. It is neither a myth nor a hypothesis. Its meaning is clear and unequivocal, for it has to correspond to the needs of a world whose problems it is meant to solve. Three sign-posts should be placed at the entry to the new road: one pointing to the recognition of the realities of the contemporary world, the second to the peaceful solution of all conflicts and differences among states. The third contains a call to respect the rule of law in international relations.

The first means that the world as it is must be taken as the point of departure for all political design and practical action. This implies the realization that it is not shaped in accordance with one pattern; it has many shades and colours. No conjuring can do away with the existence of states of different political and economic systems. Part of that reality is the struggle of nations for a free and unfettered life; against misery and want, hardship and inequality, frequently the heritage of foreign domination, against discrimination whatever its origin or character. What used to be regarded as political *vacuum* controlled by outside powers exists no more. It has been filled by the inner power of nations claiming the right to control their destinies and those of the whole regions they inhabit.

Any attempt to ignore all these processes is tantamount to entering a "world of unreality and to pretend," as John Basset Moore once said, "that events which have happened have not in fact come to pass."

The second principle provides for the obligation of peaceful settlement of all disputes between states. The states concerned may retain their different

views and positions. This, however, should not prevent them from reaching agreements on practical solutions. Negotiations on all levels, bilateral and multilateral, within and without international organizations, form the instrument to be employed.

It goes without saying that states should also seek other means, like enquiry, mediation, conciliation, arbitration or judicial settlement.

The two principles mentioned do not exhaust what may be called a programme for co-existence. It is not suggested that we deal with it here and now. What we are concerned with, is the function of international law and of lawyers in it, the role they can and should play. This leads to the third element. As a matter of fact it embraces the two preceding ones. *Ex factis jus oritur*—hence the close link between the realities of life and the rule of law. On the other hand the outlawry of threats or use of force means that states are barred from resorting to any other but peaceful means in the process of resolving their differences. Hence the paramount importance of restoring or rather establishing a true rule of law in international relations. There is an urgent need to vindicate international law, prove its worth and reveal its real possibilities. At no time in history has it been more urgent than today.

Some may, of course, subscribe to the view of a brave admiral that: "International law is not law at all and incalculable harm has been done to our national security by those jurists and statesmen who have made the people believe it is," or share the argument that: "International law is non-existent or so weak that to lean on it is to court disaster." Others may seek comfort in the assertion that in this revolutionary age there is little room for international law. However, most of those familiar with the issues involved will be rather shocked by these sweeping judgements, as they would be when reading the view recently advanced that: "International law is a permanent incitement to hypocrisy." These claims of sceptics and cynics, devoid, as they are, of any scientific basis would merit little attention and no special consideration, if they were not so dangerous. This is why it was so apt when a very high authority stated that: "The conditions prevailing in the world of today give increased importance to the rule of international law, its strict and undeviating observance by all Governments in strengthening international peace, developing friendly and co-operative relations among nations."[3] Any serious discussion of the subject must begin with a clear delineation of the issues involved. It is not the existence or validity of international law which gives rise to doubts. It is a truism to state that it has a long history behind it, each of its stages having added new chapters enriching its substance. Thus it is obviously part and parcel of the realities of the world of today. Has it always been

[3] Resolution of the General Assembly of the United Nations, 1505/XV; confirmed by Resolution 1686/XVI.

effective? Certainly not. Why then the special challenge it faces today? An evaluation of the environment in which it is called upon to operate offers the reply. The world has shrunk, the quality of distance has changed, nations and states have become much closer to one another. Almost daily contact between them has become inevitable. All this has produced twofold effects, which may seem contradictory. We are witnessing a continuous growth of international law, both horizontal and vertical. Ever new branches appear on its tree. Ever new rules come into existence dealing with problems of trade and communication, modern technology and transport, cultural and scientific relations. It has entered our daily life to an extent that makes its operation in the solution of thousands of problems almost unnoticeable. We take it for granted.

On the other hand, the direct confrontation of states has increased the areas of their conflicting interests. The speed of contemporary life has contributed to the greater concentration of conflicts in time. The differences between East and West, metropolitan powers and dependent nations, wealth and poverty have become more acute. It suffices to look at the map of the world to see the social forces of to-day standing in direct confrontation, armed as they are with material and ideological weapons. The solution of important problems is long overdue. Most of them remain unresolved and further delay carries with it the danger of explosion. It is here that the law lags behind. The real issue we face is therefore how to make it more effective, how to speed up the operation of its mechanisms, to increase its impact on events and actions. From among the many aspects of the problem, we propose to deal with one or two only.

In order to cope with life, law is bound to breathe the oxygen of the facts of life. Too frequently law has been identified with what is old, outdated and obsolete. Hence it is no mere coincidence that since time immemorial the lawyer has been the favourite of the muse of satire, who has continued to visit him in both his study and his courtroom. His manners, dress and, indeed, work have been the subject of continuous ridicule. As such he has been the hero of great works of world literature. To recall only Cervantes and his Sancho Panza, Dickens and his case of Bordell v. Pickwick, Guy de Maupassant and his case of M. Hippolyte Lacour v. Madame Celeste Cesarine Luneau, Luigi Pirandello's court in Sicily, Anton Chekhov, Anatole France, Karel Čapek, or Rabelais, Zola and many others. Even the lawyer's language has become a jargon. So it was suggested that had Shakespeare been a lawyer, the famous soliloquy would have read: to be or the contrary. On the more serious side we were only recently reminded by an authority on the subject that "one of the reasons why lawyers were the most conservative section in the community was because they were brought up to believe that if there was a precedent for something it was all right but if there was not, it was all wrong."[4]

[4] The Lord Chancellor of England, House of Lords, 11 November 1964, "The Times," 12 November 1964.

What was useful yesterday does not suffice today. Yet, we are frequently confronted with attempts to petrify rules which have lost their *ratio existendi.* What is worse, it is sometimes positive law that does this. There could hardly be a stronger condemnation of a law that has outlived itself than the words of an English judge pronounced 197 years ago: "The state of slavery is of such nature that it is incapable of being introduced on any reasons, moral or political, but only by positive law, which preserves its force long after the reasons, occasion and time itself from whence it was ever created are erased from memory. It is so odious that nothing can support it but positive law."[5]

Similar and even much greater dangers, in view of the far reaching implications of international conflict, exist in international law. Outdated and obsolete principles, rules and treaties, cease to be effective, lose their impact on life; thus instead of preventing and solving conflicts, they may contribute to their emergence and make them more acute. That is why it is so important to make law reflect the changes life continuosly brings about, while retaining what is so important: confidence in its operation, reliance in its stability.

Hence the urgent need to dispel institutions and rules which are on their way out, to open the doors to new ones which evolve in the wake of changing events.

In view of the speedy transformations refered to earlier we find certain provisions of law becoming outdated within the lifetime of even one generation. We see this happening before our very eyes. An important illustration is offered by the Charter of the United Nations. The years that have passed since 1945 have brought about changes having an obvious bearing on the principles and provisions of this most important document. Some require amplification, others a new approach, still others which were in their cradles in 1945 have matured into new legal concepts. The refusal to take account of all this is one of the main sources of the crisis in the United Nations. Only by adapting it to the needs of 1967 and the years to follow can the document of 1945 become more effective and restore the Organization to the place that is its due. The same applies to other areas of international contacts and relations. This is one of the means of translating international law into the language of the realities of the world of today. This is no mere theoretical exercise for it is closely linked with the solution of practical problems. In fact, important progress has been made in bringing old established principles up to date and in shaping new ones. The notion of sovereignty has acquired a new dimension; the right of peoples freely to use and exploit their national "wealth and resources" has been declared "inherent in their sovereignty." Expanding relations create new forms of co--operation and even institutions. The principle of "self-determination" has

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[5] Lord Mansfield in the Somerset (The Negro Case), 20, Howell's State Trials, p. 82.

acquired a new meaning; a notion of neutrality, completely different from the traditional one, has come into being.

The deep concern with the growing armaments race has produced many constructive ideas and concepts which, once implemented, would arrest the dangerous trend. Some of them are acquiring the status of legal institutions. These are processes in which the international lawyer can play a part of no mean importance. His is the task of shaping instruments of mutual understanding. In doing so he should not only take account of the up-to-date developments of law, but should also do pioneering work by forging provisions creating new law. The substance of negotiations remains, of course, within the province of politics or economics, as the case may be. But their background is law and their outcome takes the form of legal instruments. Hence the important role of the lawyer in them. By his advice, by the formulae he offers, the text he drafts, he can cause the instruments of diplomacy to be used with subtlety, their priorities adapted to the situation he confronts. Negotiations on all levels should be so employed as never to exhaust the possibilities of peaceful settlement of a controversial issue. Guiding the negotiator, he may influence his judgment by recommending remedies which would take account of the real relationship between law and fact, warn him of the risks involved should the law be disregarded.

International organizations offer further possibilities. To mention only the analysis of the atmosphere of the deliberations and the results of the votes taken. Apart from the other consequences they produce, their importance lies in the numerical expression they give to tendencies and changes in relations among states. Voting results are concrete facts which reflect the changing face of the political situation, a political phenomenon on the threshold of negotiations and decisions. They therefore constitute precious raw material, a basis for the evaluation of the possibility of making a step forward towards the creation of a new rule or towards a new interpretation of an existing rule. This also applies to initiatives and proposals prepared or actions taken in other areas. A proper analysis of facts and the law may make a state discontinue a line of policy or refrain from actions which are detached from reality and therefore do not take into account their possible repercussions. This is how tension and crisis can be prevented.

Through the education of those active in international affairs, what is called metaphysics in politics, i.e. the belief that they cannot be changed will gradually be destroyed. If the importance of law is impressed upon politicians it will cease to be the poor relation of politics. To attain this objective a mechanical approach does not suffice. Already Gentilis revolted against *nuda recitatio*. The international lawyer cannot be regarded as a mere technician or narrow practitioner supplying the tools. He must shape them, too. In so doing he cannot remain neutral when confronted with the vital issues which face humanity. Nor can he maintain, to use the words of a great philosopher of our age, "a mood

of abstract contemplation in a world so perilous." He must be committed to the cause of progress, co-operation and peace.

The road leading to a universal recognition that international law is the guardian of the interests of all states and nations is not an easy one. On the one hand governments must be made aware that the benefits which may result from violations of the rights of others are illusory or, at best, short-lived. That in the long run states will derive much more advantage from respecting law and recognizing the vital rights of others. Reciprocity is the best guarantee of one's own rights. In fact, it is already producing effects in many fields of international relations. On the other hand it is necessary to create an atmosphere of confidence in the law and its mechanisms. They have to be convinced that the law is not a bulwark of the past, and that when entrusting their problems to international bodies or organs they can rely on their decisions.

With these processes maturing, simultaneous action in two directions is called for: one leading from the codification of the important fields of international law to the solution of practical issues, the other from arrangements settling individual controversial problems of immediate interest to wider, more general agreements. In the first, important progress can be recorded. From the Law of the Sea through the Law of Diplomatic Relations and Consular Relations we are about to move to the Law of Treaties. Much remains to be done with regard to the law of the United Nations and the wider field of those principles which constitute the basis of the organization, thus embracing the key issues of the law of coexistence. As to the other, much more attention should be paid to the need for backing solutions *ad casum* by more effective legal machinery. Some have broken down and have led to a revival of conflict, some others remain in suspense.

Even more important are the possibilities of applying specific solutions which have proved their worth to similar situations. Here is a field that has not been adequately explored.

Thus, in developing the edifice of law one should move from the general to the specific and *vice versa*, downwards and upwards. In the process, international law will meet the requirements of life to an ever greater degree it will do so with open eyes. One may therefore claim that blindfolded Themis can no more remain its protector. While educating office-holders and laymen, it will acquire the wide backing of public opinion. Canning once called it "the fatal artillery of popular excitation." Almost a hundred years later the Permanent Court of Arbitration qualified "appeal to public opinion" as one of "ordinary sanctions of international law." Today it is a powerful force, the impact of which may be decisive in securing compliance with its rules tomorrow.

Here, then, are some reflections and suggestions on the subject of how to make international law acquire the place due to it in international relations. They are neither exhaustive nor do they offer anything particularly new. Their sole purpose is to make mankind subscribe to the rule of law, to draw attention to the urgency of the issue, imposed by the dangers inherent in the present international situation of an explosive world armed with nuclear weapons.

LEGAL PRINCIPLES OF PEACEFUL CO-EXISTENCE AND THEIR CODIFICATION

by REMIGIUSZ BIERZANEK

1. *The Historical Type of Contemporary International Law*

It is truism to say that international law is valid in a specific system of international relations and that its characteristic features and development are directly related to, and dependent on, the existing system which was shaped in the course of historical development. It would be equally true to assert that the times which we live in are a period of deep changes in the traditional pattern of international relations and that those changes—of necessity—will, by their very nature, influence further development of international law. Irrespective of whether in evaluating the present state of international law it is called "crisis of international law" with "particularly disquieting symptoms"—although this is "la crise d'un certain droit international formé dans une société des Etats qui n'a plus beaucoup de ressemblance avec celle où nous vivons désormais," or in other words "la crise d'adaptation,"[1] the crisis presented even sometimes with extreme pessimism, as "une partie, une facette de la crise mondiale totale,"[2] or whether it will be called optimistically "une crise de croissance,"[3] or whether one simply observes that "in the last half-century, the nature and structure of international society has undergone fundamental transformations which, though far from being completed, have already profoundly modified the substance and structure of International Law"[4]—one fact is indisputable: in its historical development the international law enters into a new phase of existence, in which its characteristic features and the function performed in international community will differ

[1] M. VIRALLY, *Le droit international en question*, "Archives de Philosophie du Droit," 1963, pp. 146 and 162.

[2] J. KUNZ, *La crise et les transformations du droit des gens*, "Recueil des Cours," 88, 1955, p. 9.

[3] Cf. H. ROBIN, *Les principes de droit international public*, "Recueil des Cours," 77, 1950, p. 314: "Le droit des gens traverse ce que d'aucuns appellent une crise de croissance, à notre avis, on peut même parler d'une réforme de structure."

[4] C. W. JENKS in the preface to W. FRIEDMAN, *The Changing Structure of International Law*, London 1964.

in many respects from those of the traditional, so-called "classical" system of international law.

It seems that despite the incontestable character of those assertions, there is a lack of sufficiently lively discussion on the trends of development of international law, on the possibilities and prospects of development of this law on the basis of transformations which have been taking place in contemporary world, during the life-time of our generation. In particular it would seem useful and proper to attempt a legal and historical analysis of the pattern of contemporary world with a view of defining the needs and possibilities for the new trends of development of international law which would conform to the realities of the coming epoch and with a view of establishing legal implications of the changes now taking place in contemporary world.

What should be the "historical type" of international law of the second half of the 20th century? The concept of the "historical type of international law" is not entirely alien to the jurisprudence. An eminenent historian of law sir Paul Vinogradoff in his treatise published after the World War I[5] has proposed the division of the history of international law into five periods corresponding to the different types of social organizations in entities which were partners of international co-operation (tribe, town, church, contractual organizations, collectivist organizations). Professor Vinogradoff stressed the need of treating international law as a system closely linked with, and corresponding to, a given historical period; he maintained that striving for conciseness and order belongs to the substance of the legal method, that great legal constructions take the form of a system and that sometimes one can even perceive that the requirements of practical life yield to the logical compactness[6].

The criterion which is to become the *fundamentum divisionis* between the traditional and the new, emerging system of international law, is certainly much more complex than was suggested by Professor Vinogradoff. Besides the changes in the economic and social structures of states forming international community—changes which are by no means uniform in all countries or groups of countries—there occurred most essential changes in the character of international relations: after the World War II a new pattern of international relations came into being, with the participation of the capitalist states, the socialist states and a great number of new nations which emerged as a result of the liquidation of the colonial system.[7] On the other hand the new technology

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[5] P. VINOGRADOFF, *Historical Types of International Law*, Leyden 1923.

[6] *Ibid.*, pp. 4 and 5.

[7] B.V.A. ROLLING, *International Law in an Expanded World*, Amsterdam 1960, p. 46, rightly stresses: "A progressive development of international law would be needed if the international community had expanded into a world community. But the emergence of the Afro-Asian world dramatically emphasizes the need and accelerates the process." R. HIGGINS likewise (*The Development of International Law through Political Organs of the United Nations*, London 1963, p. 6)

of warfare and in particular the invention of nuclear weapons caused that the war in our times ceased to be an instrument of international policy and a means for solving international disputes, that for the first time in history man is confronted with the problem of "collective survival" which is not "the old problem of life and death—it is qualitatively different."[8] The consciousness of the emergence of a new pattern of international relations as well as of the need to base those relations on the legal norms and principles, to a considerable extent different from the tenets of the classic international law is gaining ground and reaches not only international lawyers,[9] but also politicians participating actively in the development of international relations.

2. *Views on the Trends of Development of International Law*

What are the prospects of development of international law in the second half of our century? What are to be the characteristic features of international law in the nearest future as compared with its traditional concepts? Like in many other problems concerning the future, also in this field the opinions differ widely. Generally speaking, in the West there can be discerned three groups of opinions in this respect:

a) The view that the traditional international law does not require changes of a fundamental character. Its adherents point to the dangers inherent in departing from the principles of the classic international law. Thus for example Baty was of the opinion that the classical international law was the only instrument capable of saving the world from anarchy.[10] The above opinion does not signify by any means that its adherents considered it possible or useful to stop the development of law. They are of the opinion that this law is developing at present, as in any other period, through the establishment of new norms and that there is no need to introduce any fundamental changes in that system or that the existing system does not constitute any obstacle to the introduction within its framework of necessary political changes. This conservative approach has many adherents among international lawyers.[11]

says, "that developments in international law have been accelerated by the emergence of new Afro-Asian states, whose common expectations do not always conform to traditional law."

[8] Cf. J. SOMMERVILLE, *The East-West Ideological Rift*, "Coexistence," 1964, No. 1, p. 7.

[9] A. ALVAREZ (*Le Droit international nouveau*, Paris 1959, p. 7) characterizes the present changes in the international law in the following, no uncertain terms: "Le droit international traditionnel, on designe, se trouve modifié non seulement dans ses details, mais aussi et surtout dans ses données fondamentales, dans sa structure bien plus qu'il ne l'avait été par le cataclysme social qui fut la Révolution Française de 1789 qui a, presque toujours, été présentée comme marquant une nouvelle époque de ce Droit".

[10] T. BATY, *International Law in Twilight*, Tokyo 1954, p. 1.

[11] "To the majority of writers and exponents of International Law"—as remarks JENKS (*loc. cit.*)—"contemporary changes appear as extensions rather than as basic challenges to the structure of international law and relations," what the author explains by the fact, that "the

b) The view according to which—because of the existence of states with different political systems and opposed ideologies and also because of deep differences of opinions on international law and its functions in the world community—there cannot exist a system of universal international law but only systems of regional international law within particular ideological blocs. The adherents of that view accept the premise that for the law to be binding it is necessary that there exists a definite quantum of uniform, commonly held ideological tenets. Thus for example Leibholz, after presentation of the present international law as being in "full crisis" in the course of which "the traditional structure of that law was shaken in its foundations because of the upheavals and events in this century," states in conclusion that "before the political and ideological homogeneity will materialize, before one ideology will bind again the members of the community of nations and before the great powers be ready to give up their sovereignty—we shall not be able to speak about legal community which would merit that name.[12] According to Wilk the post-war development of international relations "carried to its extreme... could break up the universal system of International Law, as it has come down to us, into regional or other partial systems, with no international legal rules to govern the actions of states across the frontiers of various systems... the universal validity of International Law appears no longer as an existing phaenomenon that may be traced back to its origins and on to its essential completion, but is a debatable assumption that stands to be justified or rejected in the light of fresh examination."[13] M.S. McDougal states emphatically that "the belief in a universal international law... is today largely an illusion."[14] According to other authors—because of the existence of the opposed ideological blocs—the deliberations on the subject of an international legal order are irrelevant till the moment of elimination of the ideological differences: thus according to Northrop—"it becomes imperative... that less attention be paid momentarily to the goal of world order and that greater attention be given to the ideological differences which present obstacles on the way to that goal."[15]

c) The view according to which the present system of international law, as no longer answering the needs of our times, should give way to a system of

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science of international law is, however, still predominantly based on the system of international relations as it developed from the time of Grotius and Gentili to the beginning of the twentieth century."

[12] G. LEIBHOLZ, *Zur gegenwärtigen Lage des Völkerrechts*, "Archiv des Völkerrechts," I, pp. 415 and 423.

[13] K. WILK, *International Law and Global Ideological Conflict: Reflection on the Universality of International Law*, AJIL 1951, pp. 648 and 669.

[14] Cf. ILA Report, 1958, p. 438.

[15] F.S.C. NORTHROP in preface to the book *Ideological Differences and World Order*, New Haven 1963, p. V.

"world law" proper for the pattern of international relations established on the ruins of sovereign states. This new system would signify the establishment of a "world government", being according to our present notions—not so much an international law but rather the constitutional law of a world state. According to the advocates of that view only such deep transformation of the pattern of international relations is capable of safeguarding a lasting peace, necessary in the contemporary world.

Among the adherents of the "world government" one of the most consistent attitude is taken by G. Clark and L. Sohn, the authors of the book *World Peace through Law* which contains ready projects of the revision of the UN Charter aimed at transformation of the United Nations into a world state, equipped with world judicial authority, permanent world police and parliament in which states would be represented proportionately to the size of their population. The international law becomes here a world law and its rules "should apply to all individual persons in the world as well as to the nations."[16] Into this group of opinions should be included the views of the authors who, while avoiding the extremism of the Harvard international lawyers, present the now binding international law as a transitory stage, preceding immediately the coming of a world state. Jenks in his work under the characteristic title *The Common Law of Mankind* is of the opinion that as a result of deep transformation and dramatic changes in the world political scene "international law can no longer be reasonably presented within the framework of the classical exposition of international law as the law governing the relations between States, but must be regarded as the common law of mankind in an early stage of its development."[17] According to Dahm—"so ist das Völkerrecht der Gegenwart die Erscheinungsform einer Übergangslage—jenseits des Nationalstaats und diesseits des Weltstaats."[18]

3. *Peaceful Co-existence as Anti-thesis of the Abovementioned Views*

The concept of peaceful co-existence is to a certain extent an anti-thesis of all the above mentioned groups of opinions.

It is first of all an anti-thesis of opinions that, taking into consideration the deep and basic differences on social-economic systems and no less basic ideological differences, international law cannot exist and develop. Differences of opinion on the substance of law and in its functions do not at all mean that there can be no legal norms binding upon States and recognized as such by those States. "So States—as Professor Tunkin says[19]—may profoundly disagree

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[16] G. CLARK and L. SOHN, *World Peace through Law*, Cambridge Mass. 1958, p. XIf.

[17] C. W. JENKS, *The Common Law of Mankind*, London 1958, p. XI.

[18] G. DAHM, *Völkerrecht*, Stuttgart 1958, vol. I, p. 3.

[19] G. I. TUNKIN, *Co-existence and International Law*, "Recueil des Cours," 95, 1958, p. 59.

as to the nature of norms of international law, but this disagreement does not create an insurmountable obstacle to reaching an agreement relating to the acceptance of specific rules and norms of international law." At the other place the same author says that "it is not necessary that States reach an agreement on the nature of international law, its social function... its is important, however, that they come to an understanding as to its specific rules and norms."[20] P. Bastid states likewise that in relations between the East and West "despite their diametrically opposed views both camps recognize the existence of international law binding upon the states; it is not important that they have different views on this law... I do not think that there is any need to differentiate between the legal and the moral aspect of the problems. None of the two groups mentioned here can aspire at imposing upon the other side its views on the social ethics. It suffices that the two join in observing the rule „*pacta sunt servanda*" which is the only principle of elementary morality and the basis of international law. None of the two partners is negating this formula."[21]

The concept of peaceful co-existence—on the other hand—runs counter to the opinion that the creation of a "world government" is realistic at the present moment and that only the establishment of such a government meets the present requirements for safeguarding peace. To achieve a "world government" with existing basic differences in political and economic systems it would be necessary to introduce first certain uniformity, at least in the basic political principles; and it does not seem possible to expect any of the two camps to renounce the accepted principles of their political and social systems. The establishment of a "world governments" presupposes also, as does any other form of integration, the existence of some ideological unity, which would be of course difficult to achieve between the opposed ideological systems. If the now existing ideological differences are often regarded as an obstacle to a more intensive international co-operation in the present time, it would be difficult to suggest overcoming that obstacle by creating all at once a new structure of a world state which to a much greater extent would require ideological uniformity. The experience of the last two decades shows that from the two types of international co-operation—co-existence and integration—"cette dernière n'apparaît qu'exceptionnellement: ni l'évolution du droit écrit—présentée ici à l'aide d'une méthode comparative—ni le nombre limité des Etats liés par l'integration n'autorisent à prévoir que le droit international suivra une évolution en ce sens."[22]

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[20] G. I. TUNKIN, *Voprosy teoriy mezhdunarodnogo prava*, Moscow 1962, p. 7.

[21] P. BASTID, *Les principes juridiques et moraux de la coexistence*, "Bulletin Interparlementaire," 1955, No. 1, pp. 3 and 4.

[22] C. BEREZOWSKI, *Coexistence et intégration — deux formes de la coopération internationale*, "Annuaire Polonais des Affaires Internationales," 1959—1960, p. 63. Professor Berezowski defines co-operation of an integrationist type as "une coopération qui exerce une influence essentielle sur la structure intérieure des Etats coopérants... Le trait caractéristique de la coopération—in-

The concept of peaceful co-existence avoids underestimating the difficulties which are bound to accompany all attempts at world co-operation of an integrationist type in a universe with such big disparities existing in the levels of economic and cultural development. But on the other hand it does not over-estimate the influence of ideological differences on the development of international co-operation. These differences no doubt constitute an obstacle to the development of this co-operation in various fields, preventing closer association between states with different political and social systems into organisms of an intergrationist type, but they are not an insurmountable obstacle to an international co-operation, especially in the fields in which the states from different ideological blocs are equally interested, for example the safeguarding of peace which becomes a necessary "organizational form of our scientific-technological century" or the development of economic co-operation on the basis of mutual benefits.

And finally, the conception of peaceful co-existence does not by any means signify the acceptance of the conservative view that international law does not require changes of a basic character and that the principles of that law established in previous historical periods constitute a fully satisfactory basis for solving the most important problems of our times. The conception of peaceful co-existence is a dynamic one, linked closely with the contemporary transformations which resulted in the establishment of socialist states and liquidation of colonialism in Asia and Africa, events which bestowed upon international community a different character than the one it had before.

4. *Historical Background of Peaceful Co-existence*

The conception of peaceful co-existence of states with different political and social systems as a guiding line of foreign policy was born in definite historical conditions, when the first socialist state was established after the victory of the October Revolution and there arose the problem of settling relations between that state and the capitalist countries.[23] The Soviet Government, at that time, was putting forward proposals of peaceful relations with all countries and Lenin opposed the views that the interests of international revolution allegedly did not allow the Soviet state to maintain peaceful relations with imperialist powers.[24]

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tégration est un amoindrissement du rôle de la souveraineté qui peut aller jusqu'à la limitation, voire violation de celle-ci." On the other hand co-operation of the coexistentionist type was defined as "une coopération qui n'exerce d'influence décisive ni sur la structure intérieure des Etats coopérants, ni sur la nature de leurs relations réciproques." *Ibid.*, pp. 45 and 54.

[23] Cf. G.P. ZADOROZHNY, *Mirnoye sosushchestvovanye i mezdhdunarodnoye pravo*, Moscow 1964, p. 135; L. MATES, *Sosushchestvovanye eto nie status quo*, "Mezhdunarodnaya politika," 5 November 1963, p. 13.

[24] Cf. V. I. LENIN, *Dzieła* (*Works*), Warsaw 1954, vol. 27, p. 58.

In the course od discussions in recent years attention was drawn to the historical beginnings of peaceful co-existence in the previous historical periods viz. in the relations between the Christian and the Muslim worlds at the end of the Middle Ages and between the Catholic and Protestant countries during Reformation.[25] It was recalled also that the term "co-existence" was used in the past both in international jurisprudence[26] and in the practice of the courts.[27]

There is no doubt that the concept of peaceful co-existence assumed particular importance and weight in international relations after World War II, in a highly differentiated international community composed of the capitalist and socialist states and the countries of so-called "third world". The importance of this concept is particulary clear against the historical background of the "cold war." For it signified that the cold war which threatened to degenerate in a hot war or more specifically—in the second half of the 20th century—into a nuclear conflict with all its disastrous consequences, could be substituted by co-operation of countries with different political and economic systems. The opposition of peaceful co-existence to the "cold war" does not denote only the sequence of events, as it is commonly the case with succeeding historical epochs, but amounts to the opposition of entirely different concepts.[28]

In its substance the concept of peaceful co-existence reflected, on the one hand, the present pattern of international relations, characterized by the existence of states with different political systems and of a large number of new states which did not want to accept without reservations the "historic stock" of the traditional international law, and on the other—it met the requirements of the contemporary world with its growing interdependence and, in particular, the need for safeguarding peace and international security.

In the 1950's the conception of peaceful co-existence found a broad response in the international political life, in several scores of international documents, e.g. treaties, declarations and communiqués, multilateral and unilateral acts. Peaceful co-existence became also subject of lively discussion both political and legal; as far as the latter was concerned we should mention particularly valuable work done by ILA which, beginning with its Dubrovnik Congress in 1957, has been organizing discussions on the legal aspects of co-existence.

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[25] Cf. M. TOSCANO, *Coexistence et histoire des religions*, "Politique étrangère," 1955, No. 5, p. 591; S. BASTID, "Politique étrangère," 1955, No. 1, p. 13; M. BARTOS, ILA Report, 1956, p. 19.

[26] Cf. ILA Report, 1960, p. 348.

[27] Cf. the finding by the Permanent Court of International Justice that the rules of international law exist "in order to regulate the relations between these coexisting communities." Publ. de la CPJI, serie A.

[28] L. RADOVANOVIC, *La codification des principes de la co-existence*, "Revue de la politique internationale," 20 February 1965: "The basic idea and the initial thought which gave rise to the doctrine of active peaceful coexistence—says Radovanovic—was born, causally and chronologically, in the period of the cold war, when the opposing social systems were clashing with

5. *The Contents of the Legal Principles of Peaceful Co-existence*

In the discussion on peaceful co-existence it was maintained, as one of the main arguments against it, that co-existence means a passive form of international co-operation which is not sufficient in contemporary world, with its requirements, and that in consequence modern world needs "something more than co-existence."[29]

The advocates of the conception of peaceful co-existence answered this criticism by stressing that peaceful co-existence does not have to be at all "passive and static", that the experience of World War II points to the possibility of a more active and intensive co-operation among states with different political systems, which fought together against the Axis powers, and that it was only during the period of the cold war that co-operation among those states assumed a "passive" character.[30] The Yugoslav lawyers (whose contribution to the discussion on peaceful co-existence is considerable) are using in their writings the term of "active peaceful co-existence", stressing that only such co-existence offers the possibility of solving key problems of contemporary world.[31] Sometimes the adjective "constructive"[32] or "active and constructive"[33] is being added to the term peaceful co-existence. There is not the slightest doubt that also the followers of peaceful co-existence, while using this term without adjectives, conceive peaceful co-existence as denoting an all-round active international co-operation. Prof. Tunkin describes its substance in the following words: "The principle of peaceful co-existence goes far beyond the principle of non-aggression: it requires that States not only should refrain from the threat or use of force in international relations, but also from pursuing policy which might eventually lead to war."[34] Professors Durdenevski and Lazarev stress that the "principle of peaceful co-existence envisages active, constructive action on the part of the States."[35] They say at the same time that peaceful

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one another. Although those clashes were neither the only cause nor the only source of the cold war... they represented its most important element. Because of the ideological solidarity, the consequences of the conflict and the existence of all other differences reached beyond the frontiers of the countries directly concerned, helping to erect barriers which prevented the development of peaceful relations and co-operation among other nations."

[29] Cf. L. FOCSANEAU, *Les "cinq principes" de coexistence et le droit international*, "Annuaire Français de Droit International," 1956, p. 150, and C. MAYHEW, *Co-existence plus. A positive approach to world peace*, London 1962, p. 1; G. KENNAN, *Weiter als zur Koexistenz*, "Aussenpolitik", 1956, No. 8. p. 481.

[30] G.P. ZADOROYHNY, *Mirnoye sosushchestvovanye*, p. 114ff.

[31] Cf. the speech by professor Bartos—ILA Report 1956, p. 34.

[32] Cf. the speech by Minister A. Rapacki, "Trybuna Ludu", 18 February 1965.

[33] Cf. A. ANGELOPOULOS, *L'atome unira-t-il le monde*, Paris 1956, p. 192.

[34] G. I. TUNKIN, *Co-existence and International Law*, p. 68.

[35] V. N. DURDENEVSKI and M. I. LAZAREV, *Pyat principov sosushchestvovanya*, Moscow 1957, s. 85.

co-existence "has been always conceived by the Soviet Union as something more than peace, than the absence of war, although peace and renunciation of the solution of disputes by means of a war are key elements in the notion of peaceful co-existence."[36]

Many Western authors criticize the term "co-existence" either because it implies only "existence side by side" and consequently a passive state of affairs[37] or because it is a political term and not a legal one.[38] Sometimes the prospects of peaceful co-existence after the period of the cold war are presented in a roundabout way, with a conscious tendency to omit this name, denoting a new phase.[39] This reluctant attitude of many politicians and lawyers in the West towards the term "peaceful co-existence" found expression i.a. in the resolution of the UN General Assembly on the codification of the principles of peaceful co-existence, which it called "the principles of peaceful relations and co-operation among states."[40]

In fact—the substance and the scope of international co-operation within the framework of peaceful co-existence stem not so much from the term accepted for denoting this type of co-operation, but from the very concept of international co-operation between the states with different political and economic systems. On the one hand, this concept provides that the growth of international interdependence and, in particular, the inability to solve disputes in the atomic era by war requires a much closer international co-operation than in the preceding periods. On the other hand, the same concept fixes definite limits

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[36] G. I. TUNKIN, *Voprosy teorii...*, p. 10.

[37] J. Hazard in his statement at the ILA Congress in New York in 1958 maintained that the concept of peaceful co-existence, in English anyway, is a somewhat negative one, suggesting a condition in which essentially hostile forces are required by circumstances to refrain from fighting (ILA Report, p. 417).

[38] Cf. L. FOCSANEAU, *Les cinq principes de coexistence et le droit international*, "Annuaire Français de Droit International", 1956, p. 165; Z. NAGORSKI—ILA Report 1958, p. 423. At the ILA Congress at Dubrovnik—as reports M. BARTOS (*Le développement théorique de la teneur juridique de la coexistence*, "Revue de la politique internationale," 20 October 1964)—"many representatives doubted that this was a legal term and attempted to demonstrate that it was a purely political notion... At present it would be difficult to deny the legal character of the notion of co-existence. It found its way into the domain of law... In Tokyo the resolution on coexistence was adopted by quasi-unanimity (with no votes against and 3 abstentions)."

[39] Thus for example a writer in the "Economist" (14 May 1965, p. 619) states: "By 1963 it became clear that both East and West were being affected by new forces: and these forces have since produced another phase in world affairs, a phase that is not the old cold war but still lacks its name of its own... The new shape of things is not altogether discouraging."

[40] Some Western authors try to differentiate between the wording used by the General Assembly and the principles of peaceful co-existence. Mc WHINNEY (*Changing International Law, Methods and Objectives in the Era of the Soviet-Western detente*, AJIL, January 1965, p. 1) considers the term "friendly relations and co-operation among States" as "the Western euphemism" of peaceful co-existence.

of international co-operation in certain fields. These fields cover the ideological problems and questions connected with the basic tenets of political and economic systems.[41] In those fields international co-operation may develop within particular groups of states, representing particular ideological affinities or having similar political and economic systems, but not between states with opposed ideologies as well as political and economic systems.

There are no basic obstacles for the international co-operation, along the lines of peaceful co-existence, to extend to a lesser or greater degree, also to all other fields. In the first place one should mention here international co-operation in safeguarding peace: a failure in this respect, at a time of nuclear armaments, makes problematic not only the possibility of co-operation in other fields but even the very existence of mankind and nations which are the subjects of international co-operation. Special importance of co-operation in safeguarding international security was recognized already in the documents of the pre-atomic era viz. in the United Nations Charter, through establishing of the Security Council and equipping it with very broad competences, as compared with those of other UN organs. In the atomic era there exists no doubt the primary need for closest and most effective international co-operation in the maintenance of peace. Small wonder therefore that the majority of the principles of peaceful co-existence imposes upon states certain obligations in this respect (prohibition of the use of force in international relations, prohibition of intervention, the obligation to settle disputes by peaceful means). The transition from an armed peace to the "world without arms" requires closer co-operation of states and their submission to a strict international control with respect to international obligations assumed in that field.

In this context international economic co-operation occupies also an important place, first because as a result of the extended international division of labour common economic interests and mutual interdependence of the partners of this co-operation grow also. Second, because economic co-operation in its psychological consequences favours international détente. This fact was observed by Montesqieu in words on that subject which became already almost classic: "Le commerce guérit les préjudices et c'est presqu'une règle générale que partout où il y a de moeurs douces il y a du commerce et que partout où il y a du commerce il y a de moeurs douces."[42] In the period of the "cold war" the trade turnover between countries with different political and economic systems decreas-

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[41] S. VINOGRADOV (*La base générale de la politique extérieure de l'Union Soviétique...*, "L'Esprit," March 1960, p. 388) wrote on this subject: "Lorsqu'ils parlent de la nécessité des concessions mutuelles, il va de soi que les Soviétiques n'envisagent pas des concessions sur les questions sociales et idéologiques fondamentales qui nous séparent... Cependant, comme le prouve une analyse minutieuse, ce ne sont nullement des problèmes idéologiques qui sont à la base de la majorité des problèmes qui engendrent le danger de guerre et la tension internationale."

[42] Cf. Ch. MONTESQUIEU, *L'Esprit des Lois*, XX.

ed considerably and only in recent years it is showing an upward trend.[43] The growth of this turnover requires the overcoming of technical and organizational obstacles, the application of somewhat different methods[44] and also some courage in eliminating barriers of psychological nature.[45]

Neither the ideological unity nor the similarity of political and economic systems constitute an essential condition for development of international co-operation in the fields of science and culture. The differences existing in this respect among states do not represent an obstacle preventing a broad exchange of persons and ideas, since the exchange of ideas by no means excludes the exchange of opposing views. Those differences do not constitute also an insurmountable obstacle in the field of the protection of human rights. Co-operation in this field was mentioned among the purposes of the United Nations in Article 1 of the Charter. Although the concept of human rights is different in the light of different ideologies and various rights which are due to individuals may be differently accentuated, but in none of the existing political and economic systems—if they are not based upon racial or national discrimination—are the elements which would contradict the idea of concluding international agreements, defining the rights of individual in particular fields of political, social and economic endeavour as well as envisaging definite implications in case of nonfulfilment by the states of their obligations contracted in this respect.[46]

It is worthwhile to point to another causal relationship between the concept of peaceful co-existence and the protection of human rights. The stabilization of international co-operation on the basis of peaceful co-existence would bring about a relaxation in international relations and the cessation of the armaments race; as a result of this in all countries there would come about much more favourable conditions for extending the rights of citizens both in the political, social and economic fields.

A question may arise whether a broad and effective international co-operation between states with opposing ideologies does not lead to any basic colli-

[43] Cf. I. VAJDA, *The Shifting Background of World Trade*, "Coexistence," 1964, No. 1, p. 39.

[44] R. BIERZANEK, *Les aspects juridiques de la coopération économique entre les pays à systèmes politiques et économiques différents*, "Annuaire de l'A.A.A.," 1964, p. 51.

[45] I. VAJDA, *op. cit.*, p. 44.

[46] G.P. ZADOROZHNY, *Mirnoye sosushchestvovanye...*, pp. 144—145, discusses broadly the relations between the protection of human rights and peaceful co-existence. He stresses that "the respect for human rights and basic freedoms is a necessary condition of a really peaceful co-existence and for the stipulations of the Universal Declaration of Human Rights to become the observed legal norms it is necessary to transform them into articles of an international agreement and making that the states signed and ratified that agreement." The same author states further that "without equality and freedom of all people there cannot be a true equality of states and nations" and although "individual is not a subject of international law since he cannot possess sovereignty..., he can be only the subject of international relations, he is the beneficiary of these or those international rights and obligations established for him by the subjects of international law on the basis of these or those international agreements or understandings."

sion between the readiness to co-operate with ideological antagonists and the continued deep conviction that only one's own way of development is the correct one. In the period of the cold war it was repeatedly stressed, with some exaggeration, that a broad basis of commonly held tenets was a prerequisite condition for an effective international co-operation. In the West certain international lawyers, clinging to the old international law established and binding in the "family of Christian states", were maintaining that in view of the existence of the opposing ideological blocs the possibilities for development of international law were very limited. They said so despite the fact that such assertions, in the presently existing universal international community, lead to the negation of the role which the international law could and should play in organizing the co-existence of the opposing ideological systems.

In the socialist countries the opinions were heard limiting the role of international law in relations between states with differing political systems, and drawing a mechanic link between international law and the economic basis: if we were to assume that the rules of law can exist and develop only in conjuction with one basis, then, with the existence of different bases—the socialist and the capitalist ones—there was but a small scope of validity for the rules of international law binding in relations between states with differing economic systems. These opinions, leading to the limitation of the role of international law precisely at a time when, in view of the development of weapons of mass destruction and the growing interdependence of states, international law assumed new importance, justly met with strong criticism.

The concept of peaceful co-existence seems to involve the necessity of a different justification of the existence and validity of international law than was the case at a time of international community conceived as a "Christian family" or as a regional, ideological and cultural commonwealth. For it is necessary to accept as a fact that in the contemporary world there exist ideological contradictions which are irreconciliable. On the basis of that fact co-operation can take place after recognition of the equal right of each ideological system to existence and to presentation of its views which by no means involves the acceptance of ethical or philosophical relativism. In such circumstances international law aims at ensuring peaceful competition and organization of co-operation between adversaries in all fields where, in spite of ideological differences, there are common interests and common attitudes.[47] Already at the beginning of the broad discussion by lawyers on the conception of peaceful co-existence Professor Tunkin came out against the opinion of some Western lawyers accepting the premise that the condition for existence of international law is a certain

[47] The article by Professor J. SOMERVILLE, *The East-West Ideological Rift*, "Coexistence," 1964, No. 1, p. 7f., contains interesting deliberations on the subject of co-operation between the opposing ideological camps. The author makes i.a. an analogy between the contemporary international community and the churches co-operating within Interfaith Council in the United States.

degree of common understanding of values and deducting on that basis a conclusion that the now existing differences between the states in social and political systems "have destroyed all standards according to which the states may reach agreements and indeed do reach them."[48]

Professor L. Dewart of the Toronto University makes an interesting attempt at a philosophical justification of peaceful co-existence in his analysis of the Papal encyclica *Pacem in Terris*. Quoting the words of the encyclica "let men give serious thought... let them study the problem until they find that point of agreement from which it would be possible to commence to go forward towards accords that will be sincere, lasting and fruitful," he rightly stresses that "the Pope's doctrine would be deficient in common sense, if it pretended to mediate a dispute caused by the opposition of ideologies by sententionally declaring that the conflict could be resolved if only those who are ideologically mistaken, should agree to recognize the truth." He goes on to state that under present conditions the measure of international justice "cannot be the satisfaction of requirements of one side, or of the other, or even of both, but only the progressive satisfaction of the common, universal requirements of mankind" and that "if in the order of natural law justice cannot be either identified with or deductible from the ideology of either side, then justice can be only experimentally derived from the essential requirements of human nature."[49]

6. *The Need for the Concretization of the Principles of Peaceful Co-existence*

The conception of peaceful co-existence is a general directive in the field of international relations and international law, answering the needs of the modern international community. It is—as Prof. Tunkin aptly put it—"a certain kind of guiding principle of the modern international law."[50] Both in the concept of Pancha Shila and in other formulations it contains a number of very general principles which should guide the actions of states in nuclear age. This state of affairs is not satisfactory especially for lawyers who would like to transform the principles of co-existence into legal norms and rules binding upon states and applicable in definite international situations.

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[48] G. I. TUNKIN, *Mirnoye sosushchestvovanye i mezhdunarodnoye pravo*, "Sovetskoye Gosudarstvo i Pravo," 1956, No. 7, p. 4.

[49] L. DEWART, *Peaceful Co-existence in John XXIII's "Pacem in Terris,"* "Coexistence," 1964, No. 1, p. 37. Prof. R. SCHLESINGER gave the following commentary to Prof. Dewart's deliberations: "Professor Dewart's contribution to this issue is important as an illustration of the extent to which such recognition of the common humanitarian ground, standing beyond the differences of the diverse ideologies, makes headway even in a community with so strong an inheritance of dogma as the Roman Catholic Church" (*op. cit.*, p. 53).

[50] G. I. TUNKIN, *Le droit international de la coexistence pacifique*, Paris 1964, p. 414.

The need for the elaboration of the principles of peaceful co-existence is generally recognized. While some of the authors advance it as criticism against the conception of peaceful co-existence, as a proof of its small practical usefulness,[51] the advocates of that conception stress this need simply as a task to be done.[52]

On the initiative of the Yugoslav lawyers the International Law Association, at its Dubrovnik Congress in 1956, has taken up work on the legal aspects of peaceful co-existence. This work continued till the recent years and contributed greatly to the establishment of the contents of that conception as well as to the clarification of many legal problems connected with peaceful co-existence.[53]

A further important stage in the formulation of the legal principles of peaceful co-existence came when that question was taken up by the UN General Assembly at its 17th session in 1962. After discussions in the Sixth Committee in 1962 and 1963 the General Assembly adopted on 16 December 1963 a resolution (1966/XVIII) in which it decided "to establish a Special Committee on principles of International Law concerning friendly relations and co-operation among States—composed of Member-States to be appointed by the President of the General Assembly, taking into consideration the principle of equitable geographical representation and the necessity that the principal legal systems of the world should be represented." The Special Committee thus established, at the Session in Mexico City—held from 27 August till 1 October 1964—made a detailed analysis of the four principles of international law (the prohibition to use force in international relations, the obligation to settle disputes by peaceful means, the principle of non-intervention and the principle of the sovereign equality of states). The Special Committee had as its task "to draw up a report containing, for the purpose of the progressive development and codification of the four principles so as to secure their more effective application, the conclusions of its study and its recommendations, taking into account in particular: a) the practice of the United Nations and of States in the application of the

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[51] Cf. L. FOCSANEANU, *Les cinq principles de coexistence et le droit international*, "Annuaire Français de Droit International," 1956, p. 150; E. MC WHINNEY, *Peaceful Co-existence and Soviet-Western International Law*, Leyden 1964, p. 36.

[52] Cf. M. LACHS, *O potrzebie konkretyzacji prawd i zasad współistnienia (On the Need of the Elaboration of the Axioms and Principles of Co-existence)*, "Państwo i Prawo", 1963, No. 5—6; E. MC WHINNEY, *Soviet and Western International Law and the Cold War*, "The Canadian Yearbook of International Law," 1963, p. 43, writes as follows: "The trouble with these particular principles, of course, is that they are formulated at a very high level of generality and abstraction. For they can really only take on firm meaning when they are applied in specific fact-settings: they need to be further refined and developed in terms of more concrete, secondary principles, before they can become useful in action."

[53] Detailed report on this work can be found in the Reports of ILA of 1956, 1958, 1960 and 1962.

principles established in the Charter of the United Nations, b) the comments submitted by Governments on this subject in accordance with paragraph 4 of resolution 1815/XVII/, c) the views and suggestions advanced by the representatives of Members States during the Seventeenth and Eighteenth sessions of the General Assembly."[54]

The work of the Special Committee was preceded by lengthy discussion on the usefulness of the codification of the legal principles of peaceful co-existence, conducted in International Law Association, in periodicals and then in the Sixth Committee of the General Assembly. A number of arguments were advanced against the codification. First of all, that the principles of peaceful co-existence represented only a certain political program and were not sufficiently precise from the legal point of view: "nothing is certain, neither the number of those principles, nor their wording, neither the sequence nor internal hierarchy, nor their relationship towards the aims and principles of the United Nations Charter"; it was also maintained that some principles were redundant.[55] Second, that the establishment of legal principles was "unable" to fulfil such a noble task as the improvement of relations between the Western and the socialist states, that the policy of "real co-existence" could only be a result of the disappearance of ideological conflict.[56] Some authors even saw in the advancing of the principles of co-existence by the lawyers of the socialist and Asian countries a manifestation of *sui generis* "Eastern mentality", inclined towards general principles, while the characteristic trait of Western mind was allegedly the search for specific solutions, in a pragmatic way.[57]

On the other hand a number of important arguments were adduced in support of the codification of the legal principles of peaceful co-existence. The Report presented at the ILA Congress in Hamburg in 1960 stressed that co-existence concerns both the law and policy and therefore the problem should be discussed in these two aspects; if the needs of international life required that states, in their everyday practice, apply the policy of co-existence, the rules of such conduct as well as the legal norms binding in this respect should be made precise. And finally the establishment and, in particular, the codification of the principles of co-existence are the best method of countering criticism and dispelling doubts evoked by the problem of co-existence.[58]

In the discussion in the Sixth Committee of the General Assembly many delegates pointed that the inclusion into the agenda of the question of codification of the legal principles of peaceful co-existence was brought about as result

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[54] Report on the work of the Special Committee—doc. A/AC. 119/L. 34.

[55] Cf. L. FOCSANEANU, *op. cit.*, p. 170 ff.; J. N. HAZARD, *Legal Research on "Peaceful Co-existence,"* AJIL 1957, No. 1, p. 69.

[56] Cf. E. BOGAERT, *Coexistence et droit international*, RGDIP 1959, No. 2, p. 218.

[57] Cf. K. S. MURTY & A. C. BOUQUET, *Studies in Problems of Peace*, Bombay 1960, p. 115.

[58] ILA Report 1962, p. 314.

of the growing conviction within the Committee that, in the present circumstances, it was necessary to take up action for the strengthening of peace, *inter alia*, through the development of international law, and that the Committee had the ability and the duty to influence actively the development of that law independently of the work of the International Law Commission. Some delegations of the Afro-Asian countries stressed the importance of the fact that the newly established states have come into being when there existed already in the world a certain political and economic order and certain legal norms, binding in international relations, which they could not accept in their entirety as something inevitable. It was necessary therefore that they could participate in the review and changing of the existing international law.

7. *The Relation of the Legal Principles of Peaceful Co-existence to the United Nations Charter*

One of the most important issues around which focused the discussion on the legal aspects of peaceful co-existence was the relation of its legal principles to the UN Charter. It has been pointed to the dangers connected with the codification of those principles. For if they contain something different than the provisions of the Charter, this will amount to a revision of the Charter done in contravention of its Articles 108 and 109, providing for the procedure of the revision of that document. On the other hand, if this amount only to an interpretation of particular provisions of the Charter—the codification will be devoid of any greater significance and might be considered redundant.

The above arguments, reminding in their unavoidable alternative of redundancy versus non-conformism the famous "arguments of Calif Omar," do not aply to legislative acts which may be changed not only through formal introduction of modifications and amendments, but also through supplementation and adaptation of the rules to the new, changed conditions and views. This applies in particular to the UN Charter which was signed in the "pre-atomic era," in the years when the colonial system still existed, and which is binding at present, when both the extent of international community which has been joined by many new states, and the nature of inter-state relations because of the implications of the discovery of nuclear weapons and the technological and economic progress—have undergone fundamental changes. The UN Charter under present conditions in the world signifies the beginning of an evolution, the trends and the scope of which it was difficult to foresee with any precision at the San Francisco Conference. "Since the time of San Francisco—states Sahovic[59] —the change in the balance of forces, which should be attributed

[59] M. SAHOVIC, *Au seuil de la phase terminale de la codification des principes de la coexistence*, "Revue de la politique internationale," No. 35, 30 November 1964.

in the first place to a happy progress of the process of decolonization and tremendous progress of science and technology—demonstrated not only the necessity of adaptation to contemporary conditions of norms of traditional international law but also the need for such adaptation of the provisions of the UN Charter. Although the codification of the principles of peaceful co-existence aims precisely at this goal, one must state, however, that the organs dealing with this problem do not have an easy task." The UN Charter—says Professor Lachs—meriting the name of the "Magna Charta of peaceful co-existence" provides "the proper point of departure for further formulation of the principles of co--existence, making them more specific, giving them greater precision."[60]

In connection with the codification of the principles of international law on the basis of the provisions of the UN Charter a question may arise whether, and to what extent, should interpretative rules aimed at finding the "true will" of the contracting parties, in this case the states-participants in the San Francisco Conference of 1945, be applied. In the discussion in the Special Committee on the principles of international law concerning friendly relations and co-operation among states in Mexico City it was recalled—among arguments against the postulated principle that the prohibition on the use of force covered also economic coercion—that the Brasilian proposal aimed at this objective was rejected at the San Francisco Conference.[61] Irrespective of the doubts raised in the course of discussion whether the rejection of the Brasilian proposal could be considered as an acceptance of the application of economic coercion by states, especially since in the report of the relevant committee at the San Francisco Conference it was stressed that the unilateral use of force or similar coercive measures were not authorized or admitted,[62] a question arises on the point of substance: whether the interpretation based on travaux preparatoires reflecting the aims of states at the time of the signing of the Charter may constitute a legal obstacle for the General Assembly now adopting a new legal principle, containing a different interpretation of the relevant article of the Charter, without inviting criticism of infringing its provisions.

The answer to the above question can be only in the negative. It stems first of all from the fact that the General Assembly is not bound by the legal interpretation based upon travaux preparatoires and may adopt interpretation of a given provision taking into consideration, above all, its effects in the present time. And secondly, if we were to adopt an opposite view, it would be necessary, for accepting a different interpretation than the one based upon travaux preparatoires, to effect a revision of the Charter and this not in order to change

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[60] M. LACHS, *Legal principles of co-existence—the need for their elaboration*, "Polish Perspectives," 1963, No. 12, p. 4.

[61] Speech by the US delegate Schwebel—cf. doc. A/AC. 119/SR. 3, p. 12.

[62] Speech by the Indian delegate Rao—*ibid.*, p. 6.

a given provision but to eliminate the possibility of refering to travaux preparatoires which would not be reasonable. And finally, what is most important, the true substance of codification of the rules in international law on the basis of the Charter is the formulation of the legal principles corresponding to the present needs of international community, its present legal convictions and not the legal principles, even those most in accordance with the wishes of States which prevailed twenty years ago, at a time when the Charter was signed. Only along this way the creative adaptation of the Charter in a "changing world" is possible and only in this way can the Charter fulfil its role of the "law in action."[63] This attitude towards the Charter was taken by the General Assembly which asked the Special Committee in its resolution 1815 (XVII) to undertake a study of the principles of International Law "in accordance with the Charter with a view to their progressive development and codification, so as to secure their more effective application."

8. *Methods of Codification of the Principles of International Law*

The norms of international law are established as a result of the conclusion by states of international agreements creating rules expressly recognized by the States and of the formation of "international customs as evidence of general practice accepted as law." In the course of development of international law the contractual and customary norms concerning a definite field of international relations are collected and systematized in codification conventions. This tends to eliminate ambiguities, and to prevent disputes thereby facilitating the application of those norms in practice. In the United Nations the organ called upon to conduct preparatory codification work is the International Law Commission. Its draft conventions are submitted to the diplomatic conferences convened by the United Nations.

A question arises whether and to what extent the same *modus procedendi* should be adopted in the codification of the principles of international law.

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[63] Cf. the analysis of the development of the provisions of the Charter by D. NINCIC (*The Evolution of the UN*, "New Yougoslav Law," 1961, pp. 45—46): "... The method of broad 'sociological' interpretation was adopted rather than the restrictive, grammatical, 'constructionist' method which was applied in interpreting the Covenant of the League of Nations. This made it possible for the structure of the Charter to adjust itself to the growth of international relations and for its provisions, most of which were broad and flexible, to be filled with the kind of substance, as it were, which the trend of international relations required. In short the UN political organs competent to apply and interpret the Charter by means of the broad and elastic criteria they themselves had adopted were in daily 'working' contact with international realities and international developments, with the dynamics of international relations, were thus under their impact while seeking at the same time to influence their course. In this complex process of action and counter-action the Charter was changing and so was, to a greater or lesser extent, the pattern of international relations themselves."

The principles of international law, like other norms of that law, may have a contractual or customary character; there is no basic obstacle which would prevent us from visualising the conclusion of an convention systematizing the dispersed principles of international law.

In spite of these similarities with other norms of international law—the codification of the principles of international law involves in many respects important differences both from the legal and political point of view. These principles do not constitute a separate chapter of international law, as for example the law of the sea or the diplomatic law, but define the basis of international legal order. Hence their codification is of much greater importance, being at the same time subjected to much greater difficulties. In the process of codification of particular branches of international law the main difficulty is frequently the systematization of a large number of rules contained in bilateral agreements and observed in practice, in order to create more general norms of a multilateral character. In the field of codification of principles of international law the main difficulty consists in the need for a precise formulation, in order to avoid ambiguities in the main principles of the international legal order, conforming with the realities and requirements of the contemporary world. Every codification of international law, even one concerning strictly administrative or technical fields has a certain political significance by the mere fact of resulting in international co-operation regulated by law. A much greater political significance, however, must be attached to the codification of the principles of international law in view of their very nature. These were no doubt the reasons for which the UN General Assembly has chosen a different *modus procedendi* for the codification of the principles of international law by establishing a Special Committee and entrusting to it the study of those principles from the point of view of progressive development and codification. For the same reasons the main function of the Special Committee consists in making general provisions of the Charter precise and specific and not in amassing possibly all principles and their systematization.

There are no basic obstacles of legal nature on account of which the codification of the principles of international law could not take the form of a codification convention. Yet the discussion in the Sixth Committee of the General Assembly made it clear that the implementation of the codification work in this form may be at least premature and unrealistic in the near future. A relatively small number of delegates mentioned that objective as possible of achievement and from their statements it transpired that what they had in mind was rather the preparation of not one general convention, but of series of conventions.[64] Another group were those who voiced reservations against any attempts at codification of principles on the basis of the Charter, because the danger of a camouflaged revision of that

[64] Cf. documents A/5671, p. 13, and doc. A/AC. 119/L.34, p. 10.

document was in a way contrary to its relevant provisions, or because these principles had rather a political and not sufficiently strong legal character. On the whole, broad support was recorded for the view that the results of the Special Committee's work should be embodied in a draft declaration or a set of declarations with a view of submitting them to the General Assembly for adoption as an Assembly's resolution.[65] It was pointed out on that occasion that the General Assembly had already recognized that the Charter was incomplete in certain respects and could be supplemented by the adoption of declarations codifying and developing certain Charter articles, such as the Universal Declaration of Human Rights, the Declaration on the granting of independence to colonial countries and peoples and the Declaration on the elimination of all forms of discrimination. These declarations had been adopted without objection that they were contrary to the Charter or violated the amendment procedure provided for in the Charter.[66]

A question then arises whether and to what extent the adoption by the General Assembly of one or more declarations on the principles of international law concerning friendly relations and co-operation among States can be considered progressive development and codification of international law. One has to bear in mind that the General Assembly resolutions, from the legal point of view, do not constitute *lex perfecta*, at par with international conventions establishing rules expressly recognized by the states. The answer to the above question belongs to the most difficult ones since the legal nature of the UN General Assembly resolutions has not been so far made sufficiently clear. In the discussion on the legal significance of the General Assembly resolutions today the diplomatic rather than legal definitions prevail. Among them should be included no doubt the well-known statement by Sir Hersh Lauterpacht[67] that every resolution of the General Assembly, irrespective of its contents and circumstances in which it was adopted, is a "legal act of the principal organ of the United Nations which Members have the obligation to treat with a certain measure of respect appropriate to a Resolution of the General Assembly," and also the often repeated view that the resolutions of the principal organ of the United Nations, although by themselves do not constitute international law, nevertheless represent an "important

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[65] The idea of declaration containing the general principles of international law has been, for a number of years, finding advocates among some international lawyers. In the inter-war period it was defended by A. ALVAREZ (*Exposé de motifs et déclaration des grands principes du Droit International*, Paris 1938). The same author in his work published after the war (*Le Droit International Nouveau*, Paris 1959) wrote on this subject as follows: "Il est nécessaire d'élaborer, comme un élément primordial de la reconaissance du Droit International, une Déclaration des données fondamentales et des grands principes de ce Droit qui soit en même temps une Déclaration des grands principes de la politique" (p. 601).

[66] Doc. A/AC. 119/L. 34, p. 11.

[67] Cf. "International Court of Justice Report" 1955, p. 120.

step in the process of making international law." [68] Other views, going much further, tend to recognize such resolutions, if adopted in specific circumstances as a source of international law and binding upon States.[69]

The moral and political significance of the resolutions of the General Assembly, particularly when adopted unanimously or quasi-unanimously, with the support of the majority of the countries of the socialist and the capitalist camps and of the so-called third world, is indisputable and generally recognized. Such resolutions have an important influence on the development of international co-operation in the spirit of co-existence and the maintenance of peace.[70] It is worthwhile also to draw attention to certain elements pointing to the legal significance of such resolutions containing formulations of the principles of international law. Thus, we should bear in mind that the principles contained in Article 2 of the Charter have universal character in the sense that they are binding not only upon the UN members, but also influence the legal position of states not belonging to that Organization. Under Article 2, paragraph 6 of the Charter—"The Organization shall ensure that States which are not Members of the United Nations act in accordance with these Principles so far as be necessary for the maintenance of international peace and security."

As a consequence, the codification of these legal principles to the extent it concerns the maintenance of international peace and security has also universal character. This exceptional nature of the principles—as compared with other provisions of the Charter—may be justified by the fact that they consitute the basis of international legal order in the contemporary world and cannot be different for the member and non-member states. In such circumstances the codification of the above principles, even in the form of a resolution of the UN General Assembly, while not creating *lex perfecta*, may have in specific cases a greater legal significance than the convention itself. Such situation may arise if some of the

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[68] Doc. A/AC. 119/L. 34, p. 13.

[69] Cf. Zadorozhny (*op. cit.*, p. 327), who expresses an opinion that "the resolutions which obtained 2/3 and more votes in the General Assembly, drawn from three main contemporary groups of states (socialist, capitalist and non-aligned) including of course the Big Powers should be considered as sources of international law." K. SKUBISZEWSKI, *Uchwały prawotwórcze organizacji międzynarodowych* (*The Law-making Resolutions of International Organizations*), Poznań 1965, p. 144, distinguishes law-making acts of international organizations as a separate source of international law. Likewise A.J.P. TAMMES, *Decisions of International Organs as a Source of International Law*, "Recueil des Cours", 94, 1958, p. 266; M. VIRALLY, *La valeur juridique des recommandations des organisations internationales*, "Annuaire Français de Droit International," 1956, p. 87.

[70] Cf. the statement by President Tito on the significance of the General Assembly Resolutions: "If one desires to improve international relations and strengthen peace in the world, it is very important that the United Nations—the most representative assembly of states and nations, equal and sovereign, that outstanding forum serving as a tribune of world opinion—develop and codify the principles of peaceful co-existence" ("Revue de la politique internationale," 5 March 1964, p. 5).

countries refuse to sign and ratify the convention, creating thereby doubts as to the extent to which the principles contained in the Charter and expanded in the convention, represent for those countries the binding law.

What is more, the resolutions of the organs of international organizations, in particular of the UN General Assembly, are no doubt an expression of the conviction of legal obligations, by which some states are bound vis-à-vis the others. This kind of conviction is an indispensable condition for creating legal norms through custom. The resolutions may, in the period of the shaping up of the custom, constitute a confirmation of the legally binding character of the new custom or facilitate the evidence of the existence of such a custom.

Pessimistic views were frequently expressed as to the possibility of developing international customary law in our century. The reason advanced is the speedy expansion of contractual law and the substitution of written agreement for customary law even in such fields as the diplomatic law and the law of the sea which were traditionally considered as domains of the customary law. It does not seem that this pessimism is well founded. It is certainly justified in so far as it concerns the possibility of shaping up of customary norms outside the consent of states, in an imperceptible way, as "happening" or "organic growth" similar—to use the comparison from the 19th century legal polemics with the opinions of the German historical school—to the growth of "country flowers, which grow and blossom untended by human hand." But already in the last century Ihering rightly pointed out that only to a very superficial analyst the shaping up of the customary law may seem as "happening" without outside interference, while a more detailed scrutiny discloses that the consciousness of aims and sense of calculation were present in the law-making process ever since the earliest period of history.[71] Ihering's views are still more convincing when applied to the shaping up of international customs; from the essence of international relations it transpires that there is no room for any mystic Volksgeist in the sense in which the custom should be created as proposed by Puchta and Savigny. Actions on behalf of a state are undertaken as a result of considerable preparations and reflection by highly qualified organs, and states have the possibility of defending themselves against the establishment of customs unfavourable for them through protests and reservations. In this situation all theories envisaging the possibility of shaping up of new legal norms without accompanying consent of the states are devoid of foundations, even should those theories stem from the most lofty tendencies to speed up the development of international law.

Nothing however stands in the way of shaping up new norms of international customary law on the basis of *locus standi* of states which would not represent only "das Nützliche von Gestern," nor would express a stubborn resistance

[71] Cf. R. IHERING, *Geist als römischen Rechts*, Leipzig 1852, vol. III, p. 6f.

to change, nor would amount to dictating the law to other states. The development of international organizations creates many opportunities for taking position on a number of issues. Miss R. Higgins in her very interesting book has rightly drawn attention both to the fact that the customary international law is "perhaps most 'political' form of international law, reflecting the consensus of great majority of states," and to the great role which the UN political organs play in creating new customs.[72] It was pointed out on many occasions that the development of international customs is of special importance in the interpretation of international treaties and Dag Hammerskjold expressed even the hope that there may grow a special branch of customary law concerning the interpretation of treaties.[73]

In the light of the above assertions one can see clearly the legal, creative value of the codification of international law's principles concerning friendly relations and co-operation among the states.

9. *The Sessions of the Special Committee in Mexico City (1964) and in New York (1966).*

The first five-week session of the Special Committee, held in Mexico City in 1964, constitutes no doubt an important stage, a landmark in the history of attempts aimed at codification of international law. For it was the first official attempt to codify the principles of international law. If we were to accept—like Professor McNair—that the term "international law is applied in double meaning, legal and general, either as an ensemble of customary and contractual norms considered as binding by the states in their mutual relations, or as law and order safeguarding for international community a quiet and orderly life,"[74] then we would have to state that the efforts undertaken so far in the development and codification of international law have only to an insignificant extent covered international law within this latter meaning, as it is conceived by large sections of world opinion. It may be easy to find the causes of this somewhat one-sided trend of the codification work in the last two decades, marked very largely by the years of the "cold war". Nevertheless it remains a fact that in the field of formulation and codification of the principles of international law only small progress was made and that precisely progress in that respect would be of particularly great importance for international law conceived as "law and order safeguarding for international community a quiet and orderly life."

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[72] R. HIGGINS, *The Development of International Law through the Political Organs of the United Nations*, London 1963, pp. 1—5.

[73] Cf. D. HAMMARSKJÖLD, *International Law and the United Nations*, "Philippine Law Journal," 1955, p. 542, quoted by HIGGINS, *op. cit.*, p. 4.

[74] A. MCNAIR, *The Expansion of International Law*, Jerusalem 1964, p. 53.

Among lawyers almost universal was the opinion that the Special Committee was facing an important, difficult and pioneering task. By and large, no great results were expected within a short period of time. The outcome of the Mexico City Conference cannot be considered as a complete success. Nevertheless the general assessment of the work of the Special Committee, made at the 20th Session of the UN General Assembly was favourable.[75] The Committee has agreed upon the formulation of the fourth principle concerning the sovereign equality of states. A considerable rapprochement was achieved on the drafting of the first principle, prohibiting the use and the threat of force in international relations.[76] There was, on the other hand, an important difference of opinions in the Committee on the text of the very important third principle, prohibiting intervention in the internal affairs of other states. Finally, as far as the obligation of states to settle disputes by peaceful means, differences of views centered around the role of international courts.

In the course of the second seven-week session of the Special Committee in New York in 1966 all seven principles of friendly relations and co-operation among States have been submitted to a detailed analysis. As result, two principles have been agreed and accepted by the Committee—namely the principle of peaceful settlement of disputes and the principle of sovereign equality. As ar as the principle of non-intervention is concerned, it has been decided that

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[75] In the discussion in the Sixth Committee at the 20th Session of the General Assembly opinions were expressed that "the work of the Committee produced encouraging results" (Rapporteur—the delegate of Sweden—H. Blix); that "in spite of the lack of spectacular results... the outcome of the Committee's work opens up favourable prospects for further progress of work... creates hopes for the future... is very useful" (the delegates of Poland, Czechoslovakia, Byelorussia); that the report by the Committee "signifies not only a stage in the study on international law, but constitutes moreover a scientific work" (delegate of Romania); that the Committee's work was a "fruitful experience" (delegate of Canada); that it was an important fact that "for the first time a group of the representatives of states made a systematic review of the substance and weight of the principles which constitute not only the corner-stone of the UN Charter, but of the whole of international law, taking up efforts to adapt them to the present-day requirements" (the delegate of Mexico); that "although the formulation of the principle of sovereign equality may appear to be the only positive result... in reality the work done is of much greater importance" (the delegate of Great Britain). An expression of the positive assessment of the work of the Special Committee was the unanimous resolution of the Sixth Committee on the continuation of the Committee's work, with its membership enlarged by the addition of four new states. Cf. doc. A/C. 6/SR. 871—891.

[76] Because of the attitude taken by the US delegate, the Special Committee could not work out agreed wording of the principle prohibiting the use or the threat of force. At the 20th Session of the UN General Assembly the US delegate in the Sixth Committee declared that now his government, after examining the matter, was ready to accept the formulation of that principle with the reservation, however, that the wording of para. 2d did not include the justified use of force. Cf. Doc. A/6165, p. 17. This statement allowed other delegates to say that as far as the first principle was concerned "an agreement was almost reached" and that "quasi agreement" was in fact attained. Cf. A/C. 6 SR. 880, p. 5, and SR. 881, p. 8.

this principle should be formulated by the Drafting Committee in accordance with the declaration on the inadmissibility of intervention in the domestic affairs of States and the protection of their independence and sovereignty, adopted by the General Assembly on 21 December 1965. The Drafting Committee didn't however succeed in achieving its formulation. A considerable area of agreement has been achieved with respect to some other principles, and particularly with respect to one imposing on States the duty to co-operate with one another in accordance with the Charter.

In the balance sheet drawn on the results of the Special Committee's work at the Mexico-City session a realistic assessment of the difficulties and achievements prevails. Sahovic rightly pointed out that the Committee "has demonstrated the difficulties which have to be overcome on the road towards codification of the principles of co-existence." The session of the Committee "provided an opportunity for a broad confrontation of the positions of the adherents and opponents of the project of codification of co-existence's principles which prevented the adoption of joint conclusions on the majority of items on the agenda. The work of the Committee constitutes an important contribution to the efforts aimed at bringing reglamentation of international relations at a higher level and improving international law through the codification of the above mentioned principles."[77] They move forward the codification of the principles of peaceful co-existence, in spite of the fact that not much progress was registered in the Committee's work.[78] Only those who, in an unrealistic fashion, expected too much from the work of the Committee, e.g. the unanimous proposal on the basic amendment of the UN Charter, seem to have been deceived. Thus M.W. Mouton, starting from the premise that a fundamental revision of the Charter is necessary, assessed the Report as a disturbing *testimonium pauperitatis* and states that "the talks in Mexico City have not contributed much to improve the will to co-operate in solving disputes by peaceful means." The author proposes the substitution of the Special Committee by "a Committee of scientists" to perform the research necessary to arrive at stating fundamental concepts of international law, whose contents, in contradiction to the constantly changing contents of international law, have been constant for several millenia.[79]

On the other hand, it does not seem proper to approach the codification work on the principles of international law in a manner which unterestimates both the importance of that work and at the same time the significance of international law for safeguarding peaceful co-existence of states with different political and economic systems. This attitude was taken in his latest works on the legal

[77] M. SAHOVIC, *Au seuil de la phase terminale de la codification des principes de la coexistence*, "Revue de la politique internationale", 30 November 1964, p. 18.

[78] L. RADOVANOVIC, "Revue de la politique internationale", 7 December 1964, pp. 4—5.

[79] M. W. MOUTON, *Co-operation between States and the Position of the Individual in International Law*, "Annuaire de l'AAA," 1964, pp. 23—27.

principles of peaceful co-existence by Professor McWhinney. He warned against codification which would be "premature" saying that the arguments of Savigny that "too early or rapid a codification can act as an undesirable brake on development still seems to be valid one." He expressed the view that "a codification of law of peaceful co-existence would sensibly appear to be a final phase, and not the first phase, in legal development."[80] According to this author, "the rational approach on the part of Western jurists, at this stage, would seem to be directed less to arriving at substantive law definitions in themselves than to establishing a plan of procedure or ground rules as to methods for reaching agreement or compromise on substantive issues in the future."[81] He argues that "The presently important priority in Soviet-Western legal relations seems to be to continue the empirically based, step-by-step approach to minimizing and reducing the dangers of nuclear conflict"; the wisdom of the doctrical attitude taken by the West is to consist "in avoiding all temptations to the adoption of a single high level code of the law of Soviet-Western relations."[82]

This attitude reduces the role of international lawyers to establishing a "plan of procedure" and "ground rules" for political negotiations aimed at a détente through compromise in the East-West relations. After the period of excessive belief in the omnipotence of the rules of international law in shaping international relations, which was characteristic of some legal milieus in the first years after the World War I—it signifies the passing over to anther extreme, viz. the under--estimation of the role of international law, which can be clearly seen in the writings of many American political scientists.[83] There is no need to deny some validity in Mc Whinney's claim that in the sphere of codification of the principles of co-existence the time has come to pass from most general principles to more specific secondary principles. Yet one cannot agree with the thesis that the task of lawyers in the present time consists mainly in formulating "ground rules" and "plans of procedure," and that the more general principles, concerning the substance, serve little practical purpose, if they are not supplemented by: detailed, secondary pirnciples, so as to give "definite, predictable answers in concrete problem-situation."[84]

The efforts aimed at the liquidation of the cold war and basing of international relations on the principles of peaceful co-existence should extend both to the field of politics and law. A realistic approach does not allow us to expect

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[80] E. McWHINNEY, *Peaceful Co-existence and Soviet-Western International Law*, AJIL 1962, p. 966.

[81] *Ibid.*, p. 967.

[82] E. McWHINNEY, *Changing International Law Method and Objectives in the Era of the Soviet-Western Détente*, AJIL, January 1965, pp. 10 and 15.

[83] Cf. the remarks of J. Kunz on this problem.

[84] E. McWHINNEY, *Peaceful Co-existence...*, p. 967, and *Soviet Bloc Publicists and the East-West Legal Debate*, "The Canadian Yearbook of International Law," 1964, p. 178.

that lawyers will be able to find solutions to all major problems of contemporary world without a political détente, based upon mutual understanding and recognition of their basic interests by the Big Powers and political camps. But, on the other hand, a détente in international relations and constructive co-operation, to have a lasting value, should be based on international law adequate to the requirements of our time. Progressive development of international law and, in particular, the development of its principles which are, by nature, of a general character is an important factor of international détente facilitating to a large extent international co-operation. Peaceful co-existence of states with different political and social systems may emerge from steadfast efforts towards mutual understanding in both spheres: politics and law concerning the establishment of legal principles of co-existence.

LEGAL PROBLEMS RELATING TO DENUCLEARIZATION IN THE POLISH PLANS FOR AN ATOM-FREE ZONE AND FOR FREEZING NUCLEAR ARMAMENTS IN CENTRAL EUROPE

by ANDRZEJ SKOWROŃSKI

I. In diplomatic practice and in the literature on the subject along with the notion of general and complete disarmament the term of so-called collateral disarmament measures is used.

These measures are to fulfil a double role: to contribute to the lessening of international tension and to facilitate the realization of general and complete disarmament, both by their direct effects, as well as by the gathering of experience in particular fields like, for instance, in the methods of abolishing armaments, in the field of control, guarantees and the like, which may be useful in the realization of broader disarmament solutions.[1]

Two basic reasons have contributed to the development of the conception of collateral disarmament measures: the continuing arms race and the consequent increase in the danger of an armed conflict, as well as the absence of an agreement between the big powers on the setting up an effective system of collective security and general disarmament and the absence of early prospects for such an agreement.

The so-called collateral disarmament measures could be divided into two principal groups. The first comprises measures operating in the military field, that is to say, collateral disarmament measures in the strict sense of the word (e.g. the destruction of specified numbers or kinds of armaments). The second group—on the other hand—consists of measures operating in the political sphere, that is to say, so-called measures of detente (e.g. a non-aggression pact).

That division should not be treated too rigidly for, in fact, it would be difficult to draw a strict line between those two spheres. Some solutions might bring effects in both fields. Concrete partial solutions in the military field might,

[1] Document No. ENDC/1/Add. 1 of the Eighteen-Nation Committee on Disarmament of 2 April 1962, determining the procedure of the Committee contains the following definition of the so-called collateral disarmament measures: "measures aimed at the lessening of international tension, the consolidation of confidence among States and facilitating general and complete disarmament."

apart from their direct measurable effects, bring non-measurable results in the political field.[2] The reverse is also possible that solutions of the nature of detente might indirectly bring about effects in the military field by creating a new political situation calling for adjustments in the sphere of the military activity of States.[3]

The so-called collateral disarmament measures can be systematized according to the criterion of their scope:

1. by the object—as measures which relate only to certain fields of the military activity of States;[4]

2. by the subject—as measures which lay down rights and duties for only certain States on a unilateral, bilateral or multilateral basis;[5]

3. by territory—as measures which are implemented only on certain territories or within specified geographic regions.[6]

From an analysis of the so-called collateral measures put forward or already implemented it follows that their *modus operandi* is different. Three forms are possible:

a) the laying down of an obligation of action (*facere*; e.g. to destroy certain quantities or kinds of armaments);[7]

b) the laying down of an obligation of action combined with an obligation of omission (*non-facere;* e.g. the abolition of foreign military bases combined with a prohibition to set up new bases);[8]

c) the laying down of an obligation of omission (e.g. suspension of tests with nuclear arms or refraining from starting them).[9]

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[2] Communique on the conclusion in Moscow of the Treaty on the prohibition of nuclear weapon tests in the atmosphere, in outer space and underwater of 25 July 1963, states, *inter alia* that "the heads of the three delegations agreed that the test ban treaty constituted an important first step toward the reduction of international tension and the strengthening of peace, and they look forward to further progress in this direction" ("Izvestya," 26 July 1963).

[3] In disarmament negotiations it has often been emphasized in argumentation relating to a non-aggression pact that its conclusion would be in the nature of a preliminary measure in the implementation of other collateral measures of disarmament. Cf., *inter alia*, the argumentation of the Polish representative at the 122-nd meeting of the Eighteen-Nation Committee on Disarmament (doc. ENDC/PV 122, pp. 17—18).

[4] Cf. the draft Declaration on renunciation of use of foreign territories for stationing strategical means of delivery of nuclear weapons, proposed by the USSR on 12 February 1963 in the Eighteen-Nation Committee on Disarmament (doc. ENDC/75).

[5] E.g. the proposal of the USSR for a declaration of the nuclear powers to the effect that none of them would be the first to use nuclear weapons.

[6] Such measures are often called "regional" or "regional disarmament".

[7] Cf. the proposal of the USSR for the elimination of bomber aircraft in the Memorandum of 28 January 1964, on measures for slowing down the armaments race and relaxing international tension (doc. ENDC/123).

[8] Cf. the Memorandum referred to above.

[9] E.g. the proposal of Mexico submitted at the Eighteen-Nation Committee on prohibiting the placing in orbit and the stationing in outer space of nuclear weapons (Doc. ENDC/98).

II. A particular example of collateral disarmament measures are nuclear free zones.

This issue holds a particular place in the disarmament negotiations of recent years. On the one hand numerous proposals have been put forward for the setting up of nuclear free zones in various regions of the world,[10] and on the other—some of those plans have already reached the stage of realization which is illustrated by the talks on the seting up of a denuclearized zone in Latin America[11] and by the advanced stage of discussions on the transformation of the African continent into such a zone.[12]

Those proposals are based on the premise that the main danger for mankind follows from the qualitative and quantitative development of nuclear weap-

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[10] Cf. W. NAGÓRSKI, *Zestawienie zachodnich planów i propozycji w sprawie "disengagement"* (*Comparison of Western Plans and Proposals on "Disengagement"*), "Sprawy Międzynarodowe," 1959, No. 4/5, pp. 132—143.

[11] On 29 October 1962, Brazil submitted in the Political Committee of the General Assembly of the United Nations a draft resolution providing for denuclearization of Latin America. It provided for an undertaking not to manufacture, receive, store or test nuclear weapons or nuclear launching devices, as well as their removal from the territory of the states of Latin America. The draft was not submitted to a vote. (Doc. A/C.1/L.312/Rev. 1). On 29 April 1963, a Declaration was published of the Presidents of Bolivia, Brazil, Chile, Equador and Mexico on the denuclearization of Latin America. The declaration does not create any obligations but it expresses the readiness of the states to sign an agreement by which the states of Latin America would undertake "not to manufacture, receive, store or test nuclear weapons or nuclear launching devices" (Doc. ENDC/87). On 27 November 1963, the General Assembly adopted a resolution expressing the hope that the states of Latin America "will initiate studies. . .concerning the measures that should be agreed upon with a view to achieving the aims of the said declaration." As a result of a preliminary agreement achieved by the States concerned, a preparatory conference of the states of Latin America was convened between 23 and 27 November 1964 and next fourth session took place, as a result of which there has been worked out an outline of basic provisions of a treaty on the denuclearization of Latin America. This treaty has been adopted by Preparatory Commission for the Denuclearization of Latin America, with effect from 14 February 1967 (Treaty for the Prohibition of Nuclear Weapons in Latin America. Doc. ENDC/186).

[12] The resolution of the General Assembly of the United Nations of 24 November 1961 (1652/XVI) called upon Member-States to refrain from carrying out in Africa nuclear tests, to refrain from using the territory, territorial waters or airspace of Africa for testing, storing or transporting nuclear weapons and to consider and respect the continent of Africa as a denuclearized zone. Point 3 of the resolution adopted by the Conference of Heads of African States and Governments at Addis-Ababa, 22—25 May 1963, committed the African States: "to bring about, by means of negotiation . . . the elimination of military bases and nuclear tests, which elimination constitutes a basic element of African independence and unity" (doc. ENDC/93/Rev. 1 of 18 June 1963). The Cairo Declaration of 10 October 1964, of the Heads of State or government of Non-aligned countries endorsed the Declaration of 1963 and called upon states to respect it (Doc. A/5763). The resolution of the General Assembly of the United Nations of 3 December 1965 (2033/XX) endorsed the Declaration of 1964 and called upon states to refrain from the use, or the threat of use, of nuclear weapons on the African continent and also to refrain from testing manufacturing, using or deploying nuclear weapons on the continent of Africa and urged States possessing nuclear weapons and capability not to transfer such weapons (Doc. ENDC/162).

ons and from their concentration in definite areas which, like Central Europe, are of fundamental significance for world peace. Consequently, the realization of measures is proposed which, apart from arresting the race of nuclear armaments, would entail the removal of nuclear weapons and means of their delivery from certain areas in which the danger of confrontation is particularly great.

The wide interest aroused by the proposals on nuclear free zones stems from the fact that they are in accord with the interests of national security of individual States, as well as with their general interests—the safeguarding of collective security. The interests of individual States call for the creation of legal and political conditions which would prevent their inclusion into the nuclear arms race or would remove from their territories all kinds of foreign nuclear missile weapons, the presence of which might—in case of conflict—bring upon them a destructive nuclear blow. The striving of States for denuclearization should thus be recognized as a manifestation of their self-defence against the operation of the mechanism of the arms race which, with every year, involves increasingly wider areas.[13] The collective interests of the international community call—on the other hand—for the creation of nuclear free zones, wherever the situation requires it, in order to prevent the outbreak of a nuclear conflict or to arrest a military-political process leading to the danger of such a conflict, among others, the process of spreading nuclear arms. That striving of States follows from the conviction that peace is indivisible and is expressed in the belief that the setting up of atom-free zones in various regions of the world can, to a considerable degree, reduce international tension and facilitate the solution of wider disarmament problems.[14]

A harmonious combination of both spheres of interests: collective and individual, is assured by a solution which neither restricts nor prejudges the rights of States, but leads to the safeguarding of conditions for the realization of their basic rights, in particular of the right to existence, so very much endangered by the proliferation of nuclear armaments.

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[13] Resolution of the General Assembly of the United Nations of 24 November 1961 on consideration of Africa as a denuclearized zone, recognized, *inter alia*, as one of its motives "the need to prevent Africa from becoming involved in any competition associated with the ideological struggles between the Powers engaged in the arms race and, particularly, with nuclear weapons."

[14] The delegate of Brazil submitting in the Eighteen-Nation Committee at Geneva the declaration on the denuclearization of Latin America stated that the aim of those participating in that venture was "to make a positive contribution towards sparing, as far as possible, the countries associated in this declaration the tragic consequences of a nuclear war, and towards fostering, by this example of a trial demonstration at regional level, the adoption of a universal contractual instrument capable of transforming the whole world into a denuclearized zone" (Doc. ENDC/PV 128, p. 9).

III. Among the submitted plans for nuclear-free zones a particular place is held by the Polish plans for the setting up of an atom-free zone [15] and for the freezing of nuclear armaments in Central Europe.[16]

The motive behind the Polish plan was the endeavour to create conditions of security in this region. In the specific political and military situation (the piling up in Central Europe of large quantities of nuclear weapons and of means of their delivery, the failure to settle a number of contentious problems, the political tendencies of the German Federal Republic aiming at a change of the territorial status in Europe and at gaining access to nuclear armaments) the realization of the Polish plans could bring about a number of far-reaching effects.[17]

According to the Polish conception the implementation of both proposals could, through action in a definite military sphere (in the field of nuclear armaments by their removal or freezing), contribute indirectly to the creation of conditions conducive to wider solutions as regards disarmament and detente in Central Europe, and in the political field—to an atmosphere conducive to a peaceful normalization and stabilization of international relations.[18]

A. The plan for the setting up of an atom-free zone in Central Europe. The Memorandum of the Government of the Polish People's Republic of 14 February 1958 provided for the following groups of obligations in the field of denuclearization:

—as regards the States to be included in the zone, namely the Polish People's Republic, the Czechoslovak Socialist Republic, the German Democratic Republic and the German Federal Republic—not to manufacture, maintain or import for their own use nuclear weapons of any type, not to permit the location of such weapons on their territories, as well as not to install on, or to admit to, their territories instalations and equipment designed for servicing nuclear weapons, including rocket launching pads;

[15] Cf. the consideration of the legal and political problems in the plan for the creation of a denuclearized zone: A. BRAMSON, *Droit international et denuclearisation, Contribution a l'étude des problèmes du dèsarmement*, Bruxelles 1958; M. LACHS, *K voprosu o bezatomnoy zonie w Centralney Evropie*, "Mezhdunarodnaya Zhizn," 1959, No. 8; S. E. NAHLIK, *Les aspects juridiques d'une zone denucléarisée*, "Annuaire de l'A.A.A.", vol. 30 ; A. SKOWROŃSKI, *Plan Rapackiego w świetle prawa międzynarodowego* (*The Rapacki Plan in the Light of International Law*), "Państwo i Prawo", 1959, No. 5—6; J. S., *Polski projekt utworzenia strefy bezatomowej w Europie* (*The Polish Plan for the Creation of a Nuclear-free Zone in Europe*), "Sprawy Międzynarodowe", 1958, No. 4.

[16] A. SKOWROŃSKI, *Polska propozycja zamrożenia zbrojeń jądrowych i termojądrowych w Europie Środkowej* (*The Polish Proposal for the Freezing of Nuclear and Thermo-nuclear Armaments in Central Europe—A political and legal analysis*), "Sprawy Międzynarodowe", 1964, No. 3, pp. 18—33.

[17] Cf. an analysis of the motives of the Polish initiatives: A. RAPACKI, *The Polish Plan for a Nuclear-free Zone Today*, "International Affairs," vol. 39, January 1963, No. 1.

[18] A. RAPACKI, *Rozbrojenie — polski punkt widzenia* (*Disarmament—the Polish Point of View*), "Sprawy Międzynarodowe" 1963, No. 3, pp. 11—13.

—as regards the nuclear powers, that is, France, the United States of America, Great Britain and the USSR: not to maintain nuclear weapons in the armaments of their forces stationed on the territories of States included in the zone; neither to maintain nor to install on the territories of the States included in the zone any installations or equipment designed for servicing nuclear weapons, including missile-launching equipment; not to transfer in any manner and under any pretext nuclear weapons or installations and equipment designed for servicing those weapons to governments or other organs of authority in this area;

—as regards States other than the Great Powers whose armed forces are stationed in the area of the zone—obligations analogous to those of the nuclear powers.

Apart from that the Memorandum imposed upon the nuclear powers a neutralizing obligation: not to use nuclear weapons against any object situated within the area of the zone.[19]

The Polish plan provided for an obligation of action combined with an obligation of renunciation. The action was to consist in the removal, upon the entry into force of the plan, of nuclear armaments and any installations for their servicing from the area of the zone, renunciation on the other hand—in the prohibition to undertake any steps which might lead to an increase in the military potential, in the field of nuclear armaments in the area of the zone (a ban on the manufacture, stockpiling and importation).

Taking into consideration the exchange of views on the Memorandum of 1958, the Polish Government presented on 28 March 1962, in the Eighteen-Nation Committee on Disarmament at Geneva a "Memorandum concerning the creation in Europe of a denuclearized and limited armaments zone."[20]

The Memorandum developed the suggestion put forward by the Minister of Foreign Affairs of the Polish People's Republic, Adam Rapacki, on 4 November 1958[21] to consider the establishment of the denuclearized zone in two stages. In the first stage the obligations of States would consist, above all, in renunciation. There would thus be established a prohibition on the preparation for production, on production itself and importation of nuclear weapons and their means of delivery, as well as a prohibition to permit the setting up of new bases and installations for stockpiling or servicing of nuclear weapons and of their means of delivery. These obligations of the States of the zone would be matched by obligations of third States not to transfer, not to introduce into the area of the zone any new nuclear weapons and their means of delivery, as well as not to set up new bases and installations for stockpiling or servicing nuclear arms and of their means of delivery. In the second stage the obligations would also

[19] "Zbiór Dokumentów", 1959, No. 2, pp. 383 ff.

[20] Document ENDC/C. 1/1.

[21] Statement by A. Rapacki at the press conference on 4 November 1958, "Zbiór Dokumentów", No. 11, pp. 83—87.

cover a ban on the maintenance of nuclear weapons and of any installations for their servicing and, consequently, an obligation to remove them from the area of the proposed zone.

Such denuclearization would be organically linked with a reduction, to an agreed level, of conventional forces and armaments of the States included in the zone and of foreign powers. Thus in its version of 1962 the Polish proposal for the setting up of a denuclearized zone in Central Europe envisaged, apart from denuclearization, some elements of limited demilitarization.

B. The plan for the freezing of nuclear and thermo-nuclear armaments in Central Europe. On 29 December 1963 the First Secretary of the Central Committee of the Polish United Workers' Party, Władysław Gomułka, announced in his speech delivered at Płock Poland's readiness to submit to the States concerned a proposal for a controlled freezing of nuclear armaments in Europe.[22] Having conducted preliminary discussions with the parties concerned, the Polish Government presented on 29 February 1964 a Memorandum on the freezing of nuclear and thermo—nuclear armaments in Central Europe.[23]

The Memorandum provided for the implementation—on the area of the Polish People's Republic, the Czechoslovak Socialist Republic, the German Democratic Republic and the German Federal Republic and, eventually, of other States—of the following obligations: not to produce, not to introduce or import, not to transfer or to accept nuclear and thermo-nuclear weapons in the meaning of this Memorandum, i.e. "all kinds of nuclear and thermo-nuclear charges, irrespective of the means of their employment and delivery."

Those obligations would concern "parties maintaining armed forces in the area of the proposed freeze of armaments," that is to say, States situated within that area, as well as other ones (the USA, the USSR, Great Britain and France, and also Belgium, Canada and Holland which maintain their forces in the area of the German Federal Republic).

The freeze would thus consist in establishing a set of obligations for the renunciation of any actions designed to increase the "freezed up" state of armaments.

The obligations contained in the Polish Memorandum can be divided into two groups: in the first are obligations of a stabilizing nature aimed at preserving the actual state of possession in the field od nuclear armaments and expres-

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[22] "Zbiór Dokumentów," 1963, No. 11—12, pp. 1623—1625.

[23] The Memorandum was transmitted in Warsaw to the representatives of : the Czechoslovak Socialist Republic, the German Democratic Republic, the USSR, the USA, Great Britain, France, Canada, Belgium, Holland, and in New Delhi—to the Ambassador of the German Federal Republic in India. The text of the Memorandum was also forwarded to the other States—Parties to the Warsaw Pact and to the North Atlantic Treaty Organization, as well as to other states either as parties in directly concerned or for their information. Cf. the text in "Trybuna Ludu" of 6 March 1964.

sed, above all, in the obligation not to introduce new quantities and new types of nuclear weapons into the area of the proposed freeze by States whose armed forces are stationed within it and which have nuclear arms at their disposal. The second group are obligations of a preventive nature aimed at preventing the taking up of production, the importation or acceptance of nuclear arms by States which do not yet have them.

IV. For the purpose of analysing the Polish plans it is necessary to define the concept of denuclearization and to compare it with the institution of demilitarization well known in international practice.

A. The contemporary concept of denuclearization contains basic elements of traditional demilitarization.[24]

Similarly to the concept of demilitarization, denuclearization should be conceived as an obligation to eliminate from a specified area nuclear weapons and installations designed for their servicing, as well as an obligation to refrain from introducing those weapons and installations into that area.[25]

Although denuclearization is a form of partial demilitarization, as it concerns but one type of weapons, its implementation calls for a considerably broader scope of obligations of States (on account of the nature of those weapons) than traditional demilitarization:

a) the territorial scope—where denuclearization is concerned, narrow frontier zones, which were the basic form of traditional demilitarization, cannot have any practical significance. Denuclearization calls for the inclusion in the obligations following therefrom of wider areas according to the striking range of nuclear weapons;

b) the object scope—where denuclearization is concerned, alongside the obligations typical for demilitarization: the elimination and non-introduction

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[24] Cf. an analysis of the problem of demilitarization in : R. ERICH, *La question des zones demilitarisées*, "Recueil des Cours," ADI, vol. 26; B. M. KLIMIENKO, *Demilitarizaciya i neytralizaciya v mezhdunarodnom pravie*, Moscow 1963; J. SACH, *System bezpieczeństwa a zagadnienie stref zdemilitaryzowanych* (*The System of Security and the Question of Demilitarized Zones*), Warsaw 1963. Cf. the definition by L. OPPENHEIM—H. LAUTERPACHT : "Demilitarization . . . denotes the agreement of two or more States by treaty not to fortify, or station troops upon, a particular zone of territory" (*International Law*, vol. II , § 72). Similarly J. F. WILLIAMS, *Chapters on Current International Law and the League of Nations*, London 1929, p. 111. International agreements on demilitarization in the twentieth century have gone even further adding to the demilitarization in its traditional meaning other obligations. Among those obligations most often appear : 1. a ban on the production, import, export and transit of weapons in the demilitarized area; 2. a ban on the conduct of military manoeuvres and the maintenance of so-called material mobilization facilities, or a ban on military training; 3. a ban on the landing of military aircraft in the demilitarized area; 4. a ban on the flight of military aircraft over the area of the demilitarized zone.

[25] J. KLEIN defines denuclearization as "the creation of a geographical zone in which the storing and production of nuclear weapons, as well as the deployment of nuclear military units would be prohibited" (*L'entreprise du désarmement, 1945—1964*, Paris 1965, p. 174).

of specified types of armaments, there inseparably appears the obligation not to proceed with the production or not to acquire nuclear weapons in any form whatsoever;

c) the subject scope—where denuclearization is concerned, it becomes necessary to establish obligations for non-nuclear States, as well as for nuclear States; the latter, irrespective of whether they are covered or not by the denuclearization obligation in the strict sense,[26] are bound *vis-à-vis* the States included in the zone by guaranteeing obligations not to use nuclear weapons against the denuclearized area.[27] This is undoubtedly related to the institution of neutralization which consists in the exclusion *a priori*—on the basis of an international agreement—of a specified area from eventual hostilities.[28] Since denuclearization constitutes a form of partial demilitarization, i.e. it concerns only one type of weapons, it is logical that neutralization which emerges with it is also of a partial nature, i.e. it ensures legal international protection only against attack effected with the use of nuclear arms.[29]

B. In international practice to date there have appeared two basic forms of denuclearization:

1. denuclearization of areas of general international significance. The first example of a denuclearizing an area of general international significance is the Antarctic Treaty, signed in Washington on 1 December 1959 by 12 States.[30]

Article 1 of that treaty establishing the obligation for the exclusively peaceful use of Antarctica prohibits at the same time measures of a military nature, such as the establishment of military bases and fortifications, the carrying out of military maneuvres, as well as the testing of nuclear weapons.

Article 5 of the treaty clearly prohibits "any nuclear explosions in Antarctica and the disposal there of radio-active waste material."[31]

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[26] For instance, in view of the stationing of its troops and the maintenance of nuclear weapons in the denuclearized area.

[27] Cf., inter alia, the resolution of the General Assembly of the United Nations of 24 November 1961, which contains the following formulation : "to respect the continent of Africa as a denuclearized zone."

[28] Cf. C. BEREZOWSKI, *Terytorium, instytucje wyspecjalizowane, współpraca międzynarodowa, obszary kolonialne i zależne, wojna powietrzna* (*Territory, Specialized Institutions, International Co-operation, Colonial and Dependent Areas, War in the Air*), Warsaw 1957, p. 117 : "In neutralized areas it is, as a rule, prohibited to maintain installations which serve the preparation of war and of armed forces. In such cases the neutralized area is at the same time a demilitarized area."

[29] Despite formal differences there is a close connection between demilitarization and neutralization : demilitarization in many cases fulfils the role of a factor which ensures the effectiveness of neutralization of a specified area. The purpose of both institutions is similar : the consolidation of peace; with the difference, however, that the operation of demilitarization covers the time of peace, whereas neutralization—the time of war. Cf. J. F. WILLIAMS, *op. cit.*, p. 117.

[30] Argentina, Australia, Belgium, Chile, France, Japan, New Zealand, Norway, the Union of South-Africa, the USSR, Great Britain and the USA.

[31] "Collection of Documents," 1960, No. 1, p. 24.

The Antarctic Treaty thus establishes a widely conceived denuclearization, including, apart from a prohibition on the conduct of nuclear tests, also a prohibition on the maintaining and stockpiling of nuclear weapons and installations for their servicing, a prohibition following from the general wording of article 1.[32]

2. Denuclearization of areas of local significance. A classical example of that type of zone in international law are demilitarized frontier zones.[33] Such zones may be of a unilateral or bilateral nature, that is to say, they may be situated within the area of one or two states. The scope of demilitarization obligations also be different: beginning with partial demilitarization up to complete one.

Out of the agreements, still in force, establishing demilitarized zones and dating back to the period preceding the invention of nuclear weapons, only those can be recognized as agreements establishing also denuclearization obligations which provide for complete demilitarization, that is to say, those which prohibit the maintenance within the area of *any* types of weapons.[34]

Demilitarized and also denuclearized frontier zones were established on the basis of the peace treaty with Italy of 10 February 1947. Within the demilitarization provisions it established various forms of denuclearization of specified areas: partial—in frontier areas with France and Yugoslavia (articles 47, 48); complete—in Pantellaria, the Pelagian Islands, Pianosa and the Dodecanese Islands.[35]

Those two basic forms of denuclearization have a number of common elements. They include: a prohibition on the maintenance in specified areas of nuclear weapons and of installations designed for their servicing, as well as an obligation following therefrom to remove them, and/or an obligation to refrain from measures which would lead to the introduction of those weapons and installations into a specified area.

Apart from those common elements one could at the same time distinguish specific elements of the particular forms of denuclearization: 1. in the case of denuclearization of areas of general international significance there comes to the forefront a set of obligations designed to secure the peaceful use of a given

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[32] Cf., *inter alia*, S. V. MOLODCOW, *Dogovor ob Antarktike*, "Sovetskoye Gosudarstvo i Pravo," 1960, No. 5, pp. 64—72; B. M. KLIMENKO, *op. cit.*, pp. 215—216; R. J. DUPUY, *Le Traité sur l'Antarctique*, "Annuaire Français de Droit International," 1960, p. 113.

[33] Cf. an analysis by A. SKOWROŃSKI, *Plan Rapackiego...*, pp. 928—930.

[34] Art. 3 and 4 of the Convention relating to the non-fortification and neutralization of the Aaland Islands.

[35] In accordance with annex XIII to the peace treaty with Italy the terms "demilitarization" and "demilitarized"—"should be deemed, to prohibit in the territory and territorial waters concerned, all naval, military and military air installations, fortifications and their armaments; artificial military, naval and air obstacles; the basing or the permanent or temporary stationing of military, naval and military air units ; military training in any form; and the production of war material" ("Dziennik Ustaw" ‹Dz. U.—"Journal of Laws"›, 1949, No. 50, text 378).

area, that is to say, the establishment of conditions enabling the development of peaceful relations among States on, or in relation to, that area. Prohibitive norms in case of such solutions appear as a factor which is to ensure conditions "of peaceful use" or of the development of peaceful relations among States. The proportions between those two elements are not equal. They depend on two factors—on the one hand on the nature of the area, and on the other hand on the scope of legal and factual events within that area or in relation to that area which justify denuclearization; 2. in the case of nuclear-free frontier zones the scope of obligations is dependent on the role which a given area is to play. The examples given above are not representative of zonal denuclearization solutions in view of their small territorial scope. That is why in order to define the role of those zones it is necessary to make additional use of the conclusions arising out of an analysis of demilitarized frontier zones.

The main motive behind the setting up of such zones was the endeavour—by way of separating the military potentials of the parties—to create a legal and factual situation which would render armed conflicts impossible.[36]

Necessarily thus, obligations regarding the removal from the area of the zone of military installations, armaments and armed forces are of particular significance in the case of such solutions.

V. The Polish plans provide for the denuclearization of the area of Central Europe, in principle covering four states: Poland, Czechoslovakia, the German Democratic Republic and the German Federal Republic. The scope of obligations in the two plans is, however, different: in the case of the plan for the setting up of a denuclearized zone emphasis has been placed on action (the removal of nuclear weapons and installations designed for their servicing), while in the case of the plan for the freezing of nuclear armaments—the action of States would be reduced to renunciation (not to increase the volume of nuclear armaments in the area of the zone).

The two plans combine elements of known forms of denuclearization.

1. The plans to set up a denuclearized zone and a zone of freezed nuclear armaments in Central Europe are proposals aimed at the denuclearization of an area of general international significance. Such significance is usually defined by a number of factors, among which particularly important are: the geographical situation, the possibility of armed conflicts arising in that area and endangering international security, the geographical and transportation role of the area in international exchange.

Central Europe is an area of general international significance not only on account of its geographical position but, above all, on account of the danger of an outbreak of an armed conflict occurring there. Across Central Europe runs

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[36] See L. ERICH, *op. cit.*, p. 603.

the line of nuclear confrontation between the two groupings: NATO and the Warsaw Pact.[37]

The Polish plans take into consideration to a large extent the postulate, typical of solutions for denuclearization in areas of general international significance, of creating conditions enabling the development of peaceful relations among States and of their co-operation. Those plans are designed to create conditions of security in Central Europe.[38]

They treat this question, however, not only as a goal, but envisage the peaceful co-operation of States as a means to ensure the effective fulfilment of the provisions contained therein.

It could be mentioned, by way of example, that the Polish plan for the freezing of nuclear armaments provides for an exchange between the four great nuclear powers—at periodic meetings of their representatives—of any information and reports necessary for the carrying out of obligations relating to the freezing of nuclear and thermo-nuclear armaments. One of the objectives of such exchange would be to create possibilities for making sure that all parties fulfil their obligations in accordance with the concluded agreement. Another objective would be to create an instrument for co-operation and joint action of nuclear States in the fulfilment of tasks laid down in the Polish proposal. The co-operation of those powers in the carrying out of regional measures of disarmament and detente, undertaken in the field of nuclear armaments, constitutes one of the essential conditions of the effectiveness of the adopted solutions.[39]

2. Both plans are related to the conception of demilitarized frontier zones. The major part of the obligations provided in them has been expressed in the form of zonal obligations, although the zone in the Polish plans is to cover not parts but the entire territories of four or more States, whereas previously established demilitarized zones were at the utmost of a several score kilometres width on each side of the frontier line.

Such physical widening of the conception of the zone can be explained by many reasons and among them, above all, by:

a) Measures undertaken hitherto by States related to conventional weapons of a lesser range than that of nuclear weapons. Thus, whereas in the past the objective of demilitarization could be achieved by the exclusion of relatively small areas, present military techniques call for the establishment of considerably larger zones.

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[37] A. RAPACKI, *Rozbrojenie...*, p. 12.

[38] The introduction to the plan for the setting up of a zone of freezed armaments states that the purpose of the plan is "the reduction of international tension and creation of conditions of security in Central Europe" ("Trybuna Ludu", 6 March 1964).

[39] Cf. a listing of the literature on the subject of the significance of the exchange of information in the article by A. SKOWROŃSKI, *Polski Plan Zamrożenia Zbrojeń*, p. 31.

b) Demilitarized zones were set up in the past along frontier lines between States with a view to reducing the possibility of conflicts arising between them. The object of the Polish plan is to create such a zone in Central Europe along the line of abutment not only of particular States, but of the two opposing groupings: the North Atlantic Treaty Organization and the Warsaw Pact.

c) Demilitarized frontier zones were most often created in areas where various armed incidents and conflicts used to take place, the danger being of their developing into wider conflagrations (e.g. the Rush-Bagot Agreement of 1817[40]); or in areas which constituted bases for sorties against other States (e.g. the demilitarization of the Rhineland following the World War I[41]). In the present set up of international relations, it is precisely in Central Europe that exists one of the particularly perilous trouble spots.

The denuclearization proposed in the Polish plan for the creation of a nuclear-free zone would be linked with partial neutralization, which is indicated by the obligation contained in the Memorandum, and binding upon nuclear States, not to use nuclear weapons against the area of the zone. The linking of elements of demilitarization and neutralization in the Polish proposals is a logical consequence of their general premise: of the endeavour to create in Central Europe a zone of real security. By the combination of elements of partial demilitarization, that is to say, denuclearization and of partial neutralization, the status of the nuclear-free zone would constitute a certain "novelty"—as international practice known hitherto has not recorded any cases of an exclusion of a specified area from the operation of some only types of weapons.

VI. The establishment by convention of a nuclear-free zone and of a zone of freezed nuclear armaments proposed in the Memoranda of the Polish Government, a proposition which differs in its form from the majority of precedents (a set of separate documents constituting, however, a certain systematic whole). Because those treaties whenever they concerned the establishment of a zone of general international significance, provided, apart from duties and rights of the States of the zone, for guarantees for the respect by third States of the status established in the treaty and for control designed to ensure the observance of duties and rights set forth in the treaties.

A. Guarantees. The Polish plans provide for the establishment of appropriate guarantees for the respect of the status created by the treaty. Two different methods have been envisaged here:

—the establishment of guarantees by laying down detailed obligations for

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[40] H. WEHBERG, *Limitation of Armaments*, Washington 1921, pp. 8—9.

[41] In accordance with Art. 44 of the Versailles Treaty of 1919 a violation by Germany of the demilitarization of the Rhineland would be considered as an act designed to disturb "world peace" (Dz. U., 1920, No. 35, text 200).

third States, that is, States situated beyond the area of the zone (e.g. the obligation not to transfer weapons, not to introduce nuclear weapons, not to establish bases designed to service nuclear weapons and the like);

—the establishment of guarantees by a general obligation to respect the status of the zone.

Both methods have been provided for in the Polish plans to a different degree.

The plan for the creation of a nuclear-free zone in its version of 14 February 1958 envisaged only one general obligation as regards third States, viz. the nuclear powers—not to use nuclear weapons against the area of the zone and any objects situated within it. The Memorandum of 28 March 1962 laid down a wider obligation as regards the nuclear powers "to refrain from any steps which might violate directly or indirectly the status of the zone."

In this way there has been established a system of effective guarantees for the respect of the status of the zone not only in time of war, but also in time of peace, not only against direct violation, but also against any political action which might be contrary to the purposes of denuclearization or which might weaken its effectiveness.[42]

The plan for the freezing of nuclear armaments—as different from the earlier plan for the setting up of a nuclear-free zone—provides for the establishment of guarantees by imposing detailed obligations only upon third States. This follows, above all, from the considerably narrower scope of this proposal which is not based on the principle of removing the nuclear potential maintained within the zone, but on that of not increasing it. Since the obligation of the powers not to use nuclear weapons against the area of the zone is an exquivalent to the renunciation of nuclear weapons by the States of the zone, in the case of freezing of nuclear armaments, the need to establish such an obligation considerably decreases.

B. Control. Both plans, though in different measure, provide for control over the fulfilment of the obligations. This has been caused, above all, by two reasons: the recognition of the fact that the adoption of obligations with regard to the setting up of the zone and of the freezing of nuclear armaments involves the vital interests of the parties concerned, and therefore they should obtain adequate possibilities for verifying the fulfilment of the obligations by the other parties; taking into consideration the position of some States recognizing the need for the establishment of an appropriate system of control as regards the realization of regional disarmament conceptions.[43]

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[42] It is wrong to maintain that the guarantees in the Polish plan for a nuclear-free zone would be ineffective because they provide for renunciation alone and not for joint action of the guarantors. Cf. H. FIEDLER, *Rapacki-Plan und Sowietisches Voelkerrechtsdenken*, "Internationales Recht und Diplomatie," 1958, No. 4.

[43] Cf. Replies of the USA and Great Britain to the questionnaire of the Secretary-General of the United Nations on the implementation of the resolution of the United Nations No 1664/XVI. Cf. doc. DC/201/Add. 2.

The plan for the setting up of a nuclear-free zone envisages three forms of control: ground, aerial and control carried out by appropriate "control posts." The Memorandum of 14 February 1958 envisaged the possibility of applying also other forms of control based on experiences acquired in this field and on plans presented in disarmament negotiations conducted hitherto "in the form and to the extent to which they can be adapted to the area of the zone." The control would be exercised by a special organ whose composition and competence would be agreed upon by the States concerned. The scope and measures of control in both stages of the creation of the nuclear-free zone would also be agreed upon by the States concerned.

The plan for the freezing of nuclear armaments in Central Europe provided for basing the system of supervision on three principal elements:

a) the supervision over the compliance with the prohibition of the production of nuclear and thermo-nuclear weapons which would be exercised in establishments used, or which could be used, for the production of those weapons;[44]

b) the supervision over the compliance with the prohibition to import nuclear and thermo-nuclear weapons, which would be conducted in agreed frontier posts of road, rail and river transportation and in designated sea and air-ports;[45]

c) the exchange between the four great nuclear powers, at periodic meetings of their representatives, of any information and reports necessary for the fulfilment of obligations relating to the freezing of nuclear and thermo-nuclear armaments. The purpose of such exchange would be to create possibilities for ascertaining whether all signatories fulfil the obligations in accordance with the concluded agreement without prejudice to its purposes on the one hand, and to the interests of the States concerned on the other.[46]

VII. As regards measures proposed in the Polish plans, it is of particular significance to base the mutual relationship of the parties upon the principle of equality, both in law and fact.

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[44] In practice supervision would not cover all production installations, but only those whose character and production capacity justify the fear that they can be used for the prohibited production. Taking into consideration that in the area of the proposed freezing nuclear weapons are now not being produced, the establishment of supervision would be comparatively simple. This is confirmed in the working document ENDC/60, para. 67, submitted by Great Britain in the Eighteen-Nation Committee on Disarmament at Geneva.

[45] Such control would be comparatively least burdensome for States and at the same time most effective. It would meet the increasingly popular postulate of such an exercise of control which would not lead to new sources of conflict. Cf. the speech by the delegate of Sweden in the Political Committee of the General Assembly of the United Nations on 30 October 1963 (doc. A/C. 1/PV 1321, p. 61).

[46] The exchange of information and reports was provided for in the Maritime Treaty signed in London on 25 March 1936 between the USA and Great Britain (Art. 11, para. 1.), and also in the Convention on Antarctica of 1 December 1959 (Art. III and VII).

The first postulate has been taken into account by the adoption of the method of denuclearization obligations being undertaken by the States of the zone and by third States voluntarily and in treaty form. This is particularly important considering the fact that in international practice there have been frequent examples of unilateral imposition by States upon other States of the obligation to create a demilitarized zone[47] or examples of States—guarantors being accorded rights enabling them to interfere in the internal affairs of States commited to demilitarization.[48]

In both plans: the zone has a bilateral nature, that is, it covers States from the two opposing groupings: the Warsaw Pact and the North Atlantic Treaty Organization; both "sides" have the same and equal rights and obligations; the rights and duties of States guaranteeing the inviolability of the status of the zone are defined in a way making impossible any interference on their part in the internal affairs of the States of the zone; those rights and duties are equal for the four Great Powers and other States whose troops are stationed in the zone.

The second postulate of actual equality has been taken into account in the Polish plans by an appropriate formulation of the obligations of States. In assessing this problem it is of basic significance, however, to explain what that actual equality of the parties as regards disarmament measures consists in. That equality cannot, naturally, be regarded as meaning an equality of services rendered by States in the course of the fulfilment of the objective of denuclearization. Those services will be different and unmeasurable for they will be determined not only by clearly formulated obligations but also by the sum total of losses and gains from the point of view of the requirements of security and national interests. The point then is to reach such solutions which would—as has been repeatedly emphasized in disarmament negotiations—ensure the security of States in an equal way and would exclude the possibility of some States gaining advantage over other States.

That problem is particularly topical in view of the objections put forward by Western countries against the Polish plans to the effect that they would upset the socalled balance of forces to the detriment of their security.[49]

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[47] For instance, the unilateral demilitarization of the Black Sea in the Paris Peace Treaty of 1856.

[48] The Austrian-British-French Treaty on guarantees signed in Paris on 15 April 1856 provided for the undertaking of various intervention measures in consultation with Turkey against Russia.

[49] Cf., *inter alia*, the notes of the Governments of the United States of 3 May 1958 and of Great Britain of 19 May 1958 and the communiqué of the Polish Press Agency of 14 June 1964 on the reply of the western States to the Polish Memorandum on the freezing of nuclear armaments in Central Europe.

The objections against the plan for the creation of a nuclear-free zone can be countered—apart from the arguments presented above—by the following arguments:

a) the implementation of the Polish plan would not lead to a onesided endangering of the security of the Western States, because it would not make it impossible for them to use, if there be need for it, the remaining military means in the zone and also weapons stationed beyond its area;[50]

b) the plan is in accord with the ever growing conviction that the maintenance of nuclear weapons along the line of abutment is becoming to an increasing degree redundant with the development of rocket weapons and with the decreasing role of the so-called coefficient of distance.

The objection as to the upsetting of the so-called balance of forces becomes totally groundless in the context of the plan for freezing nuclear armaments. Because it follows from the essence of freezing that there cannot take place a worsening of the situation of any of the sides: the "freezing" obligations do not alter the actual state of armaments within the specified area, they only prevent their increase which could lead precisely to what may be upsetting the existing balance.

The argument alleging that the creation of the nuclearfree zone or of the zone of freezed nuclear armaments would lead to the upsetting of the balance of forces, is by no means new. It was repeatedly put forward also in the past against various plans fot the creation of demilitarized zones. One can find similar objections as far back as the British-American diplomatic correspondence preceding the conclusion of the so-called Rush-Bagot Agreement of 1817.[51] It was put forward by Great Britain. Despite that—as is known—an agreement was reached on the partial demilitarization of the socalled Great Lakes along the frontier between the USA and Canada. That agreement played a beneficial role in the consolidation of peaceful relations between Great Britain and the United States of America, and served for many years as a kind of model, to which advocates of demilitarized zones not infrequently referred.[52]

VIII. Another essential problem connected with the Polish proposals is the relation of the agreements establishing the zone towards third States.

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[50] The Secretary of Defence of the United States of America, McNamara, drew attention to the role of such forces in his speech delivered on 18 November 1963 in the Economic Club in New York ("The Department of State Bulletin," No. 1277, 16 December 1963, p. 916). This problem was also widely dealt with in the article of E. HINTERHOFF entitled *Americas Militärmacht und ihre strategische Doktrin*, „Aussenpolitik," 1963, No. 11, pp. 761—768.

[51] Cf. a review in J. B. MOORE, *A Digest of International Law*, Washington 1906, vol. I, pp. 691—698.

[52] Cf. a discussion of the significance of the agreement, *inter alia*, in the note of the USA to Canada of 9 June 1939, Documents on American Foreign Relations, Boston 1941, vol. III, p. 170.

In international law, apart from agreements establishing mutual rights and duties of the parties taking part in their preparation and conclusion, there are also known socalled agreements in favour of third States (*pacta in favorem tertii*), that is, States which are not parties to the agreement and have no intention of acceding to it. It is, however, a required condition that the State which is to benefit from such an agreement, as well as the scope of the benefits accorded—is to be clearly defined.[53]

The question, however, arises what is the relation of international agreements to third States if those agreements do not explicitly accord such benefits.

This problem has an increasing practical significance in connection with the development of the so-called "agreements of general significance," which term is often applied also to agreements on "the neutralization or demilitarization of certain areas."[54]

The general character of those agreements follows, *inter alia*, from the subject-matter they regulate—problems of collective security, which concern directly not only States-Parties to such an agreement, but indirectly also other States interested for geographical or substantive reasons in the maintenance of the state of affairs established by the agreement.

It can be assumed that to such agreements would also belong one creating a nuclear-free zone. Its foundation would consist of two universally recognized norms of international law: 1. a ban on aggression[55] and 2. a ban to use weapons of mass annihilation.[56]

It follows from the universality of those norms that they are binding also upon States which are not parties to a specific agreement which is explicitly or implicitly based on them.

It is for those reasons that in replying to the question put above it should be said that taking cognizance by a third State (tacitly or explicitly) of the fact of the conclusion and entry into force, *inter alia*, of such agreements which provide for neutralization or demilitarization "signifies that they recognize all consequences arising therefrom as relating to them."[57]

That principle if confirmed, *inter alia*, by the stipulations of article 9 of the Convention relating to non-fortification and neutralization of the Aaland Islands, signed on 20 October 1921, which clearly provide that: "Le Conseil de la Société

[53] Cf., *inter alia*, Art. 18, para. (b) of the draft prepared by the Harvard Research in International Law, *The Law of Treaties*, "American Journal of International Law," 1935, vol. XXIX, Supplement, p. 924 ff.

[54] M. LACHS, *Umowy wielostronne* (*Multilateral Agreements*), Warsaw 1958, p. 184.

[55] The universality of the ban on aggression has been emphasized in Art. 2, para. 4 and 6 of the Charter of the United Nations.

[56] Cf., *inter alia*, the Geneva Protocol of 1925 for the prohibition of the use in war of asphyxiating, poisonous or other gases, and of bacteriological methods of warfare, and the respective provisions of the Hague Conventions of 1899 and 1907.

[57] M. LACHS, *op. cit.*, p. 186.

des Nations est prié do vouloir bien porter la présente Convention à la connaissance des Membres de la Société, afin que le régime juridique des iles d'Aaland, partie intégrante de la République de Finlande, tel qu'il ressort des dispositions de cette Convention, soit respecté par tous dans l'intérêt de la paix générale comme faisant partie des règles de conduite effectives des gouvernements."[58]

A reflection of that principle can also be found in the formulations of the Polish Memorandum of 28 March 1962 which authorize the Eighteen-Nation Committee on Disarmament to request the General Assembly of the United Nations "to adopt a resolution concerning the creation of a denuclearized and limited armaments zone in Europe."[59]

In this specific case the consequences for third states would be: the obligation to respect the status of the zone, and the right to demand that states respect the status of the zone; that right shall be enjoyed in the first place by States directly interested for geographical or substantive reasons in the maintenance of the status created by the agreement.

IX. Both Polish proposals while differing from each other in scope and way of implementation, would in case of acceptance have great significance for collective security:

1. A consequence of the acceptance of the Polish proposals would be the emergence on the line of abutment between the States-Parties to the North Atlantic Treaty Organization and to the Warsaw Pact—of a wide area on which, in the case of the Rapacki plan, nuclear armaments would be eliminated and conventional armaments limited or—as provided for in the Gomułka plan—the process of development of nuclear armaments would be arrested.

2. In both cases the risk of an outbreak of a nuclear conflict would be reduced and a sense of security equal for both sides would be created without prejudg ing in any way the rights and possibilities for defence which they have now Neither would there be any infringement on the right of States to self-defence to which they are entitled under article 51 of the Charter, however, the possibility would be restricted to invoke that right in order to justify an arms race.[60]

3. The creation of a nuclear-free zone would fulfil on a regional scale, in the area of Central Europe, the role of nuclear disarmament, a freezing of nuclear armaments—on the other hand—could constitute an initial step to such disarmament. In both cases conditions would be created conducive to the realization

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[58] *Prawo Międzynarodowe* (*International Law*), vol. II, p. 189.

[59] Doc. ENDC/C. 1/1.

[60] The right of self-defence, in accordance with article 51 of the Charter is subordinated to the principles of collective security; it cannot thus be used as a justification for armaments beyond the real needs of defence defined in Art. 51 of the Charter.

of more far-reaching military measures and also an atmosphere facilitating the solution of political problems relating to collective security.

4. The creation of a nuclear-free zone or else of a zone of freezed nuclear armaments would be of significance not only to States participants or guarantors, but also to other States of Europe. An agreement to create a nuclear-free zone, or to freeze nuclear and thermo-nuclear armaments, would have a number of features of a regional agreement[61] within the meaning of Article 53 of the Charter of the United Nations:

a) it would relate to "the maintenance of international peace and security" and would have, both as regards its object as well as its subject-matter—a "regional" character;

b) it would be in accord with the purposes and principles of the United Nations as defined in Articles 1 and 2 of the Charter and, especially, with the postulate contained in paragraph 1 of article 1 on maintaining international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace;

c) it would be in accord with the principle of the sovereign equality of States as defined, *inter alia*, in Article 2, paragraph 1, of the Charter of the United Nations;[62]

d) it would have an open character, that is to say, apart from Poland, Czechoslovakia, the German Democratic Republic and the German Federal Republic, other European states would be able to accede to the zone.[63]

5. The implementation of the Polish plans would be a valuable experiment in international co-operation between the two opposing groupings in an area fraught with conflicts. They could be utilized with advantage in the realization in that area of other military and political measures aimed at further detente and disarmament.[64]

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[61] For instance, in the letter of 14 January 1958 of the Prime Minister of France, Gaillard constituting a reply to the letter of the Prime Minister of the USRR, Bulganin, of 10 December 1957, the Rapacki Plan was defined as a regional disarmament solution.

[62] In the light of the above, the objection on the alleged discrimination of the German Federal Republic put forward by some political elements in the west is unjustified.

[63] Cf. the interview of the Warsaw correspondent of "Die Welt" with the Minister of Foreign Affairs of the Polish People's Republic, A. Rapacki, of 12 December 1957 ("Zbiór Dokumentów", 1957, No. 12, p. 764). Similarly in the interview given to the correspondent of the weekly "Sunday Times" and published in that paper on 3 January 1958, Minister Rapacki emphasized : "We would welcome the decision of any government to renounce and prohibit the production and stockpiling of nuclear weapons on its territory" ("Zbiór Dokumentów", 1958, No. 1, p. 202). The open character of the Polish proposal on the freezing of nuclear armaments follows directly from the wording of para. 1 of the Memorandum of the Polish People's Republic of 29 February 1964. Cf. also press conference of Minister A. Rapacki of 5 March 1964 ("Trybuna Ludu," 6 March 1964).

[64] Cf. M. DOBROSIELSKI, *Regionale Rüstungsbeschrankung und militarische Sicherheit in Europa*, "Europa-Archiv," 1964, No. 5, pp. 157—162.

PRINCIPLES OF CONTEMPORARY POLISH PRIVATE INTERNATIONAL LAW IN THE LIGHT OF THE PROVISIONS OF THE ACT OF 12 NOVEMBER 1965

by KAZIMIERZ PRZYBYŁOWSKI

I. *General Remarks Relating to the New Act*

1. On 12 November 1965 the Sejm enacted an act which defines "the law governing international personal and property relations in the field of civil, family and guardianship laws and labour law." It entered into force on 1 July 1966, replacing the conflict rules of the Act of 2 August 1926. Even before that date and namely as of 1 January 1965 those provisions of the Act of 2 August 1926 which related to the subject-matter regulated in the new Code of Civil Procedure, enacted on 17 November 1964,[1] ceased to be effective.

2. The Act of 2 August 1926 was a valuable Polish achievement and was—and rightly so—generally highly appreciated. It contained a number of provisions which retained their usefulness until the last period of their operation. It contained, however, also such provisions which were inadequate either right from the start, or have become so within the system of conflict rules of contemporary Polish private international law. By way of example reference could be made here to:[2] a) conflict rules relating to contractual obligations not adjusted to the needs of foreign trade; b) the unjustified favouring of the personal law of the husband and father in family relations; c) the specific regulation of the legal status of children born out of wedlock; d) the anachronistic provisions of article 12, paragraph 2, relating to impediments to marriage; e) the unjustified provisions on the applicability of the last common national law, prescribing the application of the law though at the relevant time it may not be any longer the national law of the parties concerned; f) provisions relating to heirless inheritance not in harmony with the provisions contained in civil

[1] The Act of 12 November 1965 was published in "Dziennik Ustaw" (Dz. U.—"Journal of Laws"), No. 46, text 290. The Code of Civil Procedure of 17 November 1964 was published in Dz. U. No. 43, text 296.

[2] Such example is given in the motivation of the governmental draft.

law; g) attempts at a casual regulation of issues relating to the so-called change of status in the generally criticized Article 6, paragraph 2, and also in Article 1, paragraph 2, Article 14, paragraph 3, Article 17, paragraph 2; h) the fragmentary regulation of certain issues relating to jurisdiction out of line with the other provisions in this field.

3. Taking this into consideration, the Ministry of Justice decided in 1951 to proceed with codification work. At the request of the Ministry I prepared at that time an appropriate report and a preliminary draft which was later on modified in some directions by the Ministry prompted by the remarks submitted in the course of the subsequent years particularly by the Ministry of Foreign Affairs and the Ministry of Foreign Trade. That draft was utilized in 1956 and later on in the course of the work of the Codification Commission. The text adopted in the first reading by a competent working group of the Commission[3] was published in 1961.[4] The outcome of public discussion was taken into account by the working group of the Commission in the course of the second and third reading in January 1963. Some changes were introduced by the Praesidium of the Codification Commission in June 1963. Following consideration of the remarks put forward by the ministries and organizations concerned,[5] the Praesidium of the Commission decided on 16 April 1964 to submit the modified draft to the Minister of Justice. Following acceptance by the Ministry of Justice and then by the Council of Ministers, the draft, with a motivation[6]

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[3] The working group on private international law consisted of : C. Berezowski (chairman), M. Lachs, M. Lisiewski, K. Przybyłowski (rapporteur), S. Szer, A. Wolter. In the work of the group participated as experts : throughout H. Trammer, and at the last sitting in January 1963 also W. Ludwiczak. Delegates of the Minister of Justice were in turn : W. Bendetson, C. Tabęcki and E. Wierzbowski.

[4] In the monthly "Nowe Prawo" ("New Law"), 1961, No. 11, pp. 1414—1420, and in a separate reprint. There also appeared translations abroad. And thus, for instance, in English in *Law in Eastern Europe*, Leiden 1963, vol. VII, pp. 321ff.; there also commentary written by D. LASOK, *The Draft Code of Polish Private International Law* (pp. 253—256). The French translation was published in "Revue critique de droit international privé," 1962, p. 189. The German translation : in WGO ("Die wichtigsten Gesetzgebundsakte in den Landern Ost-Südeuropas") 3, 1961, p. 222.

[5] Remarks to the draft were submitted on the part of : the Office of the Council of Ministers, the Ministry of Foreign Affairs, the Ministry of Foreign Trade, the Ministry of Finance, the Office of the Prosecutor-General, the Committee for Work, Wages and Salaries, the Voivodship Court in Poznań, several judges of the Supreme Court and the Main Board of the Women's League. The Praesidium of the Codification Commission entrusted the preparation of a draft resolution on those remarks to a team consisting of : M. Lachs, K. Przybyłowski, A. Wolter, with the co-operation of the director of department of the Ministry of Foreign Affairs—W. Zawadzki.

[6] It was in its entirety literally in accord with one of those motivations which I have prepared as rapporteur of the draft in the Codification Commission, viz. with the last one presented in April 1964 at the request of the Praesidium of that Commission.

thereof, was presented to the Sejm on 31 July 1964. The Sejm Committee for Administration of Justice, following a preliminary consideration of the draft,[7] set up a sub-committee which scrutinized its particular provisions,[8] discussing the contents and wording of each article. Taking into account the results of the work of the sub-committee, the Committee adopted the draft with amendments.[9] However, the III Sejm did not, for lack of time, enact the statute. The Council of Ministers submitted the draft to the IV Sejm on 14 July 1965, in the version as adopted by the Committee for Administration of Justice of the III Sejm.[10] The Committee for Administration of Justice of the IV Sejm considered the draft first on 17 September 1965 and next—taking into account the conclusions of the group set up at that time—on 29 September 1965.[11] At that latter meeting the Committee decided to present to the Sejm a motion on the adoption of the governmental draft with amendments. The Act was ultimately enacted by the Sejm[12] at its meeting on 12 November 1965.[13]

4. The new Act, just like the old one, contains rules of the so-called general private international law. It does not deal, however, with issues regulated in specific provisions (e.g. in the field of maritime law, air law, promissory notes and bills of exchange law and the law of cheques)[14] which—as expressly laid down in Article 37—continue to remain in force.

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[7] Its text is given in a Sejm publication "Sejm PRL, III kadencja, VIII sesja ("The III Sejm of the Polish People's Republic, VIII Session"), paper No. 197.

[8] The sub-committee deliberated on 19, 22, and 30 January 1965, consisting of : J. Jodłowski (chairman), J. Wasilkowski (rapporteur), R. Bierzanek, T. Makowski, T. Nowakowski, with the co-operation of the under-secretary of state at the Ministry of Justice J. Pawlak, of the director-general in the Office of the Council of Ministers S. Rozmaryn, and of representatives of other ministries. K. Przybyłowski took part in the sittings of the sub-committee as an expert.

[9] At sittings on 12 February and 9 March 1965. Cf. Sejm paper No. 219.

[10] "Sejm PRL, IV kadencja, I sesja" ("The IV Sejm of the Polish People's Republic, I Session"), paper No. 8. The motivation annexed to the draft differs from the previous one (mentioned above in note 6) as a rule only in those few places in which the necessity of modification arose from changes in the text of the draft.

[11] The group appointed on 17 September 1965 consisted of J. Wasilkowski, H. Karpińska and T. Makowski. In the deliberations of the Committee on 29 September 1965 took part : representatives of Sejm Committees for Foreign Affairs and for Foreign Trade, under-secretary J. Pawlak, deputy prosecutor-general K. Świtała, director-general in the Office of the Council of Ministers S. Rozmaryn, director of team at the Supreme Chamber of Control H. Kaczyński and representatives of the Ministry of Foreign Affairs and of the Ministry of Foreign Trade; also as experts : K. Przybyłowski and A. Wolter. J. Wasilkowski was rapporteur. Adopted amendments are enumerated in the report of the Committee ("Sejm PRL, IV kadencja", paper No 14).

[12] The rapporteur was J. Wasilkowski.

[13] More detailed information on the course of the codification work I have given in my treatises published in "Studia Cywilistyczne," Cracow vol. V (1964), and vol. VIII (1966).

[14] Such specific provisions are contained, for instance, in the Maritime Code of 1 December 1961 (Dz. U. No. 58, text 318), in the air law of 31 May 1962 (Dz. U. No. 32, text 153), in the promissory notes and bills of exchange law of 28 April 1936 (Dz. U. No. 37, text 282), in the law of cheques of 28 April 1936 (Dz. U. No. 37, text 283).

Neither do its provisions apply where an international agreement to which the Polish People's Republic is a party provides otherwise (Article 1, paragraph 2).

5. The Act contains conflict rules determining the applicable law. It does not, in principle, deal with issues relating to the legal position of aliens, to which refers just one provision contained in Article 8.[15]

6. The new Act introduces changes into the existing legal situation only as much as it is necessary in contemporary international relations, particularly in connection with the need for common action in the strengthening of peaceful co-existence and international co-operation of states and in order to take account of changes in the legal structure resulting from the socio-economic transformations in the Polish People's Republic.

7. The Act is marked by moderation as regards the range of regulated issues. Anyway Poland has been since 1926 among those countries which have got ahead of so many other states in the field of statutory regulation of conflict problems of private international law. A further thoughtful amplification of the statutory provisions of that branch of law may gradually—as the need arises—be effected in the future.

8. Synthetic, concise formulations predominate in the Act. Certain deviations from that rule in the field of contractual obligations have been the result of particularly important needs of practice.

There also clearly predominate therein such formulations which make it possible to foresee the results of the application of conflict rules and thereby enable the parties to take those anticipated results into consideration to a wider extent than is the case with formulations allowing for a greater discretion (free appreciation) on the part of the pronouncing authorities. That is why, the Statute does not include provisions contemplating such criteria like, for instance, "reasonable appreciation" or "just appreciation" or "the nature of things." This does not mean that flexible formulations have been given up entirely. Such formulations do appear but only where they are indispensable. Neither does the new Statute make the applicable law dependent on the appreciation regarding which law is "more favourable" (as did the Act of 1926 in Article 21 relating to children born out of wedlock), precisely in order not to introduce vague criteria, changeable in time, operating unevenly in various directions and, consequently, causing uncertainty in legal relations.

9. The application of foreign conflict rules is admissible under the new Act to a somewhat modified extent. And thus, as regards foreign rules of private international law, this results from the extended sphere of the operation of remission (cf. below, Chapter II, point 3). A greater respect for other foreign conflict rules (e.g. inter-local, intertemporal and the like) has been reflected in the extension of the scope of operation of the provision contained in Article 5 (cf.

[15] Cf. infra in Chapter II, point 7.

infra, Chapter II, point 4). On the other hand, the new Act does not provide for conditional application of the *lex rei sitae* as provided for in Articles 16 and 19 of the old Act (cf. below, Chapter II, points 12 and 14).

10. The principle of the application of the national law has been retained to a wide degree, viz. in the sphere of legal capacity, capacity to enter into legal transactions, family and guardianship law as well as succession law. This is justified by the intensity and stability of the connection existing between the national and his state—considerably greater than in the case of domicile. In some fields, however, the approach adopted in the new Act towards the application of the national law is different, particularly in the field of family law. And thus, for instance, in relations between the spouses it does not provide for any privileged treatment of the national law of the husband, and in relations between parents and children it prescribes the application of the national law of the child both as regards children born in wedlock as well as those born out of it. In Chapter II below reference will be made to still other differences between the old and the new Act as regards the application of the national law.

11. The new Act, like the old one, does not contain intertemporal provisions. It should be accepted that, in principle, *lex retro non agit*. It should, however, be borne in mind that not infrequently a seemingly "new" rule clearly expresses a principle which was binding previously and that often a provision better formulated expresses more correctly the content of a rule which followed from an interpretation of a previous, worse formulation.

12. The systematics followed in the new Act differs from that in the previous one. The general rules have been put first. Conflict rules of the family and guardianship law come before the set of rules relating to property relations and obligations. New sections have been added which include conflict rules relating to *prescriptton* and to labour relations.

II. *Rules Relating to Particular Issues*

1. Article 2 of the new Act solves the problem of the governing law in cases of plural nationality. As is well known, the question whether a person possesses the nationality of a given state should be decided by the law of that state.[16] However, on account of differences between the rules relating to acquisition and loss of nationality, which are binding in particular states, it may occur that a person being a national of one state possesses at the same time the nationality of another state. In this respect two categories of cases should be distinguished.

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[16] See Art. 2 of the Convention on certain questions relating to the conflict of nationality laws, signed at the Hague on 12 April 1930 (publ. in Dz. U. 1937, No. 47, text 361). That article provides : "Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State."

To the first—there belongs the concurrence of Polish nationality with a foreign one and it is to that category that Article 2, paragraph 1, relates which lays down that where the Act provides that the national law shall be applicable, a Polish citizen is subject to Polish law though under the law of another state he will be considered as the national of that state.[17] This is consistent with the principle prevailing hitherto. Thus as regards the sphere of operation of conflict rules, the consequences arising from the provisions relating to nationality are clearly stated.

The second category covers cases of concurrence of foreign nationalities. It is to that category that Article 2, paragraph 2, relates, according to which "an alien possessing the nationality of two or more states is subject—as regards the national law—to the law of that of the states with which he is most closely connected."[18]

The question arises whether in that controversial question the principle so far prevailing has been changed. I believe it has not and I proceed from the assumption that I have been right in the view I have been defending all along on the basis ot the legal rules prevailing heretofore.[19]

2. Under Article 3 where the law provides that the national law shall apply and the nationality of the person concerned cannot be established, or that person does not possess the nationality of any state, the law of the state shall apply in which the person has his domicile. In this way the rule pertaining to personal capacity in Article 1 of the Act of 1926 has been generalized, and at the same time lack of nationality—apart from the impossibility to establish it—has been clearly mentioned. That is how I have taken it to mean on the basis of the Act of 1926 and I do not, therefore, see here any change in the legal situation prevailing heretofore, but only a clear statement of a valid rule.

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[17] In particular now—from Art. 2 of the Act of 15 February 1962 on Polish nationality (Dz. U. No. 10, text 49), which provides that "a Polish citizen cannot—under Polish law—be at the same time recognized as a citizen of another state." Cf. also article 3 of The Hague Convention referred to in the preceding note, according to which "subject to the provisions of the present Convention, a person having two or more nationalities may be regarded as its national by each of the States whose nationality he possesses."

[18] Cf. Art. 2 of the Act of 29 March 1963 on Aliens (Dz. U. No. 15, text 77), according to which "an alien possessing the nationalities of two or more states should be treated as a national of only one of those states." Art. 5 of The Hague Convention of 12 April 1930 (referred to in note 16) provides the following : "Within a third State, a person having more than one nationality shall be treated as if he had only one. Without prejudice to the application of its law in matters of personal status and of any conventions in force, a third State shall, of the nationalities which any such person possesses, recognize exclusively in its territory either the nationality of the country in which he is habitually and principally resident, or the nationality of the country with which in the circumstances he appears to be in fact most closely connected."

[19] Already in the treatise *Bezpaństwowość i wielorakie obywatelstwo* (*Statelessness and Plural Nationality*), Lwów 1934. Cf. also *Prawo prywatne międzynarodowe* (*Private International Law*), Lwów 1935, p. 116, and also *Le problème des multiples nationalités en Pologne*, Warsaw 1937.

3. Neither has transmission, as shaped thus far, been changed. Also under the new Act it is admitted only where the transmitting foreign law is the law to which the Polish conflict points as to the national law, that is to say, with the help of the connecting factor of nationality. And it continues to be admitted only as a "single" transmission;[20] thus e.g. if Danish law, pointed out as the national law by the Polish conflict rule, referred to Dutch law, we in Poland would apply the provisions of Dutch law.

Remission, on the other hand, is admitted whenever a case is sent back to Polish law by a foreign law to which the Polish conflict rule points with the help of any connecting factor (that is to say, not only with help of the connecting factor of nationality, as laid down in Article 36 of the Act of 1926).

4. Often the governing law is that of a state in which in its particular areas (or in respect of different periods of time, different persons or in other respects) there apply separate sets of substantive rules. It is the appropriate conflict rules binding in that state, that is, the rules of the inter-local law (or intertemporal, interpersonal and so on) that decide on the applicability of those substantive rules. The interpretation of Article 37 of the Act of 1926, adopted thus far, provided for the taking into account of those rules and this has not been changed by the new Act which in Article 5 merely formulates the principle so far prevailing more correctly. However, the scope of its operation has now been broadened due to the fact that instead of the application of the law of the place, as repeatedly provided for by the Act of 1926, the application of the law of the state is provided for in the relevant Articles of the new Act (cf. Articles 1, 2, 5, 8, 9, 13 of the old law and Articles 3, 9, 12, 15, 25—29 of the new one).

Consistently with that principle foreign rules of intertemporal law may, *inter alia*, come to be applied. Conflict rules prescribing the application of the national law at a specified time do not stand in the way of such development; those rules do not thereby prejudge the issues discussed here but relate to other issues (viz. to the change of status).

In particular such expressions as: "the national law at the time of the conclusion of the contract" (Article 17, paragraph 2, of the new Act), "at the time of the application for divorce" (Article 18), "at the time of the birth of the child" (Article 19, paragraph 2, first sentence), "the national law of the testator at the time of his death" (Article 34) or "at the time of the performance of the trans-

[20] As regards transmission the principles established on the basis of Art. 36 of the Act of 1926 continue to be binding. Cf. what I wrote about them in the treatise entitled *Z problematyki stosowania obcych norm kolizyjnych* (*Some Problems Relating to the Application of Foreign Conflict Rules*), Cracow 1959. The draft of the Codification Commission and the governmental draft of 1964 took into account transmission only where the state to which transmission has been made recognizes its law as applicable. The Sub-committee appointed by the Committee for Administration of Justice of the Third Sejm was against such an approach, sharing the doubts expressed by J. Jodłowski who feared that the courts might be excessively burdened with examining whether the law of a third state recognises its application.

action" (Article 35)—mean the law of the state whose national the person concerned is at the relevant time and do not exclude the application of intertemporal rules, prevailing in the state of which the person concerned is subject.[21]

5. The so-called exception of public policy does not allow for the application of a foreign law if the effects thereof would be contrary to the fundamental principles of the legal order prevailing in the Polish People's Republic. This formulation is more correct than the previous one contained in Article 38 of the Act of 1926.

6. The subsidiary application of the Polish law is provided for in Article 7 in the event the circumstances on which the application of a specified foreign law depends cannot be ascertained or where the contents of the applicable foreign law cannot be established. From Article 7 of the new Act, just like from Article 39 of the old, it cannot be inferred that Polish private international law provides, in principle, for the application of Polish substantial law and allegedly only exceptionally—foreign law. Neither does any indication follow from Article 7 to the effect that in case of doubt Polish law shall apply. In case of a gap or in case of doubts arising in connection with the interpretation of conflict rules, general principles of interpretation and application of law should be followed, and one should not be tempted to favour a wide application of one's own substantial law.

7. Article 8 of the new Act contains a provision (outside the sphere of conflict rules, but pertaining to the so-called legal position of aliens), according to which aliens may have rights and obligations in Poland on equal terms with Polish nationals unless the Act provides otherwise. That provision does not introduce any change into the prevailing legal situation, in which there has been no discrimination of aliens. In connection with the operation of conflict rules relating to legal capacity it should be pointed out that if under the law applicable on the basis of those rules an alien does not possess legal capacity, then in such a case Article 8 does not change anything in this respect (in glaring cases only the intervention of the exception of public policy provided for in Article 6 could be considered); however, if the alien possesses such capacity, he enjoys it without any fear of discrimination, unless a specific provision provides otherwise.

8. Legal capacity and capacity to enter into legal transactions of a natural person are subject to his national law.[22] The new Act leaves out the rule con-

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[21] Cf. infra note 50.

[22] The Act of 1926 used here the vague expression "personal capacity" which was to denote jointly legal capacity as well as capacity to enter into legal transactions. It gave rise to different interpretations. And thus, for instance, Z. CYBICHOWSKI (*Prawo międzynarodowe (International Law)*, 3rd ed., Warsaw 1928, p. 378, 4th ed., Warsaw 1932, p. 451) wrote that "Polish law does not mention legal capacity, and capacity to enter into legal transactions is incorrectly called personal capacity as if there also existed a real capacity." That expression was also erroneously understood by, for instance, UNRUH (*Handbuch des polnischen Rechts für den Handelsverkehr mit Polen,*

tained in the second paragraph of Article 1 of the Act of 1926, under which "a change of nationality does not entail loss of majority already attained."[23] The capacity of a legal person is subject to the law of the state in which that person has its seat. However, if a natural or a legal person makes a legal transaction within the scope of his business, his capacity is subject to the law of the state, in which the seat of the enterprise is situate.[24] If an alien who is incapable—under his national law—performs in Poland a legal transaction which is to have effects in Poland, the alien's capacity in this respect is governed by Polish law if the protection of persons acting in good faith so requires. This provision does not apply to legal transactions in the field of family and guardianship law and in the succession law (Article 10).[25]

Declarations of death in respect of missing persons are governed by the national law. The same holds true of ascertainment of death. If, however, a Polish court pronounces on a declaration of death or a confirmation of death of an alien, Polish law applies (Article 11).[26]

9. The form of a legal transaction is governed by the law which governs that transaction (the so-called *lex causae*), it suffices, however, to observe the form precsribed by the law of the state in which the transaction is made (Article 12 of the new Act; likewise Article 5 of the law of 1926 which, however, referred to the law of the "place" and not of the "state").

The vague concluding words of Article 5 of the Act of 1926: "if that place is not dubious" have been omitted. As indicated in the substantiation of the governmental draft law, "it still relates to the law of the state on whose territory the transaction has actually been made." Thus, both according to the old as well as the new Act, the *lex loci actus* does not operate if the conclusion of the transaction has not actually been localized on one and the same State, that is

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Wrocław—Berlin 1932, p. 254) and E. CAEMMERER (*Rechtsvergleichendes Handwörterbuch*, vol. IV, Berlin 1933, p. 352).

[23] That provision solved conflicts (relating to the field of change of personal status) always in favour of the *previous* national law, although, following a change of nationality, capacity is already subject to another national law. It did so without taking into account the position held in this matter by the actual national law (surely the most competent) or by the previous national law; it thus prescribed the application of that previous law even if both national laws concerned decided otherwise by, for instance, recognizing the actual law to be the governing law.

[24] Under the Act of 1926 "capacity of legal persons and of all partnerships and associations is governed by the law being in force in the place of their seat" (Art. 1, para. 3). On the other hand, "personal capacity of a merchant in his trade dealings is governed by the law binding in the seat of the enterprise" (Art. 2).

[25] The relevant Art. 3 of the Act of 1926 provided that if an alien incapable under the law to which he was personally subject, performed in Poland a legal transaction which was to produce effects in Poland, his capacity was to be governed by the Polish law should the safeguarding of honest intercourse so require.

[26] Polish jurisdiction in those matters is regulated in Art. 1106 of the Code of Civil Procedure of 17 November 1964.

to say, particularly in cases in which, for instance, a contract between parties residing in different states has been concluded by correspondence or by telephone.

Where neither the form prescribed by the *lex causae* nor that prescribed by the *lex loci actus* has been observed, the consequences of non-observance of the form are governed by the *lex causae*; it has been repeatedly emphasized in discussions in the course of the codification work that this follows from the provision which in principle recognizes the *lex causae* to be decisive and admits the *lex loci actus* only in as much as it is sufficient to observe the form prescribed by it.

The rule contained in Article 12 is applicable even where immovables situate in Poland are involved as the new Act has not taken over the limitation provided for in Article 6, paragraph 3, of the Act of 1926. Because experience has proved that provision of Article 6, paragraph 3, prescribing the observance of the form of Polish law has caused too great difficulties in the course of the making of legal transactions beyond Poland's frontiers.[27]

10. *Préscription* in respect of a claim is subject to the law governing the claim (Article 13). That provision, though formally "new" (it was not included in the Act of 1926), does not change the legal situation prevailing heretofore.

11. The conditions of marriage are governed by the national law of either party to the marriage. This relates to all so-called substantial conditions of marriage (that is, other than the form), whether or not concerning invalidity. This was differently regulated under the Act of 1926 which narrowed the scope of application of the national law of the parties by referring to the conditions of the valid marriage.

The new Act has omitted the so-called specific exception of public policy as provided for by Article 12, paragraph 2, of the Act of 1926[28]; in this respect

[27] This is stated in the motivations of the governmental drafts of 1964 and 1965. As regards the contents of Art. 6, para. 3, cf. note 37 infra. At the same sitting on 12 November 1965 the rapporteur deputy J. Wasilkowski spoke on this matter in the following way : "I would like to mention that contrary to the now binding Act of 1926 on private international law, the draft does not require for the disposal of immovables situate in Poland the observance of the form prescribed by Polish law if the disposal is effected abroad. In Poland, as is well-known, alienation or encumbrance of immovables must be made in notarial form. The view has prevailed that no difficulties should be put in the way of the disposal of immovables situate in Poland by Polish nationals residing abroad or by foreign nationals of Polish descent, especially because in practice that disposal is effected in favour of our nationals residing in Poland. The proposed change of the present legal situation is essential, particularly in view of the fact that in the largest communities of our old emigrés who left Poland in search of work, above all in North America, the observance of the notarial form, conforming to the provisions of Polish law, comes up against difficulties and entails considerable costs."

[28] Art. 12, para. 2, of the Act of 1926 provided : "Aliens, notwithstanding their capacity to contract marriage under their national laws, shall not be permitted to contract marriage in Poland before Polish authorities if according to the law in force in Poland there exists one of the

only the operation of the general exception of public policy of Article 6 is now decisive.

The form of marriage is subject to the law of the state in which it is concluded. However, when marriage is concluded outside Poland's frontiers, it suffices to observe the form prescribed by the national laws of both spouses. This is in accord with the former law (Article 13 of the Act of 1926), however, also here the application of the law of the place has been replaced by the application of the law of the state.

The question whether it is necessary to introduce a provision under which a Polish national may contract a valid marriage in a civil form only, was repeatedly considered in the course of the codification work (in discussions by the Praesidium of the Codification Commission and in the course of work on the draft law in the Sejm). Such provision has not, however, been introduced in order not to make it difficult for Polish nationals to contract valid marriage abroad.

The Act of 1926 did not contain any provisions expressly determining which law should be applied in pronouncing on the existence and validity of marriage. In my opinion it was the law applicable under the conflict rules to the conclusion of marriage that should have been applied. And it is precisely so laid down now in Article 17 of the new Act in respect of annulment; an analogous approach should be taken in pronouncing on the existence of marriage.

12. The personal and property relations between the spouses are governed, in principle, by the national law common to both spouses at the relevant time.

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following, irremovable by means of a dispensation, impediments to a valid marriage : 1. consanguinity or affinity; 2. attempt on the life of the other spouse; 3. the existence of a previous marriage; 4. difference of religions, holy orders and monastic vows." Some time ago the problem of sanctions was controversial. In my view a marriage contracted in contravention of the above mentioned provision could be annulled, about which I wrote in the treatise *Znaczenie prawa obowiązującego w miejscu zawarcia małżeństwa przy ocenie materialnych wymogów jego ważności* (*The Significance of the Law Being in Force in the Place of Contracting in Testing the Conditions of Intrinsic Validity of Marriage*), Lwów 1932 ; in this matter cf. also F. ZOLL, *Międzynarodowe prawo prywatne w zarysie* (*An Outline of Private International Law*), 4th ed., Cracow 1947, pp. 72—73. The impediments enumerated in Art. 12 invalidated marriage only when under the law binding in the place and at the time of the contracting of marriage : a) they were provided as *impedimenta dirimentia*, and at the same time b) they were irremovable by way of dispensation (however, since the time of the unification of the law on marriage in Poland, account should be taken here—in my view—of the inadmissibility of a court authorization). In connection with that, Art. 12, para. 2, has recently had practical significance only in respect of consanguinity and the existence of a previous marriage. It was in this respect that an appropriate provision appeared in the draft adopted in the first reading (I mentioned that draft in note 4 supra), viz. in Art. 20 reading as follows: "Aliens, notwithstanding their capacity to contract marriage under their national laws, shall not be permitted to contract marriage in Poland if according to Polish law marriage is inadmissible on ground of consanguinity or a previous marriage." That Article was, however, later deleted as *superfluous* (because the general exception of public policy is sufficient as on its basis everything that was provided for in Art. 20 of the draft can be accepted).

It is that law that decides on the admissibility of conclusion, change or dissolution of a matrimonial property agreement. Property relations resulting from the matrimonial property agreements are subject to the national law common to both spouses at the time of its conclusion, while under the Act of 1926 "matrimonial property agreements, as well as donations between the spouses or the betrothed" were subject to the law "of the state, to which the husband or the fiancé was subject at the time of the conclusion of the contract."

The Act of 1926 provided that "a change of nationality per se entails no change in the statutory matrimonial regime which continues to be subject to the national law of the husband at the time of the celebration of the marriage" (Article 14, paragraph 3). The necessity for equal treatment of the spouses, as well as the circumstance that there is no sufficient justification for the application here of the national law at the time of the conclusion of the marriage despite the change of nationality by the spouses—militate against such a conflict rule. That is why the new Act does not include this rule and, therefore, the general principle should be applied that the decisive law is the national law at the relevant time. Neither does the new Act contain the provision on the conditional application of the law of the state, in which the immovable property is situate.[29]

In the absence of a national law common to both spouses their last common national law has hitherto been decisive, the question, however, being controversial of the course to be followed failing such a law. It is laid down in the new Act that—failing a national law common to both spouses—the governing law shall be the law of the state, in which both spouses have their domicile, and where the spouses do not reside in the same state—Polish law shall apply. Attention should be drawn to the fact that the Act takes into account the law of the state where the spouses have their domicile, even though they may reside in different places within the same state (similarly in Articles 18, 26 and 33).

13. According to Article 18 divorce is governed by the national law common to the spouses at the time of the application for divorce. In the absence of a common national law it is the law of the state, in which both spouses have their domicile that is decisive and should the spouses have their domiciles in different states—Polish law applies. Here the principle of the applicability of the last national law common to the spouses—as provided for in the Act of 1926—has not been adopted too. The new Act does not include the provision contained in Article 17, paragraph 2, of the old Act.[30] It does not follow, however, there-

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[29] Under Art. 16 of the Act of 1926 its provisions contained in Art. 14 and 15 (providing for the application of the national law) cannot be applied "if the state within whose boundaries the immovables of the spouses are situate, require the application of its own law in respect of those immovables."

[30] Art. 17, para. 2, of the Act of 1926 provided : "If the spouses have changed their nationality then a fact which preceded that change can constitute a ground for divorce or separation only

from that the new Act has adopted a basic position as regards the question of evasion of law which it does not regulate. Generally, as well as in this particular matter, the Act avoids casuistry and does not regulate *expressis verbis* various detailed issues, as, for instance, the consequences of divorce.

14. In legal relations between parents and children the new Act does not favour the national law of the father and it accords equal treatment to children born in wedlock and those born out of it. Neither does it provide for the conditional application of the law of the state in which the immovable property is situate.[31]

Now the governing law is the national law of the child. The establishment and denial of paternity or maternity is subject to the national law of the child at the time of its birth. However, acknowledgement of the child is subject to the law of the state whose national the child is at the time of acknowledgement. Acknowledgement of a child conceived but not yet born is subject to the national law of the mother (Article 19).[32]

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inasmuch as it justifies divorce or separation also under the law applicable before that change " The point here is mainly to prevent evasion of the law. However, the provision has been so formulated that it operated in a scope wider than desired, by making divorce difficult in cases of change of nationality. The rule following from Art. 17, para. 2, is inadequate in cases in which *both* spouses want to get the divorce; surely, if they change their nationality for that purpose, they can also manage to arrange for the appropriate "fact" already after the change of nationality. That rule is also anachronistic because it grew on the ground of other relationships and other substantive rules than those being in operation today. It was justified to a greater degree where divorce was subject to the national law of the husband and where it related to the change of nationality of the husband. Cf. E. RABEL, *The Conflict of Laws*, vol. I, 2nd ed., Ann Arbor 1958, pp. 486ff.

[31] Under Art. 19, para. 3, of the Act of 1926, "the rights of the parents and of the child in immovable property belonging to the child are determined by the law of the state in which the immovable property is situate, if the state regards its law as applicable."

[32] The Act of 1926 contained the following provisions with regard to relations between parents and children:

Art. 18. 1) The national law of the mother's husband at the time of the birth of the child determines whether the child was born in wedlock. 2) If the mother's husband was then no longer alive, the law of the deceased at the time of his death shall apply.

Art. 19. 1) Relations between parents and children born in wedlock are governed by their national law. 2) Should those laws be different and varying there shall apply the law of the State to which the parties were last jointly subject. 3) *See supra note 31.* 4) Relations between parents and a married daughter are determined by the national law of the daughter's husband if the rights of the parents under the law to which they are subject are contrary to the rights of the husband under the law to which he is subject.

Art. 20. Relations between a child born out of wedlock and his mother are governed by the law of the state to which the mother and the child are subject; should, however, the laws of the mother and the child be later on different and varying—by the last law common to them.

Art. 21. 1) Determination of paternity of a child born out of wedlock, of the mutual rights and duties of the father and the child, as well as of the father and the mother are governed by the law of the state to which the mother and the child were subject at the time of the birth of the

15. Maintenance claims between persons related by consanguinity and persons related by affinity are subject to the national law of the person entitled to maintenance (Article 20).

16. Claims of the mother against the father of the extra-marital child in connection with the conception and birth of the child, are subject to the national law of the mother (Article 21).

17. Under Article 23 of the law of 1926 "adoption is governed by the law of the state whose subject is the adopter." This principle has been recognized also by the new Act in Article 22, paragraph 1, which lays it down that "adoption is subject to the national law of the adopter."

The provisions of the Act of 1926 gave rise to doubts as regards the extent to which the national law of the adoptee should also have been taken into account. This question has been solved in Article 22, paragraph 2, of the new Act which provides that adoption cannot take place unless the provisions of the national law of the person to be adopted are observed if such provisions concern the consent of that person, the consent of his legal representative and permission of the competent state organ.[33]

18. Guardianship is governed by the national law of the person in respect of whom it is or is to be established. That provision applies, as appropriate, to curatorship. However curatorship to settle a particular matter is subject to the law governing the matter (Article 23).[34]

19. As regards real rights there continues to be valid the principle that they are governed by the law of the state in which the object is situate (*lex rei sitae*),

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child. 2) If at the time the father and the mother have their domicile in Poland—the law being in force in Poland should be applied if it is more favourable to the child.

Art. 22. Legitimation of a child born out of wedlock is subject to the national law of the father at the time of the legitimation, and where the father was not then alive any longer—to the law at the time of his death.

[33] In the draft adopted by the Praesidium of the Codification Commission and in the governmental draft of 1964 there appeared a special provision relating to adoption effected by the spouses, in the following wording : "Adoption by the spouses cannot take place unless the national law of each of them is observed." It was deleted in the course of the Sejm's work for the following reasons : First of all it follows from the basic provision (which prescribe the application of the national law of the adopter) that in case of adoption by the spouses who are not nationals of the same state, adoption effected by each of the spouses should be governed by his or her national law. That law decides whether adoption effected by one of the spouses shall be valid despite the invalidity of the adoption effected by the other. Adeption should not be made difficult by the introduction of too extensive requirements in particular by provisions: a) prescribing the joint application of both national laws at the testing of each of the two adoptions, b) making the validity of either of them dependent on the validity of the other, no matter what position the national laws of the adopters take in this matter.

[34] The Act of 1926 did not positively resolve the issue as to which law should be applied to curatorship in respect of "specific matters." It provided only that provisions contained in Art.24—26 concerning guardianship and curatorship shall not apply to that curatorship.

and this holds true both of movable and immovable property (Article 6, paragraph 1, of the Act of 1926, Article 24, paragraphs 1 and 3, of the Act of 1965). That principle does not extend to legal events from other fields of civil law, constituting a legal ground for changes in property relations. And thus, for instance, as regards a contract of sale of movables, the conditions of validity of that contract and its obligatory effects are subject to the law applicable under the conflict rules relating to obligations (Article 25 et seqq. of the new Act), account being, naturally, taken also of the conflict rules relating to capacity and form.[35] As regards contracts relating to immovables—the principle that they are determined by the *lex rei sitae* follows from the conflict rules in the field of obligations.

Article 24, paragraph 2, sets forth that the acquisition or loss of property, as well as the acquisition or loss of other real rights, modification in their contents or in priority are governed by the law of the state in which the object of those rights was situate at the time of the legal event entailing the said legal effects. In this way there has been clearly regulated an important question relating to the so-called change of status, in the sense of respect for the legal situation once shaped, which is not without significance for solving other issues within that field. There is no change here in the legal situation prevailing hitherto, although there has so far been no such explicit provision in our law.[36]

The new Act has not retained the provision contained in the third paragraph of Article 6 of the Act of 1926 relating to immovable property situate in Poland.[37] In practice this will have a particularly great significance as regards the question of the form of legal transactions performed abroad, because under the new Act those transactions may be effected in the form of the *lex loci actus*.[38] Neither has the provision contained in Article 6, paragraph 2, of the Act of 1926 been retained.[39]

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[35] However, its effects in the field of property law are subject to the law of the state of the *situs rei*, that is to say, for instance, as regards the time of the transfer of the right of ownership.

[36] The Act does not go into the regulation of various detailed issues such as, e. g., the question of the treatment of the conditions relating not only to acquisition but also to subsistence of the acquired real right or the question of taking into account (in case of usucaption) possession of a thing at the time when it was within another legal area.

[37] Art. 6, para. 3, of the Act of 1926 laid down the following : "Acquisition, change or extinction of real rights in respect of an immovable property situate in Poland, as well as obligations arising out of legal transactions on the basis of which such rights are to be acquired, changed or extinguished, are subject, as regards the form, as well as other conditions of validity, exclusively to the law binding in Poland. This does not relate, however, to duties resulting from family relations or succession rights."

[38] Cf. supra note 27.

[39] Art. 6, para. 2, of the Act of 1926 laid down : "Usucaption, prescription or reticence are determined by the law of the place in which the movable object was situate at the time of the lapse of the period of limitation. The person acquiring the right may also invoke the law of the place, in which the movable object was situate at the time when the period of limitation began

19. A) As regards contractual obligations it should first be stated that obligations relating to immovables are subject to the law of the state in which the immovable property is situate (Articles 25 and 26 of the new Act). They cannot be made subject to any other law by means of a choice of law. That conflict rule relates both to immovables situate in Poland, as well as those outside Poland.[40]

B) As regards other contractual obligations (that is to say, those not relating to immovables) they are governed in the first place by the law chosen by the parties.[41] Specifically, under Article 25, paragraph 1, of the new Act, the parties may make their relations in the field of contractual obligations subject to the law chosen by them if there is a connection between that law and the obligation, whereas—under Article 7 of the Act of 1926—the parties could only choose the national law, the law of the domicile, the law of the place of contract-

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to run." This is, undoubtedly, an incorrect provision. The first sentence presents—rather clumsily anyway—the rule which can be inferred from the basic application of the *lex rei sitae* provided for in the first paragraph of Art. 6. The second sentence, on the other hand, contains a wrong idea. The source of inspiration here was a conception of compromise adopted in respect of usucaption by the second Austrian draft of 1913, but that was under another order of proper laws and in conditions of a more detailed regulation of the issue. In the course of the Polish codification work on the Act of 1926 that order was changed, the provision was abridged and was made applicable also to prescription and reticence; despite the extension of the scope of the provision to cover prescription, the expression "the person acquiring the right" has been retained. That provision belongs to the most criticized rules of the Act of 1926. Thus, for instance, E. FRANKENSTEIN (*Internationales Privatrecht*, vol. II, Berlin 1928, p. 79) writes, *inter alia*, that it contains "eine wissenschaftlich unmögliche Konstruktion". M. UDINA spoke of it in the following way : "Lo scopo di questo diritto di scelta non si capisce assolutamente, e le complicazioni cui può dar luogo tale disposizione, che è una delle più criticabili dell'intera legge. . . sono più che evidenti" ("Rivista di diritto internazionale," 1927, p. 221). According to R. AGO "questa possibilità di scelta della legge più favorevole può presentare gravissimi inconvenienti nella pratica" ("Rivista di diritto internazionale", 1931, p. 322). Cf. also L. BABIŃSKI : *La riforma del diritto internazionale privato in Italia dal punto di visto del diritto polacco* ("Annuario di diritto comparato e di studi legislativi," vol. VII, fasc. IV, 1933, p. 340). Also E. RABEL criticizes that conception as a "week middle solution" (in the treatise *The Conflict of Laws*, vol. IV, Ann Arbor 1958, p. 99). In order to somehow find a way out of some of the difficulties, arising out of the application of the said provision, it was sometimes attempted *contra legem* to accept that the more favourable law operates here *ipso iure*; it was in this manner that M. WOLFF spoke on the question of acquisition by usucaption (*Rechtsvergleichendes Handwörterbuch*, vol. IV, Berlin 1933, p. 396). Cf. here also the interpretation given by J. SKĄPSKI in the treatise *Autonomia woli w prawie międzynarodowym prywatnym w zakresie zobowiązań z umów* (*The Autonomy of the Parties in Private International Law as Regards Contractual Obligations*), Cracow 1964, pp. 29—30.

[40] Art. 8 of the Act of 1926 provided that where the parties did not indicate the proper law, then the law prevailing in the place where the immovable property was situate was applicable to contracts relating to immovables. At the same time, however, the provision contained in Art. 6, para. 3, of that Act which was quoted above in note 37, should be taken into account.

[41] The problem of the choice of law is discussed in detail in the treatise by J. Skąpski, referred to above in note 39.

ing, the law of the place of performance and the law of the place in which the object was situate.

Failing a choice of law by the parties, the following law is applicable:

a) in respect of obligations arising out of an stock exchange contract—the law prevailing in the seat of the stock exchange; that provision applies, as appropriate, to contracts concluded at public fairs (Article 28);

b) in respect of obligations arising out of other contracts—the law of the state, in which the parties have at the time of the conclusion of the contract their seat (which relates to legal persons) or their domicile (which relates to natural persons).

Where on the other hand, the seat or the domicile of the parties is not in the same state, then:

aa) obligations arising out of contracts enumerated in article 27—are governed by the laws specified in that Article;[42]

bb) obligations arising out of contracts not enumerated in Article 27 are governed by the law of the state, in which the contract has been concluded (Article 29).

Obligations arising out of contracts concluded within the scope of business, are governed instead of the law of the state, in which the legal person has its seat or the natural person his domicile, by the law of the state, in which the enterprise has its seat (Article 27, paragraph 3).

C) Provisions relating to the law governing contractual obligations are applied, as appropriate, to obligations arising out of unilateral legal transactions (Article 30).

D) Among the changes effected by the new Act in the legal situation prevailing hitherto,[43] it is worth drawing attention to (apart from what I have already

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[42] Art. 27 of the Act of 1965 provides that where the parties do not have their seat or domicile in the same State and have not chosen a law, there applies : 1) in respect of obligations arising out of contracts of sale of movables or of delivery contracts—the law of the state in which the seller or the supplier has his seat or domicile at the time of the conclusion of the contract; 2) in respect of obligations arising out of a contract for work, mandate, agency, commission, carriage, forwarding, deposit and warehousing contract—the law of the state in which at the time of the conclusion of the contract the contractor, the mandatary, the agent, the commissioner, the carrier, the forwarding agent, the depositary or the warehouse enterprise has his seat or domicile; 3) in respect of obligations arising out of an insurance contract—the law of the state in which the insurance enterprise has its seat at the time of the conclusion of the contract; 4) in respect of obligations arising out of an contract for the transfer of authors' rights—the law of the state in which the person acquiring those rights has his seat or domicile at the time of the conclusion of the contract. Where the seat or domicile of the parties, as enumerated above, cannot be established—the law of the state applies in which the contract has been concluded.

[43] Art. 7 has already been referred to in the text of this paper. The Art. 8—10 of the Act of 1926 read as follows:

Art. 8. Where the parties have not indicated the proper law, there applies : 1) in respect of contracts concluded at the stock exchange or at public fairs—the law binding there; 2) in respect

mentioned), *inter alia,* the omission of the provisions embodied in Article 10 of the Act of 1926,[44] of Article 9, paragraph 1, sentence 3, of that Act[45] and also of the special treatment in respect of contracts entailing one-sided obligations.[46]

20. An obligation not arising out of a legal transaction is subject to the law of the state, in which the event leading to the obligation has occurred (Article 31, paragraph 1). In adopting that traditional rule recognized also by the Act of 1926, the new Act departs, however, from this rule inasmuch as it provides that where

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of contracts relating to immovables—the law binding in the place where the immovable is situate; 3) in respect of contracts concluded in retail trade—the law of the place, where the seller has his seat; 4) in respect of contracts for services, work, construction and delivery concluded with the state—the law of the seat of the authorities concerned, and in respect of such contracts concluded with other public bodies—the law binding in the place where those bodies have their seat; 5) in respect of insurance contracts—the law binding in the seat of the insurance enterprise; in respect of contracts concluded with a representative of a foreign enterprise having its seat in Poland—the law binding in Poland; 6) in respect of contracts concluded with public notaries, advocates and other persons exercising their professional functions—for the exercise of professional services—the law of the place in which those persons habitually exercise their profession; 7) in respect of contracts of employment concluded with employees by trade, industrial and mining enterprises—the law of the place in which the work is performed.

Art. 9. 1) In respect of contracts not covered by points 1—7 of Art. 8—the law of the state should be applied in which both parties have their domicile at the time of the conclusion of the contract. Where the parties reside in different states and the obligation is unilateral—the law of the state should be applied in which the debtor resides; where the obligation is mutual—the law of the state in which the contract has been concluded. A contract made *inter absentes* is considered as concluded in the place where the offeror received the acceptance of his offer; 2) The law binding in the place of the conclusion of the contract is applicable also in the event the domicile, which is to determine the proper law, cannot be established; 3) Where the debtor making a one-sided transaction has not himself indicated the proper law, he is bound by the law of the domicile, and where the domicile cannot be ascertained—by the law of the place of the performance of the transaction; 4) The domicile of a merchant in respect of his trading activities is the seat of the enterprise; where the merchant has several enterprises—the seat of the enterprise with which the relationship has been entered into.

Art. 10. In all the above cases (Art. 7—9) the parties are bound by specific statutory prohibitions invalidating legal transactions contrary to them, and issued in states in which the debtor has his domicile and is to fulfil his obligation.

[44] The text of Art. 10 is given in the preceding note.

[45] It concerns a provision under which a contract *inter absentes* is deemed to have been concluded in the place in which the offeror received the acceptance of his offer. In the course of the Polish codification work in recent years the view has been repeatedly expressed against proposals relating to provisions clarifying such a notion and while some argued that they did not want to prejudge such issues by referring to rigidly formulated statutory provisions, others did so because they favoured qualification according to substantive rules of Polish law. In this connection it should be pointed out that the now binding Civil Code of 1964 provides in Art. 70, para. 2, that "in case of doubt a contract is deemed to have been concluded in the place in which the offeror received the declaration on the acceptance of his offer, and where the receipt by the offeror of the declaration on the acceptance of his offer is not necessary—in the place of domicile of the offeror at the time of the conclusion of the contract."

[46] Cf. Art. 9, para. 1, of the Act of 1926 quoted in note 43 supra.

the parties are nationals of the same state and have their domicile therein, it is the law of that state that is applicable (Article 31, paragraph 2). It is the law applicable under those rules that determines, *inter alia,* also whether a person of limited capacity is liable for damage caused by a prohibited act, that is to say, the so-called delictual capacity is governed by that law and not by the law governing the legal capacity and the capacity to enter into legal transactions.

21. The law which according to those principles (referred to in points 19 and 20) governs obligations arising out of contracts, unilateral transactions, or other sources, decides—in my view—on both the creation of an obligation,[47] as well as on its content and exstinction (*inter alia,* on the mode of the fulfilment of the obligation and on the effects of non-fulfilment).[48]

22. An employment relationship may be made subject by the parties to a law chosen by them, if it has a connection with the employment relationship (Article 32); in comparison with the law binding hitherto the possibilities of the choice of law are thereby extended. Where the parties have failed to make that choice, the employment relationship is governed by the law of the state, in which the parties have their domicile at the time of the creation of the relationship (which pertains to natural persons) or their seat (which pertains to legal persons). If the work is, was, or was to be executed in the enterprise of the employer, the decisive criterion is the seat of the enterprise instead of the domicile or seat of the employer. If the parties have no domicile or seat in the same state and have not chosen a law, the law of the state, in which the work is, was, or was to be performed, applies (Article 33).[49]

23. As regards the Polish conflict law of succession, the basic principle continues to be the rule that the national law of the deceased at the time of his death is decisive (Article 28 of the Act of 1926, Article 34 of the Act of 1965), that is, the law of the state, whose national the deceased was at the time of his death.[50]

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[47] Naturally, while taking into account conflict rules relating to capacity and form, as well as those relating to fields otherwise regulated.

[48] The Act does not clearly determine various specific issues relating to the scope of operation of the law governing obligations. In Polish judical practice in the pre-war time, as a rule, the tendency manifested itself to accord that law a fairly wide scope. I wrote about it in the treatise entitled *Grundprobleme des internationalen Obligationenrechts im Lichte der polnischen Gesetzgebung und Rechtsprechung* ("Zeitschrift für osteuropäisches Recht," Berlin 1938, pp. 552ff., and particularly pp. 563—566).

[49] Cf. Art. 8, point 7, of the Act of 1926 quoted in note 43 supra.

[50] Both in the old Act as well as in the new one that provision does not determine issues to which Art. 37 of the old and Art. 5 of the new Act relate (cf. supra point 4 of the text). From the fact that the law of state *A* (whose national the deceased was at the time of his death) is applicable, it does not yet automatically follow that the substantive rules of the law of succession which were binding in that state at the time of the death of the deceased are always applicable. Because in connection with the change of those rules in state *A*, the intertemporal provisions prevailing in that state would have to be taken into account. True enough, those provisions usually provide for the application of the substantive rules of the law of succession, which were binding at the

The validity of a will and other dispositions *mortis causa* are determined by the national law of the testator at the time of the performance of those legal acts (Article 35, sentence 1, of the new Act); no change has been introduced here into the existing legal situation, because it is precisely in this way that provision of Article 29 of the Act of 1926 should have been construed. This holds true also of the form of those legal dispositions, though it suffices to observe the form prescribed by the law of the state, in which the disposition is made (Article 35, sentence 2).[51]

Regulations contained in article 28, paragraph 2[52] and in Article 30[53] of the Act of 1926 have not been included in the new Act.

The new Act does not expressly refer to the statutory right of the state to take estates; in the absence of specific provisions relating to the so-called heirless inheritance,[54] the law applicable in that respect is also that which governs inher-

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time of the death of the deceased, but this is not always the case, as sometimes, in some respect, they provide for the application of the rules prevailing at another time, e. g. at the time of the acceptance of the inheritance. A wrong translation of Art. 28 of the Act of 2 August 1926 appeared in the periodical "Ostrecht" (Berlin 1926, p. 1094) and in two editions of the well-known collection of Makarov (A. N. MAKAROV, *Quellen des internationalen Privatrechts*); viz. the application of the national law of the deceased, which "zur Zeit seines Todes galt." Makarov has corrected it in his article entitled *Postmortale Änderung der Sachnormen des Erbstatuts*, published in "Zeitschrift für ausländisches und internationales Privatrecht" (Berlin—Tübingen 1957, p. 205). G. Geilke did not take this into account and what he writes in "Recht in Ost und West" (Berlin 1959, No. 5, p. 181) and his argumentation relating to Polish private international law contained in the third volume of a publication devoted to international law of succession (M. FERID, K. FIRSCHING, *Internationales Erbrecht*, III, Münich and Berlin 1964) continues to be based on that erroneous translation.

[51] That provision was not necessary because its normative content followed already from the general provision relating to form (Art. 12 of the new Act). However, it has appeared in the new Act for clarification in view of the doubts that were arising out of the Act of 1926. I have presented the jurisdiction, literature and my own views on that question in the gloss to the decision of the Supreme Court of 16 October 1963 published in "Orzecznictwo Sądów Polskich i Komisji Arbitrażowych" ("Decisions of Polish Courts and Arbitration Commissions"), 1964, text 187.

[52] Under Art. 28, para. 2, of the Act of 1926 "heirs must possess capacity to inherit not only under the law governing inheritance rights, but also under their national law." In this respect the national law of the testator is now decisive, however, as regards legal capacity of the heir or legatee, the conflict rule following from Art. 9 of the new Act should also be taken into account.

[53] Art. 30 of the Act of 1926 provided in para. 1 that "property in respect of which the testator cannot make dispositions *mortis causa* is subject to the law of the state in which it is situate." In para. 2 it was laid down that "the same law should be applied to limitations of a public nature, to which the estate or part thereof is subject."

[54] Such provisions are contained in some international agreements binding in Poland. And thus Art. 43 of the agreement concluded on 28 December 1957 with the USSR (Dz. U. 1958, text 147) provides that "if under the law of the Contracting Parties the heirless inheritance escheats to the state, then in such event movable property is transferred to the state whose national the deceased was at the time of his death, and immovable property escheats to the state on whose

ltance matters, that is, the law of the state, whose national the deceased was at the time of his death.[55]

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territory it is situate." Cf. similar provisions of Art. 43 of the agreement with the German Democratic Republic, signed on 1 February 1957 (Dz. U. 1958, No. 27, text 114) and Art. 48 of the agreement with the Hungarian People's Republic, signed on 6 March 1958 (Dz. U. 1960, No. 8, text 54).

[55] Art. 31 of the Act of 1926 provided here for the application of the law of the state in which the estate was situate at the time of death of the testator. A modification in that legal situation took place as a result of the entry into force of the decree of 8 October 1946 on the law of succession.

PROBLEMS OF DUAL NATIONALITY IN THE LIGHT OF LEGISLATION AND TREATIES OF SOCIALIST COUNTRIES

by LUDWIK GELBERG

The nature of the modern State, the organizational structure of the international community and the logic behind it favoured the adoption of the principle, today nearly universally accepted in international law—that every individual inhabiting our globe should be bound by a legal tie of permanent citizenship of one State, member of international community. For citizenship of a State, or nationality, is the source of defined rights and duties of the individual. Among the latter the duty of allegiance to one's own country is of prime importance. Such loyalty cannot be divided. This principle of single nationality is not usually questioned today on theoretical grounds. It has been confirmed in a series of international Documents. For example, the Hague Convention of 12 April 1930, on the question of certain problems arising from the conflict of laws on nationality[1] stated in the preamble "that it is in the general interest of the international community to secure that all its members should recognize that every person should have a nationality and should have one nationality only," and that "the ideal towards which the efforts of humanity should be directed in this domain is the abolition of all cases both of statelessness and of dual nationality." The Universal Declaration of Human Rights of 1948 states that "Everyone has the right to a nationality" (Article 15, paragraph 1).

The overwhelming majority of international law doctrine and case-law support this view.[2]

The almost universal negative attitude of States towards plural nationality has been expressed in a series of resolutions and other international documents. For example, the Final Act of the Hague Conference (13 March—12 April 1930)[3] was unequivocal: "The Conference is unanimously of the opinion that

[1] "Dziennik Ustaw" (Dz. U.—"Journal of Laws"), 1937, No. 47, text 361.

[2] "No one can be a citizen in the complete sense of the word... of two States... at one and the same time." Cf. RALSTON, *The Law and Procedure of International Tribunals*, 1926, p. 173, in the case of Barron, Forbes and Company.

[3] *Laws Concerning Nationality*, "United Nations Legislative Series," 1954, p. 580.

it is very desirable that States should, in the exercise of their power of regulating questions of nationality, make every effort to reduce so far as possible cases of dual nationality... and that the League of Nations should consider what steps may be taken for arriving at an international settlement of the different conflicts which arise from the possession by an individual of two or more nationalities (III)... The Conference recommends that States should... facilitate in the case of persons possessing two or more nationalities at birth, the renunciation of the nationality of the countries in which they are not resident, without subjecting such renunciation to unnecessary conditions (IV)... It is desirable that States should apply the principle that the acquisition of a foreign nationality through naturalization involves the loss of the previous nationality."

This does not, however, mean that modern international law prohibits dual nationality, or that a State is violating binding international law, if it allows such cases in legislation and in practice, and enacts provisions which increase the danger of an even greater number of cases of dual nationality. It also does not prevent a State from naturalizing persons who keep their previous nationality and naturalization is not dependent on the consent of the State, of which the person concerned has so far been a national, for the acquisition of a new nationality.[4]

The Hague Convention of 1930 recognized the existence of dual nationality (Article 3) and did very little to eliminate this undesirable situation.

In this Convention it was stressed that "under the economic and social conditions which at present exist in the various countries, it is not possible to reach immediately a uniform solution of all the... problems," and so "as a first step" the Convention aimed to settle, "in a first attempt at progressive codification, those questions relating to the conflict of nationality laws on which it is possible at the present time to reach international agreement."

In practice, there are today some international agreements based on the admissibility and legality of dual nationality. For example, Spain has concluded in the last few years three agreements (with Chile on the 24 May 1958, with Peru on the 16 May 1959, and with Paraguay on the 25 June 1959),[5] based on the view that the dual nationality of persons with a common tradition, culture and language gives no reasons for doubts. If these persons aquire the nationality of the other State—party to the treaty, they are registered by the State whose nationality they have acquired, and are then subject to the legal system of the State in which they are resident, that is, of the State in which their naturalization has been registered.[6]

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[4] Cf. G. DAHM, *Völkerrecht*, Stuttgart 1958, vol. I, p. 489.

[5] A. N. MAKAROV, *Allgemeine Lehren des Staatsangehörigkeitsrechts*, Heidelberg 1962, 2nd ed., p. 131.

[6] Ibidem.

In practice, the status of dual nationality is a constant source of acute friction between States; the consequences for persons possessing more than one nationality can be tragic, particularly in time of war. In 1812, Great Britain still took the stand that its citizens by birth could not under any circumstances lose their nationality; the compulsory conscription of Englishmen, naturalized in the USA, for American military service, was one of the main causes of the Anglo-American war.[7] If a person today possesses dual nationality, he would be under an obligation of double military service which is not only a physical impossibility, but also a political and military inadmissibility when the two States belong to opposing alliances. The person of dual nationality will not be in a position to fulfil the requirement of military service in one of the States and will consequently be treated as a deserter with all its negative consequences. His situation will be even worse if he is taken as a prisoner-of-war during a war between the two States of which he is a citizen.

Another source of friction caused by plural nationality is the institution of diplomatic protection extended by a State to its nationals if they are effected by illegal acts committed by another State. In cases of plural nationality the problem arises as to which State can and should offer diplomatic protection. Can diplomatic protection operate against a State which regards the person in question as its own citizen? The Hague Convention of 1930 decided the question as follows: "A State may not afford diplomatic protection to one of its nationals against a State whose nationality such a person also possesses" (Article 4). This Convention, however, is only binding on a few States. The Institute of International Law during its last session in Warsaw (2—11 September 1965) in the draft resolution "sur le caractère national d'une réclamation internationale présentée par un Etat en raison d'un dommage subi par un individu" proposes the following solution: "a) Une réclamation internationale en faveur d'un individu qui possède en même temps les nationalités de l'Etat requérant et de l'Etat requis, peut-être rejetée par celui-ci ou déclarée irrecevable. b) Une réclamation internationale en faveur d'un individu qui possède en plus de la nationalité de l'Etat requérant, celle d'un Etat autre que l'Etat requis, peut-être rejetée par celui-ci ou déclarée irrecevable, à moins qu'il possède un lien de rattachement prépondérant avec l'Etat requérant. c) Une réclamation internationale présentée par un Etat en raison d'un dommage subi par un individu peut-être rejetée par l'Etat requis ou déclarée irrecevable lorsque, compte tenu des circonstances propres à la cause, il apparaît que la naturalisation a été octroyée à cet individu en l'absence de tout lien de rattachement."

The status of dual nationality may also cause difficulties in other fields, for example, in private international law.[8]

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[7] L. OPPENHEIM, *International Law*, vol. I, 7th ed. by H. Lauterpacht, London 1948.

[8] The Polish Private International Law Act of 12 November 1965 contains in this connection the following provision (Art. 2, para. 2) : "A foreigner possessing the nationality of two or more

The anomaly of dual nationality in the context of the modern State and the structure and mechanism of modern international relations, together with the practical considerations discussed above prompt States to at least reduce drastically the existing cases of dual nationality, and to create legal barriers to prevent or hinder even future contigencies, if not to eliminate them completely—which is of course no simple matter. It is exceptionally difficult to find a general solution to this question. Steps taken by the League of Nations in the 1930's to solve this problem complicated the matter even further or were of a purely declaratory character, in reality preserving the *status quo*.[9] At the present stage of international relations, States consistently deprecate dual nationality, if they are interested in the standardizing and streamlining of inter-State relations, and in the removal of obstacles hampering these relations. Socialist States play an important part among such States.

The sources of dual nationality are very varied. Usually they arise from lack of precision and clumsiness in the wording of international agreements concerning cessions of territories or migration of population. An English textbook rightly puts it: "As the Law of Nations has at present no generally binding rules concerning acquisition and loss of nationality... and as the Municipal Laws of the different States differ in many points concerning this matter, the necessary consequence is that an individual may possess more than one nationality as easily as none at all... Double nationality may be produced by every mode of acquiring nationality. Even birth can invest a child with double nationality... Double nationality can likewise be the result of marriage... Legitimation of illegitimate children can produce the same effect... Naturalization in the narrower sense of the term is frequently a cause of double nationality..."[10]

In practice a very common source of dual nationality is the positive conflict of the laws of two States, resulting in the application of both *ius sanguinis* and *ius soli* to a person at birth. For example, the child of a Polish woman born in Mexico, will be a Polish citizen according to Polish law, but according to Mexican law, a citizen of Mexico. If either the principle of *ius sanguinis* or the principle of *ius soli* were adopted in all countries of the world, cases of dual nationality would not arise at birth. As, however, both these principles co-exist in the world, new cases of dual nationality are constantly arising. Only the unification of the nationality laws of all countries, based on the adoption of one of the above mentioned principles, could regulate this problem. This would require a multilateral Convention signed by all States. Without going into the relative merits

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States is subject to the law of that country which he is most closely connected with, as his national law." Dz. U. 1965, No. 64, text 290.

[9] G. E. VILKOV, *Mezhdunarodno-pravovoye regulirovanye voprosov dvoynogo grazhdanstva* (*Settlement of Questions of Dual Nationality under International Law*), "Sovetsky Ezhegodnik Mezhdunarodnogo Prava," 1959, p. 360.

[10] OPPENHEIM—LAUTERPACHT, pp. 606-607.

of these principles which are usually adopted in a combined form, it is difficult not to agree with Cordova's opinion in the preamble to the Report for the Commission of International Law on plural nationality: "There is of course no practical possibility of asking Governments to renounce definitely one or the other of the two systems" (article 9).[11]

Dual nationality is often also a result of marriage when the laws of the States are in conflict. For example, a Soviet woman who married a Polish citizen before 1951 acquired Polish nationality without losing her Soviet nationality (under the Nationality Act of the USSR of 1938) thus obtaining dual nationality.

Another very common source of dual nationality is the birth of children of mixed marriages. For example, according to the Czechoslovakian Nationality Act of 1949 "A child born in the Republic of Czechoslovakia whose father or mother possesses Czechoslovak nationality, acquires Czechoslovak nationality upon birth." At the same time, if one of the parents is a Polish citizen, in accordance with the Polish Nationality Act of 1962,[12] "the child of parents of whom one is a Polish citizen while the other is a citizen of another State, acquires upon birth Polish nationality," irrespective of the place of birth; and if the parents do not exercise the right to choose for the child the nationality of the other parent, a case of dual nationality is produced.

Adoption, too, can produce dual nationality. For example, according to Soviet law, the adoption of a foreigner by a Soviet citizen or of a Soviet citizen by a foreigner does not produce a change in the nationality of the adoptee, where as according to some other legislatures, the adoptee in such cases acquires the nationality of the adopting person.[13]

Another fairly common source of double nationality is naturalization, when the acquisition of the new nationality is not associated, under law, with the loss of the original nationality. For example, Article 8 of the Polish Nationality Act of 1962 lays down: "The granting of Polish nationality may be dependent on proof of the loss of, or release from, a foreign nationality." Many other States do not even have such a provision, what obviously must lead to the acquisition of dual nationality by naturalization. Even though cases of dual nationality usually arise from positive conflicts between the Municipal Laws of particular countries, it is necessary to remember that, even where is complete unanimity of the relevant legal provisions, dual nationality can still arise, namely in cases where a statute attaches (*anknüpft*) particular effects to a declaration of will by a given person, in the sphere of nationality law.[14] The famous Carlier case may

[11] Document A/CN. 4/83."Yearbook of the International Law Commission," 1954, vol. II, p. 42.

[12] Dz. U. 1962, No. 10, text 49.

[13] L. A. ŁUNC, *Mezhdunarodnoe chastnoe pravo. Osobennaya chast*, Moscow 1963, p. 28.

[14] A. N. MAKAROV, *Allgemeine Lehren...*, p. 292.

be quoted here. Dual nationality can arise today even when the legal principles concerned are the same. For example, the illegitimate child of a West German mother and a Soviet father acquires both German and Soviet nationality, although both States have adopted the principle of *ius sanguinis*.[15] Thus dual nationality can arise from either a divergence between the legal provisions of the particular States or from a divergence of *Geltendmachung* between the similarly worded legal provisions of the States in question.[16]

Cases of dual nationality can arise as a result of Government acts (granting of nationality, cession of land, lack of suitable provisions or imprecision of these provisions), or as a result of individual acts (marriage, adoption, naturalization or other change of personal status).

A physical person may possess double nationality consciously (by naturalization without release from the former nationality) or unconsciously (often by birth, when the person is not aware of it and only finds out, for example, during war-time, the consequences of which are often tragic). A person can acquire double nationality intentionally (for example, the well-known case of Nottebohm who acquired the nationality of Liechtenstein to avoid sanctions against the property of a citizen of an enemy State) or also unintentionally. As has already been indicated, the solution of the problem of double nationality is no simple matter. The overwhelming majority of States, however, considers the status of plural nationality as an anomalous and undesirable phenomenon which is sometimes very dangerous both for the States, whose peaceful relations it may upset, and for the individuals concerned. These States have taken many steps to reduce, if not to eliminate, existing cases and future contingencies of dual nationality.

The struggle against dual nationality may find its expression in Municipal Law. One method of opposing plural nationality is the adoption in Nationality Acts, or even sometimes in Constitutions,[17] of the principle of one nationality. Apart from this, the legislatures of particular States provide legal means to eliminate or drastically reduce the existing number of persons of double nationality (for example, by release from their nationality of persons possessing the nationality of another State), and preventive measures to make the future increase of cases of dual nationality impossible, or at least more difficult (for example, the requirement of proof of release from or loss of the previous nationality as a necessary condition of naturalization or reintegration). It is necessary, however, to remember that the municipal law of individual States can only play a limited role in the fight against plural nationality. Often it is necessary to concede to, and

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[15] DAHM, *op. cit.*, vol. I, p. 486.

[16] MAKAROV, *op. cit.*, p. 293.

[17] Constitution of Polish Republic of 1921, Art. 87; Constitution of Libya of 1951, Art. 10, etc.

sometimes even to approve cases of dual nationality, while adopting the principle of single nationality. Municipal laws cannot affect the operation of laws of other States, and cannot be dependent upon the laws of other States. If a State today was to take alone a rigorous stand on the principle of single nationality, it would necessarily become itself dependent on the laws of other States, which would run against its fundamental right to regulate autonomously its own nationality laws as belonging to its domaine reservé.[18]

International agreements, bilateral and multilateral, are a considerably more effective weapon in the fight against plural nationality. These agreements can be divided into two groups. The first group deals especially with positive conflicts between particular Nationality Acts, and determine the "stronger" of the accumulated nationalities, granting it (for example, the effective nationality) priority while not attempting to eliminate the actual accumulation. The other agreements contain uniform norms regulating defined problems of nationality and attempt to eliminate, or at least reduce, existing and possible future cases of dual nationality.[19]

Among the bilateral agreements regulating problems of dual nationality particularly important were the so-called Bancroft Treaties concluded in 1868 and 1869 by the United States with the German States, and later with several other European countries. These treaties provided that naturalized persons should be deemed to be exclusively citizens of the State, the nationality of which they had acquired, after 5 years residence in that State. In the event of a return to the State of which the person had previously been a citizen, and of permanent residence there (2 years), it was presumed that the person had renounced the nationality acquired by naturalization. In practice, there are many bilateral agreements, liquidating or limiting existing or possible future cases of dual nationality, by the use of the principles of option, of permanent residence, of effective nationality etc. One can cite, for exapmle, from the inter-war period the Polish-German Treaty on Upper Silesia of 15 May 1922,[20] or the Polish--German Convention of 30 August 1924.[21]

Apart from these, there are several bilateral treaties which do not try to eliminate or reduce cases of dual nationality, but attempt only to remove some of the negative consequences of dual nationality, notably in the sphere of military service. These treaties are usually based on the reciprocal honouring of military service duly discharged by a person of dual nationality in one of the signatory States. For example, the agreement between the USA and France (exchange of diplomatic notes) of 1948 on the military service of certain persons

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[18] L. GELBERG, *Nowa ustawa o obywatelstwie polskim* (*New Polish Nationality Act*), "Państwo i Prawo", 1962, No. 8—9, p. 340.

[19] MAKAROV, *op. cit.*, p. 141.

[20] Dz. U. No. 44, text 371.

[21] Dz. U. No. 72, text 708.

possessing dual nationality[22] states that military service in one of the contracting States between 1939—1945 would be recognized by the other party. At the same time it stresses (Article 6) that "The provisions of this present agreement in no way affect the legal position of interested parties in the matter of nationality." The Italian-Chile Convention of 4 June 1956, on military service, contains analogous provisions[23]: Article 1 states that military service done in one State will be honoured in the other, but that, however "Le disposizioni della presente Convezione non pregiudicano in nessun modo la condizione giuridica della persone interessate in materia di cittadinanza" (Article 8).

The best method of combating dual nationality would be multilateral conventions of a universal character. The conclusion of a universal convention—signed by every State, and based for example on the principle of either *ius sanguinis* or *ius soli*, or establishing a right of obligatory option in cases of dual nationality and, in case of the non-exercise of this option, providing for the loss of one nationality, for example according to the place of permanent residence—would lead to the drastic reduction, if not complete elimination, of cases of plural nationality. Up to now, the role of multilateral agreements against dual nationality has been rather modest. Among the few such treaties are the Treaty of Rio de Janeiro of 1906 which is based on the principles of the Bancroft agreements, some of the provisions of the peace Treaties signed after the World War I,[24] and the Hague Convention of 1930[25] on certain problems concerning the conflict of municipal Nationality Laws, together with its three protocols. It is worth stressing that the Hague Convention has so far been ratified by only 14 States (and by 5 of these with reservations).

Even fewer States have ratified the protocols; the protocol on statelessness has been ratified by only 8 States and has not come into effect at all. After World War II, a Convention on the nationality of married women was concluded under the aegis of the United Nations (to be discussed below).

It is worth mentioning that learned societies have many times elaborated interesting drafts of International Conventions on nationality. For example, Institut de Droit International in 1895, 1896, and 1928, the International Law Association in 1924, and Harvard Law School in 1924 worked out such drafts.

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[22] "United Nations Treaty Series," vol. 67, No. 864.

[23] "United Nations Treaty Series," vol. 362, No. 5195.

[24] For example, Art. 278 of the Treaty of Versailles laid down that : "Germany undertakes to recognize any new nationality which has been or may be acquired by her nationals under the laws of the Allied and Associated Powers and in accordance with the decisions of the competent authorities of these Powers pursuant to naturalization laws or under treaty stipulations, and to regard such persons as having, in consequence of the acquisition of such new nationality, in all respects severed the allegiance to their country of origin." Analogous provisions are contained in the Treaty of St. Germain (Art. 230), of Trianon (Art. 213), etc.

[25] Dz. U. 1937, No. 47.

"The American Journal of International Law" of 2 July 1965 contains the interesting *Model Rules Concerning Dual Nationality*.[26]

The negative attitude of socialist countries to dual nationality is expressed mainly in municipal laws. The majority of the Nationality Acts in force in these countries include special provisions asserting the principle of one nationality. A different view seems to be represented by Ivan Sepkov in his article *Settlement of Dual Nationality in European Communist Countries* ("American Journal of International Law," vol. 56, No. 4, October 1962, pp. 1010—1019). He distinguishes two groups: among 9 socialist countries of Europe one whose legislation prohibits dual nationality, the second where there is no such a prohibition. The first group comprised originally 6 countries and at present (1962) only 4 (p. 1011). The author has probably acquainted himself not sufficiently well with the legislation and practice of socialist States in the domain of nationality. For example, see the Polish Nationality Act of 15 February 1962.[27] The Albanian Nationality Act No. 377 of 16 December 1946[28] states in Article 2 that "A person possessing Albanian nationality may not at the same time possess a foreign nationality." The Bulgarian Citizenship Act No. 9327 of the 19 March 1948 contains identical provisions in Article 24,[29] as does the Nationality Act No. 370/331 of 1 July 1946 of the Federal People's Republic of Yugoslavia, article 2.[30] In the Nationality Acts of other States which do not contain such express disapproval of dual nationality, there are other provisions which admit of no doubt as to their attitude towards double nationality. For example, the Hungarian Nationality Act, No. 5, of 1957, provides in Article 4 that a Hungarian citizen, who is at the same time a citizen of another State, should be considered as a Hungarian citizen as long as he has not been released from or deprived of his nationality.[31]

The similar provisions are contained in the § 3 (1) of the Staatsbürgerschaftsgesetz of German Democratic Republic of 20 February 1967: "Staatsbürger der Deutschen Demokratischen Republik können nach allgemein anerkanntem Völkerrecht gegenüber der Deutschen Demokratischen Republik keine

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[26] "American Journal of International Law," vol. 59, No. 3, July 1965, pp. 722-723.

[27] The previous Nationality Act of 1951 contained an analogous provision in Art. 1.

[28] "United Nations Legislative Series." St/Leg/Ser. B/4. *Laws Concerning Nationality*, p. 4. The new Nationality Act has been brought into effect by Decree 1874 of 7 June 1954.

[29] *Laws Concerning Nationality*, p. 60 : "A Bulgarian citizen cannot be simultaneously a citizen of another country."

[30] *Laws Concerning Nationality*, p. 554. The New Yugoslavian Nationality Act of 17 September 1964 ("Służbeni List," Broj 38—23 September 1964) does not contain analogous provisions but requires that the acquisition of Yugoslav nationality by naturalization be accompanied by release from the former nationality (Art. 7).

[31] The previous Hungarian Nationality Act (Act LX of 1948) contained an analogous provision (para. 23).

Rechte oder Pflichten aus einer anderen Staatsbürgerschaft geltend machen" ("Gesetzblatt der Deutschen Demokratischen Republik," 1967, Teil 1, Nr 2).

Sometimes the problem is omitted in the Nationality Act, for example in the Soviet Act of 1938, or the Romanian Act of 1952 (the former Romanian Law of July 1948 contained provision which expressly prohibited the acquisition of another nationality by citizen of Romania), but the same result is produced by other acts together with the treaty practice of the countries concerned.

People's China which has a decidedly negative attitude towards dual nationality, regulate these matters through agreement with respective countries of South-East Asia. The "People's Daily" in an editorial in its 24 December 1960 issue entitled *Rational Settlement of the Problem of Dual Nationality of Overseas Chineses* emphasized the official policy of attempting to settle the dual nationality problem of the overseas Chineses in order to improve the relations with the countries that have a large Chinese population: "The dual nationality of the overseas Chineses is a problem inherited from history. The Chinese Government has always held the view that it is irrational for the overseas Chineses to have dual nationality" (Tao-tai Hsia, *Settlement of Dual Nationality between Communist China and Other Countries,* "Ost-Europa Recht," 1965, No. 1, p. 31).

Provisions contained in Nationality Acts to the effect that a citizen of the State concerned cannot be at the same time a citizen of another State, do not provide sanctions against persons possessing dual nationality.[32] For dual nationality can often occur without the wish of the person concerned, for example upon the birth of a child to parents whose national law is based on the principle of *ius sanguinis,* in the territory of a State which recognizes *ius soli.* The legislatures of socialist countries simply do not take cognisance of the fact that some of their citizens possess at the same time another nationality.[33] Persons possessing several nationalities have in socialist countries the same rights and are subject to the same duties as persons possessing only one nationality. In particular, they cannot avail themselves of the diplomatic protection of the second State of which they are also citizens, against their own State.

The provisions on the inadmissibility of dual nationality are accompanied in the Acts of socialist countries cited above by other provisions, which make it more difficult for cases of dual nationality to arise and reduce the number of these cases as far as possible. We shall take as examples naturalization and restitution of nationality, in which municipal laws can do very much to liqui-

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[32] In this context, it is worth mentioning a peculiar provision of a special kind of the Bulgarian Nationality Act of 1946 (Art. 26) : "A Bulgarian citizen who claims or avails himself of a foreign citizenship shall be liable to a fine of 100,000 leva, and in a particularly serious case, to rigorous imprisonment."

[33] If the Act calls for the application of the national law, a Polish citizen is subject to Polish law, even though the law of another State recognizes him as a citizen of that other State (Art. 2, para. 1, of the Polish Act on Private International Law).

date dual nationality. The new Polish Nationality Act of 1962 provides that the acquisition of Polish nationality (naturalization) may be made dependent upon the adducement of evidence of loss of or release from a foreign nationality (Article 8, paragraph 3).[34] An analogous provision is formulated in Article 10 of the above Act, concerning the acquisition of Polish nationality in a simplified way by a foreigner who has married a Polish citizen: similarly in Article 11, concerning the regaining of Polish nationality by a woman who has lost her Polish nationality by acquiring a foreign nationality as a result of marriage with a foreigner, or in connection with such a marriage. This condition of the producing of evidence of the loss of a foreign nationality is aimed against future contingencies of dual nationality, but because of its optional character (the acquisition may be made dependent on) it does not exclude the possibility of the creation of cases of dual nationality. In practice, however, the number of cases of exemption from this requirement of proof of the loss of or release from a foreign nationality is negligeable. The provisions of Article 13 are also directed against dual nationality; the acquisition of a foreign nationality results in loss of Polish nationality; and Article 14 provides that the acquisition of foreign nationality by a Polish woman in connection with marriage, or the regaining of a foreign nationality by a foreign woman in connection with the dissolution of a marriage with a Polish citizen, results in loss of Polish nationality. On the other hand, the new Polish Act contains a series of provisions, admitting the inevitability of dual nationality in some cases (Articles 6, 7, 8, 9, 10, 11, 12)—in cases of repatriation it is not necessary to adduce evidence of the loss of or of release from a foreign nationality to re-acquire Polish nationality (Articles 13, 14, 19).[35]

According to the Albanian Nationality Act of 1946 (Article 7), a foreigner may acquire Albanian nationality if (paragraph 4) "he has been permitted to renounce his former nationality, or can show proof that his former nationality does not oppose his acquisition of Albanian nationality," and (paragraph 5) "In the case of a stateless person, or where under the law of the country of which the person has hitherto been a national, the acquisition of another nationality involves the loss of that earlier nationality, the conditions of paragraph 4 above shall be deemed to have been fulfilled. Where a foreign State does not permit its nationals to acquire a foreign nationality or stipulates conditions which are incapable of fulfilment, it shall be sufficient for a national of such a State, when applying for Albanian nationality, to make a formal declaration to the effect that he

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[34] The previous Polish Nationality Act contained an analogous requirement for naturalization (Article 10) : "The acquisition of Polish nationality may be made dependent on the adducement of evidence of release from a foreign nationality."

[35] Cf. L. GELBERG, *Nowa ustawa o obywatelstwie polskim* (*The New Polish Nationality Act*), "Państwo i Prawo", 1962, No. 7—8, p. 340.

intends to renounce his previous nationality."[36] In cases of marriage or adoption the above conditions need not be fulfilled. Thus the Albanian legislation, in the same way as the Polish one, calls in principle for proof of the release from a foreign nationality before Albanian nationality can be acquired, but puts this in a flexible way, so as not to subject itself to the legislation and practice of foreign States or to admit of limitations on its fundamental right of independent regulation of the rules of acquisition of its nationality.

Similarly the Czechoslovak Act of 1949 contemplates the grant of Czechoslovak nationality "to applicants who... acquiring Czechoslovak citizenship renounce, unless stateless, their previous national allegianc,e" adding that "The Ministry of the Interior..." may in its discretion "... in special cases grant the said citizenship to a person who does not fulfil the condition of paragraph lc..."[37]

The Bulgarian Citizenship Act, No. 9327, of 19 March 1948[38] deals with the problem rather differently. Article 3, concerning naturalization, does not make this dependent on the renunciation of the foreign nationality; however Article 4 states that "An alien who marries a Bulgarian citizen may become a Bulgarian citizen provided that he is released from the former citizenship." This provision is directly aimed against dual nationality, just as is Article 11 of this Act which says that repatriation may be granted after the person in question is released from the foreign nationality.

The new Nationality Law of the German Democratic Republic contains at one hand a number of provisions directed against dual nationality (§ 3, p. 1 and 2; § 6, p. 1 and 2). On the other hand, taking into account the situation which has emerged in Germany after the Second World War, this Law does not dismiss (in § 1, p. a) the legal effects of pre-war nationality. Thus, persons which at the moment of creation of the GDR had possessed the German nationality and were permanent residents of the territory of the GDR, had been recognized as the GDR nationals if they did not loose subsequently their nationality in due course, regardless of whether they may acquire in the meantime another nationality.

The new Yugoslav Nationality Act of the 17 September 1964 contains special provisions on this problem.[39] A condition of naturalization is the possession by the foreigner applying for Yugoslav citizenship of a release from his former one, or a promise of such a release in the event of his acquiring Yugoslav citizenship (Article 7, paragraph 2). The Act, however, deems this condition to have been fulfilled, if the foreigner applying for Yugoslav citizenship is stateless, or if, under the laws of the country of which the person has hitherto been

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[36] *Laws Concerning Nationality* (Decree No. 1874), p. 4. A new Act was promulgated in 1954.

[37] *Laws Concerning Nationality*, pp. 195-200, or "Sbirka zakonu" 1949.

[38] *Laws Concerning Nationality*, p. 60.

[39] "Službeni list," Broj 38, 29 September 1964.

a national, he loses that nationality upon naturalization. If, however, the foreign State does not provide for release from its citizenship, or lays down conditions which cannot be fulfilled, it is sufficient for the applicant for Yugoslav citizenship to make a declaration that in the event of an accumulation of Yugoslav and second citizenship he will renounce that second citizenship (Article 7, paragraph 4).

The Yugoslav Act at the same time provides a simplified procedure for the acquisition of citizenship for Yugoslav emigrants and members of their families applying for Yugoslav citizenship, and exempts them from the fulfilment of the conditions discussed above[40]; the same simplified procedure and exemptions are granted to foreigners who have married Yugoslav citizens and would therefore like to be naturalized (Article 8), and to foreigners applying for naturalization, when their "acceptance as Yugoslav citizens is in the interest of Yugoslavia" (Article 9).[41] It is obvious that these exceptions from the general rule can give rise to double nationality.

Soviet legislative practice in this field is rich and of long standing. At the time of the October Revolution there were a great many foreigners in Russia. The overwhelming majority of these were workers who had come from China, Finland, Korea, Belgium and other countries for economic reasons, and there were too very many prisoners of war from the Austro-Hungarian Empire and from Germany.[42] A considerable number of them were very sympathetic towards the new Soviet Government and took part in the suppression of the counter-revolution and foreign intervention. Many of them stayed permanently on the territories of the Soviet Republics. The Soviet legislature went far in facilitating their acquisition of the Soviet nationality. The legislature of the Soviet Republics introduced in the first few years a simplified procedure for the granting of nationality to foreigners from the working classes, even delegating the right to decide to the local Councils of the areas where the foreigners concerned were living. This necessarily led to many cases of dual nationality. Already however in the first decrees of the Soviet Republics concerning the acquisition of nationality, there were provisions aimed against dual nationality, to the extent that it was possible in those times. For example, Article 6 of Decree No. 31 of 1918 on the acquisition of the Soviet nationality made it obligatory for

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[40] The previous Nationality Act No. 370/3 of 1 July 1946 of the Federal People's Republic of Yugoslavia contained a similar provision (Article 9). "An applicant who belongs ethnically to one of the peoples of the FPRY may be granted the nationality of the FPRY irrespective of conditions. . ." (§ 4 of Art. 8 of this Act). This refers to a release from the previous nationality or a promise that one will obtain such a release in the event of his acquiring Yugoslav citizenship.

[41] The former Nationality Act contained identical provisions.

[42] M. M. BOGUSLAVSKY, A. A. RUBANOV, *Pravovoye polozhenie inostrancev v SSSR*, Moscow 1962, p. 5.

the People's Commisariat for Home Affairs to register and promulgate the list of foreigners received as citizens, and to inform, through the People's Commisariat for Foreign Affairs, the States of which the persons concerned were citizens.[43] The Resolution of the Council of People's Commissars of Byelorussia of 4 August 1922 was more strongly worded, putting on the People's Commissariat for Foreign Affairs the obligation "to inform the State concerned of the renunciation of its nationality by persons received as citizens of Byelorussia" (paragraph 8).[44] At that time individual Soviet Republics had their own laws concerning nationality and foreigners, which were often essentially different from each other. All these provisions produced a highly complicated situation.[45]

Only after the founding of the U.S.R.R. the Federal Nationality Act od 29 October 1924 established one federal nationality and introduced uniform provisions, changing the former procedure for acquisition of citizenship. From then on only the Central Executive Committees of the Federal Republics were empowered to make decisions as to the granting of Soviet nationality (Article 7), although the simplified procedure for the granting of citizenship to working-class foreigners was retained. On dual nationality the Act of 1924 contained the following provision (Article 11): "Foreigners, to whom Soviet nationality has been granted, do not enjoy the rights and are not subject to the duties appartenant to the possession of the nationality of other States."[46] A series of decrees were aimed against double nationality, by depriving of Soviet nationality: a) emigrants who had not registered with the Soviet diplomatic or consular representatives, b) persons who under international agreements had opted for a foreign nationality, c) persons who had acquired a foreign citizenship[47] or had applied for it.[48]

The Nationality Act of the U.S.R.R. at present in force (19 August 1938) does not contain a special provision on dual nationality, nor does it make *expressis verbis* the acquisition of Soviet citizenship by naturalization or repatriation dependent on the adducing of evidence of the renunciation or loss of the foreign nationality. The result of this is that the Soviet Union, while being decid-

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[43] V. V. JEGOREV, G. N. DASHKIEWICZ, M. A. PLOTKIN, B. D. ROZENBLUM, *Zakonodatelstvo i mezhdunarodnye dogovory Soyuza SSR i soyuznych respublik o pravovom polozheniy inostrannykh fizicheskikh i yuridicheskikh lic*, Moscow 1926, p. 23.

[44] *Ibid.*, p. 19.

[45] V. N. DURDENEVSKY, S. B. KRYLOV, *Podręcznik prawa międzynarodowego* (*Manual of International Law*), Warsaw 1950, p. 202.

[46] V. V. JEGOREV etc., *op. cit.*, p. 18.

[47] For example, Art. 8 of Decree No. 11 of the Council of People's Commissars of Georgia of 11 July 1922, *op. cit.*, p. 30.

[48] The provisions of the Central Executive Committee and the Council of People's Commissars of 27 May 1933, "concerning former Russian subjects who went abroad before 25 October 1917 and took a foreign nationality, or applied for a foreign nationality." "Svod zakonov USSR," 1933, No. 34.

edly against dual nationality, in view of the limited possibilities of using municipal law to regulate these matters, has concentrated on bilateral agreements, which are obviously deemed to be a more effective weapon in this field. With respect to the number of contracting-parties and the number of treaties concluded to deal with the problem of dual nationality, the Soviet Union is decidedly ahead of the other socialist countries.

There are some Soviet statutes expressly directed against dual nationality. For example, the Resolution (postanovlenye) of the Central Executive Committee and the Council of People's Commissars of 27 May 1933 stated: "Former Russian subjects who went abroad before 25 October 1917 and took a foreign nationality or applied for a foreign nationality, are not deemed to be citizens of the USSR."[49] There are too, however, other legal instruments concerning nationality which necessarily result in cases of dual nationality. During World War II and immediately afterwards, a series of Decrees were issued by the Presidium of the Supreme Council, introducing a simplified procedure for the restoration of Soviet nationality to previous subjects of the Russian Empire and to persons who had lost their Soviet nationality and were living in Manchuria, in the province of Sincian, in the towns of Shanghai and Tientsin, in Bulgaria, Yugoslavia, France, Japan, Czechoslovakia and Belgium.[50] This simplified procedure for renaturalization did not require proof of the loss of or release from the foreign nationality, and thus in many cases could give rise to cases of dual nationality.

Soviet authors, both international lawyers and specialists on Constitutional Law, take a consistent stand against dual nationality and point to the practice of the Soviet Union in that direction.[51]

The Hungarian Nationality Act of 1957[52] does not preclude in principle the possibility of the existence of an anomalous status of plural nationality. This status can arise, because a person who has not lost his former citizenship can acquire Hungarian citizenship, and also because the naturalization of a Hun-

[49] *Ibid.*

[50] G. E. VILKOV, *Zakonodatelstvo SSSR i mezhdunarodnye soglashenya po voprosam grazhdanstva* (*Sbornik*), Moscow 1964, documents 41—47, 49, 51.

[51] "Thus the negative attitude of the majority of States to an accumulation of nationalities; in particular, Soviet law takes up this negative position, beginning from the Decree of 22 August 1921," writes W. N. Durdenevsky (DURDENEVSKY, KRYLOV, *op. cit.*, p. 201). In the *Manual of International Law* of 1964, edited by F. Kozhevnikov, p. 288, it is stated that : "The legislation of the USSR takes a negative attitude towards the accumulation of a Soviet and foreign nationality. The Nationality Act in force of 1938 does not contemplate the possibility of allowing people to hold a double nationality, Soviet and foreign." M. I. BOGUSLAVSKY and A. A. RUBANOV take an analogous stand in *Pravovoye polozhenye inostrancev v SSSR*, Moscow 1962, p. 42, while A. I. LEPYOSHKIN in the textbook *Kurs sovetskogo gosudarstvennogo prava*, 1961, vol. I, writes that "Soviet constitutional law considers the status of dual nationality as anomalous, temporary and transitional" (p. 473).

[52] "Zeitschrift für Ostrecht", 1957, p. 114ff.

garian citizen by another State is not, according to Hungarian law, deemed to be *per se* grounds for loss of Hungarian citizenship. A Hungarian citizen may be at the same time a citizen of another State by birth in a country which applies the principle of *ius soli*, or when one of his parents possesses the nationality of a State, under the laws of which the naturalization of one parent involves the acquisition of that nationality by the child upon birth *per se*.[53]

Soviet authors consider the status of dual nationality as anomalous, and put forward the principle of exclusiveness—that is, a citizen of a socialist State cannot at the same time be the citizen of another State.[54] Hungary concluded a series of treaties, directed towards the liquidation or reduction of existing cases of dual nationality and the prevention of future contingencies.

There are, however, special cases, where a State by treaty relinquishes, or agrees to the limitation of, some of its powers over its citizens who possess double nationality for the benefit of the State of which these persons are at the same time citizens. For example, in the agreement reached by exchange of diplomatic notes of 23 and 25 May 1950 between Yugoslavia and the United States of America, Yugoslavia agreed to treat its citizens who are permanently resident in the USA and possess American nationality as American citizens, for purposes of granting entrance and exit visas for temporary visits to Yugoslavia.[55]

Some socialist States have concluded between themselves a series of bilateral treaties directed against dual nationality. There is no doubt that the Soviet Union has concluded by far the greatest number of special bilateral treaties to deal with the problem of dual nationality. The first in this series of treaties was the Soviet-Mongolian Treaty of the 20 May 1930, later replaced by the Treaty of 24 April 1937[56] which is still in force. On 25 August 1958 the USSR concluded a new Convention to deal with the problem of persons of dual nationality with the Mongolian People's Republic.[57] In this field, the USSR

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[53] J. BEER, I. KOVÁCS, L. SZAMEL, *Gosudarstvennoe pravo Vengerskoy Narodnoy Respubliki*, Moscow 1963, p. 261.

[54] *Ibid.*

[55] "United Nations Treaty Series," vol. 98, No. 1365, words the above agreement thus: "As of 1 April 1950 all American citizens of Yugoslav origin who qualify for entry into Yugoslavia for temporary visits, will be granted Yugoslav entrance visas on their American passports, and all persons who enter Yugoslavia bearing American passports containing Yugoslav entrance visas will be granted exit permits. The phrase 'American citizens of Yugoslav origin' is understood to include persons who are regarded by the American Government as American citizens by birth or naturalization in accordance with American law but who are at the same time regarded by the Yugoslav Government as Yugoslav citizens in accordance with Yugoslav law. It is understood that the foregoing does not pertain to persons who apply for entry into Yugoslavia for permanent residence."

[56] "Sbornik deystvuyushchykh dogovorov, soglasheniy i konvenciy, zakluchonnych SSSR s inostrannymi gosudarstvami," Ministry of Foreign Office USSR, X, 1955, document No. 383.

[57] "Sbornik. . .," XX, 1961, document No. 870, or 322 "UN Treaty Series" 201.

concluded two Conventions with Hungary (24 August 1957[58] and 21 January 1963[59]), with Romania (4 September 1957),[60] with Albania (18 September 1957),[61] with Czechoslovakia (5 October 1957),[62] with Bulgaria (12 December 1957),[63] with Korea (16 December 1957),[64] two conventions with Poland (21 January 1958[65] and 31 March 1965[66]) and with Yugoslavia (22 May 1956[67]). Thus USSR concluded bilateral agreements on dual nationality with 9 socialist States which in turn concluded a series of similar Conventions with each other. For example, see the Polish-Hungarian Convention of 5 July 1961,[68] the Polish--Czechoslovak Convention of 17 May 1965,[69] the Bulgarian-Hungarian Convention of 27 June 1958,[70] the Bulgarian-Romanian Convention of 24 September 1959,[71] the Hungarian-Czechoslovak Convention of 4 November 1960,[72] etc. Together all these Conventions establish a system of treaty-norms, governing the relations between the socialist States concerned on problems of nationality, and aiming at a drastic reduction of the number of cases of dual nationality, if not at their complete elimination. These Conventions have aroused much academic interest because of the originality of the solutions and the uncomplicated practical mechanism, made possible by the homogenous structure of the contracting States.[73] They undoubtedly loom large in the history of the long fight against plural nationality, just as did the Bancroft Treaties in the second half of the 19th century.

It should also be mentioned that some socialist countries have also concluded reaties on nationality problems with non-socialist States. In particular, Yugolavia concluded an agreement with the United States of America on 23 March

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[58] *Ibid.*, document No. 868, or 318 "UN Treaty Series" 35.

[59] "Vedomosti Verchovnogo Soveta," 1963, No. 30.

[60] "Sbornik. . .," XX, document No. 872, or "Buletinul Oficial," 1957, No. 34, or 318 "UN Treaty Series" 89.

[61] *Ibid.*, document No. 866.

[62] *Ibid.*, document No. 873, or 320 "UN Treaty Series" 111.

[63] *Ibid.*, document No. 867, or 302 "UN Treaty Series" 3.

[64] *Ibid.*, document No. 869.

[65] "Sbornik. . .," XX, document No. 871, or Dz. U. 1958, No. 32, or 319 "UN Treaty Series" 277.

[66] Dz. U. 1966, No. 4, text 20.

[67] "Vedomosti Verchovnogo Soveta," 1956, No. 16, or 259 "UN Treaty Series" 155; as a result of an exchange of notes between the two Governments on the 22 and 29 August 1957 the term of a year for the filing of declarations on nationality, provided for by Art. 2 of the Convention, was extended for another year.

[68] Dz. U. 1962, No 5.

[69] Dz. U. 1966, No. 19, text 121.

[70] "Izvestiya na Preziduma na Narodnoto Sobranye," 1959, No. 81.

[71] *Ibid.*, 1960, No. 17, or "Buletinul Oficial," 1959, No. 29.

[72] "Sbirka zakonu," 1961, Částka 15.

[73] A. MAKAROV, *Allgemeine Lehren des Staatsangehörigkeitsrecht*, 2nd ed., 1962.

1950,[74] and on 22 April 1955 the People's Republic of China concluded a treaty with Indonesia,[75] and on 20 September 1950 was signed an agreement between People's Rep. of China and Nepal.

We are primarily concerned here with the conventions concluded between socialist states. The overwhelming majority of these aim to reduce drastically the number of existing cases of dual nationality. For example, the preamble to the Polish-Hungarian convention of 5 July 1961 states that the two States concluded the Convention "in consideration of the fact that there are a certain number of persons whom each of the States under its own laws regards as its own citizens," and "with the desire of removing the double nationality of these persons, on the basis of their free decision." In these Conventions, persons resident in the territory of one of the contracting States, and even in some Conventions (eg. the Polish-Hungarian, or Bulgarian-Soviet) persons resident in the territory of a third State[76] and possessing the nationality of both the contracting States were granted a right of option to be exercised by filing a written declaration in the course of a year with the diplomatic or consular representatives of the State the nationality of which they opted exclusively to retain. Some Conventions treat the filing of a declaration on the choice of nationality by the person concerned as sufficient to conclude the option, and do not require the consent or any other document of the State, the nationality of which the person desires to retain (for example—the Bulgarian-Soviet, the Soviet-Korean, the Czechoslovak-Soviet or Polish-Soviet conventions). Some, however, require after the filing of the declaration of option an expression of consent by the State whose citizenship the person concerned intends to retain. For example, the Albanian-Soviet Convention refers in Article 5 to persons whose declarations of choice of nationality will not be accepted (paragraph 1), and to decisions on such declarations by the State concerned (paragraph 2); the Polish-Hungarian Convention formulates the matter in this way: "If one of the parties to the convention states that the declaration of retention of its nationality has been filed by a person who does not possess that nationality, such a person should be treated as not having filed an application" (Article 5, paragraph 2). Some other international agreements, in particular the Hague Convention of 1930 recognized the right of persons of dual nationality to renounce one of them, but made such renunciation conditional upon the authorization of the State whose nationality was being surrendered; the bilateral Conventions of Socialist States, however, make the renunciation of double nationality dependent either on the option of the person concerned alone, without requiring the approval of either

[74] "United Nations Treaty Series," vol. 98, p. 197.

[75] "Mezhdunarodnaya Zhizn," 1955, No. 6, pp. 205-229. This agreement only came into effect on 21 December 1960, when documents of ratification were exchanged.

[76] In such a case the Convention aims not to reduce in part, but completely to eliminate existing cases of dual nationality in the relations between the parties to the Convention.

of the two States, or on the option as approved or accepted by the State, the nationality of which is retained. When there is a reference, as in some Conventions, to the consent of the State concerned, it certainly means that its competent organs must be given the opportunity to check the facts confirming that the person opting to retain his nationality, actually is in possession of that nationality.[77] The decisions of one State are communicated to the second State through diplomatic channels. All these Conventions strongly emphasize the complete freedom of choice of nationality, and provide guarantees in accordance with this principle of freedom of will. For example, the Polish-Soviet Convention, typically, states that: "Persons who... choose the nationality of the second Party to the Convention, will be permitted to remain in their present place of residence; such persons will be subject to the provisions applicable to foreigners" (Article 8). None of the conventions requires that the person leave the country, the nationality of which he has renounced. To exclude any possibility of the application of administrative sanctions of a discriminatory character, some of the Conventions, which make the option dependent on the consent of the State in favour of which the option is made, provide at the same time that, if this consent is not granted, the person concerned should be treated as though he had not filed the application (for example, Article 5, paragraph 2, of the Hungarian-Soviet Convention).

The Yugoslav-Soviet Convention is at some variance in the question of persons entitled to exercise the option; this Convention also concerns persons residing in the territory of either State and considered by that State as its citizens, but excludes persons who, while in possession of the nationality of one of the States concerned, acquired the nationality of the second State without obtaining a release from their former nationality, provided that such persons are permanently resident in the State the nationality of which they formerly possessed (Article 1).

The above-mentioned Conventions granted all to the actual person possessing dual nationality the right to choose completely freely which nationality he preferred to retain. At the same time, however, in an attempt logically to eliminate the greatest possible number of cases of dual nationality, these Conventions provided that, if the option were not exercised by the persons concerned in the term stated, those persons would be deemed to be exclusively citizens of the State being a party to the contract where they were resident (for example, Article 6 of the Romanian-Soviet Convention, Article 7 of the Soviet-Yugoslav Convention etc.).

Those conventions, such as the Polish-Hungarian or the Czechoslovak--Soviet Convention, which also deal with persons of dual nationality resident

[77] Some Western authors, such as Makarov, suppose that "in granting consent to the choice of nationality, the State concerned may take into consideration not only legal but also political factors"; see *op. cit.* This hypothesis obviously does not take into account the political homogeneity of the States who are parties to the Conventions cited above.

in a third State, state that, if the option is not exercised by the persons concerned within the fixed time-limit, those persons will be deemed to be nationals of that State party to the Convention, where they were resident before they went abroad.[78] Thus the principle of option in these Conventions was supplemented by the principle of residence, which can play a subsidiary but effective role in the elimination or reduction of existing cases of dual nationality. The non-exercise of the right of option also in this way results in the liquidation of double nationality. Persons who are 18 or more years old or are married, are entitled to file a declaration of choice of nationality. Apart from this, the Conventions contain particular provisions concerning the determination of the nationality of minors possessing dual nationality. For example, the Polish-Hungarian Convention, cited above, of 1961, states in Article 4 that minors will possess exclusively the nationality of the parents if they, in accordance with the provisions of the Convention, possess the same nationality. If, however, the parents possess or choose different nationalities, they should together decide on the nationality of the minor child. If the parents do not agree, the child will retain the nationality of the State, if a party to the Convention, where it is resident. When one of the parents is dead, or the minor child has been deprived of parental care, the child retains the nationality of the parent under whose authority it remains. Children without parents retain the nationality of the State where they are resident on the last day of a year from the day on which the Convention came into force. Children resident in a third State, if there is no agreement between the parents, retain the nationality of that State party to the Convention, where they were resident immediately before their departure abroad, and if they were never resident in either of the contracting States, they retain exclusively the nationality of the mother.

Some Conventions provide that, if one of the parents of a minor child is resident in one of the contracting States, and the second in the second State, and there is no agreement between the parents, the child will retain the nationality of that parent who supports and educates it (Article 4, paragraph 3, of the Polish-Soviet Convention).

The majority of these Conventions are directed against cases of dual nationality already existing in the relations between the States concluding the Convention. Some States, however, also contain provisions to obviate future contingencies of dual nationality (for example, Article 5 of the Czechoslovak-Soviet Convention of 1957, Article 5 of the Bulgarian-Soviet Convention of 1957, Article

[78] For example, Art. 6 of the Polish-Hungarian Convention states that : "1. Persons, who have not filed the declaration in the manner at term laid down in Article 2, will be deemed to be exclusively citizens of that State party to this Convention, where they are resident. 2. Persons resident in a third State who have not filed a declaration of retention of citizenship in the manner and time laid down, will be deemed to be exclusively citizens of that State party to this Convention where they were resident immediately before their departure abroad."

9 of the Polish-Hungarian Convention of 1961). There are, too, special bilateral conventions which are exclusively devoted to eliminaing or reducing future cases of double nationality—for example, the Soviet-Hungarian Convention od 21 January 1963, to obviate future cases of double nationality.[79]

To this group belong also two Conventions concluded by Poland in 1965, namely the Polish-Soviet Convention of 31 March 1965,[80] on the prevention future cases of dual nationality, and the Polish-Czechoslovak Convention of 17 May 1965, dealing with problems of dual nationality. This last convention contains particular provisions as to the nationality of children born after its coming into force (Article 9). It is worth emphasing that both the Soviet--Hungarian Convention of 1963, cited above, and the Polish-Czechoslovak Convention of 1965 are valid for five years (the previous Conventions were concluded for one year), and can be extended for a further five years, as long as one of the parties does not renounce the Convention at least six months before its expiration (Article 12 of the Soviet-Hungarian Convention, Article 14 of the Polish-Czechoslovak one). The Polish-Soviet Convention of 1965 is valid for an indefinite period, continuing in force for six months from the day of its renunciation by one party. This long-term policy frees the parties from the necessity of negotiating new agreements, which in turn makes it easier to take action to avoid, in particular, future cases of dual nationality. By virtue of the Nationality Acts in force in each State, new cases of dual nationality may arise among the citizens of each State after the conclusion of the Convention, particularly when children are born to parents of different nationalities. The Conventions mentioned above should prevent this. The Conventions provide that, in a mixed marriage, the parents should together determine the nationality of children born after the coming into force of the Convention. The parents should exercise this choice of nationality for the child within three months from the date of birth of the child by depositing a correct declaration with the organs of the State the nationality of which they have chosen for the child. If there is no agreement between the parents, the child will possess exclusively the nationality of the State where it was born. If the child was born in a third State, and there is no agreement between the parents, it will possess exclusively the nationality of the State where the parents had their common residence before their departure to the third State, and if there was no such common residence, the child will possess exclusively the nationality of the mother (Article 1, paragraph 5, of the Polish-Soviet Convention of 1965).

These Conventions also contain provisions to prevent cases of double nationality arising from naturalization. The Municipal Laws of socialist states do not always require release from the previous nationality before granting nation-

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[79] "Vedomosti Verkhovnogo Soveta SSSR," 1963, No. 30.

[80] Dz. U. 1966, No. 4, text 19.

ality. The Polish Nationality Act of 1962 states that "the grant of Polish nationality may be made conditional on the presentation, of evidence of loss of or release from a foreign nationality." The Soviet (1938) and Hungarian (1957) and GDR (1967) statutes do not mention the matter at all. Some, however, of the bilateral Conventions deal with the problem. The Soviet-Mongolian Treaty of 24 April 1937 contains interesting provisions in this connection.[81] The parties agreed not to grant their nationality to persons being citizens of the second State without the consent of the competent organs of that State (Article 1). The parties will ascertain from each other through diplomatic channels whether there are any obstacles to the granting to the person concerned the nationality of the other State; silence will be deemed to be consent. Similar provisions are contained in the Conventions between the USSR and Hungary (1963—Article 10), Poland and Czechoslovakia (1965—Article 11), and Poland and the Soviet Union (1965—Article 5, paragraph 1).[82]

Among the agreements concluded by socialist states to deal with the problem of dual nationality by giving a right of option, it is worth mentioning the Treaty concluded on 22 April 1955[83] between the People's Republic of China and the Republic of Indonesia on Dual Nationality.[84] The main reason for the conclusion of this treaty was the fact that more than 2 million Chinese were living in Indonesia, who, under the Dutch Act of 1910, had acquired *iure soli* Indonesian nationality, while at the same time retaining Chinese nationality. In this agreement, China and Indonesia, "with the aim of finding a rational solution to the problem" of persons of dual nationality, granted to them the right to choose their nationality within two years from the coming into force of the agreement "in accordance with their own will." The choice of one nationality involves the automatic loss of the other. As in the Conventions concluded between socialist countries and discussed above, the non-exercise of the option also here results in the liquidation of the status of dual nationality, although, unlike those Conventions, the nationality to be retained is not determined by the place of residence, but by the father's, or, if his nationality is not ascertainable, by the mother's national origin (Article 5). Persons of 18 years of age or more, or married persons are entitled to exercise the option. The agreement also settles the nationality of minors. They can exercise the

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[81] "Sbornik deystvuyushchikh. . . ," No. 383.

[82] "From the day of the coming into force of this Convention, neither of the Parties will grant an application for the acquisition of nationality filed by a person in possession of the nationality of the second Party, unless the person concerned has first submitted a document, issued by the proper organ of that second Party whose nationality the person possesses, stating that there are no obstacles to a change of nationality."

[83] This agreement came into force only on 21 December 1960, when documents of ratification were exchanged under the provisions of Art. 14 (MAKAROV, *op. cit.*, p. 138).

[84] "Mezhdunarodnaya Zhizn," 1955, No. 6, pp. 156—159.

right of option within one year after they have attained their majority.[85] During the time of their minority, these persons will be deemed to be citizens of that State, the nationality of which their father chose, or which their mother chose, if the father died before exercising the option, if he is unknown, or if his own nationality cannot be ascertained. If these persons do not make a choice of nationality within a year after they have attained their majority, they will be treated as if they had chosen the nationality which they possessed during their minority. The Treaty also contains a series of provisions on the acquisition (including regaining) and loss of nationality, connected with the relations between the two States. The agreement settles the problems of the nationality of children of mixed marrriages, as well as of persons who marry. A series of provisions in the Treaty aim to prevent future cases of dual nationality (Articles 7—10).

People's China has also concluded an agreement on dual nationality with Ceylon.

The Sino-Nepalese agreement was signed on 20 September 1956. This agreement solved only the problem of persons with dual nationality residing in China, in the following way: "The high contracting parties agree that all persons which reside in China who are also the children of parents with citizenship of the People's Republic of China and of the Kingdom of Nepal respectively, after they have attained the age of 18, may choose, in accordance with their own will, for themselves and their children who are under 18, the nationality of the People's Republic of China. Such persons shall carry out the necessary steps with the Chinese government in accordance with the prescribed procedure. After the completion of the above procedure, such persons and their children who are under 18 shall be considered as having voluntarily lost the nationality of the Kingdom of Nepal."[86]

As regards multilateral treaties on matters of dual nationality, signed by socialist countries, one can only mention the Convention on the nationality of married women of 20 February 1957.[87] This Convention came into force on 11 August 1958, and by 1 August 1963 had been signed by 28 States, of which 11 were socialist countries.[88] Thus all the Socialist countries not precluded by Article 4 of the Convention from participation[89] are parties to the Convention.

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[85] "The Treaty is to be valid for 20 years, and will remain in force indefinitely thereafter, but can then be terminated by either party upon one year's written notice" (Art. 14).

[86] Tao-tai HSIA, *Settlement of Dual Nationality between Communist China and Other Countries*, "Ost-Europa Recht," 1965, No. 1, p. 29.

[87] Only Poland has signed the Hague Convention of 1930.

[88] *Nationalité de la femme mariée* "Nations Unies," E/CN 6/254/ReA, p. 19.

[89] Art. 4 of the Convention provides for the participation only of members of the United Nations and its specialized organizations, of the International Court of Justice and of States specially invited to take part by the UN General Assembly —thus eliminating the People's Republic of China, the German Democratic Republic, the Korean People's Democratic Republic and the Democratic Republic of Vietnam.

with the exception of Mongolia. The Convention corresponds to the tendency expressed in many municipal laws,[90] particularly in the laws of socialist countries, which have always accepted the principle of the complete equality of rights for women. According to Article 1 of the Convention, "neither the celebration nor the dissolution of a marriage between one of its nationals and an alien, nor the change of nationality by the husband during marriage shall automatically effect the nationality of the wife," and according to Article 2, "neither the voluntary acquisition of the nationality of another State nor the renunciation of its nationality by one of its nationals shall prevent the retention of its nationality by the wife of such national." In the interests, however, of family unity, Article 3 of the Convention provides for the naturalization of a foreign wife at her request by a specially simplified procedure, if this is not hampered by considerations "of national security or public policy."

In the past very many legislatures adopted the principle of family unity, and provided that a wife upon marriage automatically acquired the nationality of the husband. A change of his nationality involved the change of the wife's nationality. This was obviously a result of the inequality of the position of woman. Many modern legislatures have rejected this position, and the principle of family unity has had to yield to the principle of the equality of rights of the wife as well as to the principle of an individual decision on matters of nationality. These principles were expressed, although insufficiently, in the Hague Convention of 1930, and the Pan-American Convention of 1933 signed in Montevideo. The Convention on the Nationality of Married Women may lead to the reduction and elimination of cases of dual nationality, if it will be accepted by all, or the vast majority of States, and if they bring their national laws into line with the provisions of the Convention. It is worth mentioning that many States between 1955—1957, that is before the coming into force of the Convention, introduced changes in their laws modernizing them in the spirit of the UN Convention. It is difficult to share the fears of some authors who see in this Convention a danger of an increased number of cases of dual nationality[91]; this danger will be rather reduced by the unification of provisions which previously differed widely in their character.

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[90] MAKAROV, *op. cit.*, p. 148.

[91] "In dem Masse, in dem. . . das neuzeitliche Recht der individuellen Willensentscheidung einen breiteren Spielraum gewährt und die Gleichberechtigung von Mann und Frau anerkannt wird, haben sich neue Möglichkeiten für die Häufung der Staatsangehörigkeiten ergeben" (DAHM, vol. I, p. 486). Also P. WEIS, *Nationality and Statelessness in International Law*, London 1956, p. 132.

THE APPLICATION OF NON-MILITARY MEASURES BY THE GENERAL ASSEMBLY OF THE UNITED NATIONS

by KRZYSZTOF SKUBISZEWSKI

This article seeks to analyse briefly the competence of the General Assembly of the United Nations to recommend the application of non-military measures. The article is based on the practice of the United Nations in the years 1946——1966.

The Term "Measures"

In the opinion of the International Court of Justice "the word 'measures' implies some kind of action."[1] This statement is not helpful, for "action" is used with different meanings in the Charter of the United Nations and in the pronouncements of Members.[2]

Measures, the taking of which is ordered or recommended to all Members and which are meant to represent the effort of the Organization, in contradistinction to activities undertaken by Members merely in their individual capacities, may be described as collective measures.

The Collective Measures Committee of the General Assembly in its first report divided the collective measures of the United Nations into three categories: (1) political, (2) economic and financial, and (3) military.[3] It is the first two that are of interest for the present paper. The writer has dealt with the military measures in another study.[4]

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[1] Certain Expenses of the United Nations (Art. 17, para. 2, of the Charter), *ICJ Reports*, 1962, p. 172.

[2] Cf. different definitions of "action" as used in only one provision of the Charter, *viz.* Art. 11, para. 2, *United Nations: Repertory of Practice of United Nations Organs*, New York 1955, vol. I, p. 308.

[3] GAOR, 6th Sess., Suppl. No. 13, Report of the Collective Measures Committee, UN Doc. A/1891, p. 3, para. 22.

[4] The Problem of the Application of Military Measures by the General Assembly of the United Nations, paper submitted for publication in Memorial Volume in Honour of J. Andrassy.

Each of the above three categories of collective measures can be divided into measures which are effective and those which are not. The term "effective" is used here in a special legal sense and does not automatically mean measures which have in fact been applied and have brought the desired results, though this might be the case.

The Charter refers to effective collective measures in Article 1, paragraph 1. Effective collective measures are those which are ordered, i.e., taken by virtue of, and based on, resolutions which are binding on their addressees. Resolutions which are binding are called decisions. In other words effective collective measures are enforcement measures determined in Articles 41 to 50, i.e., measures which can be taken exclusively by the Security Council.[5]

Thus only measures other than ordered (binding, "effective") could possibly pertain to the competence of the General Assembly. Below the question is discussed whether the Charter, or the practice of the Organization, or both have conferred such a competence on the General Assembly in the non-military field, and if so, to what extent.

The Provisions of the Charter

The role of the General Assembly in the maintenance of international peace and security is of a secondary nature. The primary responsibility in this respect rests with the Security Council (Article 24, paragraph 1). When the latter organ is exercising the functions assigned to it under the Charter in respect of any dispute or situation, the Assembly can only discuss this dispute or situation. Any further activity on the part of the Assembly, in particular the making of recommendations, depends on the request of the Council itself (Article 12, paragraph 1).

The picture changes, and the role of the Assembly increases, whenever the Council chooses not to exercise its functions. The non-exercise of its functions by the Council is best proved by the removal of the item in question from the Council's agenda. This pattern has been followed in the practice of the Organization. It may be added that the removal of an item from the agenda is a procedural decision, i. e., it can be taken once it has the support of any nine Members of the Council (Article 27, paragraph 2). But the view has also been expressed that Article 12 refers to the actual exercise of the Council's functions. Therefore,

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[5] H. KELSEN, *The Law of the United Nations*, London 1950, pp. 14, 281 and 724. There are also enforcement measures which do not constitute the collective activity of the United Nations, *ibid.*, p. 91. They are enforcement measures taken by regional organizations under Art. 53. Enforcement measures provided for in Article 106 are the action of the United Nations because they are taken on behalf of the Organization, yet they are not collective in nature. Enforcement measures should be distinguished from enforcement of a decision, such as enforcement of a judgment of the International Court of Justice under Art. 94, para. 1, *ibid.*, p. 294.

according to this opinion, no formal act, such as manipulating the agenda, is necessary. The very inaction of the Council, caused for instance by the operation of the veto, amounts to the non-exercising of functions, though the item may continue to figure on the Council's agenda.[6] It may be observed that the first view, which requires the removal of the item from the agenda, appears to serve better the smooth application of Article 12. In fact, during the twenty two year history of the Organization Article 12 has been applied without obstacles, and no friction has arisen between the Council and the Assembly on that account.[7]

However, even if the requirements of Article 12 are met, the Assembly's powers remain limited. What the Assembly can do is to make recommendations alone. In substantive matters pertaining to the maintenance of international peace and security the Assembly has no powers of decision, i. e., it cannot order Members to take a specific course of action.

It is possible to base the competence of the Assembly to recommend non-military measures on two provisions of the Charter: Article 11, paragraph 2, and Article 14. In its resolutions relating to such measures the Assembly avoids invoking any Charter provisions and, consequently, it is rather difficult to locate a resolution of the Assembly either under Article 11, paragraph 2, or Article 14. How undetermined and imprecise the dividing line between measures under Article 11, paragraph 2, and those under Article 14 is has been shown by the *Expenses* case. In this case the International Court of Justice regarded the Assembly resolutions on the United Nations Emergency Force as falling under Article 14,[8] though in logic they should rather be considered as adopted in application of Article 11, paragraph 2.[9]

On the other hand it seems preferable not to invoke here the general authority of the Assembly to make recommendations under Article 10. It is submitted that the powers of the General Assembly relating to the maintenance of international peace and security, in particular the competence to recommend measures, have been set out in Articles 11 and 14, and Article 10 neither adds to nor detracts from the said powers. The discussion on whether Article 11, paragraph 2, restricts the broad competence under Article 10 or whether, *vice versa*, that latter provision overrules any limitations following from Article 11

[6] KELSEN, *op. cit.*, p. 217, points to the possibility of the two interpretations. P. F. BRUGIÈRE, *Les pouvoirs de l'Assemblée Générale des Nations Unies en matières politique et de sécurité*, Paris 1955, rejects the second interpretation, while J. ANDRASSY, *Uniting for Peace*, "American Journal of International Law," Vol. 50, 1956, at p. 569 is rather inclined to accept it. BRUGIÉRE, *op. cit.*, pp. 377—382 and 384—391, contends that Art. 12 has been violated by the Assembly in a number of questions.

[7] BRUGIÈRE, *op. cit.*, p. 77.

[8] *ICJ Reports*, 1962, at p. 172.

[9] D. W. BOWETT, *United Nations Forces. A Legal Study of United Nations Practice*, London 1964, pp. 289—290.

remained inconclusive,[10] and it is the practice of the Organization which has clarified the scope and extent of the measures which the Assembly has the power to recommend.

The Uniting for Peace Resolution

In resolution 377 A(V) of 3 November 1950 (Uniting for Peace)[11] the General Assembly interpreted its power to recommend collective measures in the following way (paragraph 1):

> If the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security.

The debate between the proposers, led by the United States, and the opposers, led by the Soviet Union, of the interpretation forwarded in the formula of the Uniting for Peace resolution has been amply and often assessed in legal writings.[12]

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[10] In legal writings this is best illustrated by H. KELSEN, *Recent Trends in the Law of the United Nations*, London 1951, pp. 953 et seq. Cf. however, Oscar SCHACHTER in "Yale Law Journal," vol. 60, 1951, pp. 189—193, on the limited value of Kelsen's purely juristic analysis.

[11] The Acheson plan.

[12] KELSEN, *Recent Trends...*, pp. 953—990 ; R. W. TUCKER, *The Interpretation of War under Present International Law, Addendum*, "International Law Quarterly," vol. 4, 1951, pp. 33-38; P. H. DOUGLAS, *United to Enforce Peace*, "Foreign Affairs," vol. 30, 1951, pp. 1—16 ; L. H. WOOLSEY, *The "Uniting for Peace" Resolution of the United Nations*, "American Journal of International Law," vol. 45, 1951, pp. 129—137; H. Field HAVILAND, Jr., *The Political Role of the General Assembly*, New York 1951, pp. 156—165 ; F. A. VALLAT, *The General Assembly and the Security Council of the United Nations*, "British Year Book of International Law," vol. XXIX, 1952, pp. 94-100 ; KATZIN, *Collective Security : The Work of the Collective Measures Committee*, "Annual Review of United Nations Affairs," 1952, p. 206 ff ; BRUGIÈRE, *Les résolutions amendant les pouvoirs de l'Assemblée des Nations Unies pour la sécurité collective*, "Revue Générale de Droit International Public," vol. 57, 1953, pp. 453-476 ; Alfred VON VERDROSS, *Idées directrices de l'Organisation des Nations Unies*, "Hague Recueil," vol. 83, 1953, II, pp. 63—67 ; André ROSIGNOL, *Des tentatives effectuées en vue de mettre un nouveau mécanisme de sécurité collective à la disposition de l'Assemblée Générale des Nations Unies et de leur inconstitutionalité*, "Revue Générale de Droit International Public," vol. 58, 1954, pp. 94—129 ; Leland M. GOODRICH and Anne P. SIMONS, *The United Nations and the Maintenance of International Peace and Security*, Washington 1955, pp. 406—423 and 430—433 ; BRUGIÈRE, *Les pouvoirs de l'Assemblée Générale des Nations Unies en matière politique et de sécurité*, Paris 1955, pp. 395—420; ANDRASSY, *op. cit.*, 563—582 ; Fernand VAN LANGENHOVE, *La crise du système de sécurité collective des Nations Unies 1946—1957*, Bruxelles 1958, pp. 122—140 ; Julius STONE, *Legal Controls of International Conflicts. A Treatise on the Dynamics of Disputes- and War-Law*, 2nd Impression with Suppl., London 1959, pp. 266—284 ; Keith S. PETERSEN, *The Uses of the Uniting for Peace Resolution since 1950*, "International Organization," vol. XIII, 1959, pp. 219—232 ; F. A. VALLAT,

In consequence of developments that took place in the United Nations after 1950, the constitutional and legal aspects of the Uniting for Peace resolution have lost their original acuteness and currency. In the course of time the United States and other countries which took a favourable view of the resolution decided not to exploit to the full the possibilities contained in the above interpretation. As one writer observed, the Uniting for Peace resolution "was the high water mark of enthusiasm for turning the United Nations into a collective security system. The flood receded rather quickly and, apparently, irreversibly."[13] On the other hand one can point to instances where the opposers of the resolution, while they maintained their views on the exclusive responsibilities of the Security Council and on the unlawfulness of the Acheson plan, approved exceptionally of the application of the Uniting for Peace resolution or did not protest against its being invoked and relied upon in the practice of the Organization.[14]

The Assembly's Measures and the Term "Action"

The competence of the General Assembly to recommend measures under Article 14 is not limited except by the scope and purpose of this Article and by the provisions of Article 12.

Measures adopted under Article 11, paragraph 2, appear to be subject to an additional restriction. For in this article there is the clause which provides

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The Competence of the United Nations General Assembly, "Hague Recueil," vol. 97, 1959, II, pp. 261—267 ; Leland M. GOODRICH, *The United Nations*, New York 1959, pp. 176—189 ; Inis L. CLAUDE, Jr., *The United Nations and the Use of Force*, "International Conciliation," March 1961 ; Finn SEYERSTED, *United Nations Forces : Some Legal Problems*, "British Year Book of International Law," vol. XXXVII, 1961, pp. 370—374 ; G. K. YEFIMOV, *Voprosy kompetentsii Generalnoy Assambley OON v mezhdunarodnopravovoy doktrine SŠA* (*Questions of Competence of the UN General Assembly in the American Doctrine of International Law*), "Soviet Year Book of International Law," 1963, pp. 345—351 ; BOWETT, *op. cit.*, pp. 290—298 and 545—551; Finn SEYERSTED, *United Nations Forces in the Law of Peace and War*, Leyden 1966, pp. 41—45 and 162—169. Generally relevant on the subject though not dealing in detail with resolution 377 A(V) is Myres S. MCDOUGAL and Richard N. GARDNER, *The Veto and the Charter: An Interpretation for Survival*, "Yale Law Journal," vol. 60, 1951, pp. 258—292.

[13] Inis L. CLAUDE, Jr., *The Management of Power in the Changing United Nations*, "International Organization," vol. XV, 1961, p. 231.

[14] Thus, for instance, the Soviet Union voted for the Security Council resolution calling an emergency special session under resolution 377A (V) to deal with the Suez conflict, SCOR, 11th Year, 751st Mtg., 31 October 1956, p. 22, para. 147. The Council's resolution was adopted by the minimum majority of 7 votes and explicitly invoked the Uniting for Peace Resolution. During the consideration of the crisis in the Near and Middle East in 1958 the Soviet Union submitted to the Security Council a draft resolution on the calling of an emergency special session of the Assembly, UN Doc. S/4057 and Rev. 1. There was no reference to resolution 377A (V) in the Soviet draft. See on this point SCOR, 13th Year, 838th Mtg., 7 August 1958, pp. 40—41, paras. 194—198. Finally, the Soviet Union voted for the revised United States draft omitting any reference to resolution 377A (V), ibid., pp. 44—45, paras. 224—225.

that any question relating to the maintenance of international peace and security "on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion."

If one accepts literally the view quoted at the beginning of this paper that "the word 'measures' implies some kind of action," then any measure of the Assembly which relates to the maintenance of international peace and security, no matter how close or distant this relation, must be preceded by the reference of the question to the Security Council and the voting of the measure by the Assembly must have the tacit or explicit agreement of the Security Council. But in its practice the General Assembly did not adopt such a broad meaning of the term "action"—a meaning that would in fact deprive the most representative organ of the United Nations of any independent powers of recommendation in matters pertaining to the nebulously defined field of peace and security.

The General Assembly did recommend the application of non-military measures as a matter of its own competence. The Assembly ascertained this competence as early as its first session in 1946 (the Spanish question) and has since recommended diplomatic or economic measures on several occasions. Before these two categories of measures are discussed, it is pertinent to say a word or two on recommendations preliminary to measures.

Recommendations Preliminary to Measures

In a few instances, before it decided on measures directed against a State, the General Assembly made a preliminary recommendation. Through such a recommendation the Assembly alerted this State that a recommendation on measures was imminent. Such imminence can be conveyed to the State concerned in several ways.

Thus the Assembly may recommend that Members desist from any or specific support that can otherwise be accorded to the country in question. At a later stage, when such general recommendation proves ineffective, the Assembly may spell out its previous prohibition of support and recommend appropriate steps. In resolution 1699 (XVI) of 19 December 1961 the General Assembly, in connection with the refusal of Portugal to transmit information on her colonies, requested all Members to deny Portugal any support and assistance which it might use "for the suppression of the peoples of its Non-Self-Governing Territories" (paragraph 8). In a resolution dealing specifically with Angola the Assembly formulated a similar request. This request was also addressed to the specialized agencies (resolution 1742(XVI) of 30 January 1962).

The Assembly may also urge Members to take, separately or collectively, measures which they deem advisable to bring about a state of affairs desired or requested by the Assembly. There may actually happen to be no difference between the first and the second *modus*. The denial of support (a negative meas-

ure) may consist, for instance, in stopping supplies of certain articles, and so may the taking of measures under the second rubric. In the latter case, however, at least theoretically, the arsenal of media appears to be larger. The second pattern of procedure may be illustrated by some resolutions of the Assembly on the question of *apartheid* in South Africa.

Starting with its seventh session the Assembly has uninterruptedly dealt with the question of race conflict in South Africa resulting from the policies of *apartheid* adopted by the Government of the Union (now Republic) of South Africa. In a series of resolutions[15] the Assembly declared that racial policies designed to perpetuate or increase discrimination were "inconsistent with the Charter of the United Nations and with the pledges of Members under Article 56 of the Charter," and it made findings to the effect that the policy of racial segregation was based on doctrines of racial discrimination. South Africa refused to comply with the resolutions and continued to adopt laws and measures that deepened racial segregation and dicrimination. In view of these developments the Assembly decided to request "all States to consider taking such separate and collective action as was open to them in conformity with the Charter of the United Nations, to bring about the abandonment" of the policies of *apartheid* (resolution 1598 (XV) of 13 April 1961, paragraph 3). In addition, the Assembly affirmed that the racial policies of South Africa were "a flagrant violation of the Charter of the United Nations and the Universal Declaration of Human Rights" and were "inconsistent with the obligations of a Member State" (paragraph 4). The phrase "consider" used in paragraph 3 had the effect of leaving States free to do as they pleased. The Assembly did not indicate the kind of action that was covered by paragraph 3, though it pointed out that the action should be "in conformity with the Charter of the United Nations". This phrase appears to permit of only one interpretation, *viz.* that resolution 1598 (XV) did not authorize measures which otherwise would amount to the violation of the State's obligations under international law but which were exceptionally permitted as means guaranteeing the respect of the law of the United Nations, e. g., non-execution of a valid treaty concluded with South Africa prior to the adoption of the resolution. The term "collective" meant that States could act here together and in cooperation with each other.

At the next session (sixteenth) the Assembly moved one step further. Confronted with continued South African non-compliance, the Assembly, instead of simply requesting all States to consider the taking of action, urged them "to take such separate and collective action" as was "open to them in conformity with the Charter" to bring about the abandonment of the *apartheid* policies (resolution 1663(XVI) of 28 November 1961, paragraph 5).

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[15] Resolutions 616B (VII) of 5 December 1952, 917 (X) of 6 December 1955 and 1248 (XIII) of 30 October 1958.

In 1962 the Assembly defined the measures which the Members (the previous formula comprised "all States") were now requested to take, "separately or collectively, in conformity with the Charter," against the Republic of South Africa (resolution 1761 (XVII) of 6 November 1962). These measures are discussed in the following Sections. At least in some instances the application of these measures would otherwise constitute a violation of international obligations between the applying State and South Africa, e. g., boycotting South African goods in contravention of trade agreements, refusing landing and passage facilities to South African aircraft in violation of the Chicago convention and the two-freedom agreement of 1944 or bilateral air arrangements, etc. In cases where the breach of law results from compliance with the Assembly's request, the measure involved is exceptionally permissible and does not constitute an international tort. But such measure could not have been taken prior to the passing of resolution 1761 (XVII), i. e., it could not have been based on recommendations preliminary to the Assembly resolution instituting the non-military measures.

Diplomatic Measures

Diplomatic measures consist of recommendations aiming at the breaking, or restricting, of the diplomatic or consular relations of a country, and also at diminishing or limiting its participation in the organized life of the international community. On the other hand, contrary to the view taken by the Collective Measures Committee,[16] mere appeals to parties or denunciations of the offending States should not be regarded as measures falling under the present heading. Up till 1966 the Assembly has resorted to diplomatic measures on three occasions.

(1) *The Question of Spain.* Certain diplomatic measures were recommended by the Assembly against Spain in resolution 39 (I) of 12 December 1946. The reasons adduced in the resolution for the recommendation of measures were her Fascist system of government and its origin,[17] and the friendly policies of the Spanish Government towards the Axis Powers during the Second World War.[18] The Assembly maintained its previous endorsement (resolution of 9

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[16] Cited in footnote 3 *supra*, see the views of the Committee at p. 3, para. 24, and p. 5, para. 38.

[17] The Assembly repeated the finding of the Sub-Committee of the Security Council that "[i]n origin, nature, structure and general conduct the Franco regime is a fascist regime [. . .]," UN Docs. S/75 and S/76. The Assembly expressed the conviction that the Spanish Government "was imposed by force upon the Spanish people with the aid of the Axis Powers" and that it did not "represent the Spanish people."

[18] The Assembly recalled the finding of the Sub-Committee referred to in footnote 17 that Spain gave "very substantial aid" to Germany and Italy and that "incontrovertible documentary evidence" established that "Franco was a guilty party with Hitler and Mussolini in the conspiracy to wage war" against the coalition of the United Nations.

February 1946) of the view that Spain under her then Government did not qualify for membership in the United Nations and recommended that she "be debarred from membership in international agencies established by or brought into relationship with the United Nations, and from participation in conferences or other activities which [might] be arranged by the United Nations or by these agencies." The Assembly also recommended that Members "immediately recall from Madrid their Ambassadors and Ministers plenipotentiary accredited there." Members were requested to report to the Secretary-General and to the second session of the Assembly what action they had taken in accordance with the resolution.[19]

The first group of measures—debarment from specialized agencies and certain international conferences—was easier to carry out. Once a consensus of opinion was reached among Members of the United Nations that certain steps should be taken against Spain, it was almost automatic to have this policy applied in organizations where the membership was practically identical with that of the United Nations. Thus the Assembly of the International Civil Aviation Organization voted in 1947 an amendment to the Chicago Convention to prevent the membership of any country not acceptable to the United Nations. Following the approval of the amendment by the Assembly of the Organization, the Spanish delegation withdrew from participation in the work of that body.[20] Although the amendment did not acquire binding force on its adoption the United Nations (acting through its Secretary-General) appeared to consider such an unaccomplished measure as justifying the conclusion that the ICAO was complying with the Assembly's resolution, and consequently the agreement between the two organizations was put into operation.[21] The Government of Spain was not invited by the United States of America to conferences of the International Telecommunications Union of 1947. Equally, the host Government did not ask Spain to attend the Congress of the Universal Postal Union in the same year.[22] Several steps were also taken by the Economic and Social Council. They mainly resulted in non-cooperation with organizations and bodies that had links with Spain. All these measures contributed to the isolation of Spain in the international plane.

On the other hand the recommendation aiming at limiting the diplomatic relations of Members with Spain had all the characteristics of a half-measure. Re-

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[19] Resolution 39 (I) was adopted by 34 votes to 6 with 13 abstentions.

[20] Annual Report of the Secretary-General on the Work of the Organization, GAOR, 2nd Sess., 1947, Suppl. No. 1 (UN Doc. A/315), p. 4.

[21] The General Assembly made its approval of the ICAO agreement conditional upon action by that Organization to debar Spain from membership and from participation in conferences and other activities.

[22] Report cited in footnote 20, p. 4.

calling ambassadors or ministers plenipotentiary and simultaneously continuing to maintain diplomatic relations had to amount only to a gesture. By adopting this recommendation the Assembly put on the appearance of taking a specific measure while in fact, even were that measure followed without exception, it was doing practically nothing. For according to the report submitted by the Secretary-General forty-nine Members were not in a position to apply the recommendation for the simple reason that they either did not maintain diplomatic relations with the Spanish Government (thirty Member countries) or had no ambassadors or ministers plenipotentiary accredited in Madrid. Only El Salvador, the Netherlands and the United Kingdom recalled the heads of their respective missions to Spain. There were other Members, like Argentine or the Dominican Republic which did not comply with the recommendation.[23] In 1948 and later, when the attempt to secure the confirmation of resolution 39 (I) by the second session of the Assembly had failed, several Members accredited ambassadors or ministers plenipotentiary to Madrid.[24] The failure of the Assembly to influence Members' policies toward Spain became obvious.

During the third session of the General Assembly it was generally realized that measures recommended in resolution 39 (I) were ineffective. This led to two divergent approaches to the problem.

Some Members, and their attitude found expression in a draft resolution introduced by Poland,[25] supported the idea of more radical steps. They would include a prohibition against exporting war and strategic materials to Spain, and refraining from entering into any agreements or treaties with this country.[26]

The second and more numerous group of Members, composed mainly of the Latin American countries, suggested that Members retain full freedom of action as regards their diplomatic relations with Spain.

None of the proposed courses of policy obtained an approval sufficient for the passing of an Assembly resolution in 1948. However, the First Committee (but not the Assembly in plenary meeting) managed to recommend that diplomatic measures be revoked.[27]

The debate on the problem was resumed at the fifth session when again the Latin American countries pressed for the rescission of the original resolution.[28] The change in attitude was linked to the then developing "cold war"

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[23] *Ibid.*, p. 3. As to Argentina, see also "New York Times," 27 December 1946, p. 9.

[24] "Annual Report of the Secretary-General on the Work of the Organization," GAOR, 4th Sess., 1949, Suppl. No. 1 (UN Doc. A/930), p. 19. In 1949 eleven Member countries maintained heads of missions in Madrid, "New York Times," 17 May 1949, pp. 1 and 4 : seven Latin American, three Arab, and Iceland.

[25] GAOR, 3rd Sess., 2nd Part, Annexes, p. 84, UN Doc. A/860.

[26] Several Member countries concluded new trade and other agreements with Spain after 1946.

[27] *Ibid.*, First Cttee., 262nd Mtg.

[28] GAOR, 5th Sess. Ad Hoc Pol. Cttee., p. 163ff.

between the East and the West, and the "value of Spain as an anti-Communist ally"[29] figured prominently among the political factors which influenced a modification of policy. The critics of the resolution now claimed that it constituted an interference in the domestic affairs of a State by the Organization,[30] though the discussions and voting in the United Nations in 1946 had established the concept of matters which remain *prima facie* within the domestic jurisdiction and yet are of international concern.[31] During the fifth session the resolution was further attacked as "an expression of rancour over the events which had led to the establishment of the present regime" in Spain.[32] It was also said that the resolution was "patently ineffectual."[33] "The Assmebly should concede that its earlier resolution had been adopted on false premises and had had no beneficial effects."[34] The delegate of Liberia stated that "the resolution had not brought about the desired results."[35] These and similar declarations made during the discussion reflected the view that the Assembly should not recommend steps when there was no reasonable chance of their being taken by those Members who alone would be in a position to put the recommended measures into operation. The reason behind the reluctance of a large number of Members to apply resolution 39 (I) was that they now favoured a policy opposite to that formulated in the resolution, and they wanted to normalize their relations with Spain. These Members included the United States and the Latin American republics, though Guatemala, Mexico and Uruguay adopted a different stand. The contention was made that the resolution's "failure [...] was due precisely to its weakness."[36] However, no matter what stronger measures might have been recommended, political and strategic considerations would always have induced the then Western majority in the Assembly to switch their Spanish policy to a more friendly attitude. This finally led to the adoption of resolution 386 (V) of 4 November 1950 whereby the General Assembly revoked the recommendations contained in resolution 39 (I). In adopting the resolution of rescission, the Assembly gave the following reasons:

> The establishment of diplomatic relations and the exchange of Ambassadors and Ministers with a government does not imply any judgment upon the domestic policy of that government ;

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[29] Rosalyn HIGGINS, *The Development of International Law through the Political Organs of the United Nations*, London—New York—Toronto 1963, p. 79, note 97.

[30] GAOR, 5th Sess., Ad Hoc Pol. Comm., 25th Mtg., 27 October 1950, p. 164, para. 10, delegate of Peru ; p. 165, para. 31, delegate of Costa Rica.

[31] HIGGINS, *op. cit.*, p. 79.

[32] GAOR, 5th Sess., Ad Hoc. Pol Comm., 26th Mtg., 27 October 1950, p. 168, para. 16, delegate of Pakistan.

[33] Same delegate, *ibid.*, para. 20.

[34] *Loc. cit.*

[35] *Ibid.*, 27th Mtg., 28 October 1950, p. 170, para. 15.

[36] *Ibid.*, 28th Mtg., 30 October 1950, p. 175, para. 19.

> The specialized agencies of the United Nations are technical and largely non-political in character and have been established in order to benefit the peoples of all nations, and [...], therefore, they should be free to decide for themselves whether participation of Spain in their activities is desirable in the interests of their work.

On 14 December 1955 Spain was admitted to the United Nations, though her internal régime had not undergone any modification.

It may be observed that in spite of its lack of success in imposing its policy in the Spanish question on reluctant Members the General Assembly had established, by virtue of resolution 39 (I), a precedent[37] for recommending measures in domestic situations that did not qualify for treatment under Chapter VII of the Charter.[38] The diplomatic measures of the Spanish question set in part the pattern for the action taken by the Assembly in dealing with the question of *apartheid* in South Africa.

(2) *The Question of* Apartheid *in South Africa.* In resolution 1761 (XVII) of 6 November 1962 the General Assembly deplored "the failure of the Government of the Republic of South Africa to comply with the repeated requests and demands of the General Assembly and of the Security Council and its flouting of world public opinion by refusing to abandon its racial policies" (paragraph 1). The Assembly deprecated "the continued and total disregard by the Government of South Africa of its obligations under the Charter of the United Nations" (paragraph 2) and reaffirmed that the continuance of the *apartheid* policies seriously endangered international peace and security (paragraph 3). The Assembly then requested Members to take several measures, "separately or collectively, in conformity with the Charter," against the Republic of South Africa to force her to abandon the policies of apartheid. One of these measures was the "breaking of diplomatic relations with the Government of the Republic of South Africa or refraining from establishing such relations" (paragraph 4a).[39] Another measure of a diplomatic nature was provided for in resolution 974 D (XXXVI), part IV, of 30 July 1963 voted by the Economic and Social Council which, it may be remembered, is an organ that acts "under the authority of the General Assembly" (Article 60 of the Charter). By virtue of that resolution South Africa was excluded from the work of the Economic Commission for Africa. The exclusion is to continue

> until the Council, on the recommendation of the Economic Commission for Africa, shall find that conditions for constructive co-operation have been restored by a change in South Africa's racial policy.

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[37] For a contrary view, see BRUGIÈRE, *Les pouvoirs. . .*, pp. 364—365. Cf., however, HIGGINS, *op. cit.*, p. 122 : "there is some precedent for at least the severance of diplomatic relations in the case of Franco Spain [. . .]."

[38] For an analysis of the Spanish question, see J. HOUSTON, *The United Nations and Spain*, "Journal of Politics," vol. 14, 1952, p. 683ff ; Helen Hart JONES, *Domestic Jurisdiction from Coven nt to Charter*, "Illinois Law Review," vol. 46, (1951), p. 219ff. ; HIGGINS, *op. cit.*, pp. 77—81.

[39] Resolution 1761 (XVII) was adopted by 67 votes to 16 with 23 abstentions.

There was very limited compliance on the part of the Member States which were requested to apply the measure. It is true that States which had not maintained diplomatic relations with South Africa prior to the adoption of resolution 1761 (XVII) refrained from establishing them.[40] However, these States had already had misgivings about relations with South Africa before the Assembly voted its measures. Here the role of the Assembly's recommendation in influencing national action was rather minimal. As to the diplomatic relations that had existed at the moment of the adoption of the resolution, their scope was never wide: in 1961 the number was twenty countries including the sovereign members of the Commonwealth. While the Special Committee on the Policies of *Apartheid* of the Government of the Republic of South Africa was in a position to note that a number of countries had broken off consular relations with the said Government,[41] it could not avoid admitting "with regret that nearly twenty Member States belonging to several regions of the world still [maintained] diplomatic relations with that Government."[42] The failure in applying the measure was rather obvious.

(3) *The Question of Territories under Portuguese Administration.* In resolution 2107(XX) of 21 December 1965 which is discussed below in more detail in connection with the economic measures, the General Assembly noted that Portugal was

> intensifying the measures of repression and military operations against the African people of these Territories with a view to defeating their legitimate aspirations to self-determination, freedom and independence,

and it expressed the conviction

> that the attitude of Portugal towards the African population of its colonies and of the neighbouring States [constituted] a threat to international peace and security [. . .].

The Assembly then decided to urge Members to take a number of measures (paragraph 7), *inter alia,*

> (a) To break off diplomatic and consular relations with the Government of Portugal or refrain from establishing such relations; [. . .].

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[40] See, for instance, the attitude of Poland, UN Docs. A/5439, A/5497/Add. 1, S/5438, and A/SPC/SR. 383.

[41] Report of the Special Committee, UN Docs. A/5497 and Add. 1 (reprinted in GAOR, 18th Sess., Annexes, Addendum to Agenda Item 30), para. 476. Incidentally, the Assembly did not request the cessation of consular relations.

[42] First Interim Report of the Special Committee, UN Doc. S/5310 and A/5418 (reprinted in GAOR, 18th Sess. Annexes, Addendum to Agends Item 30, Annex III), para. 75. It follows from the 1964 and 1965 Reports of the Special Committee that the situation did not change in this respect, cf. UN Docs. A/5825, A/5932, A/5850 and Add. 1, and A/5957. Nor did the situation change in 1966.

Economic Measures

Measures of an economic nature are numerous. They are, first, embargoes on exports or imports. Such embargoes may be either total or partial; the latter type of embargo concerns only a specific export or import, e. g., arms. There are, further, measures which result in the severence of financial relations. They include the withholding of loans and credits, the suspension of payments, the sterilization of gold resources, and the blocking of the external assets. Sequestration of the property of the offending country is another possible measure. Finally, a separate series of steps in the economic sphere is the severence of transport and communications to and from the country concerned.[43]

The General Assembly recommended the application of divergent economic measures in a number of disputes or situations.

The recommendation of the diplomatic measures by the Assembly in the three questions referred to above lead to some objections against this organ's competence to do so. The voting of the economic measures became an occasion for raising even more serious and basic doubts as to whether the Assembly had the power to recommend non-military measures. These doubts did not concern specifically the economic, in contradistinction to diplomatic, measures. The doubts were of a general nature and applied to the jurisdiction of the Assembly. They were voiced irrespective of the kind of measures which the Assembly intended to recommend.

It may happen, as it happened before, that the Assembly recommends measures in spite of the fact that its competence to do so has been seriously and fundamentally questioned. If this is the case, then the precedent value of the Assembly's action is much lesser than in instances where no basic doubts are raised regarding the competence of the Assembly. It may even be contended that such a precedent value is limited to its negative aspect, i. e., it shows the category of conflicts into which the Assembly should not interfere and in which it should not attempt to recommend any measures.

For the purpose of the present analysis it is perhaps useful to distinguish between, first, situations directly involving the East-West conflicts where the competence of the Assembly to recommend measures was fundamentally questioned as a matter of law and, second, more recent situations involving certain domestic and colonial problems where disagreement concerned, in the first place, the expediency or desirability of the measures taken by the Assembly.

Economic Measures: East-West Conflicts

(1) *The Greek Question.* In 1947 the General Assembly took up the question of incidents at the Greek frontier, civil strife in Greece, and external support to

[43] For a detailed though abstract discussion of the economic and financial measures, see Report cited in footnote 3, pp. 6—22.

Greek guerillas. The Greek question divided sharply the East and the West in the United Nations. During the second session of the Assembly there was some agreement between the East and the West on the power of that organ to deal with the question, while disagreement concerned mainly the substantive solution. During the third and fourth sessions the competence of the Assembly has been definitely questioned by the delegates of the Eastern block.

In resolution 193 A (III) of 27 November 1948 the Assembly noted the conclusions of its Special Committee on the Balkans and called upon

> Albania, Bulgaria and Yugoslavia to cease forthwith rendering any assistance or support in any form to the guerillas in fighting against the Greek Government, including the use of their territories as a base for the preparation or launching of armed action.

When mere admonishments of the above kind proved ineffective, the Assembly decided to recommend that certain measures be taken against Albania and Bulgaria (in the meantime, Yugoslavia changed her policy on the Greek question). In paragraph 4(b) of resolution 288 A (IV) of 18 November 1948[44] the Assembly recommended to all States

> to refrain from the direct or indirect provision of arms or other materials of war to Albania and Bulgaria until the Special Committee or another competent United Nations organ has determined that the unlawful assistance of these States to the Greek guerillas has ceased; [...]·

The prohibition on the provision of arms or other war materials remained ineffective. The Western countries which made the Assembly recommend the application of the measure had no arms trade with the two countries and did not intend to have any. Therefore, for their policies, the resolution had no practical meaning, while the Soviet Union made it clear that she would not submit to the request of the Assembly which she regarded as unlawful. In fact, the civil war in Greece and friction in the Balkans came to an end under the influence of factors other than the interference by the United Nations: the role of the embargo recommended by the Assembly was non-existent.

(2) *The Participation of the People's Republic of China in the Korean War.* In this question the Soviet Union and some other Members contested from the outset the competence of the General Assembly to deal with any aspect of the hostilities in Korea: the matter fell under Chapter VII of the Charter and thus remained within the exclusive jurisdiction of the Security Council. Nonetheless, in view of lack of agreement among the permanent Members of the Council on how to solve the problem of Korea, the United States and her allies decided to submit to the General Assembly a number of proposals on the application of economic measures. Owing to the then prevailing voting strength in the Assembly, the American proposals were easily adopted.

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[44] Resolution 288A (IV) was adopted by 50 votes to 6 with 2 abstentions.

By paragraph 1 of resolution 500 (V) of 18 May 1951[45] the General Assembly recommended that every State

> (a) Apply an embargo on the shipment to areas under the control of the Central People's Government of the People's Republic of China and of the North Korean authorities of arms, ammunition and implements of war, atomic energy materials, petroleum, transportation materials of strategic value, and items useful in the production of arms, ammunition and implements of war ;
>
> (b) Determine which commodities exported from its territory fall within the embargo, and apply controls to give effect to the embargo ;
>
> (c) Prevent by all means within its jurisdiction the circumvention of controls on shipments applied by other States pursuant to the present resolution ;
>
> (d) Co-operate with other States in carrying out the purposes of this embargo ; [. . .].

Resolution 500 (V) was preceded by resolution 498 (V) in which the Assembly *inter alia* called upon the People's Republic of China "to cause its forces and nationals in Korea to cease hostilities against the United Nations forces and to withdraw from Korea" (paragraph 2).

Thirty seven Members and some non-Members reported that they had taken action to implement resolution 500 (V). The replies from three Members (Burma, India, and Pakistan) indicated that their exports to China did not include the items specified in the resolution. Five Members (Byelorussia, Czechoslovakia, Poland, Ukraine, and the Soviet Union), and some non-Members, refused to consider the resolution let alone implement it. They regarded it as unlawful. The position of certain non-Members was unclear; it was known, for instance, that there had been shipments of arms to China from Switzerland.[46] Thus the embargo was not complete and China was able to satisfy her import needs in arms and strategic materials by engaging in trade with countries that defied the resolution. Contrary to the expectations expressed by the Additional Measures Committee,[47] the application of the embargo did not assist in putting an end to the hostilities in Korea. Measures recommended by the Assembly cannot be listed among the factors which contributed to the conclusion of the Korean armistice in 1953.

Economic Measures: Domestic Situations and Colonial Problems

(1) *The Question of* Apartheid *in South Africa.* By paragraph 4 of resolution 1761 (XVII) referred to above the General Assembly requested Members to take the following economic measures against the Republic of South Africa:

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[45] Resolution 500 (V) was adopted unanimously with 8 abstentions. Five Members who questioned the competence of the Assembly did not participate in the voting, see GAOR, 5th Sess., Pl., vol. II, 330th Mtg., pp. 733—742, para. 25—131.

[46] For details, see replies of Governments in UN Doc. A/1841 and Add.

[47] Its Report to the Assembly is contained in UN Doc. A/1799.

(a) [. . .];

(b) Closing their ports to all vessels flying the South African flag ;

(c) Enacting legislation prohibiting their ships from entering South African ports ;

(d) Boycotting all South African goods and refraining from exporting goods including all arms and ammunition to South Africa ;

(e) Refusing landing and passage facilities to all aircraft belonging to the Government of South Africa and companies registered under the laws of South Africa.

The motive behind the recommendation of the above measures was the vulnerability of South Africa to international action in the economic field. Foreign trade plays a significant role in the economy of South Africa. South African exports are restricted to a few commodities. Foreign investments originating in a limited number of countries contribute greatly to the present economic development of the Republic and to the growing prosperity of the white population.[48] Economic boycott along the lines recommended by the Assembly, in particular the full application of the measure specified under (d), resulting in a concerted action with the participation of all the important economic partners of South Africa, could bring substantial harm to the economic and, consequently, political position of the offending country.

While the response on the part of Member States to the Assembly's recommendations has been varied,[49] it may be stated that countries which were in a position to exercise influence on the economic life of South Africa did not comply with resolution 1761 (XVII).

A number of Members took the economic measures as recommended by the General Assembly. The adoption of these measures often had unfavorable effects in the national economies of the applying countries. The problem was particularly difficult for several developing countries which in their majority did not hesitate to make "great sacrifices."[50] However there were limits to such sacrifices; this is shown by the example of Zambia which in 1965 continued to buy nearly a third of her consumer goods from South Africa.

On the other hand the countries which, owing to their geographical or economic situation, could have played decisive role in the application of the recommendations refused to act against South Africa. These countries may de divided into two groups.

First, there are neighbours of South Africa, such as Portugal and her colonial territories and Southern Rhodesia, which engage in extensive economic co-operation with South Africa. Portugal provided new facilities for South African aircraft when such facilities were refused by certain African States.

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[48] Cf. the observations by the Special Committee in its Report cited in footnote 41, para. 481—494.

[49] For texts of replies by Governments, see UN Docs. A/SPC/94, A/5614 and Add. 1—3, and S/5457 and Add. 1—3 reprinted in GAOR, 18th Sess., Annexes, Agenda Item 30.

[50] Words used by the Special Committee, Report cited in footnote 41, para. 474.

Second, there are the main industrial countries of the West which are the traditional trade partners of South Africa and which remain the source of investment capital for this country. In spite of the Assembly resolution, these countries have even increased their trade with South Africa, made new investments there, signed new commercial agreements with her, and continued to supply military equipment to her Government. It is appropriate to quote here the following paragraphs from the Report of the Special Committee on the Policies of *Apartheid* of 10 August 1965:[51]

> 135. The Special Committee has stated in its reports that the primary responsibility for the failure of the efforts of the United Nations must be borne by the major trading partners of South Africa, including several permanent members of the Security Council. They have opposed timely and adquate action by the United Nation for many years. They advocated limiting international action to appeals and placing reliance on a change of heart within the white minority in South Africa, a course which proved totally ineffective and unrealistic. By maintaining and often strengthening political, economic and military relations with the South African Government, they have encouraged the latter to persist in its policies in the confidence that effective action would not be taken. They have failed to implement the provisions of General Assembly resolution 1761 (XVII) : some have even failed to comply fully with the solemn and unanimous requests of the Security Council for an end to all forms of military co-operation with the South African Government. They have resisted proposals to define the situation in South Africa as falling within the purview of Chapter VII of the Charter and requiring action under that Chapter.
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> 136. In this connection, the Special Committee expresses alarm at the reports that the Government of France, a permanent member of the Security Council, has continued and increased the supply of military equipment to the South African Government thus failing to comply with solemn and unanimous requests of the Security Council, contained in its resolutions of 7 August and 4 December 1963 and 18 June 1964, and that it has sought to benefit by replacing the traditional suppliers of arms who have announced compliance with the arms embargo.
>
> 137. It expresses serious concern over reports that the Republic of South Africa has received assistance in the establishment of an aircraft industry, for military and police purposes, from Italy, the United Kingdom and the United States ; that the United Kingdom has granted licences for the supply of trucks to the South African Government for military use ; and that Japan is contemplating sale of arms to it. It has also noted with serious concern that international corporations, owned by interests in the United Kingdom, the United States and other countries, are greatly increasing their investments in the Republic of South Africa and assisting the latter to develop its military power, to promote self-sufficiency and to overcome the effect of economic measures taken at great sacrifice by many countries and to resist international economic sanctions. It notes, further, that several countries, including some which had not had large trade with South Africa in the past, have greatly increased their trade in the past few years despite the provisions of General Assembly resolution 1761 (XVII) [. . .].

It may be added that the three countries which have made the most rapid gains in trade are Japan, Italy and a non-Member, the Federal Republic of Germany.

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[51] UN Docs. A/5957 and S/6605.

In resolution 2054 A(XX) of 15 December 1965 (paragraph 1) the Assembly urgently appealed

> to the major trading partners of the Republic of South Africa to cease their increasing economic collaboration with the Government of South Africa, which encourages that Government to defy world opinion and to accelerate the implementation of the policies of apartheid ; [. . .].

In the same resolution (paragraph 10) the Assembly broadened the economic measures directed against South Africa by inviting the specialized agencies

> (a) To take the necessary steps to deny technical and economic assistance to the Government of South Africa, without, however, interfereing with humanitarian assistance to the victims of the policies of *apartheid* ;
>
> (b) To take active measures, within their fields of competence, to compel the Government of South Africa to abandon its racial policies ; [. . .].

While according to a statement by the Chairman of the Special Committee on the Policies of *Apartheid* "most of the specialized agencies [had] extended their co-operation in that respect,"[52] the International Bank for Reconstruction and Development, which is one of the specialized agencies of the United Nations, announced on 29 July 1966 the approval of a loan equivalent to $20 million to the South African Electricity Supply Commission.[53] The loan was to be guaranteed by the South African Government. The non-compliance with the resolution of the Assembly in the key field of financial co-operation and assistance frustrated, at least to some extent, the steps taken against South Africa in other areas of specialized international co-operation.[54]

Nor was there any improvement in 1966 in the application of the economic measures against South Africa by individual Members. At the end of that year it was beyond doubt that the resolutions of the Assembly had failed to achieve anything in curtailing, let alone stopping, the policies of *apartheid*, or to influence the policies of the major trading partners of South Africa. Despite repeated appeals by the General Assembly[55] these partners "increased their profitable collaboration with the South African Government".[56] The Special

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[52] UN Docs. A/6486 and S/7565, para. 74, p. 32.

[53] United Nations Press Release IB/1796, 29 July 1966. UN Docs. A/6486 and S/7565, para. 74.

[54] See para. 6 (d) of resolution 2202 A (XXI) of 16 December 1966 which provides for consultations between the United Nations and the Bank on this subject.

[55] In resolution 2202 A (XXI) the Assembly "deplores the attitude of the main trading partners of South Africa, including three permanent members of the Security Council, which, by their failure to co-operate in implementing resolutions of the General Assembly, by their refusal to join the Special Committee on the Policies of Apartheid of the Government of the Republic of South Africa and by their increasing collaboration with the Government of South Africa, have encouraged the latter to persist in its racial policies;" the three countries referred to are France, the United Kingdom and the United States.

[56] Report of the Special Committee on the Policies of Apartheid of the Government of the Republic of South Africa, 21 October 1966, UN Docs. A/6486 and S/7565, para. 129.

Committee stated that foreign business interests were "deriving excessive profits from the present system" and were "engaged in active propaganda in favour of that system and [were] attempting to influence other Governments against action to counteract *apartheid.*"[57]

(2) *The Question of South West Africa.* The persistent refusal of the Republic of South Africa to cooperate with the United Nations in solving the problem of the Territory of South West Africa, the failure of the Republic to fulfil its international obligations in the administration of the Territory, and the development of the situation in the Territory, the continuation of which constituted, in the Assembly's view, "a serious threat to international peace and security", led the Assembly to urge all States to take measures against the Republic "with reference to the question of South West Africa." The Assembly indicated these measures in paragraph 7 of resolution 1899 (XVIII) of 13 November 1963[58] by urging States to

> (a) Refrain forthwith from supplying in any manner or form any arms or military equipment to South Africa ;
>
> (b) Refrain also from supplying in any manner or form any petroleum or petroleum products to South Africa.

It may be observed that these prohibitions seem to have been already included in paragraph 4 d of resolution 1761 (XVIII) referred to above.

The attitude of Members, i. e., their compliance or non-compliance with the Assembly's recommendations relating specifically to South West Africa was similar to that taken by them with respect to the general problem of international action against the Republic of South Africa as described in the preceding Sub-Section.[59]

(3) *The Question of Territories under Portuguese Administration.* In resolution 1807 (XVII) of 14 December 1962[60] the General Assembly elaborated its previous request (resolution 1699 (XVI) of 19 December 1961) that Members deny Portugal any support and assistance which she might use for the suppression of the inhabitants of the non-self-governing territories under her administration. In resolution 1807 (XVII) the Assembly requested (paragraph 7)

> all States to refrain forthwith from offering the Portuguese Government any assistance which would enable it to continue its repression of the peoples of the Territories under its administration and, for this purpose, to take all measures to prevent the sale and supply of arms and military equipment to the Portuguese Government.

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[57] *Ibid.*, para. 132.

[58] Adopted by 84 votes to 6 with 17 abstentions.

[59] Cf. Report of the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, UN Doc. A/5800/Add. 2, South West Africa.

[60] Adopted by 82 votes to 7 with 13 abstentions.

The Assembly repeated its request in resolution 1819 (XVII) of 18 December 1962 relating to the situation in Angola.[61] In paragraph 7 of the resolution Members were requested "in particular to terminate the supply of arms to Portugal."

The majority of Members informed the Secretary-General that they complied with the Assembly's request. That request was later repeated by the Security Council in its resolution of 31 July 1963.[62] Nonetheless some Members, including the United Kindgom and the United States, made a distinction between arms or military equipment the sale and supply of which were prohibited under the resolutions and arms and military equipment that could be supplied "to help Portugal meet its NATO obligations."[63] This, in turn, led to the expression of fears that the weapons supplied to Portugal under the second rubric were being used for the purpose of repression in the colonies.[64] The fact remains that the measures applied against Portugal were not fully complied with by the Members and did not prove effective in bringing about a change of policy on the part of Portugal.

Neither the unpromising experience with the economic measures recommended against South Africa nor the very partial application of the more limited measures against Portugal prevented the General Assembly from taking further steps against the latter country.

By resolution 2107 (XX) of 21 December 1965[65] the Assembly urged all Members to take the following measures, separately or collectively (paragraph 7):

> (a) [. . .] ;
> (b) To close their ports to all vessels flying the Portuguese flag or in the service of Portugal;
> (c) To prohibit their ships from entering any ports in Portugal and its colonial territories;
> (d) To refuse landing and transit facilities to all aircraft belonging to or in the service of the Government of Portugal and to companies registered under the laws of Portugal;
> (e) To boycott all trade with Portugal ; [. . .].

The Assembly also requested all States (paragraph 8), "and in particular the military allies of Portugal within the framework of the North Atlantic Treaty Organization," to take the following steps:

> (a) To refrain forthwith from giving the Portuguese Government any assistance which would enable it to continue its repression of the African people in the Territories under its administration;
> (b) To take all the necessary measures to prevent the sale or supply of arms and military equipment to the Government of Portugal;
> (c) To stop the sale or shipment to the Government of Portugal of equipment and materials for the manufacture or maintenance of arms and ammunition; [. . .].

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[61] Adopted by 57 votes to 14 with 18 abstentions.

[62] UN Doc. S/5380. For the report on the action taken by Members, see UN Doc. S/5448 and Add. 1—3.

[63] Reply by the United States of America, UN Doc. S/5448/Add. 2, p. 4.

[64] Cf. Report cited in footnote 59, UN Doc. 5800/Add. 3, paras. 274, 287, and 301

[65] Adopted by 66 votes to 26 with 15 abstentions.

The Assembly repeated its request for the taking of the above steps relating to arms and ammunition in resolution 2184 (XXI) of 12 December 1966 (paragraph 8). In resolution 2107 (XX) the Assembly appealed (paragraph 9)

> to all the specialized agencies, in particular to the International Bank for Reconstruction and Development and the International Monetary Fund, to refrain from granting Portugal any financial, economic or technical assistance so long as the Government of Portugal fails to implement General Assembly resolution 1514 (XV)

(which is the Declaration on the Granting of Independence to Colonial Countries and Peoples).

In analogy to the question of *apartheid* States which in view of their military and economic links with Portugal were in a position to bring harm to that country through the application of the measures recommended by the Assembly did not comply with resolution 2107 (XX).[66] Thus during the next session the Assembly could only express its "deep concern" over "the activities of foreign financial interests" in the Portuguese colonies. In resolution 2184 (XXI) the Assembly condemned those activities (paragraph 4) and requested all States to "take the necessary measures to put an end to such activities" (paragraph 8 d).[67]

Conclusions

The practice of the General Assembly to recommend non-military measures against a State or States originated in the first year of the Organization's existence (the question of Spain). The practice of the Assembly shows that the most representative organ of the United Nations has had little doubt as to its own competence to engage in quasi-executive activities through the instrumentality of non-military measures.

It was long before the adoption of the Uniting for Peace resolution that the Assembly asserted its competence to recommend non-military measures. The constitutional changes which this resolution purported to introduce into the machinery of the United Nations have been overrated.[68] There have been no such changes as regards the application of non-military measures under the Assembly recommendations. It has even been contended that the Assembly

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[66] See Report of Sub-Committee I, 15 October 1965, and Supplementary Report, 23 September 1966, of the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, UN Docs. A/AC. 109/L. 257 and 334. The reports describe the activities of foreign economic and other interests which are impending the implementation of the Assembly resolutions in the Portuguese colonies.

[67] Resolution 2184 (XXI) was adopted by 70 votes to 13 with 22 abstentions.

[68] Cf. R. B. RUSSEL, *Changing Patterns of Constitutional Development*, "*The United Nations: Accomplishments and Prospects*," "International Organization," vol. XIX, 1965, p. 415.

"by tying its procedures to a veto in the Security Council, [...] may have slightly narrowed the existing scope" of its competence under the Charter.[69] In the above considerations an attempt has been made to find the answer to the problem not in an analysis of the Uniting for Peace resolution but in a study of the practice of the Organization which alone supplies life and meaning to the general formulas contained in the provisions of the Charter.

During its twenty two year history, the Assembly has rarely hesitated as to its competence to go in its recommendations beyond mere expressions of opinion or exhortations addressed to the country or countries concerned. While the Assembly admitted expressly, though not without opposition on the part of some Members, that it had the right to recommend collective measures,[70] it also distinguished between steps taken by it and sanctions ordered by the Security Council.[71]

It can be seen from the votes cast by Members that the composition of the majorities behind the resolutions and the composition of dissenting minorities were changing according to the merits of each case. In most instances the Members did not question the Assembly's competence in general, but rather objected to the way in which this competence was exercised in a particular contingency. In those few cases where the objections concerned less the expediency or desirability of the action proposed and concentrated more on the competence of the Assembly and the purported unlawfulness of its measures, the value of the resolutions as precedents for the future is small.

The actual limits to the competence of the General Assembly in recommending non-military measures are not to be sought in the provisions of the Charter alone. Law in the United Nations "is not to be approached as a set of autonomous norms which dictate decisions but as a process through which States and peoples pursue their interests and undertake joint action in accordance with felt necessities and values."[72] Also, "the gulf between agreement on principles and disagreement on the interpretation and application of these principles in concrete situations"[73] makes many a reference to the Charter alone rather meaningless.

Factors which determine the desirability and effectiveness of Assembly action must be taken into consideration.

Thus the Assembly should avoid making recommendations that cannot be put into operation. It is a truism to say that, at the moment the action is decided, it is highly difficult to assess the impracticability or impossibility of the

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[69] L. S. FINKELSTEIN, *The United Nations : Then and Now*, ibid., p. 385.

[70] Cf. paragraph 3 of resolution 503 A (VI), 12 January 1952.

[71] Cf. paragraph 8 of resolution 1761 (XVII), 6 November 1962, and paragraph 9 of resolution 1819 (XVII), 18 December 1962.

[72] O. SCHACHTER, *The Relation of Law, Politics and Action in the United Nations*, "Hague Recueil," vol. 109, 1963, II, p. 169.

[73] *Ibid.*, p. 177.

recommended measures. According to one view, the "adoption of a text which had little chance of being fully implemented was bound to weaken [...] the United Nations itself, which would become an instrument of empty threats."[74] But perhaps full implementation, which in many domains of the domestic sphere of the State remains equally an unattainable ideal, is a claim that goes too far, while inaction on the part of the world organization usually turns out to be a worse alternative.

The effectiveness of the measures recommended by the Assembly depends on the extent to which the consensus has been reached among the Members to follow the resolution in question. The very fact that the resolution has been adopted is often less significant than the composition of the majority that stands behind the resolution. For on some issues "efforts to deal with differences by mobilizing voting pressures against the minority whose interests are at stake serves only to harden rather than resolve the disagreements;"[75] the result then is the non-implementation of the Assembly measures. In particular the consensus which engenders the action of the Assembly should comprise the great powers. The recent experience and difficulties of the United Nations relating to its peace-keeping operations led a representative of the great power that some twenty years ago was an ardent believer in, and sponsor of, very broad powers for the Assembly to make the following observation:[76]

> The plain fact of the matter is that the United Nations simply cannot take significant action without the support of members who supply it with resources and have the capacity to act. [. . .] The UN can be effective only if its has the backing of those who have the means to make it effective.

The absence of a great power veto in the Assembly does not by itself make much difference between the political possibilities for action which stand at the disposal, on the one hand, of that organ, and, on the other, of the Security Council. The concurrence of the great powers in the Assembly, or at least non--opposition on their part, constitute the indispensable (though not the only) requirement for the success of non-military measures recommended by the Assembly. The consent or lack of resistance on the part of Members who happen to hold key positions, i. e., can effectively influence the developments in the contingency in which the Assembly becomes involved, are of decisive importance. The withdrawal of a State's approval when the action is already under way is less paralyzing (the Congo is a case in point), although a great power or the State holding a strategic position in the affair—once they decide to oppose

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[74] GAOR, 15th Sess., 2nd Part, Sp. Pol. Comm., 243rd Mtg., 5 April 1961, p. 81, para. 22, delegate of the United States. Cf. HAVILLAND, *op. cit.*, p. 111, on the adverse effects of some Assembly resolutions.

[75] FINKELSTEIN, *op. cit.*, p. 381.

[76] Dean RUSK, *The First Twenty-Five Years of the United Nations—from San Francisco to the 1970's*, "Departament of State Bulletin," vol. 50, No. 1283, 1964, p. 118.

the United Nations—can create problems which in time might prove insurmountable. The task of the parliamentary diplomacy in the General Assembly is to prepare and expand "the consensual basis for the United Nations operations."[77] The minimum requirement of an effective quasi-executive operation recommended and instituted by the Assembly is the tolerance of the great powers; the Assembly, no more than the Security Council, is neither legally nor actually in a position to force anything upon an unwilling great power.[78]

It should also be borne in mind that the structure and voting system in the Assembly are not, theoretically, well adapted to at least some realities of international life. This commands even greater caution in using the Assembly as an instrumentality for the application of collective measures. The financial problems of the United Nations arising from the expenses of the Suez and Congo operations made States realize that a two-thirds majority is not sufficient to guarantee the success of a recommendation. It is one thing to recommend a course of action and another to see to it that this course is in fact taken.[79]

The continuous debate on the powers of the General Assembly and the practice of this organ lead one to conclude that the proper areas for the Assembly's recommendations on the application of non-military measures are domestic situations which cause international concern, or breaches of human rights and fundamental freedoms, or opposition to the decolonization process. Non-military measures which the Assembly takes on these questions do not constitute action in the sense of Article 11, paragraph 2.

The collective and non-military measures recommended by the General Assembly are not enforcement action of the United Nations. Enforcement measures remain, apart from the exceptional provision of Article 106, within the sole competence of the Security Council. The application of coercion is neither the prerogative nor the function of the General Assembly.[80]

But the role and importance of the collective measures of the Assembly should not be judged exclusively in the light of the fact that they are relegated to levels inferior to enforcement action or that they have more often than not proved ineffective. In the course of time the General Assembly has acquired the political function of validating or condemning the national policies of States.

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[77] I. L. CLAUDE, Jr., *The Political Framework of the United Nations Financial Problems*, "International Organization," vol. XVII, 1963, p. 859.

[78] This is the basic political limitation on the otherwise increased role and functions of the Assembly in the area of executive action. On the growth of that role, see in particular GOODRICH and SIMONS, *op. cit.*, passim, and especially at pp. 603—622, and GOODRICH, *op. cit.*, pp. 120—128 and 176—182.

[79] RUSK, *op. cit.*, p. 117.

[80] This view seems to have received the support of the International Court of Justice in the Expenses case, cf. *ICJ Reports*, 1962, pp. 164 and 165. See also BOWETT, *op. cit.*, pp. 289 and 291.

This "function of collective legitimization" as it has come to be called[81] may express itself, in its delegitimization aspect, through recommendations on non--military measures. In that case the value of the collective measures cannot be assessed exclusively by the yardstick of compliance or non-compliance on the part of Members. Here the resolution or resolutions of the Assembly are part of a complex operation by the United Nations which aim at influencing the national policies of States. Perhaps a perspective longer than that of the years 1946—1966 is required in order to assess and estimate the implementation of this basic task by the Organization and the contribution made thereto by the General Assembly.

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[81] I. L. CLAUDE, Jr., *Implications and Questions for the Future, "The United Nations: Accomplishments and Prospects,"* "International Organization," Vol. XIX, 1965, at pp. 844—846.

NOTE : This paper is part of a larger study on the political functions of the General Assembly of the United Nations which the writer has started preparing as Visiting Scholar, School of International Affairs, Columbia University, 1963—1964. The writer extends his sincere thanks to Professor Leland M. Goodrich and Dr. Kenneth W. Thompson.

II

PROBLEMS OF THE CONFLICT OF LAWS IN THE MARRIAGE LAW IN POLAND

by MIECZYSŁAW SOŚNIAK

Introduction

The question of the conflict of rules in the law on marriage is of great practical significance in Poland and it has been in recent years repeatedly studied from the theoretical point of view.[1] The object of this essay is to discuss Polish provisions in this respect without going into extensive doctrinal considerations on the matter and without giving numerous practical examples as illustration. This cannot be done within the limits of a short article.

We shall be considering the conflict of laws in the field of marriage in three aspects. The Act of 2 August 1926 on private international law will serve as the point of departure. At the time of writing this article that Act continued to be binding despite the enactment on 12 November 1965 of the new Act on private international law which, however, came into force only on 1 July 1966. A comparison of both those Acts testifies to the evolution of Polish conflict rules over a period of 40 years also as regards the law on marriage, the subject-matter of this article. Lastly, the third aspect relates to provisions of international agreements concluded by Poland. Among those agreements the provisions of the Hague Conventions on the subject[2] do not call for a separate, comprehensive presentation, as they are generally known. We shall deal, however, in possibly greater detail, with bilateral agreements on legal assistance, concluded by Poland with other socialist states in the post-war two decades.

I

In accordance with the order of treatment of the question of conclusion of marriage in Polish provisions and also in accordance with Polish theory and

[1] Among others in the work by J. BALICKI, *Problemy kolizyjne prawa małżeńskiego* (*Conflict of Laws in the Law on Marriage*), Warsaw 1959; in the article by W. LUDWICZAK, *Niektóre luki w ustawie z 2 VIII 1926 o prawie międzynarodowym prywatnym* (*Some Gaps in the Act of 2 August 1926 on Private International Law*), "Państwo i Prawo", 1957, No. 2; in the works by E. Wierzbowski, in the works by the author of this essay, and apart from that in textbooks on Polish private international law. Among the newest textbooks cf. the views on this subject in the textbook by B. WALASZEK and M. SOŚNIAK, *Polskie prawo prywatne. Część szczegółowa* (*Private International Law. Detailed Part*), Cracow 1965, pp. 81—104; W. LUDWICZAK *Międzynarodowe prawo prywatne* (*Private international law*), Warsaw 1967.

[2] Poland acceded to those Conventions in the interwar period.

practice, we shall consider that question separately in relation to the conditions of intrinsic validity of marriage and separately with respect to the form of celebration of marriage.

As regards the history of the provision relating to conflict rules in the field of the intrinsic validity of marriage contained in the Polish Act of 1926, there were generally no doubts that the fundamental connecting principle here should be the *lex patriae* of the parties to the marriage. Even before 1926 Polish judicature adhered to that position. The very definition of the intrinsic validity of marriage provoked discussion. Polish codifiers followed the wording of the Hague Convention, which referred to "droit de contracter mariage" and accepted the expression "legal capacity to contract marriage." The notion of capacity was meant to cover not only "capacity" itself but also all conditions of validity, save for the form itself.[3] A definition of that kind, included in Article 12, paragraph 1 of the Act of 1926, was criticized in Polish literature, hence in the drafts of a new private international law new solutions were sought for in this respect. Eventually, however, the wording "capacity to contract marriage" was used in Article 14 of the Act of 12 November 1965.

The codifiers of the Act of 1926 emphasized that "the legal capacity to contract marriage" cannot be tested in the abstract. The point in issue is a concrete test, that is to say, an answer to the question whether each party to the marriage (and not both parties jointly) has under his personal law capacity to contract marriage precisely with that other party. The point then is the so-called relative capacity. Polish judicature has repeatedly emphasized that the test must be separate in respect of either party to the marriage and that it has to be concrete.

As regards the law declared to be competent to govern the intrinsic validity of marriage, we recognize "renvoi". Thus, where the foreign national law of the parties to the marriage declared to be applicable by Polish provisions, requires that that validity be tested according to the law of the domicile or to the law of the place of celebration—we shall apply the other law.

In laying down the general principles with respect to what law is to determine the intrinsic validity of marriage, account was also taken of the influence exerted by the *lex loci celebrationis* on the testing of that validity. Every state, as is well known, makes permission for the conclusion of marriage subject to certain conditions, irrespective of what is prescribed in this respect in the law recognized to be competent in a given case (that is, for instance, in the *lex patriae* of the parties to the marriage). The drafting of the provisions of the Act of 1926 in this respect was basically influenced by the Hague Convention of 12 June 1902. Under that influence it was laid down in Article 12, paragraph 2, of that Act that aliens, notwithstanding their capacity to contract marriage under their national laws, shall not be permitted to contract marriage in Poland before Polish authorities if according to the law in force in Poland there exists one of the following, irremovable by means of a dispensation, impediments to a valid marriage: 1. consanguinity or affinity; 2. attempt on the life of the other spouse; 3. the existence of a previous marriage; 4. difference of religions, holy orders and monastic vows.

In view of the explicit proviso that those impediments bar the conclusion of marriage in Poland only to the extent that such impediments are provided for by the Polish law in force at the time of the celebration of marriage, the

[3] Cf. on this F. ZOLL, *Międzynarodowe prawo prywatne w zarysie* (*An Outline of Private International Law*), 4th ed., publ. 1947, p. 71.

impediment of attempt on the life of the other spouse, as well as that of difference of religions, holy orders and monastic vows—has lost any significance upon unification of the Polish law on marriage.

The provision relating to the impediments to marriage was for a number of years arousing in Poland lengthy discussions on various problems connected therewith. We shall confine ourselves to mentioning only two of those problems.

The first related to the effects resulting from a disregard of the prohibitions specified in Article 12, paragraph 2, that is to say, the conclusion of marriage in spite of the existence of one of the impediments established in that provision. Eventually, the view prevailed on the invalidity of a marriage concluded in spite of the existence of an impediment which according to Polish law invalidates a marriage.

The second question was of a more general nature. It was concerned with the relation of the specific bars to marriage to the general exceptions of public policy. In Polish literature it was recognized that although the said Article 12, paragraph 2, excluded the application of the general clause of public policy to the negative—as regulated in that article—effects of the impediments provided for by the *lex loci celebrationis matrimonii* on the validity of marriages concluded by aliens before Polish authorities, this did not imply a complete exclusion of the influence of general public policy on the conditions of marriage. Outside the scope of the said provision, public policy would act in a permissive sense to allow for the influence of the Polish law binding at the place of celebration. That influence reflected in the permission for marriage would act against the prohibitions provided for by the national statutes of the parties to the marriage.[4]

Detailed limitations, relating to the conclusion of marriages by aliens in Poland, contained in the said provision of Article 12, paragraph 2, of the Polish Act of 1926, had a bearing also on the first drafts of the new Polish private international law.[5] However, in the discussion on the draft thought was given to the advisability of retaining those limitations. Attention was drawn to the fact that also the new Statute contained a general exception of public policy operating against the application of foreign provisions when contrary to the basic principles of the legal order obtaining in the Polish People's Republic. Finally, however, considerations prevailed in favour of the deletion of any limitations in respect of the substantial conditions of marriage. It was decided that the matter could be covered by the general exception of public policy. For those reasons further drafts contained no reference to any limitations introduced by the *lex loci celebrationis* in respect of the prerequisites provided for by the *lex patriae* of the parties to the marriage. The motive behind the deletion—as mentioned—was the conviction that those limitations were superfluous in view of the existence of the general exception of public policy. Furthermore, it was

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[4] Cf. on this subject the basic treatise by prof. Kazimierz PRZYBYŁOWSKI, *Znaczenie prawa obowiązującego w miejscu zawarcia małżeństwa przy ocenie materialnych wymogów jego ważności* (*The Significance of the Law Prevailing in the Place of Contracting in Testing the Conditions of Intrinsic Validity of Marriage*), Lwów 1932, p. 29.

[5] Some of them like, for instance, the draft of 1961 contained the following stipulations: "Aliens who under their national laws could contract marriage, cannot, nevertheless, conclude marriage in Poland if under Polish law marriage is inadmissible on ground of consanguinity or the existence of previous marriage." As follows from that text, of the old bars provided for in the Act of 1926 only two basic impediments recognized by the majority of the world's states have been retained.

held that their inclusion might give rise to doubts as to the operation of the general exception of public policy in relation to impediments not enumerated in the provision.[6]

Such approach having been adopted in the framing of the new Polish Act on private international law which, moreover, follows the principle firmly established in Poland that the intrinsic validity of marriage should be tested by the *lex patriae* of each party—all attention is concentrated on the general foundations for invoking the exception of public policy with respect to the intrinsic validity of marriage.

As regards the form of marriage, the basic principle of the Polish Act of 1926 (Article 13, paragraph 1) adopted in this respect was the rule of the *lex loci celebrationis matrimonii*. Apart from that basic principle, another rule was introduced relating exclusively to marriages concluded outside Poland. For the validity of such marriages celebration in the form prescribed by the national laws of both spouses is sufficient.

Thus, as regards the law competent to govern the form of marriage two principles have been adopted in Poland: the principle of obligatory local form for marriages contracted in Poland and the principle of admissible national form for marriages concluded abroad. A condition allowing for an exception to the rule of *locus regit actum* in favour of the *lex patriae* is the observance of the form prescribed by the national law of both spouses.

Polish legislation, while upholding the principles laid down in the Act of 1926, recognized, however, the necessity to depart from them in certain cases. This was true of the decree of 3 February 1947 on the recognition of the validity of some marriages and divorces of Polish citizens. Under Article 3 of that decree for the validity of a marriage concluded by a Polish citizen on the territory of the German Reich in the period 1 September 1939 to 1 January 1946 it is sufficient to have observed the form required by the prescriptions of the religion of one of the spouses. That provision, in the light of Article 5 of the said decree, applies also to marriages concluded by Polish citizens during the German occupation within the territory in which the German civil code was applicable. Article 5 of that decree recognizes also the validity of marriages contracted by Poles in the stated period and territory before a liaison officer or camp commander, excepting commanders appointed by the German Nazi authorities.

As follows from the foregoing, departure from the basic principles governing the form of marriage was caused only by exceptional war situations.

The principles established in respect of the form of marriage in the Act of 1926 underwent no significant changes in the course of the codification work on the new Polish private international law. After some attempts at supplementing those principles the authors ultimately contended themselves with drafting changes of the relevant provision.[7] Thus the basic connecting principle as regards the form of marriage continues to be the *lex loci celebrationis matrimonii*,

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[6] As pointed out by the author of the draft of the new Polish private international law, K. PRZYBYŁOWSKI, in his treatise: *Kodyfikacyjne zagadnienia polskiego prawa międzynarodowego prywatnego* (*Issues Relating to the Codification of Polish Private International Law*), "Studia Cywilistyczne," Vol. V, 1964, p. 39.

[7] Art. 15, para. 1, of the Act of 12 November 1965: "The form of celebration of marriage is subject to the law of the state in which the marriage is concluded." Para. 2 of that article: "However, where the marriage is concluded outside Poland, the observance of the form prescribed by the national laws of both spouses is sufficient."

however, for the validity of a marriage concluded beyond Poland's frontiers it is sufficient to observe the form prescribed by the *lex patriae* of both spouses.

The question of the form of marriage is connected with the broad problem of marriages concluded before consular and diplomatic representatives. In this respect I shall limit myself to mentioning that Article 61, paragraph 1, of the law on civil status registration[8] provides for the designation by the Minister of Foreign Affairs of officers of the consular or diplomatic service authorized to register abroad the civil status of Polish citizens. In countries where there are no such designated officers, the head of a consular or diplomatic mission has under Article 61, paragraph 2, the authority to accept declarations of marriage by Polish citizens.

Furthermore, Poland concluded or acceded to international agreements in this field which make provision for the conclusion of marriages in this way. The oldest of those agreements is the Hague Convention of 1902 which—as is well known—allows in Article 6 for a marriage to be contracted before a diplomatic or consular representative according to his national law subject to two conditions: that neither party to the marriage possesses the nationality of the state where the marriage is to be contracted, and that that state is not opposed to it.

The rule that the *lex patriae* of the parties to the marriage is decisive as regards the intrinsic validity of the marriage has generally been retained (with certain exceptions only) in international agreements concluded by Poland in the last twenty years. This holds particularly true of Article 12, paragraph 1, of the Polish-Czechoslovak agreement of 4 July 1961 (Dz. U. 1962, No. 23, text 103), of Article 31, paragraph 2, of the Polish-Hungarian agreement of 6 March 1959 (Dz. U. No. 8, text 54), of Article 22, paragraph 1, of the Polish-Bulgarian agreement of 4 December 1961 (Dz. U. 1962, No. 11, text 88), of Article 22, paragraph 3, of the Polish-Romanian agreement of 21 January 1962 (Dz. U. No. 63, text 301). However, the Polish-Yugoslav agreement of 6 February 1960 (Dz. U. 1963, No. 27, text 162) which in the first sentence of paragraph 2 of Article 25 also points to the *lex patriae* as to the connecting principle, nevertheless introduces in the subsequent part of that article certain limitations by adding in the second sentence of paragraph 2 of Article 25 that the law of the state, on whose territory the marriage is contracted, applies also to aliens as regards impediments established in that law and resulting from the existence of a previous marriage, consanguinity, mental illness or lack of capacity to govern one's actions.

In this matter, however, the interpretation of the provisions of the agreement between Poland and the German Democratic Republic of 1 February 1957 (Dz. U. 1958, No. 27, text 114) and of that between Poland and the USSR of 28 December 1957 (Dz. U. 1958, No. 32, text 147) presents some difficulties. As for the former (despite the absence of an explicit provision in the matter), the line has been followed in present-day German literature[9] and also in Polish

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[8] The Act of 8 June 1955, "Dziennik Ustaw," (Dz. U. — "Journal of Laws"), No. 25, text 151.

[9] Cf. H. WIEMANN, *Kollizyonnye voprosy semeynogo prava v dogovorakh o pravovoy pomoshchi Germanskey Demokraticheskoy Respubliki. Pravovoye sotrudniczestwo mezhdu socyalisticheskimi gosudarstvami* (*The Problems of Conflict of Laws in Family Law in Agreements on Legal Assistance of the German Democratic Republic. Co-operation in Legal Matters among Socialist States*), Moscow 1962, p. 221.

literature[10] that the intrinsic validity of marriage is tested for each of the parties separately according to the national law of each of them. However, as regards the second of those agreements, it seems that from the various opinions voiced in this respect,[11] the most reasonable is that according to which the capacity to contract marriage (that is the question of age, capacity to enter into legal transactions, non-existence of a previous marriage) should be tested by the *lex patriae* of either party, while the remaining substantial conditions of the marriage—by the *lex loci celebrationis matrimonii.* A solution of this kind adopted in the practice of both countries is of great significance for simplifying the testing of the conditions of a valid marriage. That solution, while retaining to some extent the applicability of the *lex patriae,* admits at the same time the *lex loci actus* which is consistent with the trends prevailing in Soviet law.

As for the regulation of the question of the form of marriage in international treaties, there exists in this respect almost complete agreement as to the applicability of the *lex loci celebrationis.* Some agreements, however (like, for instance, Article 21 of the agreement with the German Democratic Republic and Article 22, paragraph 1, of the agreement with Romania) declare that principle to be the only one, while other agreements (like, for instance, Article 28 of the agreement with the Soviet Union or Article 22, paragraph 2, of the agreement with Bulgaria) in respect of marriages concluded by citizens of one of the Contracting States within the territory of the other Contracting State provide for the possibility to observe the form of marriage prescribed by the national law of the parties to the marriage.

Some agreements explicitly provide for the possibility to conclude marriage before consular or diplomatic representatives. This question is dealt with, in the first place, by the relevant provisions of the consular conventions concluded by Poland like, for instance, the consular convention with the Soviet Union of 21 January 1958 (Dz. U. No. 32, text 145) or the consular convention concluded with the German Democratic Republic of 25 November 1957. The acceptance by the consul of a declaration of marriage is conditional upon the possession by both parties to the marriage of the nationality of the State which appointed the consul.

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[10] The view presented here is represented in Polish literature, among others, by the author of this article. In this connection cf. the above quoted work by J. Balicki, p. 45, and the article by M. PAZDAN, *Materialne wymogi ważności małżeństwa w bilateralnych konwencjach zawartych przez Polskę w latach 1949—1962* (*The Conditions of Intrinsic Validity of Marriage in Bilateral Conventions Concluded by Poland in the Years 1949—1962*), *Księga Pamiątkowa dla uczczenia pracy naukowej Kazimierza Przybyłowskiego,* Cracow 1964, pp. 257ff.

[11] From Soviet literature cf., *inter alia,* N. W. ORŁOWA, *Voprosy braka i semy v dogovorakch o pravovoy pomoshchi mezdhu Sov. Soyuzom i drugimi stranami socyalisticheskogo lagera. Problemy mezhdunarodnogo chastnogo prava* (*Questions of Marriage and Family in Agreements in Assistance on Legal Matters between the Soviet Union and Other Countries of the Socialist Camp. Problems of Private International Law*), Moscow 1960, p. 131; J. K. GORODECKAYA, *Voprosy semeynogo prava v dogovorakh o pravovoy pomoshchi. Pravovoye sotrudnichestvo mezhdu socyalisticheskimi gosudarstvami* (*Questions of Family Law in Agreements on Assistance in Legal Matters. Co-operation in Legal Matters between Socialist States*), Moscow 1962, p. 79; M. M. BOGUSLAWSKY—RUBANOV, *Pravovoye polozhenye sovetskikh grazhdan za granicey* (*The Legal Position of Soviet Citizens Abroad*), Moscow 1961, p. 85. From Polish literature cf. in this matter BALICKI, *op. cit.*, pp. 46ff., PAZDAN, *op. cit.*, p. 261. Supporters of the interpretation presented in the text are E. Wierzbowski and the author of this article.

II

The problem of annulment of marriage was not regulated in a separate provision in the Act of 1926. The authors of the Act proceeded on the assumption that the question of the law competent to decide on the existence and validity of a marriage followed from the provisions relating to the conclusion of marriage. A similar position was taken by the judicature of our Supreme Court[12] and in our doctrine.[13] Thus—and this is also recognized in modern literature on private international law[14]—the same law which decides on the substantial and formal conditions of a valid marriage determines the sanctions for non-observance of those conditions. Hence, with respect to an infringement of the requirements as to the form of marriage, it will be either the law of the place of celebration or the national law of both spouses that will decide. In respect of an infringement of the substantial conditions, it will be the law applicable to the testing of those conditions that will decide. That latter law will determine whether there is at all a case of invalidity of marriage, and what persons may claim such invalidity and specify the time-limit for instituting annulment proceedings.

On the other hand, the question of the determination of the law competent to test invalidity of marriage was taken into account—contrary to the line followed in the Act of 1926—in the drafts of a new Polish private international law. Already in the original draft a rule on this matter was included, establishing that the law which had governed the conditions of marriage would be applicable to the annulment of marriage, however, the possibility of Polish courts decreeing the annulment of a marriage was made subject to the annulment being admissible in Poland at the time of its pronouncement. In subsequent drafts it was attempted—in accordance with the line taken by the Act of 1926—to disregard that question. However, the final text of the Law of 12 November 1965 includes, in Article 16, a provision laying down that the law defined in Articles 14 and 15, that is the law governing the conclusion of marriage, shall be applicable to the annulment of marriage.

As regards the authorities competent in cases of annulment of marriage, it was once held in Polish literature that the competent authorities were those of the state to which both the spouses were personally subjected at the time of the initiation of proceedings or the authorities of the state to which both the spouses were jointly subject in the preceding period (that view was based on a similar line taken in Article 17 of the Act of 1926).[15] However, provisions relating to jurisdiction, contained in the Act of 1926, ceased to be binding upon entry into force of the new Polish code of civil procedure, that is, on 1 January 1965. Under Article 1100 of that code, matters of marriage come within Polish jurisdiction where at least one of the spouses possesses Polish nationality or, possessing none, has his domicile in Poland. Where both spouses have their

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[12] Cf., for instance, the decision by the Plenum of the Supreme Court of 6 October 1926, III. 22.

[13] Cf. ZOLL, *op. cit.*, p. 79; Walaszek in the quoted work: B. WALASZEK, M. SOŚNIAK, *op. cit.*, p. 102.

[14] Cf., for instance, H. BATIFFOL, *Traité élémentaire de droit international privé*, 1959, p. 436.

[15] In Polish literature the question was also considered whether to apply the personal law common to both spouses in the case where the wife has acquired by marriage *quaestionis* the law of the husband or else to apply the personal law of each of the spouses at the time of the conclusion of the marriage. Walaszek (*op. cit.*, p. 103) rightly favours the second solution. Surely the nationality acquired by marriage, which is about to be annulled, should not be taken into account.

domicile in Poland, Polish jurisdiction is exclusive. Apart from that matrimonial cases of aliens residing in Poland come within Polish jurisdiction.

Agreements on assistance in legal matters concluded by Poland follow—in principle at least—that solution. They thus recognize—in principle—that as regards an annulment on the ground of non-observance of the substantial conditions of a valid marriage, it is the national law that is decisive, and as regards an annulment on the ground of non-observance of the form, it is the law of the State before whose organ the marriage has been contracted (or according to whose form the marriage was celebrated) that is decisive. It is in this way that the question of the annulment of marriage is, in principle, regulated in Poland's agreements with Czechoslovakia (Article 15) and with Bulgaria (Article 25). Some of the agreements introduce a certain "strengthening" of the requirements by admitting the possibility of annulment of marriage only where in a given case the ground for invalidating the marriage is provided for both by the law of the place of contracting, as well as by the national law of the spouses. It is in this way that this matter has been regulated in Poland's agreements with the Soviet Union (Article 30, paragraph 2), with Yugoslavia (Article 27, paragraph 3), with the German Democratic Republic (Article 24) and with Romania (Article 25).

III

As regards the personal and property relations between the spouses, the Polish Act of 1926 follows the line that they are governed by the *lex patriae* common to both spouses at the relevant time (Article 14, paragraph 1). The application of that principle, the soundness of which was not seriously questioned *de lege ferenda*, comes up against difficulties where the spouses are nationals of different states. Although the Act provided for situations where the relations between the spouses would be governed by the law of the state last common to both spouses, that solution was neither the most proper[16] nor one providing an answer to all cases of lack of common nationality. Because it could have occurred that the spouses never possessed common nationality. In the latter event some Polish theoreticians referred the case to the personal laws to which the husband and wife were subject at the time of contracting marriage, however, if those laws would differ substantially enough to preclude their joint application, then—according to those theoreticians—Polish law should be applied.[17] Others advocated the application of the *lex domicilii* common to both spouses, and in the absence thereof, of the *lex patriae* of each of them.[18] Still others suggested that in such cases the Polish law as the *lex fori* should be applied.[19]

The Act of 1926 admits three exceptions to the rule that the *lex patriae* governs all matters connected with personal and property relations between the spouses: The first of them relates to the statutory matrimonial property system which is subject to the personal law of the husband at the time of the conclusion of the marriage (Article 14, paragraph 3). The second operates in

[16] Why should the question of the applicable law be connected with the system which has become the system of only one of the spouses or which has perhaps ceased to be the system even for both of them? What real connection there is here?

[17] According to Walaszek in WALASZEK—SOŚNIAK, *op. cit.*, p. 94.

[18] According to W. LUDWICZAK, *Międzynarodowe prawo prywatne* (*Private International Law*), 4th ed., 1961, pp. 109ff.

[19] According to BALICKI, *op. cit.*, p. 82.

respect of matrimonial property agreements and of gifts between the spouses or the betrothed. They are to be governed by the law of the state of which the husband or the fiancé was a national at the time of the conclusion of the agreement (Article 15). In testing those agreements regard should be had to the reservation provided for in Article 14, paragraph 2, according to which the national law of the spouses at the relevant time is competent to decide whether they may enter during marriage into a contractual agreement, change or dissolve an existing matrimonial contract.[20] Lastly the third exception (following from Article 16) excludes the application of the basic principles relating to the law applicable to property and personal relations if the state, within whose territory the immovables of the spouses are situated, requires the application in respect of those properties of its own law.

That question has been regulated in a different way in international agreements signed by Poland. Before proceeding to discuss them, it should be borne in mind (just like in matters discussed above) that in that field, too, Poland acceded to the Hague Convention of 17 July 1905 relating to the conflict of legislations regarding the effects of marriage on the rights and duties of spouses in their personal and property relations. It was on that convention that the provisions of the Act of 1926 in this matter were partly modelled. On the other hand, the provisions of bilateral agreements concluded by Poland with socialist states regulate this matter differently. And thus the Polish-Soviet agreement (Article 29) declares the common *lex domicili* as applicable. Where there are different domiciles (one spouse resides on the territory of one of the Signatory States and the other spouse on the territory of the other Signatory State) and common nationality—that common *lex patriae* applies. Where, however, both domicile and nationality are different, the law of the state on whose territory the spouses had their last residence is applied.

The agreement between Poland and the German Democratic Republic (Article 22), though starting from the principle of the common *lex patriae* being applicable, nevertheless declares—where the spouses are nationals of different states—the common *lex domicilii* to be decisive and where also that is different—the law of the place of the last common domicile. However those rules do not relate to marriage property agreements, which are subject to the *lex loci actus*.

The remaining bilateral agreements concluded by Poland to date make this matter subject to the *lex patriae* common to both spouses. Where there is no such law common to both spouses, the law of the common domicile is applied and in the absence thereof—the law of the last common domicile. Such principles are embodied in Article 32 of the Polish-Hungarian agreement, in Article 13 of the Polish-Czechoslovak agreement, in Article 23 of the Polish--Romanian agreement, in Article 23 of the Polish-Bulgarian agreement and in Article 26 of the Polish-Yugoslav agreement.

As follows from the foregoing, the principle that the common *lex patriae* of the spouses is decisive in the matter, predominates in those bilateral agreements. The *lex domicilii* common to the spouses at the relevant time or the last *lex domicilii* common to both spouses is applied only subsidiarily.

The drafts of a new Polish Act on private international law were based on similar principles. Following a certain evolution of the formulation of the relevant provision, it was laid down in Article 17, paragraph 1, of the Act of 12

[20] In the Act of 1926 there is no provision regulating the form of matrimonial property agreements, which shall consequently be subject to the law provided for the form of all legal acts.

November 1965 that the law common to both spouses shall be decisive, viz. the national law common to the spouses at the relevant time. In the absence thereof the law of the state, in which both spouses have their domicile (Article 17, paragraph 3) shall be applied. In default of such law—Polish law shall apply. The new Act respecting the principle of equality of the spouses has not retained former provisions on the applicability of the personal law of the husband to the statutory matrimonial regime and to marriage property agreements. The provision on the conditional applicability of the *lex rei sitae* has also been left out. They were replaced by one general provision which makes the contractual matrimonial property system subject to the *lex patriae* common to both spouses at the time of the conclusion of the matrimonial contract (Article 17, paragraph 2). The *lex patriae* common to the spouses at the relevant time shall decide whether a matrimonial contract may be entered into, changed or dissolved during marriage.

IV

Under the Act of 1926 divorce and separation[21] are governed by the law of the state to which the spouses are personally subject at the time of the application for divorce. Like in the cases referred to above, there arises the question of different nationalities of the spouses. The Act by referring to the last law, to which the spouses were jointly subject, regulates only one type of cases of such difference of nationality. It does not, however, just like in the matters discussed above, provide a solution should both spouses never have been subject to common national law. On this point, too, various solutions of the question of the applicable law were advanced in Polish literature suggesting either the national law of the husband, the law of the domicile of the spouses,[22] the national law of both the husband and the wife[23] or Polish law.[24]

The Act of 1926 includes, moreover, in Article 17, paragraph 2, a provision under which in case of change of nationality by the spouses a circumstance which preceded that change may constitute a ground for divorce only in as much as it justifies the divorce also under the law applicable before that change. That provision meant to prevent evasion of law, went beyond the intended scope.[25] It rendered it difficult to obtain a divorce decree in all cases of change of nationality, irrespective of what was provided by the national laws concerned on the question of change of national status.

The provisions of the bilateral agreements concluded by Poland recognize, as a rule, the law of the state, of which the spouses are nationals at the time of the application for divorce, to be applicable to divorce.[26] In the absence of such

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[21] Present-day Polish family law does not know the institution of separation from bed and board. The Act of 1926 was based on different legislation. Obviously, the problem of separation may also come up before Polish courts at the present time where aliens are involved.

[22] According to K. PRZYBYŁOWSKI, *Prawo prywatne międzynarodowe. Część ogólna* (*Private International Law. General Part*), Lwów 1935, pp. 109ff.

[23] According to J. SUŁKOWSKI, *Conception du droit international privé d'après la doctrine et pratique en Pologne*, "Rec. de Cours," 1932, III, pp. 688ff., and contemporarily—to LUDWICZAK, *op. cit.*, p. 111.

[24] According to BALICKI, *op. cit.*, pp. 82 and 104.

[25] As held by K. PRZYBYŁOWSKI in the above quoted *Kodyfikacyjne zagadnienia...*, p. 47.

[26] As provided for, in principle, in Art. 30 of the Polish-Soviet agreement, in Art. 33 of the Polish-Hungarian agreement, Art. 27 of the Polish-Yugoslav agreement, Art. 24 of the Polish-Bulgarian agreement, Art. 14 of the Polish-Czechoslovak agreement, Art. 24 of the Polish-Ro-

common law, some of those agreements point to the *lex fori* of the state, where the spouses possessed or possess their domicile, as to the applicable law,[27] some, on the other hand, suggest still other solutions.[28]

The Act of 1926 in determining the law applicable to divorce, resolved at the same time the question of jurisdiction connecting the question of the applicable law with that of the competent authority. Apart from those general principles on jurisdiction, the Act included two special provisions determining the authorities having jurisdiction in respect of spouses possessing Polish nationality or whose last nationality was Polish and in respect of aliens residing in Poland. In the first instance jurisdiction of Polish authorities or the authorities of the state of the spouses domicile was provided for (Article 17, paragraph 3).[29] In the second instance—also the jurisdiction of Polish authorities, unless exclusive jurisdiction was claimed by the state of which the spouses were nationals (Article 17, paragraph 4), but even where such claim was made, Polish authorities could issue temporary orders. These provisions, too, ceased to be binding upon entry into force of the new code of civil procedure and have been replaced by Article 1100 thereof, quoted above.

To the matters discussed here there apply also provisions relating to the recognition of foreign judgements. In this respect separate Acts were issued prior to the enactment of the new code.[30] Now provisions of Article 1145 and subsequent articles of the code of civil procedure are the basic provisions governing the recognition of foreign judgements.

As regards the authorities having divorce jurisdiction, bilateral agreements on legal assistance concluded by Poland accept, as a rule, the principle that common nationality of the spouses and in case of common domicile—also the domiciliary law[31] determine what authorities have jurisdiction. There are, however, some differences as regards the regulation of cases of different nationality and different domicile. Some agreements recognize in such cases the jurisdiction of the courts of both states concerned,[32] whereas others—the jurisdiction of the courts of those states where the spouses had or have their last domicile.[33]

The new private international law of 1965 has to a great extent simplified the solution of the question of divorce where there is a conflict of laws by basing the new regulation on a three level approach (Article 18). The *lex patriae* common to both spouses at the time the action for divorce is brought, determines

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manian agreement, Art. 23 of the agreement between Poland and the German Democratic Republic.

[27] Thus e.g. in Art. 24, para. 2, of the Polish-Bulgarian agreement, and in Art. 14, para. 2, of the Polish-Czechoslovak agreement.

[28] Cf. Art. 23, para. 2, of Poland's agreement with the German Democratic Republic and an analogous provision in Art. 24, para. 2, of the Polish-Romanian agreement.

[29] The reservation was, however, added that should the authorities of a foreign state fail to apply Polish law, their judgements shall not be recognized or executed on the territory of Poland.

[30] Cf., *inter alia*, the decree of 3 February 1947 on the recognition of the validity of certain marriages and divorces of Polish citizens and the Act of 26 April 1950 on divorce jurisdiction of Polish courts in certain cases.

[31] Thus e.g. Art. 23, para. 2, of the agreement with the German Democratic Republic; Art. 30, para. 1, of the agreement with the USSR; Art. 24, para. 1, of the agreement with Romania, Art. 14 para. 1, of the agreement with Czechoslovakia, Art. 24, para. 1, of the agreement with Bulgaria.

[32] Thus e.g. Art. 23, para. 2, of the agreement with the German Democratic Republic; Art. 30, para. 1, of the agreement with the USSR; and Art. 24, para. 2, of the agreement with Romania.

[33] Thus e.g. Art. 14, para. 2, of the agreement with Czechoslovakia, and Art. 24, para. 2, of that with Bulgaria.

the basic applicable law. In the absence of a *lex patriae* common to both spouses, the law of the state in which the spouses have their domicile is applied. Where the spouses do not reside in the same state, Polish law is applied. Thus under the new Act the possibility of applying the national law last common to both spouses has been rejected, because in such cases there is either no connection between the spouses and that last common law—where, for example, both spouses have subsequently acquired the nationality of different states—or else that connection is not sufficient to justify the applicability of the last common law.[34] Neither has the new Statute retained the above discussed provision designed to prevent evasion of law in the sphere of divorce.

Conclusions

In effect, it can be said that as compared with the provisions of the Act of 1926 the new Polish conflict rules of 1965 are characteristic for their concise, simple and logical construction. All casuistry has been discarded in favour of clear and practical regulations. The national law of the spouses has been chosen as the basic connecting principle in the sphere of the law on marriage. In the absence of a national law common to both spouses, the law of the common domicile is resorted to, and where there is no such common law—Polish law is applied as *ultimum refugium.*

As pointed out, the principle of the "last law common to both spouses," causing so much trouble, has been finally rejected. Detailed reservations in favour of Polish law have been omitted. The principle of full equality of the spouses has been adopted and the method of determining the applicable law according to the law of the husband has been abandoned. In fixing the time at which to determine the applicable law, the actual state at the given moment is, as a rule, adopted, viz. the law applicable at the relevant time, the time of application for divorce and the like. The only exception has been provided for the contractual matrimonial property system which is subject to the national law common to the spouses at the time of the conclusion of the matrimonial contract. By fixing the time in such a way, the solution of conflicts entailed in the so-called change of status has been facilitated. This is characteristic of the concern—evident in the whole framing of the new Polish Act on Private International Law—for a possibly complete regulation of the issues in question, while preserving the conciseness of the relevant provisions.

As regards the position in the new Act towards international agreements binding Poland, it should be pointed out that the new Act while retaining an independence of solutions arising, inter alia, from the fact that conflict rules of the Act have a much wider range of application than the provisions of particular agreements, reflects a considerable approximation of a number of solutions.

This testifies to the fact that the new Polish rules are related to present-day international practice and to postulates put forward in international exchange in this field.

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[34] As pointed out by K. PRZYBYŁOWSKI, in the *Kodyfikacyjne zagadnienia...*, p. 46.

SOME ASPECTS OF THE LEGAL STATUS OF SPACE OBJECTS*

by JERZY SZTUCKI

In his questionnaire on "The Legal Status of Space Vehicles" prepared for the Working Group of the I.L.A. Space Law Committee Prof. Jennings rightly stated that "it is obvious that there cannot be any adequeate legal recognition of happenings in space unless there is some record of what is there."[1]

"Adequate legal recognition of happenings in space" necessarily presupposes the existence of some definite criteria of the imputability of those happenings to particular subjects of international rights and obligations without which they may become meaningless in each particular case.

Identification of space objects from the point of view of the possibility of attributing the related legal facts to particular subjects seems to be the basic problem of the legal status of space objects. And since space objects are the main—if not the only—tools of space activities, this problem seems to gain importance also as one of the basic problems of space law in general.

Yet, it is a fact that the newly emerging space law develops—so far—somehow "around" this apparently important problem, dealing only indirectly with the question of a legally relevant link between a space object and a subject of international rights and obligations arising from its use.

The first step towards this direction has been made in the UN Resolution 1721 B/XVI of 20 December 1961 which

> "1. Calls upon States launching objects into the orbit or beyond to furnish information promptly to the Committee on the Peaceful Uses of Outer Space, through the Secretary-General, for the registration of launchings;
>
> 2. Requests the Secretary-General to maintain a public registry of the information furnished in accordance with paragraph 1 above."

This is a recommendation only, and furnishing of information as well as its scope is voluntary. In fact, information is being furnished and the registry is being maintained. Some doubts persist, however, whether all launchings were reported[2] and one attempt was oficially made by one state to ascribe a series of launchings to another state—in defiance of earlier press reports.[3] Moreover,

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* For the author's views regarding terminology and the scope of the notion "space object" — see J. SZTUCKI, *Some Preliminary Problems of the Legal Status of Space Objects*, Proceedings of the VIII Colloquium on the Law of Outer Space, Athens 14—15 September 1965.

[1] JENNINGS, *Legal Status of Space Vehicles*, Questionnaire, The International Law Association, Report of the Fifty-First Conference, Toyo 1964, London 1965, p. 711.

[2] See HALEY, *Space Law and Government*, New York 1963, p. 137.

[3] See UN doc. A/AC. 105/15, p. 2.

information furnished under the said resolution reaches UN Secretariat and is published by it usually with a delay of 6—10 weeks when a part of the objects reported is already no longer in flight.

The recommendation quoted above has not been put on an obligatory basis by the Treaty of 27 January 1967 by which the States-Parties have only agreed generally

> "to inform the Secretary-General of the United Nations as well as the public and the international scientific community, to the greatest extent feasible and practicable, of the nature, conduct, locations, and results of such (i.e. space—J. S.) activities" (art. XI).

As it can be easily seen, this article does not include any specific obligation and, in particular, does not provide for the obligatory reporting of every launching for the purpose of its international registration.

Records of discussions in the UN organs as well as various proposals presented there show that states touch upon the problems under our consideration very carefully, rather indirectly, and hesitantly.

For example, the Declaration of Legal Principles of 1963 contains in paragraph 7 and 9 the notion of "the state of registry" which is of the US origin[4] and which would imply some requirement to maintain such a registry. But the Declaration does not contain any direct provision for the maintenance of such a registry. The United States used the same notion of "the state of registry" in their early drafts on space liability and on assistance to and return of astronauts and space vehicles,[5] but then withdrew that terminology in view of objections raised by some other delegations.[6]

Similarly, one version of the Belgian draft convention on space liability uses the notion of a "state whose flag the space device flies,"[7] which again implies a nationality of a space object by analogy from the law of the sea or from air law although there is no direct provision for a nationality of space objects in international documents. But here again authors soon abandoned this terminology and did not use it in the next version of their draft.[8]

Also, the first version of the Soviet Draft convention on the assistance and return required, *inter alia*, that a space object to be returned should possess identification marks indicating the state of origin and that its launching should be officially announced[9]—thus again implying a requirement to announce officially the launching and to provide the space object with specific identification marks although there is no direct provision of law for this. And here again, the first requirement was abandoned in the second version of the draft.[10]

In all these cases we are witnessing a rather peculiar phenomenon—advancing of proposals which indirectly imply some specific obligations and some

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[4] At the meeting of the UN Legal Sub-Committee on the Peaceful Uses of Outer Space on 11 March 1964 the US representative explained that what was meant by the "registry" was a national, and not an international (or the UN), registry. (See UN doc. A/AC. 105/C. 2/SR. 29—37, p. 27).

[5] See UN doc. A/AC. 105/C. 2/L. 8 and A/AC. 105/C. 2/L. 9.

[6] See statement of the US representative at the meeting on UN Legal Sub-Committee on 5 October 1964 (doc. A/AC. 105/C.2/SR. 38, p. 6). For objections raised by the representatives of Belgium, United Kingdom and the Soviet Union—see UN doc. A/AC. 105/C. 2/SR. 29—37, pp. 37, 51 and 87 respectively.

[7] See UN doc. A/AC. 105/C. 2/L. 7/ Rev. 1.

[8] See UN doc. A/AC. 105/C. 2/L. 7/ Rev. 2.

[9] See UN doc. A/AC. 105/C. 2/L. 2.

[10] See UN doc. A/AC. 105/C. 2/L. 2/Rev. 1.

specific legally relevant link between a space object and a subject of international rights and obligations (as if it had been felt that establishment of such a link is necessary), and then—withdrawal of these very same proposals together with their implications.

Probably this uncertainty induced the representative of France to state in connection with the two draft conventions mentioned that

> "in any event, they would lead to a realization of the need for rules in other fields, such as international regulations for the registration of space vehicles, without which the application of specific draft agreements might be extremely difficult."[11]

Later on, the notion of "the state of registry", already abandoned in the course of the current negotiations on the said two conventions, reappeared again in Art. V and VIII of the Treaty of 1967 in the same context as in paras. 9 and 7 of the Declaration of 1963—and again without providing directly for maintenance of the registry referred to. Strange as it may seem, the notion of "the state of registry" has been reintroduced this time by one of its earlier opponents[12] and has not been objected to by anybody. Both articles were adopted during negotiations as non-controversial, without any discussion on their substance so that the record did not offer an opportunity to disclose and ascertain what specific intentions lay behind the reversion to this wording and what were the specific meaning or implications of this wording that have been understood and accepted.

A broad—if not universal—agreement seems to prevail in the legal literature on the necessity of having an adequate possibility to identify unequivocally each space object and to impute legal facts in space to particular subjects of rights and obligations.[13] The documents referred to above seem to indicate that this view is, in general, fully shared also on an official level. The question which still remains open, despite those general feelings, is how to obtain desirable and expected results with respect to the specific situation of space activities and space objects.

It seems that a majority of authors who have written on the subject advocate the application of the classical concept of nationality to space objects.[14] Undoubtedly this position is influenced by the law of the sea and air law and the legal status of seagoing vessels and aircraft. True enough, from the formal juridical point of view the concept of nationality of moving devices is congruous and consistent and its legal consequences in practice are simple and clear. Temptations to solve the basic question of legal status of space objects in an identical manner can be, therefore, easily understood.

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[11] Summ. Rec. of the meeting of the UN Legal Sub-Committee on the Peaceful Uses of Outer Space on 12 March 1964—in UN doc. A/AC. 105/C. 2/SR. 29—37, p. 47.

[12] See the Soviet Draft Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, the Moon and Other Celestial Bodies (Art. V and IX)—UN doc. A/6352.

[13] See e. g. GALINA, *K voprosu o mezhplanetnom prave*, "Sovetskoye Gosudarstvo i Pravo," 1958, No. 8; BERESFORD, *The Basis of East-West Agreement on the Use of Space*, paper presented to the A. R. S., New York 1959; CHAUMONT, *Le droit de l'espace*, Paris 1960, p. 71; JENKS—in Institut de Droit International..., *Rapport préliminaire présenté par...*, Genève 1963, p. 207; JENNINGS, *loc. cit.*; MACHOWSKI *Paragrafy dla kosmosu*, Warsaw 1965, p. 78. See also UN doc. A/4141 (29 July 1959).

[14] Among above mentioned authors—e. g. CHAUMONT, *op. cit.*, p. 68—69; MACHOWSKI, *op. cit.*, p. 77. Also SCHACHTER, *Who Owns the Universe*, "Collier's", 22 March 1952, p. 36; HORSFORD, *The Law of Space*, "Journ. of the Brit. Interplanet. Soc.," May—June 1955, pp. 144—150; COOPER, *The Russian Satellite—Legal and Political Problems*, "Journal of Air Law and Commerce," Autumn 1957, pp. 379—383.

Yet, methods of establishment of a legally relevant link between a state any moving devices tested in some fields of human activity must not necessarily withstand the test of confrontation with the practical requirements and conditions in another field of human activity, in our case—the space activity. It is to be noted in this connection that the concept of nationality in a technical sense is not being applied for specific reasons to automobiles. Also the possibility of applying the concept of nationality to space objects gives rise to some critical reflexions:

1. The link between a state and an object created by the institution of nationality is of purely formal character. A link thus created must not necessarily coincide with the actual link since it is up to states to determine under what conditions their nationality may be accorded to an object and—as a consequence—in a number of cases the "formal nationality" obtained through the act of registration is, in fact, different from "actual nationality" of the object. One may have serious doubts whether in the field of space activities, with their political and military implications, such situations would contribute to the security of international legal intercourse and to the adequate protection of rights and interests of states. The problem at stake here is to create an institution which would permit to identify the actual link between the state and an object as legal ground for attributing international rights and responsibilities in connection with a space object.

2. Also in those cases when the nationality of an object is strictly dependent on the nationality of an owner or a majority of co-owners, the institution of nationality again seems to be not quite suitable for application to space objects. This is because the prevailing tendency in international space law is to leave the questions of ownership to the domestic legal order of states and to deal with states (or intergovernmental organizations) as the only subjects of international rights and obligations with respect to space activities, regardless of the actual ownership status of a space object under domestic law. The institution of nationality seems to reflect the situations where subjects of private law might have been direct subjects of rights and obligations. In our case this concept is, thus, rather confusing the situation than clarifying it.

3. When speaking about space activities we have always in mind the prospects of development of those activities not only on a national level but also by operating intergovernmental organizations. The question then arises: what useful purpose may be served by the concept of nationality in a technical sense with respect to international organization and what would be the practical consequences of a possible application of this concept to international organization? The answer to that question would probably cause a great many difficulties, to say the least. And one may suppose that this is precisely why the United States in the period of adhering to the notion of "state of registry" used the following formulas in their draft conventions on liability and on assistance and return: "state of registry or international organization involved in launching"; "state of registry or international organization responsible for launching"[15]— apparently recognizing that the institution of "registry" is hardly applicable to an international organization. The institution of "nationality" applied to such organizations is still more difficult to conceive.

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[15] UN doc. A/AC. 105/C. 2/L. 8 and A/AC. 105/C. 2/L. 9 respectively.

For all those and probably also for other reasons some authors express the opinion that

> "there is much to be said... for avoiding the technical concept of nationality when attempting to elaborate the law concerning the legal status of space craft;"[16]
> "La notion de nationalité na semble... pas nécessaire pour faire le point du droit de l'espace en général... Il paraît préférable, du moins au stade actuel, de considérer que l'auteur du lancement conserve la responsabilité de l'astronef lancé par lui."[17]

It is to be added that the institution of nationality did not find its way to the resolution on space law adopted by the Institut de Droit International on 11 September 1963. In paragraphs 3 and 4 it provides only for international registration of spacecraft and marking them with identification signs which, of course, are not tantamount to according of nationality (registration results in obtaining nationality only when law expressly provides for such a legal consequence of the act of registration).[18]

Apparently all these doubts are also being shared by states themselves. To draw an analogy with the ready and tested institution of the law of the sea and air law would be the simplest and easiest thing to do, should states recognize the usefulness of such an institution and analogy. Nevertheless, putting aside one of the versions of the Belgian draft convention on space liability (which, by the way, was further revised within only few weeks),[19] the existing documents bring one unequivocally to the conclusion that States are more inclined to create link between state and space object based on factual circumstances (fact of launching) rather than on formal ones (registration resulting in obtaining nationality). True enough, expressions of this concept are still neither uniform (and, consequently—not final) nor precise. In the preliminarily agreed articles of the convention on assistance and return the state linked with a space object is described as "state which announced the launching."[20] The Hungarian draft convention on space liability describes such a state as "the launching state."[21] Nevertheless this is how the developments before the conclusion of the Treaty of 1967 have been understood by the most reputed international legal organizations as the I.D.I. and I.L.A. which themselves seem to share this attitude. According to Jennings, who refers to various proposals submitted in the UN organs,

> "in virtually all cases it seems to be agreed that it is the 'launching state' that is primarily concerned in all these legal questions whether of liability or of jurisdiction. To regard the launching state as a protagonist in all these legal questions concerning the status of space craft is the obvious and inevitable answer."[22]

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[16] JENNINGS, *op. cit.*, p. 714; also PÉPIN, ibid., p. 721.

[17] JENKS, *op. cit.*, p. 207 (official French translation). See also p. 209, where the same concept is applied to the "competences" of the "author of launching."

[18] Opposite concept i. e. (that of nationality in technical sense) is reflected in Art. 5 of the Draft Code of Rules on the Exploration and Use of Outer Space prepared by the David Davies Memorial Institute for International Studies—in *Proceedings of the Fifth Colloquium on the Law of Outer Space, Varna 1962,* Washington 1963, mimeo., p. 12.

[19] Cf. UN doc. A/AC. 105/C. 2/L./7/Rev. 1 and Rev. 2 respectively.

[20] See UN doc. A/AC. 105/21, Annex III.

[21] See UN doc. A/AC. 105/C. 2/L. 10. Similarly—in third version of the UN draft of the same convention (see UN doc. A/AC. 105/C. 2/L. 8/Rev. 2).

[22] JENNINGS, *op. cit.*, p. 712. The author, however, seems to be not quite consistent in his view when he proposes the registration of spacecraft "in some State in accordance with the requirements of the municipal laws of that State" (p. 714) although according to his concept the role of the registration is quite different from that in the case of traditional institution of nationality.

It is to be stressed that the provisions of Articles V and VIII of the Treaty of 1967 by a mere reference to "the state of registry" did not solve the problem in favour of the classical concept of nationality. There is no similarity of legal construction between the said articles and, e.g., Articles 17 and 19 of the Chicago Convention which expressly state that "aircraft have the nationality of the State in which they are registered" and that "the registration or transfer of registration of aircraft in any contracting State shall be made in accordance with its law and regulations."

True enough, under Articles V and VIII of the Treaty of 1967 states become bearers of certain rights with respect to a space object on no other ground than that of having registered the space object in question. Thus the entry of a space object into a registry is constitutive for acquiring certain rights with respect to this space object by the state concerned. Nevertheless, in the Treaty of 1967 there is nothing resembling an international obligation to keep a registry (like in Article 19 of the Chicago Convention); and still less—resembling a statement that registration results in acquiring a nationality (like in Article 17 of the Chicago Convention).

The fact that Article XIII of the Treaty of 1967 makes its provisions applicable also to space activities carried by States-Parties through intergovernmental organizations, and thus—to space objects operated by such organizations, makes it still less probable that the authors of the Treaty intended to fix the legal status of space objects on the basis of the classical concept of nationality. The problem seems to remain still open and the emphasis by some Western countries on the development of private agencies to operate in space (also on an international level) seems to have some bearing on the problem. Undesirable as the penetration of space by private enterprise is for many other reasons, it does also complicate the solution of the problem under consideration.[23]

But besides that, the concept of legally relevant factual link between a subject of space activities and a space object requires further elaboration in two directions before it can be fully brought into practice, namely:

1) the agreed upon, uniform and obligatory means of identification of this factual link;

2) the form of expression of the factual link which is to be established and identified.

It seems, moreover, that until and unless there is a clear idea about the manner in which to solve these questions and also prospects for agreement on any such idea, it is impossible to establish directly any general rule or principle because the adequacy of such a principle is greatly dependent on the solution of the two more detailed questions mentioned above.

Ad 1. The least controversial point regarding means of identification is probably that of providing space objects with visual identification marks. In fact, an overwhelming majority of space objects launched—if not all of them—are somehow marked with specific signs and the only remaining problem is to make such markings uniform and obligatory. True, however, that in the specific conditions of space activities visual identification marks are of very limited value—if only because of their small size and huge distances in space—while it is obvious

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[23] See U. S. Communications Satellite Act of 1962; also CORDINER, *Competitive Private Enterprise in Space*, "Congressional Record," 2 June 1960; also KOVALEV and CHEPROV, *Na puti k kosmicheskomu pravu*, Moscow 1962, pp. 93—94.

that the means of identification should be such as to make possible the unequivocal identification in any situation and at any moment. At the Extraordinary Administrative Radio Conference held in Geneva in 1963 the possibility of identification of space objects (or, more exactly—radio stations aboard space objects) by individualized call signals was considered. Newly added Appendix 1A to the International Radio Regulations provides in section B for indication of such signals in notices relating to radio stations in space to be sent to IFRB[24] and the new Regulation 773A (in revised Art. 19) recommends specific composition of such call signals. However, at the same time it has been recognized in Regulation 735.1 that

> "in the present state of technique... the transmission of identifying signals for certain radio systems (e. g. radio determination, radio relay systems and space systems) is not always possible."[25]

Thus far—to the author's best knowledge—no space object has been equipped with a radio station transmitting identification signals and one may wonder whether this has been so for purely technical reasons only. Obligatory official announcements of orbital characteristics of space objects (with possible current changes of those characteristics) might be of significant help for identification purposes[26] and orbital characteristics (at least the initial ones) are, in fact, already being announced in the information furnished to the UN under resolution 1721 B (XVI). However, there are reasons to believe that a system of identification means which would be fully adequate from the technical point of view in specific conditions of space activities might interfere with matters involving national security.[27] And it does not seem that such a system could be acceptable to states under prevailing political conditions (which include arms race extending also to space and not fully banned by Article IV of Treaty of 1967).[28] Under such circumstances states may even have objections against putting on obligatory basis what they actually do voluntarily.

Ad 2. Different proposals were advanced as to the form of expression of the legally relevant link between a subject of rights and obligations, and a space object. But, roughly speaking, they can be classified under the following three categories:

— obligatory national registration of space objects;[29]
— obligatory international registration of space objects;[30]

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[24] *Final Acts of the Extraordinary Administrative Radio Conference to Allocate Frequency Bands for Space Radiocommunication Purposes*, Geneva 1963, p. 12—13.

[25] *Ibid.*, pp. 9—10.

[26] Newly added Regulation 737 A (in the revised Art. 19 of the Int. Radio Regulation) states that "in the event that the transmission of identification signals by a space station is not possible, that station shall be identified by specifying the angle of inclination of the orbit, the period of the object in space and the altitude of apogee and perigee of the space station in kilometres" (*ibid.*).

[27] See e. g. HALEY, *op. cit.*, p. 138. The author, however, holds the view that sufficient number of relevant elements of identification does not involve security matters and is, in fact, being published.

[28] See e. g. official announcements of a plan to put into orbit a series of military Manned Orbital Laboratories (MOL) starting in 1968 ("N. Y. Herald Tribune," Eur. Ed., 26 August 1965, p. 1, and 27 August, p. 4) — not to say about earlier military projects involving space activities.

[29] E. g. JENNINGS, *op. cit.*

[30] E. g.—p. 3 of the Resolution of the Institut de Droit International on the Legal Status of Outer Space unanimously adopted on 11 September 1963.

— obligatory official announcements of launchings,[31]
or some combinations of those elements.

To avoid any misunderstandings it should be noted that the registration within this concept is quite different from the registration within the classical concept of nationality. In some writings the act of registration is expressly imposed on the actual author of the launching and on him only.[32]

Most recent international developments show that the preferable form of attributing space object to a subject of rights and obligations are: *national registration* as implied in Articles V and VIII of the Treaty of 1967 and the *announcement of launching* which has been adopted in the agreed articles of the convention on assistance and return. It is understood that the announcement in question is the announcement made by the actual "author of launching" so that if the actual "author" concealed the fact of launching and if another state detected the object and announced its launching, this state would not acquire by such an announcement any rights or obligations with respect to that object.

Acceptance of the announcements of launchings in the said convention, however, means only that if no announcement is forthcoming, appropriate provisions of the convention will not apply but does not create in itself a legal obligation to make such announcements. This remains to be a voluntary act—no matter how broad the recognition of the desirability or even necessity of such an announcement. The question who is to make an announcement or registration (thus disclosing the real and legal link between a subject of rights and obligations and a space object), which is simple and clear in case of launchings performed by states individually, becomes much more complicated in case of space ventures undertaken by states jointly—both in the institutionalised form (by international organizations) and those not institutionalised. Some additional and rather complex problems arise in this case:

Who is expected to make an announcement—*any* participating state or *some specific* state (e.g. that which launches the object, that which procures the object for launching or that form whose territory or facilities the object is launched)—to use the language of the Article VII of the Treaty of 1967? And what—if the facilities, or booster rockets, or the satellites themselves belong to two or more states?

What would be the legal consequences of making an announcement for a particular state which makes it? Would making such an announcement imply that the announcing participant assumes, on behalf of all participants, the role of the sole bearer of international rights and obligations with respect to the space object, the launching of which he announces?

The author's opinion is that the choice of the participant to make an announcement should be left to participating states. Thus far the practice in connection with UN registry has not been uniform. In the cases of joint American-British and American-Canadian launchings it was only *the launching state* (i. e. the United States), and not the one which procured satellite for launching, who

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[31] See discussion on this subject in the UN Legal Sub-Committee on the Peaceful Uses of Outer Space during the second part of its third session (October 1964)—UN doc. A/AC. 105/21, Annex IV.

[32] As c. g. in the already mentioned resolution of the Institut de Droit International (see note 30).

sent the information to the UN.[33] In the case of American-Italian launching, both participating states sent information separately.[34] But this seems irrelevant. And there seems to be no obstacles also for international organizations to make an announcement as well. But in any case the announcement should indicate the states involved.

However the announcement should not be construed as meaning that the announcing party is the sole bearer of international rights and obligations. The concept of taking over rights and obligations by one state from other sovereign states thus relieving them from any international responsibility and depriving them of their rights, otherwise attributable to them, is unknown to international law although the principles of sharing the rights and responsibilities among states actually involved may vary in different categories of situations. For example, in the field of liability for damages and injuries resulting from space activities, the principle of joint liability seems to prevail in recent discussions in the UN Legal Sub-Committee. On the other hand one could hardly conceive the same principle applied to responsibility for international delinquencies committed with participation of several states. So far as one can judge at the present stage of development of space activities and space techniques, it would be difficult to find in this field of activities such international obligations or responsibilities which could not be shared by possible participants in a common space venture. The same applies in most cases to the sharing of possible rights. But at least in one case it would be apparently impossible to share the rights—and the case is rather an important one. This is the case of right of jurisdiction over space objects.

Article VIII of the Treaty of 27 January 1967 provides that

> "the State on whose registry an object launched into outer space is carried, shall retain jurisdiction and control over such object, and any personnel thereon, while in outer space,"

thus repeating the corresponding provision of Declaration of 1963 (para. 7).

The essential ingredient of the right of jurisdiction is the extension and applicability of local legal order. An attempt at applying jointly more than one local legal order to a single space object in case of common venture in space would amount to sheer nonsense. Logically, the right of jurisdiction over space object in case of a joint launching should belong to the state to which that very object belongs. But exercising jurisdiction over space object in flight implies technical capabilities to do so—especially (though not only) in case of unmanned space object. And it is precisely in case of joint space ventures that we shall be faced with the situations in which a state to whom the space object belongs and which procures that object for launching by another state, does not itself possess such technical capabilities. What then? And what—if the very object itself belongs to more than one state?

Furthermore, while focusing on jurisdiction, we are faced with specific problems resulting from possible participation of international organizations in space activities. One can easily conceive the exercise of jurisdiction over an unmanned space object by an international organization since in this case it would practically mean automatic control over the object for the purpose of performing statutory functions of the organization in accordance with international law. But how can an international organization exercise personal juris-

[33] See UN doc. A/AC. 105/INF. 7, 20, and 68, 90 respectively.
[34] See UN doc. A/AC. 105/INF. 90 and 91.

diction with respect to manned space object if, in the best case, it might be limited only to disciplinary jurisdiction over its own personnel?

In the author's view the answers to the foregoing questions could be as follows:

In case of a space object belonging to a state which does not possess technical capabilities to exercise jurisdiction over it, this state, nevertheless, retains the right of jurisdiction; it is only represented in exercising these rights by another state possessing adequate technical capabilities. Personnel—if any—aboard such a space object is subject to the legal order of the state to which the object belongs (if there are no indications to the contrary, e. g. in case of a person enjoying jurisdictional immunity).

If the object belongs to more than one state, it is up to the states concerned to settle the question between themselves but the security of international legal intercourse would require that such a settlement be officially announced.

Personnel aboard a spacecraft launched by international organizations is subject to respective national jurisdiction in all the cases not falling within the possible disciplinary jurisdiction of the organization itself.

One may arrive at the conclusion that instead of trying to solve all those and possible similar complicated details, it would be much more simple to turn back to the traditional institution of nationality of a moving object. Yet, for the reasons stated above—as it can be seen from practice—states are reluctant to accept this traditional concept and are looking for a solution more suitable for the specific circumstances. It is difficult to forecast the final result. One can say only that both the development of world political situation (including possible progress in the field of disarmament) and the progress in space sciences and space technology would undoubtedly have considerable bearing upon the final solution. For the time being, however, the imputability of the facts in space to particular subjects of rights and obligations will be probably based on the *de facto* ascertainement of what is going on in space and who is responsible. Yet it is to be expected that the further development and intensification of space activities and, especially, growth in the number of subjects engaged in them, will also stimulate the formal legal solution of the above mentioned problems.

The principle of jurisdiction of states over space objects as proclaimed in the Declaration of Legal Principles of 1963 and repeated in the Treaty of 1967 gives rise not only to the question to whom precisely this right belongs but also 1) to what objects it applies, and 2) where it applies.

Ad 1. The substance of rights conferred in the first sentence of Article VIII of the Space Treaty of 1967 with respect to space objects is defined as "jurisdiction and control." As it has already been indicated in literature,[35] "control" is not a legal institution or notion. In our context it is to be construed as an additional descriptive explanation of the notion of "jurisdiction" with regard to very specific conditions of exercising it: at immense distances and—in overwhelming majority of cases—exclusively through automatic guidance under command ("control") of a subject concerned.

Actual manifestations of exercising this right will, however, vary depending on the category (type) of object.

a) with respect to objects which are non-functional *ab origine* or those which became non-functional as a result of the conclusion of their mission and the

[35] Cf. e. g. M. LACHS, *The International Law of Space*, Ch. III, § 3, "Recueil des Cours, Académie de Droit International," La Haye 1964.

actual loss of contact with a launching state (if that loss has a permanent character), the right of jurisdiction and control, at least at the present stage of development of space techniques, can not mean more than *nudum ius* at the best. One may even wonder if in this case such right continues to exist at all, once the application of an appropriate rule of law is physically impossible. In this context Jenks proposes that abandoned space objects be no longer considered as subjected to the competence of state or international organization which is the "author of launching."[36]

b) with respect to unmanned functional space objects the right of jurisdiction and control means exclusive right of the subject to command and guide the performance of a flight programme by a space object. This right has its counterpart in the international responsibility of the subject for such conduct and performance of a space object under its jurisdiction and control, which would be in accordance with international law.

c) with respect to manned space objects the right of jurisdiction and control includes, in addition, also the competence of authorities of respective states and the applicability of their respective laws to legal facts occurring aboard the space object.

Ad 2. Much more complicated is the "spatial" aspect of the right of jurisdiction and control over space objects. The Space Treaty of 1967 in its Article VIII confers this right over space objects *while in outer space* (italics added—J.S.). Two interpretations of the idea expressed in this formula are possible:

a) that it excludes the jurisdiction and control of the launching state over its space object while in airspace over a foreign state (with the obvious consequence that the latter then takes over the jurisdiction over the object);

b) that it leaves open the question of jurisdiction and control over space object while in airspace over foreign states.[37]

Arguments may be found in favour of each of those interpretations.

Ad a). The provision in question relates only to the situation in areas not covered by the existing rules of law (i. e. outer space) and existing rules pertaining to the jurisdiction of states in other areas (airspace etc.) are simply left unaffected and *ipso iure* applicable.[38] Should the provision be construed as leaving open situations not expressly covered by it, it would mean that it leaves also *open* the problem of jurisdiction of a launching state over the space object while in airspace over its own territory and over high seas. However, attributing such a meaning to this provision would be obviously absurd.[39]

Ad b). Though it is true that the provision in question left *existing rules* pertaining to jurisdiction unaffected, one cannot say that there have actually been any "existing rules" concerning the status of a *space object* overflying

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[36] Cf. JENKS, *op. cit.*, p. 208.

[37] This view is held e. g. by LACHS, *loc. cit.*; also by ŻUKOW, *Etapy i perspektywy rozwoju prawa kosmicznego* (*Stages and Perspectives of the Development of Law of Outer Space*), "Sprawy Międzynarodowe," 1965, No. 1, s. 59.

[38] Already more than 30 years ago Mandl expressed the opinion that space objects in the air space over foreign states are subject to the competence of that state (See MANDL, *Das Weltraumrecht, Ein Problem der Raumfahrt,* Berlin-Leipzig-Mannheim 1932, p. 18).

[39] Already in 1956 Cooper indicated that what is absolutely certain in positive international law is that the launching state exercises jurisdiction over its space object while over its own territory or over high seas (See COOPER, *Legal Problems of Upper Space,* "Proceedings of the American Society of International Law, 50th Annual Meeting," Washington 1956, p. 85—93).

foreign territory; and moreover, that such allegedly existing rules were based on the spatial criterion—differentiation of legal status depending on whether the object is in airspace or in outer space. This argumentation seems to be more correct, especially in view of obvious lack of an essential element of any alleged previous reglamentation based on such differentiation, namely—lack of a recognized boundary between airspace and outer space.

To avoid any misunderstandings it is to be recalled that the question under consideration here (i. e. jurisdiction over space object overflying foreign territory) is different from the widely discussed question of the upper limit of territorial sovereignty of states and the very right to overfly them freely at certain altitudes.[40] States may exercise or not exercise jurisdiction regardless of whether the very passage through their territory is free or subject to permission.[41] They may exercise jurisdiction outside the limits of their territorial sovereignty[42] and not exercise it within those limits.[43]

In any case, just as there is so far no legally recognized boundary between airspace and outer space, there does not exist in international law any recognized upper limit of jurisdiction of subjacent states over foreign objects overflying them.

Moreover, it seems that—for the future—if the space object is to overfly foreign countries on whatever ground (free passage or permission granted) at a relatively low altitude *in transit without landing*—fixation of an upper limit of state jurisdiction and extension of jurisdiction of the subjacent state to space objects overflying it below that limit, would make little or no sense. First, because the period of overflight would be extremely short; second—because the possibilities of a subjacent state to establish facts occuring aboard overflying space objects are highly questionable; and—last but not least—because fixation of the limits of jurisdiction in space provides no remedy against possible violation of rights or interest of the subjacent states. On the other hand, remedies against such violations could be found on a functional basis, in reglamentation by specification of the acts prescribed, permitted, or prohibited.

Probably these are the reasons which convinced a number of competent authors that the principle according to which the author of launching would—in principle—retain jurisdiction over a space object launched by him, without limitation by any spatial boundaries, though the Declaration of Legal Principles—and, later, also the Treaty of 1967—still left the question open. In support of this attitude one may also invoke the argument that space activities retain their character of space activities from the moment of launching until the moment of landing, destruction or decay of a space object and if the legal reglamentation of space activities is to be based on the principle of jurisdiction of

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[40] For author's opinion on these questions—see SZTUCKI, *Problemy prawne kosmosu* (*The Law Problems of Cosmos*), Warsaw 1965, Chapters II—VI (English summary, p. 157—162).

[41] E. g. in certain instances states do not exercise jurisdiction over foreign ships during their innocent passage through territorial sea of the state concerned while the innocent passage as such is free; and in similar instances *mutatis mutandis* states do not exercise jurisdiction over foreign aircraft in transit over their territory without landing though in this case the passage through the airspace as such is subject to permission.

[42] Cf. e. g. Judgement of the Permanent Court of International Justice in "Lotus" case (PCIJ, Publ. No. A/10, p. 18, 35).

[43] Cf. e. g. Art. 31 of the Vienna Convention on diplomatic relations of 18 April 1963, or Art. Art. 19—22 of the Convention on territorial sea of 29 April 1958 relating to the conditions of innocent passage. In an analogous manner the question of jurisdiction of a subjacent state over foreign aircraft in transit without landing is settled.

a launching state, this principle should logically apply to these activities taken as a whole.

Paragraph 5 of the resolution of the Institute de Droit International of 11 September 1963, already referred to, declares that "every space object launched in accordance with the foregoing provisions shall remain subject to the jurisdiction of the state under the authority of which it was launched."[44]

It appears that the authors of this provision envisaged some possibility of an exemption of a space object from the jurisdiction of a launching state—but anyway based on obedience to certain rules of conduct ("foregoing provisions") rather than on any spatial boundaries.

But is the launching state to retain jurisdiction over space object launched by it, also while the said object is approaching the surface of foreign territory for landing and after it had landed there? The exact wording of the said provision—which does not contain any spatial or territorial limitations—would lead to a positive answer to that question as well. There certainly exist strong reasons in support of this proposal but, if we may judge from discussions in the UN Legal Sub-Committee, it is not being generally accepted at present. Some indications—if any—of the opposite attitude can be found in the discussion on the draft convention on assistance to and return of astronauts and space vehicles. Namely, in connection with the proposed obligation to return promptly astronauts to the country of their origin, the French delegation submitted an amendment to the effect that such an obligation "shall not be construed as preventing juridical or administrative proceedings, or the enforcement of measures resulting from such proceedings, instituted by reason of the deeds or words of such persons after the completion of operations relating to the emergency landing."[45]

The amendment has been submitted apparently in conviction that unless it is adopted, the convention might be construed as exempting astronauts from local jurisdiction, and in order to avoid such possible understanding of the obligation in question. Since Article VIII of the Space Treaty of 1967 assimilates space objects with personnel thereon insofar as the question of jurisdiction over them is concerned, we may assume that a similar difference of attitudes would apply to space objects themselves (though rules pertaining to return are to be different for space objects and for astronauts).

It is to be noted, however, that the present discussion in the Legal Sub-Committee is focusing on emergency situations with a generally recognized and practiced tendency to reduce to a necessary minimum limitations of freedom and rights of the party which suffered the distress. And whatever might be the solution of the question of jurisdiction over space objects and astronauts making an emergency landing on foreign territory, it is hard to believe that states would agree to the exemption of foreign space objects and astronauts from local jurisdiction if their landings were to become common and routine phenomena in the future, unless they would be otherwise enjoying jurisdictional immunity.

Little has been said so far on real rights with respect to space objects and their possible influence upon international legal status of the object. In the

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[44] Quoted after mimeographed text, p. 2. Cf. also KOVALEV and CHEPROV, *op. cit.*, Moscow 1962, p. 68.

[45] UN Legal Sub-Committee's conference documents WG. I/21 and WG. I/28—in doc. A/AC. 105/21, Annex I, p. 7.

second sentence of paragraph 7 the Declaration of Legal Principles states merely that "ownership of objects launched into outer space, and of their component parts, is not affected by their passage through outer space or by their return to the earth."

This principle has been upheld by the Treaty of 1967 which in the second sentence of Article VIII specifies additionally that it is also applicable to space objects delivered to or constructed on a celestial body, and that it is also not affected by the landing of a space object on a celestial body.

It follows from this provision that international space law does not dwell on material regulation of the right of ownership (probably also other real rights) of space objects, leaving it entirely to the domestic legal order. It appears that the provision quoted above has both its positive and negative aspects:

Positive—in the sense that international law notes that the right of ownership may in fact belong to another subject than that which is the subject of international rights and obligations with respect to any particular space object; and that it does not exclude any particular form of ownership of space objects, provided for in domestic laws.

Negative—in the sense that at the same time it does not recognize any international legal consequences of a possible variety of forms of ownership of space vehicles;[46] nor does it recognize ownership in general as a relevant legal title for acquisition of international rights or assuming international obligations with respect to a space object.

E.g., it is the state under the authority of which the space object was launched—and not its actual owner under domestic law—that is internationally responsible for the proper conduct of space activities performed by it (paragraph 5 of the Declaration of Legal Principles and Article VI of the Treaty of 1967). It is, further, the appropriate state (or states)—and again not the actual owner of a space object—who is held internationally liable for the possible damages and injuries caused by it to another state or its natural or juridical persons (paragraph 8 of the Declaration and Article VII of the Treaty); it is again a state which announced the launching of space object and not its actual owner—who may demand the return of the object, if found by another state or its nationals; and it is to that state and not to the owner that the object is to be returned (third sentence in paragraph 7 of the Declaration and in Article VIII of the Treaty);[47] and so on.

By stating that rights of ownership are not affected by passage of an object through outer space, the Treaty rejected the idea advanced by some authors on the threshold of space era, namely—that space objects should be considered *res derelictae* by the mere fact of their launching.[48] The provision in question explains—in a negative way—the influence of specifically "cosmic" circumstances upon the ownership of a space object.

On the other hand, nothing in the Declaration or in the Treaty impairs any change of the ownership status of a space object under conditions "normally"

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[46] Draft Code of Rules on the Exploration and Use of Outer Space prepared by the David Davies Memorial Institute for International Studies directly proposes that a space object "be deemed to be property" of the state that launched it (Art. 5, para. 2 b), thus refusing even to take note of the different forms of ownership of space object.

[47] Also—in preliminarily agreed Art. 6 of the Convention on assistance to and return of astronauts and space vehicles (cf. UN doc. A/AC. 105/21, Annex III, p. 3—4).

[48] See e. g. DANIER et SAPORTA, *Un nouveau problème de droit aérien : les satellites artificiels*, "Rev. Gén. de l'Air", 1955, s. 297—303.

provided for by the appropriate domestic law. It does not formally impair such changes even with respect to a space object while in flight. If, however, the concept of a factual link between an author of the launching and a space object launched—as a basis of acquiring international rights and obligations with respect to that object—is to be generally accepted with all consequences of it, it would follow that international transfer of ownership of a space object in flight should be prohibited. Otherwise, many complications hardly soluble would arise from such transfers.

In apparent recognition of difficulties which would arise from a possible transfer of ownership of a space object in flight, the David Davies Memorial Institute in its Draft Code provided directly (Article 5, paragraph 2 b) that a space object "*throughout its life* (italics added—J.S.) shall, with its component parts long as they are identifiable, be deemed to be property of that State" (i.e.—the State which launched and registered it).[49]

It has been said earlier that the idea of the application of the institution of *res derelicta* to space objects in general has been rejected in the Declaration of Legal Principles and that this position has been confirmed by the Treaty of 1967. However, insofar as real rights are concerned, probably every object may become a *res derelicta*. Thus, the question remains whether in some specific situations—if any—a space object might become an abandoned thing. Some reflections come to mind in connection with the preliminarily agreed Article 6 of the Convention on assistance to and return of astronauts and space vehicles. Paragraph 5 of the said article does not provide for unconditional return of an object found outside the territory of a state which announced the launching. Return takes place only upon request by that state while under paragraph 1 of the same article the states which (or whose nationals) found a space object launched by another state have to notify immediately of this fact the state concerned and the Secretary-General of the United Nations.[50] One may wonder, therefore, whether for lack of demand for return, the said object would not become an abandoned thing? True enough, the lack of any time limits for filling a demand for return makes an unequivocal answer to this particular question rather difficult, yet one may probably conceive still other circumstances under which a space object might possibly become a *res derelicta*. It seems, however, that in view of the Declaration of Legal Principles and of the Treaty, which do not provide for any exclusions from the rights of jurisdiction and ownership—any such exclusions would have to be specially agreed upon as conventional exceptions from the general rule.

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[49] See *Proceedings of the Fifth Colloquium...*, p. 12.

[50] Request for return has not been envisaged para. 7 of the Declaration of Legal Principles and—in principle—also under first two versions of the Soviet draft of the Convention on assistance to and return of astronauts and space objects (A/AC.105/C.2/L.2 and Rev. 1—Art. 7 and Art. 9 respectively). According to the third version of the Soviet draft (Art. 6, para. 2) the return of space object was made conditional upon request by the state which launched it.

THE JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE: THE PLEA TO THE ADMISSIBILITY

by MARIAN IWANEJKO

I

The procedure of the International Court of Justice is determined by the Statute and the Rules of the Court. These two sets of norms are part of the system of norms of international law and are of the same general character. They constitute a separate branch of international law which may be called the "procedural law" of the Court. On the basis of that denomination borrowed from municipal law the nature of the norms of the "procedural law" of the Court should not be prejudged by analogy with that of the norms of municipal procedural law. A systematic distinction between adjective and substantive law which is, as a rule, maintained in municipal law, cannot be justifiably drawn here.

The difference between the nature of the norms of municipal procedural law and that of the procedural norms of the Court is almost generally stressed in the science of international law, attention being drawn, in particular, to the following two distinguishing elements: 1. the non-exclusively formal character of the norms contained in the Statute and the Rules of the Court; 2. the more flexible, deformalized "judicial process."

Ad 1. The procedural rules of the Court are determined by the substantive rights of the states: the mutual rights of the parties to the Statute, the rights of the parties to a dispute before the Court, of the parties vis-à-vis the Court and of the Court vis à-vis the parties. They thus do not have the nature of technical norms of adjective law.[1]

Ad 2. The judicial process before the Court, that is to say, the duration of proceedings as a basic element of the dynamics of the process,[2] the way and methods of considering pleadings of the parties and also the order of the filling of the pleadings are determined by the Court itself *ad casum* on the basis of discretional power which it possesses in this respect. And although the static and dynamic side of the process is determined by the Statute and the Rules of the Court, and notwithstanding the fact that the parties to the dispute participate in

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[1] Cf. the statement by Judge Korecki in the Case Concerning the Northern Cameroons: "One cannot regard rules of procedure as being simple technical. They determine not only a way of proceedings but procedural rights of the parties as well" ("ICJ Reports" 1963, p. 40).

[2] M. CIEŚLAK, *Wstęp do nauki polskiego procesu karnego* (*Introduction to Polish Criminal Proceedings*), 1961, p. 18.

it in some measure (e.g. according to Article 37 of the Rules), it is, nonetheless, the Court that decides on the choice of concrete principles of procedure.

Both the structure of the Court, as well as some procedural institutions in the Court reveal many resemblances to various systems of municipal law.[3] The "judicial process" before the Court is, however, basically different from known patterns. It is under the impact of that "judicial process" that an international dispute pending before the Court may transform into several "disputes" in the procedural sense which provide a ground for the Court to conclude them with separate judgments. The possibility of such a transformation of one dispute into at least two "disputes" in the procedural sense arises principally, though not only, when preliminary objections are raised by the respondent party.[4] The raising of preliminary objections constitutes an obstacle to the examination of the merits of the claim set forth in the application in respect of which proceedings become suspended and the Court opens separate proceedings for the settlement of the preliminary question arising out of the objections raised.[5]

There appear then two stages in the proceedings before the Court: the jurisdictional stage and the stage of proceedings on the merits.[6] The judgment on the question of jurisdiction is of decisive importance for further proceedings. It may terminate the proceedings *in limine litis* or it may open the road to further proceedings on the merits.

The only normative indication establishing the principles governing the judicial process before the Court is contained in Article 62 of the Rules of the Court. This is a very general and broad indication. It gives the Court a wide discretional power (which the Court often comes to make use of) as regards the laying down and applying of such procedural principles as it deems in each particular case to be most adequately meeting the requirements of the administration of justice.[7]

That power is essential inasmuch as the exercise thereof predetermines the rights of the parties to the proceedings. As regards preliminary objections, that power of the Court is still more strongly emphazised in Article 36(6) of the Statute, which reads: "In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court." Thus the Court has been invested with a peculiar "compétence de la compétence."

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[3] Cf. K. GRZYBOWSKI, *Trybunały międzynarodowe a prawo wewnętrzne* (*International Courts and Municipal Law*), 1937, pp. 235ff.

[4] The practice of the Court has recorded the raising of preliminary objections by the applicant state or by the Court itself *proprio motu*. In the Monetary Gold case the Court declared that Art. 62 of the Rules of the Court did not exclude the filing of preliminary objections also by the applicant party, the question of competence being anyway decided by the Court itself ("ICJ Reports" 1954, pp. 28—29).

[5] It is worth while emphasizing that despite the plurality of judgments, the singularity of the dispute within the meaning of the principles of the administration of justice has invariably been stressed by the Court, even where from the point of view of the theory of international disputes it could be said that two different disputes were involved. Such case arises when the party which has obtained a judgment confirming an infringement of rights requests that the amount of compensation be assessed. The road of evolution of the principles by which the Court has been guided in such events leads from the Chorzów Factory case (Claim for Indemnity—PCIJ, Series A, No. 9, 1927) to the Corfu Channel Case (Assessment of Compensation—"ICJ Reports" 1949, pp. 244ff.); cf. also separate opinion of Judge *ad hoc* Ehrlich (PCIJ, Series A, No. 9, 1927, pp. 35ff.)

[6] In preliminary jurisdiction proceedings a change of roles takes place between the parties to the proceedings in accordance with the rule *exceptione reus sit actor*.

[7] "The Court....is at liberty to adopt the principle which it considers best calculated to ensure the administration of justice" (Mavrommatis Case, PCIJ, Series A, No. 2, p. 16).

Preliminary objections by their very nature serve the respondent. It is that party which tries to contest the application either on the ground that the merits of the claim cannot be the subject of a settlement before the Court (*ratione temporis*, *ratione materiae* or *ratione personae*),[8] or else because of the absence of formal conditions for the Court's jurisdiction or, lastly, because for other reasons proceedings are inadmissible. Nonetheless, however, preliminary objections may also be filed by the applicant party or even by the Court itself *proprio motu*.[9]

According to Article 62 of the Rules of the Court a state may file one or several preliminary objections and they may be of a different character. Rosenne suggests the following classification of preliminary objections on account of their character: a) interruptive; b) defensive; c) interpretative; d) suspensive. This classification of the types of preliminary objections points to the fact that their object is clearly procedural. Some of them (a) are of a purely preliminary significance, those of the defensive character (b) are closely related to the merits of the claim, the remaining ones (c, d)—on the other hand—may be either of a preliminary significance or not, depending on the circumstances.[10]

From the point of view of their contents preliminary objections may contain either a purely formal plea to the jurisdiction or a plea to the admissibility of the claim or, lastly, a plea to the jurisdiction on the ground of inadmissibility of proceedings.[11] Whatever the case may be, however, preliminary objections challenge any possible defects, whether in the application itself or on the part of the applicant, to meet some specified conditions.

In municipal procedural law the admissibility of the institution of proceedings and of a judicial settlement of a dispute is determined by what is called the "procedural premises." They may be purely formal conditions of admissibility of proceedings or they may consist in the fulfilment or non-fulfilment of the substantive legal conditions for seeking legal protection. "The subject-matter of an action may not be considered on its merits unless proceedings designed to produce a decision on the merits are legally admissible ... In certain circumstances the law does not admit proceedings; we then speak about the inadmissibility of proceedings or prosecution, about the impossibility to terminate such proceedings with a decision on the merits . . . in such event proceedings can be concluded only with a formal decision . . . that formal decision is presented as a dismissal of the action and signifies that the action has been concluded as inadmissible."[12]

In the British practice so defined conditions for the initiation of an action cover the institution of "preliminary enquiry" in criminal proceedings before

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[8] Cf. E. HAMBRO, *The Jurisdiction of the International Court of Justice* (76 RCADI, 1950/I/, pp. 125ff., 142—180).

[9] Such was the stand taken by the Court e. g. in Prince v. Pless Administration Case (PCIJ, Series A/B, No. 52, p. 15), and the principle governing this matter was formulated by the Court in the Chorzów Factory case in judgment No. 9 (PCIJ Series A, No. 9, p. 32); the present Court had a chance to take such a stand, *inter alia*, in decision in the Case Concerning the Northern Cameroons ("ICJ Reports" 1963, pp. 15ff.); cf. also A. DERYNG, *Kompetencja wyrokowania Stałego Trybunału Sprawiedliwości* (*Jurisdiction of the Permanent Court of International Justice*), 1930, pp. 112ff.

[10] S. ROSENNE, *The International Court of Justice*, 1957, pp. 344—345.

[11] *Ibid.*; this may relate particularly to a defective filing of an application.

[12] S. ŚLIWIŃSKI, *Proces karny* (*Criminal Proceedings*), 1961, pp. 95ff.; also J. JODŁOWSKI, W. SIEDLECKI, *Postępowanie cywilne* (*Civil Proceedure*), vol. I, 1958.

a Justice of Peace. The object of that enquiry is to ascertain "whether there is *prima facie* case against the accused" and to establish the "probability of charges."[13]

In the sphere of international procedural law no clear differentiation can be made between formal and substantive conditions on the basis of a division into adjective and substantive law. The distinction as regards preliminary objections between pleas to the jurisdiction of the Court and pleas to the admissibility of an action corresponds in a way to the distinction made in municipal procedural law. And although this distinction seems to be of a secondary importance, yet it assumes a particular significance owing to the absence of an explicit general rule, which would allow for the determination—beyond any doubt—of the character of an objection. The absence of any explicit provisions in this respect leaves much latitude to the Court in adopting such a principle *ad casum* as is considered by it to be "best calculated to ensure the administration of justice."[14] Such a method of appreciation of preliminary objections, the pragmatic method, reveals the specific powers of the Court as regards its judicial functions. The Court is becoming an organ which decides in an essential way on the enjoyment of specific substantive rights by the states.

The judicature of the Court provides a number of practical solutions of this problem. These solutions show that the Court has applied a variety of principles. These principles determined two fundamental procedural questions: the question of the order in which preliminary objections should be examined and the question (which is schematically dealt with in Article 62 (3) and (5) at what stage of the proceedings should the objections raised be considered (at the jurisdictional stage or at the stage of proceedings on the merits).

As regards the first question, the logic of the proceedings points to the need of applying—and quite uniform practice of the Court in this respect affirms—the principle that "preliminary objections must be examined—and rejected—before the plea of admissibility is examined."[15] Where preliminary objections are taken both to formal jurisdiction of the Court, and the admissibility, the point is to establish whether the claim would be admissible if the court had jurisdiction. In examining first the question of formal jurisdiction the Court at the same time (as if incidentally) ascertains the possibility of examining the question of the admissibility of the claim. Any change in this fundamental order in which preliminary objections are examined, may produce, particularly in two instances, undesirable consequences. Were the Court to consider first a plea to the admissibility and to uphold it making thereby the question of ascertaining whether it has jurisdiction redundant, it may happen that it does so without having jurisdiction at all. Were the Court—on the other hand—to reject the plea

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[13] E. JENKS, *The Book of English Law,* 5th rev. ed., 1956, pp. 81—82; also R. M. JACKSON, *The Machinery of Justice in England,* 1953, pp. 120—121.

[14] "In particular it (the Court) need not consider whether 'competence' and 'jurisdiction', *incompétence* and *fin de non-recevoir* should invariably and in every connection be regarded a synonymous expressions" (PCIJ Series A, No. 2, p. 10); "Neither the Statute nor the Rules of Court contain any rule regarding the procedure to be followed in the event of an objection being taken *in limine litis* to the Court's jurisdiction. The Court therefore is at liberty to adopt the principle which it considers best calculated to ensure the administration of justice..." (*op. cit.*, p. 16).

[15] Separate opinion by Sir Hersch Lauterpacht in the Interhandel case (Preliminary Objections — "ICJ Reports" 1959, p. 100; cf. also in the same case the separate opinion by Judge Sir Percy Spender (*op. cit.*, p. 54), and also the judgment itself in which the Court changed the order of examining objections (*op. cit.*, p. 23).

to the admissibility first and then to decide that it lacks jurisdiction, it would not only clearly recognize that it did something without having jurisdiction but, what is more, it would infringe upon the principle of the economics of the proceedings.[16]

There may be cases, however, in which the mixed character of an objection combined with the principles of the economics of the proceedings make it imperative to examine a plea to the admissibility before a plea to the jurisdiction. Such a plea is examined by the Court as a "preliminary question."[17] In the Corfu Channel case (Preliminary Objection) the plea to the admissibility of the claim raised by Albania on ground of the inadmissible form of instituting proceedings by means of an application was precisely of that nature.[18] It justified thus the interlocutory examination of that part of the plea which related to the admissibility in priority over other questions.

In proceedings before the Court the most essential question, however, is that of determining which of the preliminary objections (most often pleas of inadmissibility) should be considered at the jurisdictional stage of proceedings and which of them should be joined to the merits. The risk entailed in an improper procedural classification of those objections has been repeatedly emphasized. H. Lauterpacht characterises it as follows: "It often happens that an objection to the jurisdiction is closely connected with a question relating to the very merits of the dispute . . . If the Court answers these questions in the Judgment relating to the jurisdiction it may be compelled to do so as the result of an examination which, having regard to the procedure relating to preliminary objections, may be cursory and far from exhaustive." And if the Court does so and rejects its jurisdiction, it runs the risk that the argumentation has not been exhausted. If the Court—on the other hand—declares itself competent, the prejudging of certain elements of the merits of the dispute may be unavoidable.[19]

The only answer to both these questions may be the practice of the Court which—as we shall see—is not uniform and is governed by vague principles of the administration of justice. As a general rule, however, the Court has been guided by certain principles of reasoning which may generally be characterized as follows: in distinguishing an objection to the admissibility from an objection to the jurisdiction in the strict sense, the examination of the contents of the objection itself should be decisive. In distinguishing—on the other hand—a plea to the admissibility on formal grounds from pleas which should be joined to the merits, the fundamental practical consideration that a judgement on the latter cannot be given without going into the merits of the claim should be taken as a basis.

The external features of an objection: the form in which it is raised or its particular type, do not constitute a sufficient basis for distinction. As regards

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[16] It suffices for the Court to rule on the basis of one objection that it has no jurisdiction or that the claim is inadmissible to make the examination of further objections redundant.

[17] Cf. below.

[18] "ICJ Reports" 1948, p. 27ff.

[19] H. LAUTERPACHT, *The Development of International Law by the International Court of Justice*, 1958, pp. 113 and 250—252; cf. also individual opinion by Judge Mbanefo in South West Africa Cases ("ICJ Reports" 1962, p. 437). Different opinions were expressed e. g. by Judge Carneiro (Ambatielos Case, individual opinion—"ICJ Reports" 1952, p. 48), Judge Read (Anglo-Iranian Oil Company case, separate opinion—"ICJ Reports" 1952, p. 149), Judge Klaestad (Nottebohm Case, separate opinion—"ICJ Reports" 1955, pp. 32—33).

the form of filing preliminary objections, Article 62 of the Rules of the Court provides that the intention of a state filing preliminary objections should be clearly stated. The documents presenting the submissions in this respect should be entitled "preliminary objections." But even in this matter the Court has displayed a tendency towards deformalization.[20] In the case of the Monetary Gold Removed from Rome in 1943 the Court opened proceedings under the name of "preliminary question" on the basis of a document so denominated by Italy.[21]

Neither should we let ourselves be guided in this respect by the type of an objection. The order in which it is examined should invariably be determined by the intimate connection existing between the plea and the dispute of which the Court is seized. And although the most typical pleas to the admissibility are definable (e.g. non-existence of a dispute, non-exhaustion of local remedies, exclusive domestic jurisdiction, lack of prior diplomatic negotiations, lack of a legal interest and the like),[22] the very identification of a plea to the admissibility is not of a decisive significance.

II

Despite a variety of solutions, the judicature of the Court allows for a systematization of the methods applied by the Court in this respect and hence for an identification of procedural principles on the basis of the following practical solutions:

A. Delivery of a "interlocutory decision" on a plea to the admissibility;
B. Examination of a plea to the admissibility at the jurisdictional stage of proceedings—a) with a favourable result, b) with a negative result;
C. Division of preliminary proceedings into two phases;
D. Examination of preliminary objections at the stage of proceedings on the merits a) without jurisdictional proceedings, b) as a result of a joinder.

A. Apart from judgments (relating to the jurisdiction, to the merits, to interpretation and to compensation) the Court makes use in contentious cases of yet another form of decision, *viz.* orders. The majority of orders are of the nature of purely procedural decisions: they fix the time-limits for the submission of the documents of the case, the dates of public hearings and the like. Not infrequently, however, the scope of a decision expressed by the Court in this form goes beyond the purely formal character of an order. This is particularly true of orders containing a decision on the removal of a case from the Court's list or on the indication of interim measures of protection or—lastly—of orders in which the very character of preliminary objections has been determined by the Court's decision on the order in which they are to be examined.

As regards the first category, *viz.* orders on the removal of a case from the Court's list, they reflect the very characteristic problem of the lack of jurisdiction

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[20] "The Court... is not bound to attach to matters of form the same degree of importance which they might possess in municipal law" (PCIJ, Series A, No. 2, p. 34).

[21] "ICJ Reports" 1954, p. 22.

[22] G. Salvioli devoting one part of his lecture in the Hague Academy to the admissibility of a claim (*recevabilité de la demande*) classified the conditions of admissibility into three groups: general conditions of admissibility, detailed conditions relating to the protection of private interests, grounds on which an interpretation of a judgment may be asked for (G. SALVIOLI, *Problèmes de procédure dans la jurisprudence internationale*, 91 RCADI, (I), 1957, pp. 557—583).

consisting mainly in that the initiation of any proceedings whatsoever is found impossible (inadmissible) due to the fact that the Court has not been validly seized. In such cases an order becomes a *sui generis* "interlocutory decision" declaring the Court incompetent on account of the inadmissibility of the institution of proceedings in general.[23]

As regards the second category of orders they are made by the Court "after deliberation." The examination of a preliminary request by the applicant party for the indication of 'interim measures of protection' calls for the opening by the Court of preliminary contentious proceedings. In those proceedings the Court decides incidentally on the admissibility of the indication or establishment of the requested measures of protection. The granting or rejection of such a request does not, in principle, entail any effects which would prejudge the question of the Court's competence to adjudicate upon the substance of the claim itself. An order is limited to a statement whether the measures of protection asked for would not infringe upon the disputed rights of the respondent. It may, however, occur that the Court in rejecting the applicant's request motivates its decision to this effect by the inadmissibility of the request owing to the character of the claim itself. The order of the Court in the Case Concerning the Polish Agrarian Reform and the German Minority (1933) provides an example of such a decision. The Court gave the following reasons for its decision rejecting Germany's application as follows: "The interim measures asked for would result in a general suspension of the agrarian reform in so far as concerns Polish nationals of German race and cannot be regarded as solely designed to protect the subject of the dispute."[24] Further, however, the Court states that the German request "is not in conformity with the provisions of Article 41" of the Statute.[25] That laconic statement of the Court was explained in greater detail by Judge Anzilotti in his individual opinion. He also held that Germany's application for the indication of interim measures of protection should be dismissed and argued that "such an application would . . . be null and void, owing to the complete absence of certainty as to the object of the claim."[26]

Finally, another category of orders within the discussed sphere are such orders in which the Court pre-determines at the preliminary stage the very character of the pleas raised by deciding to dispose of them at the stage of proceedings on the merits. Already in the form of an order the Court recognized, as if preliminarily, that further proceedings on the merits "will place the Court in a better position to adjudicate with a full knowledge of the facts upon the second objection."[27] In another order the Court held that the preliminary objection raised may be considered as ". . . a defence on the merits, or at any rate as being founded on arguments which be employed for the purpose of that defence."[28] Such orders take, as if, the place of jurisdictional proceedings. They are, however, of the nature of preliminary decisions in so far as they classify

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[23] Cf. e. g. the Aerial Incident case of 4 September 1954, Order of 9 December 1958 ("ICJ Reports" 1958, pp. 158ff., and also "ICJ Pleadings" 1958, pp. 8ff).

[24] PCIJ, Series A/B, No. 58, p. 178.

[25] *Op. cit.*, p. 179.

[26] *Op. cit.*, p. 182.

[27] PCIJ, Series A/B, No. 66, p. 9.

[28] PCIJ, Series A/B, No. 67, pp. 23—24; see also Panevezys-Saldutiskis Railway Case (PCIJ, Series A/B, No. 75, pp. 55ff.).

only *prima facie* the pleas raised and determine that their character is intimately related to the merits of the claim.

On the borderline between orders of the nature of preliminary decisions as illustrated above and a judgment relating to jurisdiction there are decisions on "preliminary questions." A particular example of such a decision is provided by the judgment on a "preliminary question" in the Case of Monetary Gold Removed from Rome in 1943.[29] This is not a typical example and that is precisely why it may constitute a precedent. First, on purely formal grounds: Article 62 of the Rules of the Court explicitly provides for the possibility of filing "preliminary objections" by a party. In this case both the document submitted by Italy, as well as the proceedings as a whole related formally to a "preliminary question" despite the fact that Article 62 of the Rules of the Court was expressly invoked. In reality in such open proceedings there was no question of a "dispute" as to the Court's competence.[30] It is in that that the judgment's second feature of the nature of a precedent consists in. The "preliminary question" was submitted by the applicant state (against its own claim) which was something new to the practice of the Court. This question raised doubts as to the admissibility of the claim. If in these unusual circumstances there arose a dispute at all, it was because in view of the "objection" so formulated by Italy, Great Britain as one of the respondents in the case postulated that the claim be declared "invalid and void."[31] The Court did not upheld this view. The Court found, however, that as regards the first proposal contained in the Italian application, the jurisdiction conferred on the Court by the parties "does not, in absence of the consent of Albania, authorize it to adjudicate" and as regards the second proposal—"it cannot adjudicate upon it."[32]

The very formulation of the reasons for the decision, the unusual procedure followed in respect of a "preliminary question" challenging the jurisdiction of the Court (—without the consent of Albania as a party concerned) and, lastly, the substance of the second Italian proposal, asking for a declaratory judgment[33]—all this caused that the judgment of the Court related to the inadmissibility of the claim. With regard to the first proposal because "where . . . the vital issue to be settled concerns the international responsibility of a third State, the Court cannot, without the consent of that third State, give a decision on that issue . . ."[34] As regards the second proposal—because the Court, while recognizing the connection existing between the first and the second proposal, declined to give a hypothetical decision on the priority of the claims of Italy and Great Britain without having satisfied itself that the claim of Italy is legally justified.[35]

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[29] "ICJ Reports" 1954, pp. 19ff. Similarly in the South West Africa Cases (Preliminary Objections) the Court solved such a preliminary question put forward on its own initiative: before examining preliminary objections "the Court finds it necessary to decide a preliminary question relating to the existence of the dispute which is the subject of the Application" (ICJ Reports" 1962, p. 328).

[30] What is more Great Britain in Observations and Submissions reserved to herself "the right... to present arguments at the later stage on the merits of the question of competence ("ICJ Reports" 1954, p. 24).

[31] *Ibid.*

[32] *Op. cit.*, p. 34.

[33] The point was to establish priority as regards the settlement of the claims of Italy and Great Britain to the Albanian gold.

[34] "ICJ Reports" 1954, p. 33.

[35] Cf. separate opinion by Judge Carneiro ("ICJ Reports" 1954, p. 44).

In both instances the character of the grounds as recognized by the Court to constitute obstacles to the examination of the claim related either to the inadmissibility of the commencement of proceedings[36] or to the inadmissibility of the application (seeking a declaratory judgment).

The judgment in the Asylum case rejecting a request for the delivery of an interpretation judgment is of the character of a preliminary decision rendered by the Court on the basis of arguments presented *proprio motu*. In a statement of reasons, non-existence of a dispute as to interpretation and hence non-fulfilment of an essential condition of Article 60 of the Statute[37] were referred to by the Court as grounds on which it had found the claim inadmissible.

B. Article 62 (3) of the Rules of the Court[38] provides for the examination of preliminary objections at a separate preliminary stage of proceedings.

The following three selected examples of jurisdictional judgments covering also the examination of pleas to the admissibility will give us an insight into various procedural situations and may provide also a basis for certain conclusions.

In the Interhandel case (Preliminary Objections) the Court examined four preliminary objections put forward by the United States. Two of them related to the admissibility of the application of Switzerland, *viz.*: the Third Objection pointing to the "non-exhaustion of local remedies" by Switzerland, and the Fourth Objection (with two variants a and b) asking for a ruling to the effect that the claim of Switzerland concerned matters lying "within domestic jurisdiction" of the United States.[39]

The Court was of the opinion that only the Third Objection related to the admissibility; it held—on the other hand—that the Fourth Objection as one referring to a reservation of the United States attached to the "declaration of acceptance" was a formal objection to the jurisdiction.[40]

The procedure adopted by the Court in respect of objections so classified by it is characteristic. In accordance with its conviction as to their character, the Court changed the order in which they were adjudicated upon giving priority to objections to jurisdiction (the First, Second and Fourth Objection) over objections to the admissibility. In spite of having adopted that course, the Court disregarded a part of the Fourth Objection considering that it was "without object at the present stage of proceedings."[41]

The judgment in the Interhandel case is an example of the Court deciding, at the stage of preliminary objection proceedings, that it was not competent, precisely on the ground of the inadmissibility of the claim, because the objections put forward by the United States to the jurisdiction in the formal sense (Objection 1, 2 and 4 b) were rejected. The contents of the objection based on the ground of non-exhaustion of local remedies wholly justified the examination of that objection at the preliminary stage. There was no connection between

[36] Cf. individual opinion by Judge Read: "The Application did not comply with the provisions of Article 40 (1) of the Statute and Article 32 (2) of the Rules. Accordingly there was a fundamental defect in the Application by which these proceedings were commenced (*op. cit.*, p. 38).

[37] "ICJ Reports" 1950, pp. 395ff.; in this case no oral proceedings took place.

[38] "Upon receipt...of a preliminary objection...the proceedings on the merits shall be suspended..."

[39] "ICJ Reports" 1959, pp. 10—11.

[40] *Op. cit.*, pp. 23—24.

[41] A different view was expressed by Judge Sir Percy Spender in his individual opinion: "Before adjudicating upon the Third Objection, the Court...is obliged first to satisfy itself that otherwise it has jurisdiction. It cannot be so satisfied unless and until it rules upon Objection 4a" (*op. cit.*, p. 54).

the objection and the merits of the claim and the examination as to whether the objection was well-founded, consisted in an investigation of the facts relating to the history of the dispute between the parties before the application instituting proceedings before the Court was filed.

The jurisdictional judgment of the Court in the Case Concerning the Northern Cameroons was of a completely different character, despite the fact that also in this case the Court declared itself not to be competent to adjudicate upon the merits of Cameroon's claim on the ground of the inadmissibility of a specified *petitum* of the claim. The Court found that "it cannot adjudicate upon the merits of the claim" owing to the following conclusions which it reached after a lengthy argumentation: "Whether or not at the moment the Application was filed there was jurisdiction of the Court to adjudicate upon the dispute submitted to it, circumstances. . . render any adjudication devoid of purpose," and "any judgment which the Court might pronounce would be without object."[42]

The Court reached these conclusions following the examination of the claim itself and of its character. It ignored or, at any rate, did not consider all preliminary objections to the jurisdiction of the Court raised by the United Kingdom.[43] A major part of the considerations—on the other hand—pertained to an objection raised by the Court *proprio motu*, an objection to the admissibility of the claim whose object was to obtain from the Court a declaratory judgment.

By proceeding in this way the Court departed from the ordinary judicial process. The Court confirmed that indirectly in the following words: "The answer to the question whether the judicial function is engaged may . . . need to wait upon an examination of the merits. In the present case, however, it is already evident that it cannot be engaged."[44]

Such a statement may give rise to doubts as to the merits and, in any case, is based on a principle arbitrarily adopted by the Court. Formally—on the other hand—it constitutes a departure from the principles of procedure as laid down in the Statute and the Rules of the Court. Among the opinions submitted by the judges who were in minority, the opinion by Judge Korecki elaborates further upon that argument. In his remarks he draws attention, in the first place, to the improper method adopted by the Court which ignored "a broadly accepted rule" that "the Court should first decide on its jurisdiction and subsequently consider the plea of admissibility."[45] But Judge Korecki emphasizes even more strongly that in reality the Court by not adjudicating upon its jurisdiction has—as early as at the preliminary stage of proceedings—"appraised Cameroon's claims on their merits. Such an appraisal could be only made at the later stage of proceedings (on the merits) and by such an appraisal the Court substituted for the stage of deciding on preliminary objections to jurisdiction the stage of deciding the case on its merits."[46]

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[42] "ICJ Reports" 1963, p. 38.

[43] It can be stated with certainty that the Court has expressly given its views only on one of the three objections, viz. on the first plea, according to which a dispute between the parties as to the subject of the claim was non-existent (*op. cit.*, p. 28).

[44] *Op. cit.*, p. 38, cf. the remarks contained in the article by D. H. N. JOHNSON, *The Case Concerning the Northern Cameroons*, (13) The Int. and Comp. L. Q., 1964, pp. 1143 and 1166ff.

[45] "ICJ Reports" 1963, p. 39.

[46] *Op. cit.*, p. 40; cf. also the statement by Judge Spiropoulos (*op. cit.*, p. 39), also the separate opinion by Judge Bustamante (p. 183).

The judgment in the Case Concerning the Northern Cameroons may serve as an example of the merits of the claim having been prejudged in the negative sense at the preliminary stage of proceedings. According to the Rules of the Court, the Court was empowered to decide on the inadmissibility of the claim at this stage only inasmuch as the examination of the objections did not require going into the merits of the claim. What is more, the Court in its pragmatic reasoning went even further by declaring that it may pronounce on the admissibility and even appraise the merits of the claim without first satisfying itself that otherwise it has jurisdiction.[47]

Just like it is a risky thing to pronounce in a preliminary judgment on the Court lacking jurisdiction on the basis of a plea to the admissibility relating to the essence of the claim, it may—for other reasons—also prove inappropriate to declare at this stage that the Court has jurisdiction, while rejecting the plea to the admissibility.

The judgment in the South West Africa cases (Preliminary Objections) furnishes an example of such a decision. At the stage of preliminary proceedings the Court considered four preliminary objections raised by the South African Republic[48] and one "preliminary question" raised *proprio motu* as to whether there existed at all a dispute between the parties.[49] The first two objections related to the jurisdiction of the Court in the formal sense (interpretation of the jurisdictional clause contained in the mandate agreement and the *locus standi* of the applicant states—Ethiopia and Liberia). The other two objections related to the admissibility of the claim[50] (lack of a legal interest on the part of the applicant states and lack of prior diplomatic negotiations).

The Court, following a thorough examination of the objections, dismissed all of them, declaring itself competent to adjudicate upon the merits of the claim.

Although the above classification of the preliminary objections put forward into pleas to the jurisdiction and pleas to the admissibility seems to be justified, as regards their contents, however, the first three objections (two to jurisdiction and the third to admissibility) show a particular connection with the merits of the claim. It was those objections that compelled the Court to allow the argumentation to go far into the sphere of arguments relating to the merits.[51] If we take, moreover, into account that as regards the question of the mandate of South West Africa, the Court had previously issued three separate opinions determining both the legal character of that territory, as well as the duties of the mandatory, that the Court had, moreover, to invoke those opinions in its statement of reasons, the judgment relating to jurisdiction ruled upon much more than was warranted at this stage of proceedings.[52] It seems that better procedural solutions would have been for the Court to declare on the basis of its ruling re-

[47] Judge Morelli in his individual opinion attempted to prove that the Court was lacking jurisdiction (while substantiating at the same time the admissibility of Cameroon's claim)—*op. cit.*, pp. 131ff.

[48] These objections were ultimately formulated in oral submissions at the session of the Court on 11 October 1962 ("ICJ Reports" 1962, pp. 326—327).

[49] *Op. cit.*, p. 328.

[50] Such a determination of the character of the preliminary objections in this case is underlined by Judge Bustamante y Rivero in his individual opinion (*op. cit.*, pp. 349 and 386).

[51] Cf. individual opinion by Judge *ad hoc* Sir Louis Mbanefo: "The way in which the claims of the Applicants and the Preliminary Objections of the Respondent are framed make it difficult for the Court to avoid touching on the merits of the case" (*op. cit.*, p. 437).

[52] Cf. the separate opinion by Judge Basdevant ("ICJ Reports" 1962, p. 460).

lating to the "preliminary question" and the Fourth Objection, that it had jurisdiction and to join the first three objections to the merits.[53]

Yet contrary to author's contentions the South West Africa cases found their—quite unexpectable if not surprising—solution in the judgment of 18 July 1966 (Second Phase).[54] The said judgment merits thorough examination as an example of unusual significance. There is, however, no room in present article to expound delicate and even embarassing questions involved. Yet one main feature of that judgment must be here emphasized as it reveals a basic irregularity of proceedings in the case. The judgment closed the proceedings which were opened as proceedings on merits. In the course of them, however, the Court's considerations turned ultimately (and *proprio motu*)[55] to the question of admissibility of the claim. The Court, disregarding the fact that that question has been once validly settled by its own judgment of 1962 (which was final and without appeal, Article 60 of the Statute), dealt with the question of *locus standi* of claimants in the case. After careful examination the Court reached the conclusion that the claim must be rejected as the claimants had no legal rights in the subject matter of the claim. In fact then the claim has been rejected as inadmissible.[56]

Both judgments alike are open to formal objections.

C. The judgment in the Nottebohm case (Second Phase) provides an example of a procedure revealing that particular "intermediate" character of a plea of admissibility. In that judgment the Court ruled "that claim submitted by the Government of the Principality of Liechtenstein is inadmissible."[57]

The first judgment in this case was relating to jurisdiction solving a preliminary objection (*ratione temporis*) raised by Guatemala.[58] Guatemala reserved to herself, already at this point, the right to submit further objections, should the Court declare itself competent.[59] The Chairman when asked about the possibility of raising further objections after the termination of preliminary proceedings, refused to give any explanation.[60] Also the Court in its judgment was silent on this point, although it could have aroused certain doubts in connection with the wording of Article 62(1) of the Rules. Under this provision a party is obliged to file preliminary objections not later than before the expiry of the time-limit fixed for the submission of the first document in the case.

The "second phase" of proceedings, as it was this time called by the Court, was formally commenced as proceedings on the merits. And it was held so still

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[53] A similar suggestion but in a more general form is given in the joint separate opinion of Judges Sir Percy Spender and Sir Gerald Fitzmaurice: "A Court called upon to consider objections to its jurisdiction must exclude from consideration all questions relating to the merits, unless the jurisdictional issues are so intertwined with the merits... and must be joined to the merits" (*op. cit.*, p. 466).

[54] "ICJ Reports" 1966, pp. 6ff.

[55] *Op. cit.*, p. 19.

[56] The said Judgment consists in an example of *praeter legem* (if not *contra legem*) revision of the Judgment of 1962. See dissenting opinions of Judges Korecki and Jessup (*op. cit.*, pp. 239ff., and 325ff.). See also A. HAJNICZ, *Wyrok MTS i jego implikacje (The Judgment of the ICJ and its Implications)*, "Sprawy Międzynarodowe" 1966, No. 11, and M. IWANEJKO, *Dwa wyroki MTS w sprawach Afryki Południowo-Zachodniej (Two Judgments of the ICJ in South West Africa Cases)*, "Państwo i Prawo", 1967, No. 7.

[57] "ICJ Reports" 1955, pp. 26.

[58] "ICJ Reports" 1953, pp. 111ff.

[59] *Op. cit.*, p. 124.

[60] ICJ Pleadings 1953, II, p. 618.

in the last reasoned order which was issued prior to the commencement of that phase, and which fixed the time-limits for the submission of the documents relating to the merits of the case. In her Counter-Memorial Guatemala submitted (in accordance with her former objection), apart from arguments against the merits of Liechtenstein's claim, three objections to the admissibility of the claim. Despite the fact that Guatemala did not invoke Article 62 of the Rules of Court, the pleas were genuine preliminary objections. Also in this case the Tribunal was silent on the very question of the principles of procedure and, after having examined one of the pleas raised, held the claim of Liechtenstein to be inadmissible, and terminated proceedings *in limine litis*.[61]

Thus a stage of proceedings formally commenced on the merits was in reality transformed into a "second phase" of preliminary proceedings. A precedent has been established thereby laying down a specific judicial interpretation of Article 62 of the Rules, an interpretation permitting a party to put forward preliminary objections—despite the fact that it has already once used that right—also at the stage of proceedings on the merits. Undoubtedly, the fact that Liechtenstein did not object to such a procedure was of decisive significance as regards its adoption.

D. The influence of the will of the parties, even where it is not directly disclosed like in the Nottebohm case, may assume—like in the case of Liechtenstein—the form of an explicit disposition by the state raising the objection to the effect that no separate stage of proceedings is to be opened for its examination. In such event the Court, by opening proceedings directly on the merits, considers the objection raised as an interlocutory preliminary question.

Such way of proceeding, although consistent with Article 37(1) of the Rules of Court, does not find any clear justification in Article 62. That article provides, in the event of preliminary objection being filed, only for the suspension of proceedings on the merits and the opening of preliminary objection proceedings, or—after the parties have been heard—for the delivery of a judgment on the objections or for their joinder to the merits.

The practice of the Court found a different solution also in this matter. Examples of such solutions are the judgment of the Permanent Court of International Justice in the Rights of Minorities in Upper Silesia case (1928) and the judgment in the Certain Norwegian Loans case (1956).

As regards the first judgment, the Court—apart from deciding on the merits—ruled then in the first place "that the objections whether to the jurisdiction or respecting the admissibility of the suit... must be overruled."[62] This became possible owing to a statement of the representative of Poland which was accepted by the Court "that he had not raised his objection to the

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[61] The problem as ultimately formulated and examined by the Court was very loosely related to one of Guatemala's objections. In critical observations on the position taken by the Court it was also emphasized that the decision on the inadmissibility of the application was delivered on grounds "not even contended for by Guatemala nor discussed by Liechtenstein" (J. Mervyn JONES, *The Nottebohm Case*, 5 Int. and C. L. Q. 1956, p. 238); similarly, Judge Klaestad in his dissenting opinion held that the Court failed "to afford to the parties an opportunity to argue this point before it is decided" ("ICJ Reports" 1955, pp. 30—31); and also J. L. KUNZ, *The Nottebohm Judgment*, 54 AJIL, 1960, pp. 539—543.

[62] PCIJ, Series A, No. 15, p. 46.

jurisdiction as a preliminary objection, but that he meant it to be taken together with the merits."[63]

As regards the second judgment, the Court on the basis of an agreement between the parties joined the preliminary objection proceedings to the merits "in order that it may adjudicate in one and the same judgment upon these Objections and, if need be, on the merits."[64] In this case, just like in the Nottebohm case, proceedings opened on the merits were terminated with a judgment on jurisdiction, as the Court after examining the objections did not find itself competent.

The matter looks quite different where the Court—in accordance with the provision of Article 62(5)—decides at the stage of preliminary proceedings to join preliminary objections to the merits.

The Case Concerning Right of Passage over Indian Territory[65] provides an example of a dispute definitely concluded in both phases.

Two out of the six preliminary objections put forward by India at the jurisdictional stage of proceedings were joined by the Court to the merits. The reasons given by the Court indicate that "it is not possible to pronounce upon the Fifth Preliminary Objection at this stage without prejudging the merits,"[66] or that "any evaluation . . . although limited to the purposes of the Sixth Preliminary Objection, would entail the risk of prejudging some of the issues closely connected with the merits."[67]

The objections joined to the merits related either to the contention that in view of the absence of any grounds under the norms of international law the subject of the dispute fell within the exclusive domestic jurisdiction of India or to the contention that the dispute originated in a situation and facts which occurred prior to a certain date, specified as the condition for the Court's jurisdiction. The Fifth Objection was of the nature of a plea to the admissibility and the Sixth Objection clearly related to the competence of the Court. Despite their different character they were related by the connection of each of them with the merits of the claim.

The Case Concerning the Barcelona Traction, Light and Power Company Limited (New Application: 1962) may serve as an illustration of a similar method of proceeding. Spain raised four preliminary objections, out of which the first two were rejected by the Court in a preliminary decision. The other two, as relating to admissibility, were joined by the Court to the merits.[68]

The objections joined to the merits were based: the third—on lack of title on the part of Belgium to file the application (national character of claim), and the fourth—on "want of utilization of the local remedies."

The argumentation of the Court in this case is characteristic of the particularly great care with which it examined preliminary objections. Even the statement of reasons for the joining of the Third and Fourth Objection to the merits (which

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[63] *Op. cit.*, p. 8; thus the question arises whether this interpretation of Art. 62 in connection with Art. 37 (1) of the Rules of Court is justifiable: it seems that the very character of a preliminary objection excludes, under the explicit stipulation of Art. 62 (1), the possibility of disregarding the preliminary stage of proceedings. The very statement of the party designed to have such an objection joined to the merits went beyond the party's procedural rights.

[64] "ICJ Reports" 1956, p. 74.

[65] Preliminary Objections, 1957; Merits 1958.

[66] "ICJ Reports" 1957, p. 150.

[67] *Op. cit.*, p. 152.

[68] "ICJ Reports" 1964, p. 6, and at p. 47.

the Court clearly held to be pleas of admissibility)[69] was preceded by an extensive doctrinal argumentation invoking the findings of the Court in previous judgments. This judgment is characteristic inasmuch as (apart from the decision on the joining of the said objections to the merits) it contains general methodological principles expressed *obiter dictum* and relating to proceedings on preliminary objections.[70] It is a rare practice for the Court to make such statements. It does, so, as a general rule, where it attempts either to establish a precedent rule, or to choose between two alternative or several rules applicable to the solution of a question. In the discussed case it is the latter meaning that should be ascribed to the argumentation of the Court. Because from a wealth of previous reasoned judgments on similar questions the Court quotes those formulations which uniformly define the principle of procedure chosen by the Court in this case in preference to other principles. According to this principle preliminary objections which can be regarded as defences to the merits, may not be adjudicated upon at the jurisdictional stage of proceedings but should—in accordance with Article 62(5)—be joined to the merits.

Although the principle itself as adopted by the Court is acceptable and can, moreover, be regarded as applicable and appropriate in all cases, however the way and method of its application arouse reflections. The rank the Court assigned in its considerations to the question of joinder of preliminary objections to the merits, did not result from an initiative taken by the Court, nor was it the result of an autonomic investigation of the interdependence between the contents of the Third and Fourth Objection and the subject of the claim, but the result of a request by the applicant state, since Belgium preferred that those two objections should be either held unsubstantiated or joined to the merits.[71] She did so mainly on account of their external type as she considered them to be of the nature of pleas of inadmissibility, and not by reason of their content and its connection with the subject of the claim. Judge Armand-Ugon in his separate opinion criticizes the stand taken by the majority of the judges and argues that the court may but in two instances join preliminary objections to the merits: where both parties ask for it, or a situation arises in which the plea "is so bound up with the question which constitutes the merits of the case that it is manifestly impossible to decide the one without deciding the other at the same time."[72] He further argues that there is no such connection in this case[73] and that compliance with the request in this respect of the applicant party alone may constitute a basis for joining the objection to the merits but "only as an absolutely exceptional step."[74]

Thus, from the proposition of Judge Armand-Ugon it transpires that, in principle, it is only an absolute certainty as to the character of the objection

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[69] "ICJ Reports" 1964, p. 41.

[70] "It will be appropriate at this point to make some general observations about such joinder" (*ibid*). The Court invoked five previous judgments and also apart from Article 62(5) referred to the discussion held by the Permanent Court of International Justice in 1936 on that article of the Rules of Court (PCIJ Series D, Third Addition, No. 2, pp. 646—649).

[71] "ICJ Reports" 1964, pp. 13, 15, 41.

[72] *Op. cit.*, p. 164.

[73] *Op. cit.*, pp. 163—166.

[74] Because "it runs manifestly counter the respondent's rights not to have merits of the case discussed unless it has first of all been established that in one way or another, its consent has been given to the Court's deciding the case" (*op. cit.*, p. 164).

and not a matter of convenience resulting from judicial caution[75] that should decide on the joining of objections to the merits.

That caution should naturally be just a reflection of the doubts which a preliminary examination of an objection may evoke as to the existence of a close connection between the objection and the subject of the claim. On this point Judge Jessup in a statement annexed to the judgment expresses the view that the principle of caution applies even where on the basis of detailed materials submitted by the parties, like in the above case, the answer to the question whether the plea should be upheld or rejected was beyond any doubt.[76]

The judgment which we are discussing provided a chance for expressing yet another basic principle "on preliminary objections in general."[77] Judge Morelli presents still another theoretical solution as a result of a doctrinal interpretation of Article 62. According to that theory in the case considered by the Court only one (the second) objection lent itself to examination at the preliminary stage of proceedings, while the remaining ones (the first, third and fourth) were not preliminary objections at all and hence they could neither be considered at the preliminary stage of proceedings nor—the more so—joined to the merits following such consideration. They should have been rejected on the ground of being inadmissible as preliminary objections. This does not mean that the party may raise these objections as separate, not preliminary objections, at the later stage of the case.[78]

III

The caution and carefulness with which the Court examined the problem of joinder of the objections to the admissibility of the Belgian claim in the Case Concerning the Barcelona Traction, and also the extensive argumentation on that matter in a number of opinions annexed to the judgment, reveal that there was an atmosphere of heated discussion among the Judges sitting in the Court. An earnest of this discussion were the previous two judgments of the Court in the South West Africa cases and in the Case Concerning the Northern Cameroons.

Notwithstanding the fact that the tradition of the judicature of both the former, as well as the present Court has followed the line adopted as far back as the early years of the Court's activity in the Mavrommatis Palestine Concessions case (1924),[79] the Court deemed it appropriate both in the reasoned decisions of the majority, as well as in separate and individual opinions, to carry out a basic reappraisal of the principles and methods of procedure applied to preliminary objections. The Court has begun increasingly more often to individualize among the preliminary objections those which related to the admissibility. They are clearly distinguishable by their character and as peculiar judicial remedies they require that proper consideration is to be taken of them in the proceedings.

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[75] A completely opposite view represented Judge Wellington Koo; see "ICJ Reports" 1964, p. 52.

[76] *Op. cit.*, p. 50. "Consequently ... conclusions of law applicable to arguments involved in those two objections, even though I would find them capable of formulation now, may appropriately be deffered until the subsequent stage of the case."

[77] *Op. cit.*, pp. 97—101.

[78] "ICJ Reports" 1964, pp. 97—98.

[79] PCIJ, Series A, No. 1, pp. 10 and 16; cf. footnote 14 above.

The practice of the Court, as systematically presented above, proves that the plea to the admissibility has in particular cases taken two different forms, i.e. either the form of a plea to the admissibility of instance (*recevabilité de l'instance*) or the form of a plea to the admissibility of the claim (*recevabilité de demande*).[80]

The absence of any formal stipulations as to that particular category of pleas, both in the Statute, as well as in the Rules of the Court, has allowed the Court, in general reliance on Article 62, to include them in the set of judicial remedies provided therein, *viz.* preliminary objections. This has in turn caused that they have been brought under the general term of pleas to the jurisdiction of the Court. This resulted from the fact that if the Court has found a plea of inadmissibility justified, its competence to any further entertainment of the case ceased.

However, the Court has on many occasions given expression to its conviction that this judicial remedy should be clearly differentiated whether it is used as a plea to the admissibility of the institution of proceedings in general, or as a plea to the admissibility of the claim (*petitum*).

On the whole the practice of the Court has been also quite uniform in excluding from preliminary objections those pleas which related to the admissibility of the institution of proceedings. The Court—not examining the question whether they are well-founded before examining pleas to its own competence—assigned to them an interlocutory priority character. Such course was adopted by the Court *proprio motu* in the South West Africa cases when it considered whether there existed at all a dispute between the parties as to the subject of the application; such was also the course it followed in the Monetary Gold case in which it considered (what was an unusual step to take) the plea to the admissibility of the institution of proceedings as a so-called "preliminary question."[81]

A plea to the admissibility of the institution of valid proceedings is invariably based on the finding of some defect as regards the fulfilment of conditions, which consists either in the non-compliance in the application with the specified formal conditions (e.g. non-indication of the subject-matter of the claim, request for an advisory opinion and the like), or in the absence of some previous action on which international law makes a judicial settlement of a claim dependent (prior diplomatic negotiations, including also the existence of a dispute).[82]

It goes without saying that the determination of the question whether such a plea is well-founded will depend on the actual existence of a rule of customary law requiring—in accordance with the principle of proportional means—to have recourse to simpler means of settling disputes before a judicial settlement

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[80] Cf. G. SALVIOLI, *op. cit.* pp. 558—559; this problem is in a sense dealt with by DELLEMAN, *Excepties voor het International Gerechtshof*, 1949; see also the opinion by Judge Morelli in the Case Concerning the Barcelona Traction ("ICJ Reports" 1964, p. 98), separate opinion by Judge Winiarski in South West Africa cases ("ICJ Reports" 1962, p. 449).

[81] See also the above discussed procedure followed by the Court in connection with the delivery of preliminary judgments.

[82] Cf. G. SALVIOLI, *op. cit.* pp. 558—567; he discusses the question of the adminissibility of claim according to the following elements: "regularité de recours," "intérêt à agir," "existence de la controverse," "negociations diplomatiques."

is sought. The question when it should be recognized that a dispute has arisen between the parties is equally doubtful.[83]

It may, however, occur, that conditions of that category are accepted by the parties in the form of reservations at accepting the jurisdiction of the Court and then the content of the pleas to the admissibility of the institution of proceedings fulfils at the same time the role of a jurisdictional plea by virtue of Article 36(2) of the Statute.

Another form of objections to the admissibility are pleas to the admissibility of the claim. In this event there may exist a clear connection with the very merits of the claim which may, moreover, be so intimate that any decision on such a plea, at the preliminary stage of proceedings, may prejudge the whole case pending before the Court.

In respect of that type of pleas the Court has established the rule of not considering them until after it has examined and rejected pleas to its jurisdiction. That procedural principle together with the explicit provistion of Article 62(5) of the Rules clearly point to the intermediate character of that category of pleas, which when raised at the stage of proceedings on preliminary objection fulfil at the same time the role of a defence to the merits.[84]

Pleas of that category may relate to non-exhaustion of local remedies, nationality of claims[85] and the like.

Acting within a wide discretional power as regards the application of such procedural rules which are best calculated to ensure the proper administration of justice and to safeguard to the utmost the judicial function of the Court, the Court has worked out in its practice a number of detailed rules. In this sense the principles of the administration of justice have become a source of inspiration in the concretization—within the framework of the provisions of Article 62 of the Rules of Court—of detailed rules of procedure applicable to preliminary objections in general and to objections to the admissibility in particular.

Those rules may be formulated as follows:

1. The applicant party has an equal right with the respondent to raise preliminary objections.

2. That right is vested, as if, *ex officio*, also in the Court itself.[86]

3. Pleas to the admissibility of the institution of proceedings should be considered in priority over pleas to the jurisdiction of the Court.

4. Pleas to the admissibility of the claim should be adjudicated upon after the examination of pleas to the jurisdiction of the Court and they should either be covered by a preliminary decision (Article 62‹1›), or joined to the merits (Article 62‹5›). The joining of objections to the merits is decided by their intimate connection with the merits.

So defined rules fill Article 62 of the Rules of the Court with a practical content. The attempt to articulate those rules goes beyond the usual interpretation of that

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[83] E.g. the Court held that the stand taken by Camercon in the organs of the United Nations, which reflected views contrary to those of Great Britain, was sufficient to recognize the existence of a dispute.

[84] Judge Morelli in his separate opinion in the Case Concerning the Barcelona Traction held that pleas of that kind should be declared inadmissible as "preliminary objections" ("ICJ Reports" 1964).

[85] Cf. G. SALVIOLI, *op. cit.*

[86] The rights referred to under 1. and 2. were exercised in respect of pleas of inadmissibility.

article. It is of a manifestly creative nature. The process of evolution of those rules was accompanied by two basic (and in a sense opposite) tendencies: subordination to the principles of the logic of the judicial process and subordination to the policy of the administration of justice (economics of the judicial process and similar considerations of advisability).[87]

The wide power of the Court in this respect has provided a chance opening the road to an informal search for rules in reliance on Article 38(2) of the Statute, and then through invoking them under Article 38(1d)—a chance for evolving a set of rules to be applied in supplementation to Article 62 of the Rules of the Court.[88]

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[87] Cf. the opinion by Judge Morelli ("ICJ Reports" 1964, pp. 98ff.).
[88] Cf. statement by Judge Korecki ("ICJ Reports" 1963, p. 40).

PRACTICE OF INTERNATIONAL ORGANIZATIONS AND CUSTOMARY LAW

by KAROL WOLFKE

The rapid development of international law by treaties in the course of the last hundred years has considerably lessened the importance of custom in international relations. It would be, however, a heavy mistake to neglect the present role of customary law as there are still branches of international life regulated by old customary rules and, what is more important, new customs are arising. Especially the activity of international organizations creates multifarious occasions for the evolution of new unwritten rules of conduct. True, writers dealing with problems of international organizations concentrate their interest mainly on written instruments and decisions. Lately, however, some attention has also been payed to the formation of customary rules by the practice of such organizations.[1]

The objective of this article is to throw more light on the law-creating effect of practice and precedents of international organizations, in particular, on their contribution to the formation of customary rules of international law.

Before approaching the main problems it is necessary, however, to clarify what nowadays should be understood by customary international law in general, for the worn oversimplified opinions on that law which still prevail in many textbooks do not permit a right appraisal of the present part played by it.

First of all, it should be stressed that not only customary rules as such are evolving but also the very concept of customary international law. Especially, on such revolutionary changes as have taken place in every field of international life a change in the requirements for the validity of customary rules and in the mechanism of their formation should be expected.

The analysis of most representative practice and opinions[2] leads to the conclusion that international customary law embraces all legal rules arising from a very broadly conceived practice which has been acquiesced in by the states concerned as an expression of a legal obligation or right. To the development of a customary rule of international law there must be a practice, that is—action, mainly (but not exclusively) of individual or common organs of

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[1] See, *e. g.*, C. W. JENKS, *The Proper Law of International Organizations*, London 1962; R. HIGGINS, *The Development of International Law Through the Political Organs of the United Nations*, London 1963; J. KOLASA, *Rules of Procedure of the United Nations General Assembly*, Wrocław 1967.

[2] For details see the present author's, *Custom in Present International Law*, Wrocław 1964.

states, and a presumed acceptance of that practice by other states as expression of right or obligation. These are the two already known elements of international custom: the so-called material element—practice, and the formal one—presumed acceptance.

At first glance it may seem as if there was nothing essentially new in such a definition. Similar requirements may be found in the doctrine. The difference between traditional opinions on international custom and the new trends in this respect is important however. It consists in more general requirements for the formation of a custom and hence, customary rule.[3] Whereas until lately the opinion prevailed that practice must be long, uninterrupted and consistent of a considerable number of states, at present the conviction is growing that there are no rigid criteria whatever in this respect. In particular, there is no absolute need for practice being either long, uninterrupted or consistent. It must not be necessarily general either, since there may be particular, even bilateral, customary rules. All depends on the totality of accompanying conditions. And the estimation whether in a given case the requirements for the birth, change or extinction of a custom have been fulfilled rests with the organ authorized by the states concerned.

The other fundamental element necessary for the existence of a customary rule, the requirement of acceptance, has evolved, too. The traditional *opinio juris sive necessitatis*, often interpreted as an unverifiable feeling or belief that the practice should be in accord with the already existing law, is being replaced by the view that this requirement boils down to acquiescence in a certain practice, sufficient evidence of this acquiescence being absence of protest.

This trend towards simplification of the requirements for the existence of customary rules is closely related to the enormous changes which have taken place in the whole international life. In the days of stage coaches and sail ships a long period of time and a large number of facts were necessary in order that states could take cognisance of a practice at all and could react to it by accepting or opposing it. Today, when, practically speaking, every event of international importance is known to the whole world, and, what is more important, every state can immediately, even on the same day, inform the whole international community that it opposes a certain practice—the requirements for a customary rule can be fulfilled very quickly, as result of even a few precedents.

The confirmation of this is to be found in the growing alertness of states, for they know that acquiescence in even one act of behaviour of another state undesirable for them may have serious legal effects—it may lead to the legalization of such behaviour and consequently—to the rise of a legal rule authorizing such behaviour. Precisely this is why nowadays so frequent are reservations raised by representatives of states against considering an exceptional act, contrary to the existing law, as precedent for the future.

Summarizing, one may say that the essential change in the rhythm of international life, caused mainly by the development of new means of communication, have brought about a considerable increase of the law-creating effect of every tolerated fact.

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[3] Custom is a kind of practice, hence actual qualified conduct. Whereas customary rule is the corresponding right or obligation, which is (or may be) expressed in words.

As to the mechanism of formation of customary law, not much information is available. It is even doubtful if there exists a uniform pattern of this process, considering the great diversity of occasions and circumstances in which such rules may arise. We may only say that such rules arise in consequence of mutual toleration of facts of behaviour.

It is also impossible to state when a customary rule comes into being or how many facts of acquiescence in a practice authorize the presumption that the state concerned accepted it as expression of a customary rule, for the moment of birth of such a rule is, by its very nature, intangible. We can only ascertain the circumstances as to the existence or non-existence of a rule at a given time.

Some authors draw an analogy with the formation of municipal customary rules. This is however misleading like any analogy between society composed of individuals with that composed of states. It suffices to mention that whereas individuals are, practically speaking, not aware that they contribute by their actions to the formation of customary law, state organs know perfectly well the legal consequences of every precedent and, therefore, watch so closely the practice of other states and react immediately on every fact undesirable to them.

The intangibleness of the process of formation of international customary rules is precisely one of the reasons why it is so difficult to state authoritatively if at all, and how, such new rules are arising. We learn of the existence of customary rules, formally speaking, only when they are ascertained by the organs authorized to do so, when legal disputes arise or the process of codification is carried out. Moreover, in this way we get information rather about those rules whose validity has been challenged. Paradoxically as it may sound, practice which is followed with no reservation by anybody, which therefore fully deserves the name of custom, may require neither confirmation nor formulation as legal rule, simply because there is no need for it.

Another reason why it is so difficult to pin-point new customary rules of international law is that international organs and writers are reluctant to qualify a settled practice as custom. This is due not only to their prudence but also, as it seems, to the general lack of orientation of what constitutes a customary rule of international law. Parenthetically, it should be added here that subparagraph 1(b) of Article 38 of the Statute of the International Court of Justice being not very happily worded has not become a satisfactory guide in this respect.

Instead of the term "customary rule" various other terms are used, like "accepted practice," "well understood practice," "continued practice," "precedent," etc. The best proof that often precisely customary rules are meant is that such "practices" or "precedents" are applied as basis of judicial opinions or decisions of international organs.

In spite of the above mentioned difficulties, we may, of course, point to areas where new customary rules, both general and particular, are developing. International relations growing with nearly geometrical progression create numerous occasions and needs for new unwritten rules of behaviour, especially in those branches of international life where, for various reasons, the conclusion of treaties or formal adoption of binding decisions is difficult. The most important function of present international customary law consists not so much, however, in regulation of a yet unregulated section of that life but, primarily, in the elastic adaptation of existing rules to new, ever changing conditions and require-

ments. In this respect, as it seems, customary law constitutes still an unrivalled instrument.

This is richly confirmed by the growing experience of international organizations. Although their activity is based, in principle, upon written rules, by multiplying contacts between states and by initiating new fields of cooperation they enormously enrich international practice. Numerous and miscellaneous situations arise which require regulation, and this is often brought about faster and better by way of practices than by the formal procedure, forseen in the statutes.

What should, however, be understood by "precedent" and "practice" in case of international organizations?

As far as precedent is concerned, it seems safest to use it in its broadest meaning, that is—every act of behaviour or ommission which has or may have any significance for international law, especially its development, application or interpretation. Of course, in the majority of cases only acts of individual or common organs of states come into play, but actions of, e.g., private persons, non-governmental organizations, employees of organizations are not excluded as far as they may have any bearing on international law. Every decision, opinion, any action or ommission related to such a decision, etc., may constitute a precedent.

Similarly, the term "practice" ought to be used in its broadest meaning, as a way of conduct in a certain period of time. Whereas precedent constitutes a single act of behaviour, practice is precisely composed of precedents determining the way of behaviour in a type of situation. Thus we speak of frequent, important, sporadic, etc., precedents, but of consistent, inconsistent, long, short, etc., practices.[4]

Practices and precedents of international organizations in their broad meaning may contribute in many ways to the development of a great diversity of customs. First of all, they contribute to the development of rules of general international law. It is obvious that, for instance, the practice of interpretation of the statutes of organizations by their organs or by their members enriches the general practice of interpretation of treaties. The opinions pronounced at the meetings of an organization on this subject may contribute to the fulfilment of the element of assent of the arising custom of general international law. Declarations, opinions, resolutions of organs where state representatives take part, as well as pronouncements by individual member-states on problems of international law or on an existing practice participate, too, in the evolution of customary international law.[5]

In this connection, one thing which often seems to be neglected, should be recalled. In evaluating the law-creating effect of an international practice or precedent one must always bear in mind both elements required for the evolution of international custom, that is—actual behaviour and acquiescence by the states concerned. Neither practice if not accompanied by presumed acceptance, nor opinions, however numerous, if not accompanied by deeds, can by themselves evolve into custom.[6]

[4] The use of the terms "precedent" and "practice" in narrower meanings seems unfounded and misleading.

[5] See, *e. g.*, HIGGINS, *op. cit.*

[6] One cannot overestimate the rightness of Professor Pal's opinion expressed in his dissenting opinion to the Judgment of the International Military Tribunal for the Far East: "Custom-

Further, the practice of international organizations contributes also to the evolution of customs in relations between those organizations and individual states, members or non-members, as well as in relations with other organizations.

Most typical for the practice of international organizations is, however, its effect on the evolution of the provisions of their constitutions and regulations. Practice of an organization supplements, amends or even abrogates written rules of such instruments. An abundance of examples of such practices may be found, for instance, in the invaluable *Repertory of Practice of the United Nations Organs.* A few of them, chosen at random, will help us to a better understanding in what the custom-making effect of the United Nations practice consists.

At first glance, from the very arrangement of this publication, it may be seen that this practice constitutes a live, best adapted to current needs and conditions interpretation of the basic instruments of the Organization, sometimes leading even to their factual revision.

The United Nations practice is described in various ways. In numerous cases, it has been simply stated that some facts have frequently taken place or that a practice exists.

For instance, as regards Article 18 of the Charter we read: "In practice, proposals representing a decision of the General Assembly *have frequently been considered as adopted* without a formal vote having been taken in plenary meeting. . ."[7]

In relation to Article 27: "*It has been the practice* of the [Security] Council to vote by show of hands, and when so voting, to ask for the votes of those in favour, those against, and those abstaining. In the record of votes, members have also been identified as not having participated or as having been absent".[8] Further: "Article 27 stipulates that decisions of the Security Council are to be made by the affirmative vote. *The Council has not infrequently taken recourse to other methods of reaching a decision* [. . .] Between 1 September 1956 and 20 August 1959, the Council took approximately one hundred and five decisions, of which fifty eight affirmative or negative decisions were taken by vote. . ."[9]

In connection with Article 62(1) of the Charter, we read *inter alia*: "*In practice*, the [Economic and Social] Council has also made recommendations to non-member states, subsidiary organs [. . .] voluntary agencies [. . .] and individuals."[10]

From the practice connected with the application of Article 67 of the Charter the following statement may be cited: "*It has been the practice* of the [Economic and Social] Council to take decisions on some proposals without a formal vote,"[11] and: "*Procedural questions have frequently been decided* on the suggestion of the President and with the tacit consent of the members of the Council. *This has always been the practice*, for example, in the case. . ."[12]

As regards the practice connected with the implementation of Article 69 of the Charter we find the following: "*It has been the practice* for Members of

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ary law does not develop only by pronouncements. Repeated pronouncements at best developed the custom or usage of making such pronouncements." R. PAL, *International Military Tribunal for the Far East: Dissenting Judgment,* Calcutta 1953.

[7] *Repertory of the United Nations Organs,* vol. I, p. 572. Italics added.

[8] *Ibid.*, vol. II, p. 66. Italics added.

[9] *Ibid., Supplement* No. 2, vol. II, p. 308. Italics added.

[10] *Repertory, op. cit,* vol. III, p. 246. Italics added.

[11] *Ibid.*, vol. III, p. 467. Italics added.

[12] *Ibid.* Italics added.

the United Nations not members of the [Economic and Social] Council to designate 'observers' to attend sessions of the Council. . ."[13] and: "*the practice of the Council has been* to allow the representatives of Governments invited to participate in its deliberations to make statements. . ."[14]

In numerous cases the practice is qualified in the *Repertory* as "general", "regular", "current", "continued", etc. For instance, relating to Article 73 of the Charter we read: "It has [. . .] become the *regular practice* for the General Assembly, in approving the special reports on economic, social and educational conditions in Non-Self-Governing Territories, to request the Secretary-General to communicate these reports for consideration to the Economic and Social Council as well as to the Trusteeship Council and the specialized agencies."[15] And further: "*The current practice* is to bring to the consideration of the Trusteeship Council the special reports adopted by the Committee of Information from Non-Self-Governing Territories. . ."[16]

In respect to Article 87 a practice has been characterized as follows: "Since the establishment of the Standing Committee on Petitions, *the practice* of hearing petitioners in the Council itself *has continued*. . ."[17] "*Practices* with regard to the composition of periodic visiting missions and the examination of other reports *remained unchanged*. . ."[18]

To illustrate the importance ascribed to even single precedents it suffices to mention the numerous cases when member states or officers of the United Nations objected to an exceptional departure from an express provision or a settled practice fearing that such an exception would create a dangerous precedent. Here are a few typical examples taken from the *Repertory*.

In relation to Article 9 of the Charter we read that "special measures were taken by the General Assembly at its eleventh and twelfth sessions to ensure that the Members being admitted should be able to take part as rapidly as possible in the General Assembly's proceeding. Thus [. . .] prior to the consideration of the provisional agenda, the General Assembly decided [. . .] to approve item 25 'Admission of new Members to the United Nations' for inclusion in the agenda for purpose of considering immediately the applications of Sudan, Morocco and Tunesia." In proposing this procedure the President stated: "the consideration of this item at this stage presents a recourse to a special procedure calculated to meet the special circumstances of the present case, *and it does not constitute a precedent.*"[19]

The delegation of the USSR in the Sixth Committee agreed to grant to the Trusteeship Council the right of requesting advisory opinions from the International Court of Justice, although this Council had not requested such right, on condition that this procedure "*should not constitute a precedent.*"[20]

Interesting cases in this respect may be found in the latest study by Kolasa.[21] At the First Session of the General Assembly when the delegate of USSR asked

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[13] *Ibid.*, p. 530. Italics added.
[14] *Ibid.*, p. 534. Italics added.
[15] *Ibid.*, vol. IV, p. 34. Italics added.
[16] *Ibid.*, p. 36. Italics added.
[17] *Ibid.*, 351. Italics added.
[18] *Repertory*, *op. cit.*, *Supplement* No. 2, vol. III, p. 343. Italics added.
[19] *Ibid.*, vol. II, p. 6. Italics added.
[20] *Repertory*, *op. cit.*, vol. V, pp. 89—90. Italics added.
[21] I wish to express my thanks to my friend Docent Jan Kolasa for calling my attention to some examples from the practice of the General Assembly.

for a postponement of the election of non-permanent members of the Security Council, this met with opposition. Most expressive was the argumentation by the representative of USA, Mr. Byrnes. He said that if they postponed the work on the agenda as it had been agreed, at the request of any one delegation, *they would establish a precedent which would be certain to cripple the future work of the Assembly*. Mr. Byrnes was of the opinion that "they would find it exceedingly difficult to deny to other that was granted to one delegation." Consequently the request of postponement has been rejected by 34 votes to 9, with 8 abstentions.[22]

At the first plenary meeting of the First Session of the General Assembly the delegate of Uruguay, in order to end the deadlock in the election of non-permanent members of the Security Council, asked the President to consult the Assembly as to whether or not it wished to proceed to the election by acclamation. The President replied among others: "If the Assembly wishes to create a precedent I am. . . at its disposal; yet *such a precedent would not*, I think, *be entirely without danger*." The precedent has not been created, however, since the Uruguayan delegate withdrew his motion.[23]

At the election of six members of the Economic and Social Council at the same Session many delegates opposed the proposal by the Belgian delegate to give up his country's seat on the Council and thus enable the election of Netherland and Turkey. Among others, the opposing delegates argued that such a solution would constitute a "dangerous" or "bad" precedent. Very characteristic in connection with this case was the view of the delegate of Argentina who said: "Some time ago a representative wished to give up his place in favour of another, and a secret vote refused him that; it is therefore not permissible that Belgium should relinquish her seat conditionally."[24]

During the First Special Session of the General Assembly, the President also warned against setting up undesirable precedents saying that the session was too specific in character to yield in the temptation "of *creating up precedents for the future occasions. . .*" *it was their duty "not to establish precedents which might be invoked on later occasions."*[25]

An interesting opinion may be found in the report of the First Committee at the Second Session of the General Assembly. During the debate on the problem of the independence of Korea, the representative of USSR, Mr. Gromyko, stated, *inter alia*, that since Jewish and Arab representatives had been invited at the time of the examination of the Palestinian question, and the Albanian and Bulgarian representative—at the time of the examination of the Greek question, a decision should be first taken on the question of inviting the Korean representatives *"in order not to create a bad precedent."*[26]

Most outspoken as to the legal importance of precedents and practices of international organizations certainly are those cases where they have been applied like legal rules or even expressly declared as binding.

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[22] *Official Records of the First Part of the First Session of the General Assembly, Plenary Meetings* 1946, pp. 73—75, 79. *Cf.* KOLASA, *op. cit.*, p. 151. Italics added.

[23] *Official Records, op. cit.*, p. 84; *cf.* KOLASA, *op. cit.*, p. 152. Italics added.

[24] *Official Records of the Second Part of the First Session of the General Assembly, Plenary Meetings*, 1946, pp. 1222—1225; *cf.* KOLASA, *op. cit.*, pp. 152—153.

[25] *Official Records of the First Special Session of the General Assembly, Plenary Meetings*, 1947, p. 9; see KOLASA, *op. cit.*, p. 154. Italics added.

[26] *Official Records of the Second Session of the General Assembly, First Committee*, 1947, p. 275. Italics added.

In the *Repertory of Practice of the United Nations Organs* we read, for instance, in respect to Article 18 of the Charter: "Alternatively, the President has ruled that a particular vote referred to an important question or that a particular resolution requires a two-thirds majority in order to be adopted, or *has based a ruling on a precedent established at a previous session* with respect to the voting on the subject under consideration."[27]

With regard to the procedure of announcing the results of voting in the General Assembly, the majority of Members considered that a special provision was superfluous and "*only confirmed a practice which was already established and normally observed by* the presiding officers. . .In opposition to the opinion that it was unnecessary and unadvisable to 'introduce ultimate refinements in the rules', the view was held that *the proposed amendment served to legalize the present practice.*"[28]

At the request of Argentina to be heard by the Economic and Social Council under Article 69 of the Charter, the president of that Council stated that hitherto, "*requests for hearing made under Article 69 had always been granted by the Council and he had no doubt that the members would wish to follow precedent in that particular case.* The Council agreed to hear the government concerned."[29]

Since a draft resolution submitted in the Fourth Committee during the Fourteenth Session of the General Assembly did not contain a statement on the competence of the General Assembly to decide whether a Non-Self-Governing Territory had or had not attained a full measure of self-government, an amendment was submitted to add a preambular paragraph to that effect. This amendment was opposed by some representatives who asserted that the General Assembly had no competence in this matter and by others, on the basis that it was unnecessary. In the *Repertory* we read: "Representatives supporting the amendment pointed out that *it merely followed the precedent of the General Assembly resolution* on Puerto Rico, on Greenland and on Netherlands Antilles and Surinam; *by communicating the pertinent information with Puerto Rico to the General Assembly, the United States had in fact given recognition to the competence of the General Assembly in this matter.* This view prevailed, and the amendment was incorporated in the draft resolution, which was subsequently adopted by the General Assembly."[30]

In respect to Article 85 of the Charter we read further that on a request by a petitioner to be allowed to speak again after the opening of the general debate on the report of the Trusteeship Council the Chairman noted that "*according to established practice*, petitioners stated their views and answered questions put to them, but did not take part in the general debate."[31]

Established practices and precedents of the United Nations organs have not only been followed and applied; they were also codified. For instance, at the Second Session of the General Assembly, as result of special studies of the practices, recommendations were made "for *the codification of existing practices.*" Consequently several new rules have been incorporated into the rules of procedure.[32] As Kolasa states: "In the course of the functioning of the General

[27] *Repertory, op. cit.*, vol. I, p. 574. Italics added.
[28] *Ibid., Supplement* No. 1, vol. I, p. 217. Italics added.
[29] *Repertory, op. cit.*, vol. III, p. 533. Italics added.
[30] *Ibid., Supplement* No. 2, vol. III, p. 197. Italics added.
[31] *Ibid.*, p. 316. Italics added.
[32] "*Recommendations for the codification of existing practices.* In the absence of precise provisions in the rules of procedure, certain useful practices have already become established. The

Assembly, particularly at the first few sessions, the codifying of customary procedural practices was no rarity."[33]

In the light of the above one may ask: how does the mechanism of formation of such unwritten customary rules operate?

From the few examples quoted it may be seen that acquiescence in a certain conduct implies assent to consider such conduct as legal. Acquiescence in an act of behaviour, more or less, legalizes it and, consequently, precludes, at least to some extent, the right to challenge it or declare illegal in the future. Thus a right to behave in this manner, *ergo* a customary permissive rule, arises.

That does not mean, of course, that any acquiescence can legalize every practice. True, no change is excluded, but all circumstances should be taken into account. For instance, the presumption of general assent must certainly be stronger when practice considerably deviates from the law in force than when this is not the case. Moreover, there are certainly limits of such change by means of practice, determined by the basic objectives and principles of every legal order. It cannot be admitted, for example, in the United Nations that any acquiescence could legalize a practice contrary to the main objectives and principles of the Charter, for this would amount to the destruction of the Organization as a whole.

On the other hand, not every kind of opposition precludes the formation of an established practice and hence customary rule. Such opposition must be in any case consistent. To such conclusion leads, for instance, the evolution of the well known and already generally accepted practice in the Security Council, according to which abstentions by permanent members of the Council are viewed as not affecting the requirement of concurring votes by those members.[34]

As it is stated in the *Repertory of Practice*: "During the period 1946—1954, sixty four decisions of seemingly non-procedural character were adopted by the [Security] Council by a vote in which one or more of the permanent members abstained. That the abstention of a permanent member otherwise than in accordance with the proviso of Article 27(3) does not preclude fulfilment of the requirement of Article 27(3) concerning affirmative decisions by the Council has been affirmed in presidential rulings and by each of the permanent members. One permanent member has placed before the Committee of Experts a proposal to embody this practice in a rule of procedure."[35] It has further been stated in the same volume that "on certain occasions some elected members have expressed doubt regarding the legality of decisions taken when a permanent member has obstained. One instance is cited in the proceedings of the Council when such an objection was raised."[36]

Committee has proposed that some of these practices should now be codified... *Proposed rule 35* (Alternates on the General Committee). It has been the custom that a Vice-President of the Assembly may designate a member of his delegation to represent him on the General Committee and that a Chairman of a Main Committee should, if he cannot attend a meeting of the General Committee, designate the vice-chairman of his committee as his substitute. The proposed new rule 35 confirms this practice." *Official Records of the Second Session of the General Assembly, Sixth Committee, Legal Questions,* 1947, pp. 255—256; *cf.* KOLASA, *op. cit.*, pp. 144—145.

[33] KOLASA, *op. cit.*, p. 145.

[34] *Repertory, op. cit.*, vol. I, p. 198.

[35] *Ibid.*, vol. II, p. 81.

[36] *Ibid.*

In *Supplements* to the *Repertory* no more opposition or reservations have been recorded. We read there only that the practice "continued unchanged."[37] In *Supplement* 2, vol. II it has been stated that "[d]uring the period under review, the Council adopted six decisions by a vote in which one of the permanent members abstained" and that "such abstention did not preclude the fulfilment of the requirement of Article 27(3). . . was affirmed in presidential rulings and by each of the permanent members."[38]

Another well-known practice should be mentioned, where reservations against considering it as precedent were much more consistent. This concerns the practice of splitting the term of office of non-permanent members of the Security Council, which is at variance with the provisions of Article 23 of the Charter. At several sessions of the General Assembly, it was only due to a gentlemen's agreement between the two candidates receiving the largest number of votes, that the deadlock in the elections to the Council was brought to an end. Such informal agreements by which the elected candidate agreed to withdraw from the Council after one year to enable the other candidate to fill the vacancy met with objections on the part of many delegations. Nevertheless, the Assembly and the parties concerned have always executed such agreements. It may be doubted, therefore, if, in spite of the reservations, it should not be considered as an already legalized way of ending a deadlock at elections.[39] Such a conclusion is fortified, for example, by the view of the President of the General Assembly at the Fifteenth Session when it was again necessary to follow the practice of agreement between the parties who obtained the largest number of votes. The President in his appeal to accept the terms of the gentleman's agreement between the parties stressed that he had used the same terms as had been used by his predecessors in announcing similar agreement to the Assembly.[40] In this connection the statement of the representative of Brazil is worth mentioning: "I am afraid of doing what is contrary to our Charter, but that has been done before and you [the President] were right when you just showed us the precedent, the last one, because it has been done twice."[41]

One may argue that by means of a tolerated practice only customary rights but no obligations may arise. At the first glance it seems so, since it is certainly more difficult to point to a tacit acceptance of an obligation to behave in a certain way than to a tacit permission, hence right, to act. In fact, however, everything

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[37] *Ibid.*, *Supplement* No. 1, vol. I, pp. 86, 272; *Supplement* No. 2, vol. I, pp. 86, 191

[38] *Repertory, Supplement* No 2, vol. II, p. 310. Professor Tunkin writing on this practice quotes a few opinions and reservations raised in the Council which show clearly that, in spite of earlier opposition against considering such practice as constituting a precedent for the future, in fact, this practice has been generally accepted as a rule. He concludes that "the above rule, resulting from the interpretation of Article 27 of the United Nations Charter, develops to some degree and supplements Subparagraph 3 of Article 27 of the Charter. Tacitly accepted by the members of the United Nations it has consolidated in the practice of the Security Council" (G. I. TUNKIN, *Voprosy Teorii Mezdunarodnogo Prava*, Moscow 1962, pp. 112—113). It should be added here, however, that, since the practice in question is clearly at variance with the express provision of Article 27 (3) of the Charter, it is hardly possible to speak of an "interpretation."

[39] *Cf.* S. BAILEY, *The General Assembly of the United Nations,* London and New York 1960, pp. 168—174; W. Morawiecki, *Organizacje Międzynarodowe* (*International Organizations*), Warszawa 1965, 2nd ed., pp. 139—140; KOLASA, *op. cit.*, pp. 155—156.

[40] *Official Records of the Fifteenth Session of the General Assembly Plenary Meetings*, 1960, p. 1485.

[41] *Official Records, op. cit.*, p. 1486; *cf.* KOLASA, *op. cit.*, p. 156.

depends on the content of the practice and the way in which it has been acquiesced in. Besides, one should not forget that each right has a corresponding obligation not to interfere in the enjoyment of the right or even an obligation to grant such right. Here is an example. The practice of the Economic and Social Council of the United Nations allowing the representatives of governments invited to participate in its deliberations actually leads (or at any rate may lead), on the one hand, to a customary right of the governments to participate, on the other—to the customary obligation of the Council to grant such a right.[42]

Much more serious, in connection with the law-creating effect of practice, is the objection that it may be followed *ex gratia* and hence be discontinued arbitrarily at any time. This is the most troublesome problem as far as customary law is concerned. How to discern custom from "usus", that is a legal obligation from a non-legal one (e.g. moral) or a simple habit? In principle, the problem is clear. Only such practice may be considered a custom which is presumptively accepted by the subjects concerned and can be formulated in the form of a customary rule of international law. The real difficulty is to ascertain the fulfilment of those conditions. Since the presumed acceptance can be asserted only indirectly by the analysis of the practice itself and of the accompanying reactions to it, it is impossible to enumerate all the facts and documents which may contribute to such evidence. The organ authorized by the parties is free to consider all circumstances which might throw light in each particular case. As far as organizations are concerned, it is, however, possible to point to a few typical situations which permit an assumption that we face a mature customary rule. When, for instance, a precedent constitutes, with the express or tacit assent[43] of all the member states, the basis for a regulation or ruling of an officer, or when a practice is considered ripe for codification in a written rule of procedure, it seems justified to conclude that we are in presence of a customary rule. Evidently, many other customary rules are created by practice of international organizations which are strictly followed and, therefore, have not been yet ascertained because there has been no occasion for it. True, the lack of information on those numerous established practices may be, at least partly, compensated by such valuable publications as the already quoted *Repertory of Practice*. We should, however, not expect that any such, present or future, publication could be either complete or contain an authoritative legal evaluation of the recorded practices or precedents, since this is simply impractical.

Readers who still are inclined to see in a customary rule something very old and stable may reproach the mechanism of transition from practice to custom outlined here for effacing the alleged cleft between law and simple practice. Such criticism seems unjustified. As pointed out, the traditional narrow conception of customary law does not fit into the framework of present international life. Besides, one should neither overestimate the stability of settled, written or unwritten, rules nor underrate the value of practices and precedents. To be sure, practices may be discontinued at any time but by no means arbitrally. This may be done, in case of well developed practices, solely with the express or tacit agreement of the subjects concerned. On the other hand, it is precisely the existence of numerous such practices of international organizations which

[42] *Repertory*, *op. cit.*, vol. III, p. 534.

[43] In case of express assent, confirmation or ratification we have, in fact, no more to do with a customary rule but with a kind of intermediary rule. See the present author's, *Custom*, *op. cit.*, pp. 104—109.

offers proof that frequently even written rules are supplemented or abrogated with only tacit assent of the parties.

From among the numerous problems connected with the subject discussed here, at least one should be mentioned. It is the question whether customary rules arising of the practices of international organizations can be classified as rules of international law *sensu stricto*. The answer is difficult and exceeds the scope of this article. One may risk, however, the assertion that at least the majority of such rules will fulfil the requirements of rules of international law. This applies, in particular, to those concerning relations between organizations and states and between organizations themselves.

More troublesome will be the rules referring to internal matters, and especially those concerning manifold relations between organizations and individuals or other subjects not being subjects of international law. In respect to such rules it would be perhaps safe to define them as rules of a customary law of international organizations or an internal customary law of such organizations, without prejudging their place within the framework of international law.

One should, however, add that in the latter case, too, a great proportion of rules will certainly also fulfil the requirements of customary rules of international law for at least two reasons. Firstly, there is a legitimate presumption that all the practice of international organizations is known, and, in absence of proof to the contrary, acquiesced by their member states. Hence, such a practice, by whoever performed, may, where appropriate, give rise to customary rights and obligations binding such states. Secondly, the practice of international organizations is based upon their constitutions and binding decisions, hence rules of international law. Of necessity the customary rules which interpret, amend or abrogate the latter must be also rules of that law.

It is obvious that all that has been said about practice of international organizations is based on very limited material. The conclusions are no more than hypotheses, which require confrontation with the vast and still unexplored records of, at least, the most important international organizations.

DEFINITION OF STATE IN INTERNATIONAL LAW DOCTRINE

by LECH ANTONOWICZ

The basis of international law is the fact that mankind is divided into states which, while maintaining their separateness, enter into relations between them. Among numerous definitions of international law some treat states as the sole subjects of that law, while some, in addition to states, enumerate also other subjects. There are also definitions which ascribe the personality in international law not to all but only to a certain category or categories of states. One cannot, however, define international law without using the term "state" or one of its equivalents. If we define international law as legal order of international community, it will be hard not to follow this with a statement that the basic political element of that community is precisely a state.[1] The link between state and international law is particularly stressed by those authors who maintain that international law is basically an inter-state law.[2]

Taking into account that the notion of state constitutes the basic element of international law, it would be hard to overestimate the importance of defining that notion. No generally accepted international agreement contains a definition of state, although the need of such a definition stems clearly from the practice of international organizations, international tribunals and other centers of international activity.[3] It appears that the addressee of many international documents described as "all states" is very difficult for identification. The history of international relations abounds in disputes as to whether a given territorial-political corporation is a state whithin the meaning of international law. It happens sometimes that some states recognize as states the organisms to which other states deny such a character. This became apparent recently in connection with the Treaty banning Nuclear Weapons Tests in the atmosphere, outer space and under the water of 5 August 1963, which has been open for all states.[4] While characterizing the situation in the field of theory A. Ross writes, not without justification, that the term "international law" is being defined with the help of the term "state," while the definition of "state" reverts to the term "international law."[5]

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[1] Cf. G. SCELLE, *Cours de droit international public,* Paris 1948, p. 17—18.

[2] F. VON LISZT, *System prawa międzynarodowego* (*System of International Law*), Cracow 1907, p. 1; J. MAKOWSKI, *Podręcznik prawa międzynarodowego* (*The Manual of International Law*), Warsaw 1948, p. 10; S. KRYLOW, *Les notions principales du droit des gens* (*La doctrine soviétique du droit international*), "Recueil des Cours," 1947, vol. 70, p. 415.

[3] Cf. "Yearbook of the International Law Commission," 1949, p. 38.

[4] "Zbiór Dokumentów," 1963, No. 8, pp. 1015—1020.

[5] *A Textbook of International Law,* London—New York—Toronto 1947, p. 12.

Doubts and disputes around the definition of state in international law are reduced basically to the following questions: Can the organisms very small in so far as their territory and population is concerned, be considered as states? Can a territorial-political entity forming a part of another state be considered itself a state? What kind of a link with another state makes possible the maintenance of the own statehood? In case of conflict what is more important—the actual state of affairs ot the legal status?

The present paper does not set itself the task of answering all these questions. Its purpose is much more modest since it would like only to establish certain theoretical premises, necessary for achieving that goal.

The difficulties in defining the state from the standpoint of international law cause that some authors cast in doubt or even reject completely the possibility of any legal definition of state.[6] This attitude seems to be erroneous. The essence of state—a phenomenon existing and recognizable in reality—lies in its social-political contents. The notion of state, however, is not only a sociological term, but also a legal one, since this notion is contained in legal acts. Legal acts—both of municipal and international law—while using the notions which are in their essence extra-legal, ascribe to them a definite meaning and thereby give them also a legal character.

No more convincing is the opinion which opposes the social-political criteria of state to its legal criterion.[7] It seems that all elements of the notion of state have sociological character and at the same time they can have legal meaning. The point is which elements of the sociological notion of state are important from the standpoint of international law. Generally speaking, one can say that these are the elements which allow to distinguish state from other social-political organisms.

One should stress also a certain autonomous character of the notion of state in international law since it may not be tentamount to the notion of state under municipal law. Some authors are questioning this differentiation[8]; an attitude which raises serious doubts. The point is not so much that the international law takes interest in state from outside and the municipal law from within. The need to differentiate state under international law from state under municipal law stems above all from the fact that the notion "state" is used in the legal systems of some states to denote territorial-political units which form an integral part of those states and do not have any international rights.[9] The need for a specific approach proper to international law, to the notion of state was ignored in the initial period of the development of international legal science and it was only a later stage that it was begun to be appreciated.[10] The above differentiation

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[6] Cf. C. A. COLLIARD, *Institutions internationales,* Paris 1956, p. 76—80; G. SCELLE, *op. cit.*, p. 94; by the same author: *Règles générales du droit de la paix*, "Recueil des Cours," 1933, vol. 46, p. 346.

[7] Cf. Ch. ROUSSEAU, *L'Indépendance de l'Etat dans l'ordre international,* "Recueil des Cours," 1948, vol. 73, pp. 171—180.

[8] Cf. K. STRUPP, *Les règles générales du droit de la paix*, "Recueil des Cours," 1934, vol. 74, pp. 422—424.

[9] E. g. the Constitution of India of 26 November 1949. A. J. PEASLE, *Constitutions of Nations*, The Hague 1956, vol. II, pp. 223—336.

[10] Cf. D. ANZILOTTI, *Cours de droit international*, Paris 1929, vol. 1, p. 125; J. L. BRIERLY, *Règles générales du droit de la paix*, "Recueil des Cours," 1936, vol. 58, pp. 48—50; D. P. O'CONNEL, *International Law*, vol. I, London—New York 1965, p. 303; A. RIVIER, *Principes du droit des gens,* Paris 1896, vol. I, p. 47; compare also A. M. KAMANDA, *A Study of the Legal Status of Protectorates in Public International Law*, Geneva 1961, pp. 182—191.

was clearly seen, in the interwar period, in the works by some Polish authors concerning the legal status of the Free City of Danzig.[11]

The term "state within the meaning of international law" is very widely employed by contemporary writers. Nevertheless conflicting views are presented as to the role of international law in defining the state for the purposes of that law. One can distinguish three basic positions in that matter:

a) International law—like every system of legal norms—could not exist if it would not provide itself the definition of its subjects; otherwise the contents of its norms would not be sufficiently precise. The science of international law cannot define anything which has not been defined or cannot be defined effectively by international law.[12]

b) International law needn't define state, but it may. According to one opinion the international legal norm defining the state was shaped at the time of the establishment of the United States of America.[13] In view of the other opinion until now there has been no norm of international law defining the notion of state, but the creation of such a norm is possible and even desirable.[14]

c) International law—it is true—defines which is its subject but cannot define the state since "state" has logical priority in relation to "international law." It is like in the case of municipal law which defines which is its subject, but does not define man. The municipal law does not define the legal person either although it may say which is not a legal person. The conception of state is given by jurisprudence and in case of the application of international law one should be guided by the prevailing opinion on the subject.[15]

Sharing the opinion that international law should define its subjects one cannot agree with the concept of international law as a system of norms superior in relation to, and independent of, states. The definition of state by international law cannot be therefore construed as a supreme act, as it is being done by the adherents of the extreme primacy of international law over municipal law. The state was a phenomenon chronologically and logically earlier than international law, for the states are makers of international law and not *vice versa*. On the other hand however, the relationship "state—international law" should be treated as a complex historical process in which both particular states and norms of international law are being created and forsaken. It seems that in the course of that process the states, recognizing each other and maintaining relations among them, are shaping the legal-international norm defining the notion of state. The contents of that norm cannot be arbitrary but must reflect actual international relations. Neither does it seem proper to fix the time from which

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[11] Cf. L. EHRLICH, *Gdańsk. Zagadnienia prawno-publiczne* (*Gdansk. The Public Legal Problems*), Lvov 1926, p. 85; J. MAKOWSKI, *Zagadnienie państwowości W. M. Gdańska* (*Problems of the Statehood of the Free City Gdansk*), Warsaw 1934, p. 3.

[12] Cf. H. KELSEN, *General Theory of Law and State*, Cambridge 1945, p. 221; by the same author: *Théorie générale du droit international public. Problèmes choisis*, "Recueil des Cours," vol. 42, pp. 263—265.

[13] A. VERDROSS, *Die Verfassung der Völkerrechtsgemeinschaft*, Wien—Berlin 1926, pp. 129—131.

[14] A. KLAFKOWSKI, *Prawo międzynarodowe publiczne* (*International Public Law*), Warsaw 1964, pp. 62—63.

[15] Cf. J. SPIROPULOS, *Théorie générale du droit international*, Paris 1930, pp. 119—125; by the same author: *Traité théorique et pratique du droit international public*, Paris 1933, pp. 46—47, and the opinion by the same author in the "Yearbook of the International Law Commission," 1949, p. 66.

international law is defining the state since it would *eo ipso* mean that there was no such definition earlier. One can only assume that the notion of state in international law, while preserving its essential elements, was partially changing its contents throughout the ages. By rejecting the existence of the norm of international law defining the notion of state we would have consistently to exclude the possibility of stating whether a given territorial-political corporation constitutes a state within the meaning of that law. In such a case one could not identify within the framework of international law its main if not the only subjects.

The arguments of the advocates of the thesis on the impossibility of defining the state under international law are not convincing. It is true that no municipal law is defining man, neither does it solve the philosophical question as to who is actually man and what is the sense of his existence. Nor does it have to describe the outer features of man, since the biological differences between human beings and animals are obvious and unquestionable. A situation to the contrary becomes only—from time to time—a subject of literary fiction or doubtful speculations. On the other hand state as a social-political organism is not always easy discernible from other similar organisms and that is why it requires definition. Besides, definition of state from the standpoint of international law need not necessarily concern the essence of state. It may limit itself to the establishment of a borderline between states and quasi-state organisms which is sufficient and at the same time required of international law to perform its proper role as a regulator of international relations.[16]

Incorrect is also the comparison between the question of definition of state under international law with that of definition of legal persons under municipal law. Thus the Polish Civil Code of 23 April 1964 (Articles 33—43) does not contain in fact a definition of legal person, but only says which bodies and in what way may become legal persons.[17] The procedure of granting legal personality through appropriate legislative act or through registry in appropriate records allows for identification of all legal persons without the necessity of using an abstract definition of legal person. Such a procedure—understandable in municipal law—is unknown in international law.

One cannot agree with the opinion according to which the definition of state is not the responsibility of international law but of international jurisprudence. International jurisprudence cannot be burdened with the task of making laws in international relations since this function is exercised only by states. All norms of international law, including the norm defining the notion of state, are made by states. The task of international jurisprudence is not the creation of the legal international norm defining the state but the examination and elucidation of its contents. And referring to the prevailing opinion as a source of the definition of state is in fact an indirect admission that international law does contain such a definition. An international court, being under obligation to pronounce judgement on the basis of international law, could not be guided by the concept of state accepted by the prevailing opinion, if it had not treated it as an element of the binding international law. The application of generally accepted concepts can take place only on the assumption that they form a part of a given legal system.

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[16] Cf. B. WIEWIÓRA, *Niemiecka Republika Demokratyczna jako podmiot prawa międzynarodowego* (*The German Democratic Republic as Subject of International Law*), Poznań 1961, p. 33.

[17] *Kodeks cywilny oraz przepisy wprowadzające* (*Civil Code and Introductory Regulations*), Warsaw 1965, pp. 9—11.

A consequence of the lack of definition of state under international law would have to be the principle that states may use arbitrary criteria in judging whether a given territorial corporation is a state or not. As a result only such corporations could be considered as states under international law which had been recognized as such by other states. Besides the opinion finds a more or less clear expression in works by some authors.[18]

The only so far positive attempt at a treaty definition of the notion of state is the convention on the rights and duties of states signed in Montevideo on 26 December 1933.[19] While omitting the question of the correctness of the definition of state given in the Convention, we should stress here the interest of American states in that problem. Their task was facilitated no doubt by the fact that the statehood of all concerned did not evoke any doubts at the time. Similar attempt—within a much wider geo-polititical framework—was made by the United Nations International Law Commission in connection with the draft declaration on the rights and duties of states. Because of divergent views as to the possibility and usefulness of defining the notion of state the Commission decided not to include such a definition into the draft declaration stating at the same time that the term "state" was used "in the sense generally accepted in international practice."[20] In this way—as it seems—the Commission spoke indirectly in favour of the existence of a norm of international law defining the notion of state.

Of considerable importance is the question in what way one can, and should, establish the substance of that norm? It does not seem that the quest for the legal-international concept of state can be limited to international customary law, as proposed by J. L. Brierly.[21] The position of P. Kazansky seems more correct. For that purpose he advocates the examination of basic elements of international agreements and customs.[22] Only the analysis of both these sources of international law can bring more satisfactory results. In particular one cannot neglect the material supplied at present by the statutes and activities of international organizations. The contemporary legal international concept of state must be in line with the whole of contemporary international law. A major but not exclusive role in this respect should be ascribed to the United Nations Charter.[23]

The starting point for research on the notion of state in international law should be legal documents and scientific works which define that notion. The analysis of the definitions of state in international law to date allows to divide the elements contained therein into the following three groups:

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[18] Cf. A. CAVAGLIERI, *Règles générales du droit de la paix*, "Recueil des Cours," 1929, vol. 26, pp. 342—343 and 363—364; E. EHRLICH, *Gdańsk...*, p. 89; J. LORIMER, *The Institutes of the Law of Nations*, Edinburgh—London 1883, vol. I, p. 107. The contrary view is held by H. WALDOCK, *General Cours on Public International Law*, "Recueil des Cours," 1962, vol. 106, p. 147.

[19] *Prawo międzynarodowe i historia dyplomatyczna. Wybór dokumentów* (*International Law and Diplomatic History. Selected Documents*) ed. by L. Gelberg, Warsaw 1958, vol. 2, pp. 356—359.

[20] "Yearbook of the International Law Commission," 1949, p. 289.

[21] *Op. cit.*, pp. 48—50.

[22] *Uchebnik mezhdunarodnogo prava publichnogo i grazhdanskogo*, Odessa 1904, p. 3.

[23] The concept of state in the UN practice is discusssed by R. HIGGINS, *The Development of International Law through the Political Organs of the United Nations*, London—New York—Toronto 1963, pp. 11—57.

a) elements which are not important from the standpoint of international law and as such should be eliminated from the legal-international definition of state,

b) elements which although necessary for state from the standpoint of international law, but which are also manifest in organisms which are not states,

c) elements which are features particular only to states and thereby are indispensable in order to distinguish a state from other social-political bodies.

The definitions of state which are limited to the elements of the first and second categories only are either not very useful or completely useless from the standpoint of international law. More thorough attention merit only definitions containing elements of the third group.

Among superflous elements of definition of state from the standpoint of international law are above all descriptions of its aims and inner nature. A classical example of such a definition of state is the definition by H. Grotius "... State is a perfect union [coetus] of free men who united with the view of enjoying laws ad for the common good."[24] This type of definition of state inspired by political sciences or general theory of state and law was particularly characteristic for old times, though it is resorted to even today. For defining the aims of state the authors use terms like "common good," "protection of law," "justice," "internal order," "peace," "security," "general needs."[25]

The problem of the objectives of state concerns its essence and is of course very controversial. The solution of that problem does not belong to international jurisprudence since from the standpoint of international law the purpose of the existence of state is immaterial. The characteristic feature of our times is the co-existence of states with differing political systems and consequently aiming at different social objectives. Under such conditions an attempt at a treaty definition of the aims of state would be doomed to failure in advance. Some authors have already for a long time, if not always consistently, spoken against including into the legal-international definition of state the description of its purposes.[26]

The proposals to assess the inner nature of state should be treated in the same way as those concerning the definition of its objectives. From the stand-

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[24] *Trzy księgi o prawie wojny i pokoju* (*Three Books on Law of War and Peace*), Warsaw 1957, vol. I, p. 96.

[25] CARMAZZA-AMARI, *Traité de droit international public en temps de paix*, Paris 1880—1882, vol. I, p. 196; J. DEVAUX, *Traité élémentaire de droit international public* (*droit de gens*), Paris 1935, p. 65; P. FIORE, *Le droit international codifié et sa sanction juridique*, Paris 1911, p. 106; L. LE FUR, *Précis de droit international public*, Paris 1933, p. 60; L. L. KLUBER, *Droit des gens moderne de l'Europe*, Paris 1861, p. 25; L. LEVI, *International Law with Materials for a Code of International Law*, London 1887, p. 79; P. PRADIER-FODÉRÉ, *Traité de droit international public européen et américain*, Paris 1885, vol. I, pp. 144—145; S. VON PUFFENDORF, *De officio hominis et civis juxta legem naturalem libri duo* (English translation), New York 1927, p. 108; F. SŁOTWIŃSKI, *Prawo narodów naturalne połączone z praktyką państw europejskich* (*The Natural Law of Nations Connected with the Practice of European States*, Cracow 1882, p. 2; H. STROYNOWSKI, *Nauka prawa przyrodzonego, politycznego, ekonomiki politycznej i prawa narodów* (*The Teaching of Natural and Political Law, Political Economy and the Law of Nations*), Warsaw 1805, p. 184; T. D. WOOLSEY, *Introduction to the Study on International Law*, New York 1897, p. 34; E. DE VATTEL, *The Law of Nations or the Principles of Natural Law Applied to the Actions and Problems of Nations and Monarchs*, Warsaw 1958, vol. 1, pp. 53 and 69.

[26] Ph. M. BROWN, *The Theory of the Independence and Equality of States*, "American Journal of International Law," 1915, No. 2, pp. 312—313; J. D. GRIMALDI, *Délimitation juridique de la communauté internationale contemporaine*, Paris 1943, p. 107; A. RIVIER, *Principes du droit des gens*, Paris 1896, vol. I, pp. 47—48.

point of international law it is useless to stress both that state is an organism and an entity[27] as well as a division of elements of state into sensual and non-sensual.[28] It does not seem justified either to include into legal-international definition of state the characteristics of social links special to it. The elimination from the category of states the organizations of pirates or such bodies as "East India Company" are to-day only of historical interest.[29] One cannot finally agree with the authors who indirectly or directly make the statehood dependent on various political and ideological conditions expressed in such terms as "rule of law," "morality," or—which is most often the case—"civilization,"[30] for the fundamental principal of international law is the sovereignty of states and the right of their peoples to choose such political system as they wish. Contemporary international community cannot be limited to the so-called civilized states since it would amount to acceptance or at least to admissibility of only one form of civilization.

Nor can statehood be conditioned by—as some authors maintain—the ability or willingness to respect international law.[31] No state can be denied the ability to observe international law since this would inevitably lead to abuses in international relations. A state, of course, bears international responsibility for violations of international law, but because of such violations it does not cease to be a state.

Among relatively less contentious elements of definition of state are: population, territory and power. These elements are not sufficient for the definition of state since they are also present with bodies which are not states, they would not allow to distinguish states from quasi-state organisms. Nevertheless they play considerable part in defining a state from the standpoint of international law.

To treat the population—variously defined—as a basic element of the notion of state is a matter of course. The same applies to territory, with the reservation however that some authors, while construing the legal-international definition of state valid for all historical epochs, do not exclude from the category of states also nomadic communities.[32] At any rate the contemporary international law does not know the notion of a nomadic state. Nowadays only social-political bodies which have a territorial basis are accepted as states although more or less significant part of their population may be conducting a nomadic way of life. Such a situation still exists in certain African and Asiatic states.

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[27] L. A. KOMAROVSKY and W. A. ULIENICKY, *Mezhdunarodnoye pravo*, Moscow 1908, pp 25—26.

[28] W. NAMYSŁOWSKI, *Systematyczny wykład prawa narodów* (*Systematic Course on the Law of Nations*), Olsztyn 1947, p. 3.

[29] Cf. DE GALET, *Mezhdunarodnoye pravo*, St. Petersburg 1860, pp. 16—17.

[30] A. S. BUSTAMENTE Y SIRVÉN, *Droit international public*, Paris 1934, vol. I, p. 121; J. DEVAUX, *Traité élémentaire de droit international public* (*droit des gens*), Paris 1935, p. 65; R. PHILLIMORE, *Commentaries upon International Law*, London 1871, vol. I, pp. 81—83; P. PRADIER-FODÉRÉ, *Traité de droit international public européen et américain*, Paris 1885, vol. I, p. 152; A. RIVIER, *Principes du droit de gens*, Paris 1896, vol. I, pp. 46—47; K. R. R. SASTRY, *Studies in International Law*, Calcutta 1952, p. 48; differently K. STRUPP, *Les règles générales du droit de la paix*, "Recueil des Cours," 1934, vol. 74, pp. 424—425.

[31] Ch. Ch. HYDE, *International Law Chiefly as Interpreted and Applied by the United States*, Boston 1951, vol. I, pp. 22—23; K. VON SCHUSCHNIGG, *International Law. An Introduction to the Law of Peace*, Milwaukee 1959, p. 74; A. VERDROSS, *Völkerrecht*, Vienna 1964, p. 195; differently T. C. CHEN, *The International Law of Recognition*, London 1951, p. 61.

[32] Z. CYBICHOWSKI, *Prawo międzynarodowe publiczne i prywatne* (*Public and Private International Law*), Warsaw 1932, p. 9.

It is quite often stressed in literature that statehood does not presupposes the necessity of fixing all frontiers and that the existence of a certain uncontested territory is enough.[33] For instance, in case of Israel the international practice shows that the lack of complete stability of frontiers does not constitute a basic obstacle for considering a given community as state. Even the requirement of the possession of uncontested territory is doubtful because of cases when the whole territory aspiring to the name and character of state is subject of claims on the part of some other state. One can quote here the initial position of Iraq on the question on Kuweit and the stand of Morocco on the question of Mauretania. The point is only that there must exist a definite territory on which a specific authority exercises effectively its functions.

Of considerable importance—in view of the existence of such organisms like Liechtenstein, Monaco, San Marino and in particular the Vatican—is the problem of a minimum number of population and minimum size of territory of a state. It is understandable that neither the number of inhabitants nor the area can be defined, but one frequently encounter the opinion that they should be sufficiently great to allow a state to maintain its existence.[34] This condition can be understood in two ways: either in a sense of economic self-sufficiency, or military defensibility. Economic self-sufficiency in many states is nowadays problematic and it would be difficult to accept it as a necessary condition for a separate existence. Receiving of foreign aid does not deprive a state of its national character. And making the existence of states dependent on their ability to self-defence would be certainly irreconciliable with contemporary international law which prohibits and condemns aggressive wars.

The element of power is manifest in that or another form in all definitions of state. Some authors try on this occasion to define the specific character of that power in order to describe in this way the essence of statehood. They point out that the state is a centralized body, that it is based on compulsion, or conversely on free association, that it constitutes *civitas perfecta*;[35] these are therefore elements which should not be included into the legal-international definition of state.

Most often the element of power in definition of state is construed as a requirement of an organized community, as opposed to the state of anarchy. This requirement is usually followed by the reservation that a short-lived anarchy does not destroy a state.[36] The situation in the Congo (Kinshasa) has demonstrated that this problem is still topical. At any rate international law prohibits the intervention into internal affairs of a state in which civil war goes on. including the intervention under the pretext that such a state ceased to exist,

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[33] A. VERDROSS, *op. cit.*, p. 194.

[34] P. FAUCHILLE, *Traité de droit international public*, vol. I/1, Paris 1922, p. 223; J. H. FERGUSON, *Manual of International Law for the Use of Navies, Colonies and Consulates*, London—The Hague—Hongkong 1884, vol. I, p. 55; P. PRADIER-FODÉRÉ, *Traité de droit international public européen et américain*, Paris 1885, vol. I, p. 152; M. SIBERT, *Traité de droit international public*, Paris 1951, vol. I, p. 99; differently T. TWISS, *The Law of Nations Considered as Independent Political Communities*, Oxford 1884, p. 11.

[35] P. GUGGENHEIM, *Les principes de droit international public*, "Recueil des Cours," 1952, vol. 80, p. 91; by the same author: *Traité de droit international public*, Geneva, vol. I, pp. 172—173; H. KELSEN, *General Theory of Law and State*, Cambridge 1945, p. 221; T. J. LAWRENCE, *A Handbook of Public International Law*, London 1938, p. 17; L. LEVI, *International Law with Materials for a Code of International Law*, London 1887, p. 79; A. VERDROSS, *op. cit.*, p. 192.

[36] E. g. M. BLUNTSCHLI, *Le droit international codifié*, Paris 1870, p. 61; differently T. BATY, *Can an Anarchy be a State?*, "American Journal of International Law," 1934, No. 3, pp. 444—445.

While the element of anarchy as a condition precluding statehood was quite often encountered in old definitions of state, the more recent definitions use rather the term of stability as a characteristic of state authority.[37] Some authors add that a necessary element of state is also time, construed in the sense either of limited[38] or unlimited duration of statehood.[39] The contradiction of those concepts is only superficial since in the first case it states that the state is not eternal and in the second that there is no time to the existence of statehood. Adding to the list of features of state those which are also characteristic of other bodies seem superfluous. That is why one can omit the element of time and the suggestion to include into the definition of state the element of national economy,[40] although without that element no state can exist. It seems that within this category of the elements of statehood it is sufficient to say that it is a territorial-political corporation. From the point of view of international law every state is a territorial political corporation, but not every territorial political corporation is a state. The point is therefore to establish those characteristics which distinguish state from other territorial-political corporations.

Of basic importance for legal-international definition of state is the characteristic which defines its relations towards remaining members of international community. The definitions of state which do not contain that element are of not much value for international law. In legal-international literature one can encounter different answers to the question what are the characteristics of inter-state relations, which allows to establish that a given territorial-political corporation is really a state from the standpoint of international law.

The answer to that question, which is considered classical, maintains that an inseparable and distinct characteristic of state is sovereignty, in Polish jurisprudence very often described as the supreme authority.[41] Accepting such a premise the situation from the theoretical point of view should be clear. From the standpoint of international law only the sovereign organism is a state and without that feature no state can exist. The development of various forms of dependence peculiar to the era of capitalism has deformed the theory into two, more logically than chronologically, successive stages. At first, while maintaining that sovereignty is the inalienable feature of state far-reaching limitations of sovereignty were admitted, in conformity with the notion of "semi-sovereign state." Next, with giving up the sovereignty as an alienable feature of state the notion of "dependent state" was construed.

The difference between the idea that all states are sovereign and the division of states into sovereign and dependent may be relative. Some authors for example recognize protectorates[42] as sovereign states, while others describe them as dependent states.[43] Starting from different theoretical premises one may arrive

[37] E. g. Ch. G. FENWICK, *International Law*, New York—London 1924, p. 84.

[38] P. GUGGENHEIM, *Les principes de droit international public*, "Recueil des Cours," 1952, vol. 80, pp. 89 and 91; H. KELSEN, *Principles of International Law*, New York 1952, p. 258.

[39] Ch. ROUSSEAU, *L'independance de l'Etat dans l'ordre international*, "Recueil des Cours," 1948, vol. 73, pp. 171—180.

[40] E. KAUFMAN, *Règles générales du droit de la paix*, "Recueil des Cours," 1935, vol. 54, pp. 392—397.

[41] Z. CYBICHOWSKI, *op. cit.*, p. 9; A. KLAFKOWSKI, *op. cit.*, p. 18; J. MAKOWSKI, *op. cit.*, p. 8; F. SŁOTWIŃSKI, *Natural Law of Nations Connected with the Practice of European States*, Cracow 1922, p. 3; H. STROYNOWSKI, *op. cit.*, 1805, p. 184.

[42] Viz. A. VERDROSS, *Völkerrecht*, pp. 196—197.

[43] Viz. O. SVARLIEN, *An Introduction to the Law of Nations*, New York—Toronto—London 1955, p. 85.

in the end at the same list of states with the difference that in the first case they will be all described as sovereign, while in the second they will be divided into two categories, those of sovereign and non-sovereign states.

The concepts of "dependent states," "semi-sovereign states" or "semi-independent states" are very wide-spread in international jurisprudence. Many authors, however, are critical of such concepts maintaining that they are internally contradictory and stress that the renunciation of sovereignty as a criterion of statehood means losing the possibility of objecitve differentiation of a state from other territorial-political corporations.[44] The attempts at finding another criterion of state are not very convincing.[45]

Inconsistent or at least ambiguous is the position of those authors who in the definition of state stress the element of sovereignty or independence and at the same time use the term "dependent state" or in a different manner recognize—if only as an exception from the rule—the existence of non-sovereign state.[46] It is not clear in such a case what really is the criterion of state. Also incorrect from the methodological point of view seem the definitions which either describe only what is a sovereign or independent state or present separately different types of states without giving their common features.[47] For at first one should define a "state" and only later one can classify "states" according to those or other criterions.

In the Soviet jurisprudence—independently of its consistently anti-colonial attitude—the term "dependent state" is frequently used and sometimes it is clearly stated that there are two categories of states—sovereign and dependent.[48] In recent years ever more wide-spread becomes the view that sovereignty is

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[44] R. J. ALFARO, *The Rights and Duties of States*, "Recueil des Cours," 1959, vol. 97, p. 99; C. BILFINGER, *Les bases fondamentales de la communauté des Etats*, "Recueil des Cours," 1938 vol. 63, p. 175; G. BRY, *Précis élémentaire de droit international public*, Paris 1910, p. 52; Z. CYBICHOWSKI, *op. cit.*, p. 9; W. P. DANEVSKY, *Posobe k izuchenyu istoriy i sistemy mezhdunarodnogo prava*, Charkow 1892, vol. I, p. 136; J. DEVAUX, *Traité élémentaire de droit international public (droit des gens)*, Paris 1935, pp. 131—132; M. S. KOROWICZ, *Some Present Aspects of Sovereignty in International Law*, "Recueil des Cours," 1961, vol. 102, pp. 87—88 and 93; K. MAREK, *Identity and Continuity of States in Public International Law*, Geneva 1954, p. 186; F. MARTENS, *Sovremennoye mezhdunarodnoye pravo civilizovannyh narodov*, Petersburg 1904—1905, vol. I, p. 258; H. ROLIN, *Les principes de droit international public*, "Recueil des Cours," 1950, vol. 77, pp. 325—326; G. VON GLAHN is criticizing the terms "semi-sovereign" and "dependent" states and proposes to substitute for them the term "limited members of international community" (*Law among Nations*, New York—Toronto 1965, p. 74).

[45] G. FITZMAURICE, *The Law and Procedure of the International Court of Justice*, 1951—1954; *General Principles and Sources of Law*, "British Year Book of International Law," 1953, pp. 2—3; P. GUGGENHEIM, *Les principes de droit international public*, "Recueil des Cours," 1952, vol. 80, p. 96; Ch. Ch. HYDE, *International Law Chiefly as Interpreted and Applied by the United States*, Boston 1951, vol. 1, pp. 22—23; D. I. O'CONNELL, *International Law*, vol. I, London—New York 1965, pp. 303—304.

[46] P. FAUCHILLE, *Traité de droit international public*, Paris 1922, vol. I/1, pp. 223—224 and 257; W. L. GOULD, *An Introduction to International Law*, New York 1957, pp. 183—184 and 189—191; S. JACKSON, *A Manual of International Law*, London 1947, p. 6; A. KLAFKOWSKI, *op. cit.*, pp. 18 and 87; J. DE LOUTER, *Le droit international public positif*, Oxford 1920, vol. I, pp. 161 and 170; M. SIBERT, *Traité de droit international public*, Paris 1951, vol. I, p. 155; O. SVARLIEN, *An Introduction to the Law of Nations*, New York—Toronto—London 1955, pp. 82—85.

[47] W. E. HALL, *A Treatise on International Law*, Oxford 1895, p. 18; P. GUGGENHEIM, *Traité de droit international public*, Geneva 1953, vol. I, pp. 173—174 and 216—226; G. SCHWARZENBERGER, *A Manual of International Law*, London—New York 1960, pp. 48—49 and 54—55; H. WHEATON, *Elements of International Law*, Oxford—London 1936, p. 44; A. VERDROSS, *Règles générales du droit international de la paix*, "Recueil des Cours," 1929, vol. 30, pp. 322—324.

[48] S. KRYLOW, *Les notions principales...*, p. 450.

an inalienable characteristic of state.[49] The same can be seen in the Polish scientific writings in the field of international law.[50]

The United Nations Charter does not contain the term "dependent state." On the contrary, its basic principle is that of sovereign equality of states. Instead of the term "state," the UN Charter uses the term "territory" for denoting units to which the principle of sovereign equality does not apply. The category of "non self governing territories" include also units known otherwise as dependent states. As an example one can quote here Morocco and Tunisia before they gained independence in 1956. It seems that the complete liquidation of colonialism should lead to the elimination of the term "dependent state."

The negative attitude towards the principle of state sovereignty, characteristic for some doctrines of international law, was expressed also in definitions of state. When rejecting the sovereignty one cannot treat it not only as an indispensable characteristic feature, but as a feature of state at all. In the opinion of some authors the important characteristic feature of state is not sovereignty but independence.[51]

Mutual relation of the notions "sovereignty" and "independence" is variously presented in connection with the definition of state in international law. Sometimes these notions are treated as equivalent or cited side by side without any differentiation between them.[52] Opposite is the view according to which a state may be sovereign and not independent, and conversely.[53] One should look in such a case for yet another characteristic feature, peculiar to all states. Convincing is the attitude that independence—besides territorial sovereignty—constitutes an integral element of state sovereignty.[54] It seems that this finds its expression in Art. 2 paragraph 4 of the United Nations Charter which deals with political independence and territorial integrity of states. Therefore independence can be a criterion of statehood if it is not opposed to the sovereignty, construed of course not in the absolute sense contrary to the respect of inter-

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[49] V. V. EVGENEV, *Pravosubektnost, suverenitet i nievmeshatelstvo w mezhdunarodnym prave* "Sovetskoye Gosudarstvo i Pravo," 1953, No. 2, p. 77; J. D. LEWIN, *Zagadnienie istoty i roli zasady suwerenności* (*The Question of the Essence and Role of the Principle of Sovereignty*), "Państwo i Prawo," 1949, No. 11, pp. 27—31; *Mezhdunarodnoye pravo,* ed. by D. B. LEWIN and G. P. KALUZHNAYA, Moscow 1964, p. 100; N. A. USHAKOW, *Suverenitet v sovremennom mezhdunarodnom prave,* Moscow 1963, p. 6; D. I. FELDMAN, *Priznane gosudarstv v sovremennom mezhdunarodnom prave,* Kazan 1965, p. 126.

[50] C. BEREZOWSKI, *Prawo międzynarodowe publiczne* (*Public International Law*), Part I, Warsaw 1966, p. 128; W. MORAWIECKI, *Organizacje międzynarodowe* (*International Organizations*), Warsaw 1965, p. 32; L. ANTONOWICZ, *Uwagi prawne o mapie politycznej świata* (*Legal Remarks on the Political Map of the World*), "Sprawy Międzynarodowe," 1966, No. 1, p. 175. By the same author: *Zasada samostanowienia narodów we współczesnym prawie międzynarodowym* (*The Principle of Self-determination of Nations in Contemporary International Law*), "Sprawy Międzynarodowe", 1963, No. 8, p. 33.

[51] Ch. ROUSSEAU, *Droit international public,* Paris 1953, pp. 87—92; by the same author: *L'indépendance de l'Etat dans l'ordre international,* "Recueil des Cours," 1948, vol. 73, pp. 171——180; one can cite here also A. ROSS, *A Textbook of International Law,* London—New York—Toronto 1947, p. 44, since it seems that his term "self-governing" is equivalent with "independent."

[52] R. J. ALFARO, *The Rights and Duties of States,* "Recueil des Cours," 1959, vol. 97, pp. 95—98; T. J. LAWRENCE, *A Handbook of Public International Law,* London 1938, p. 17; K. VON SCHUSCHNIGG, *International Law. An Introduction to the Law of Peace,* Milwaukee 1959, p. 74; O. SVARLIEN, *An Introduction to the Law of Nations,* New York—Toronto—London 1955, p. 84.

[53] T. TWISS, *The Law of Nations Considered as Independent Political Communities,* Oxford 1884, pp. 23—24.

[54] N. A. USHAKOV, *Suverenitet...,* p. 6, see also E. N. VAN KLEFFENS, *Sovereignty in International Law,* "Recueil des Cours," 1953, vol. 82, pp. 88—89.

national law. One cannot agree here with the opinion that independence of state concerns only its relations with other states while it can itself, without losing its character, be subordinated to an international organization (*Viz.* Triest).[55] It seems that territorial-political corporations of such kind are not states within the meaning of international law.

Inter-American convention on the rights and duties of states of 1933 lays down that the characteristic feature of state as a person in international law is—besides population, territory and government—its capacity to maintain relations with other states.[56] Also some authors accept this formula while giving the definition of state.[57] A question arises whether "the capacity to maintain relations with other states" differs from "sovereignty" or "independence." From the theoretical point of view it seems obvious that a sovereign and independent state has the ability to maintain relations with other states and that it is one of the characteristics of its statehood. It should be stressed, however, that what one has here in mind are direct, equal and all round relations since failing that, the above definition can also cover the concept of "dependent state."[58] In order to avoid such a situation the definitions of state meant to serve practical purposes tend to define the specific manifestations of its international personality. One should stress here above all the resolutions of the United Nations General Assembly on the question of full self-government within the meaning of Article 73 of the Charter.[59]

According to those resolutions the outward manifestations of independence are: full international responsibility for own sovereign acts, the ability to acquire membership of the United Nations, the ability to maintain all sorts of direct relations with other states and international organizations, and the ability to negotiate, sign and ratify international agreements, and finally the right to organize national defence. The inner signs of independence are: full freedom of the people to chose their form of government, freedom from control or interference by the government of another state in internal matters, complete freedom in economic, social and cultural matters. One can maintain that a political-territorial corporation devoid of those characteristics is not a state. The concept of the capacity of establishing direct international relations can facilitate the definition of state.

Some authors accept as a criterion of statehood the direct subordination to international law.[60] This concept may be valid only under the assumption that states are the sole subjects of international law since it would be hard to deny that every subject is directly subordinated to the law of which it is a subject. Recognizing that the list of subjects of international law is not limited to states only, this criterion would lose its validity. In order to avoid such an eventuality the reservation is made that the characteristic feature of state—as different

[55] H. KELSEN, *Principles of International Law,* New York 1952, p. 112.

[56] *Prawo międzynarodowe i historia dyplomatyczna,* vol. II, pp. 356—359.

[57] Viz. J. G. STARKE, *An Introduction to International Law,* London 1963, p. 89.

[58] This is so at Ch. Ch. HYDE'S *International Law Chiefly as Interpreted and Applied by the United States,* Boston 1951, vol. I, pp. 22—23.

[59] "Resolutions Adopted by the General Assembly During Its Sixth Session, 6 November 1951 to 5 February 1952," pp. 60—62; "Resolutions Adopted by the General Assembly at Its Seventh Session During the Period from 14 October to 21 December 1952," pp. 33—35; "Resolutions Adopted by the General Assembly at Its Eighth Session during the Period from 15 September to 9 December 1953," pp. 21—23.

[60] DELBEZ, *Manuel de droit international public,* Paris 1948, p. 27; G. SCELLE, *Cours de droit international public,* Paris 1948, p. 104.

from other subjects of international law—is the direct subordination to international customary law.[61]

It seems that the direct subordination to international law in general or only to international customary law cannot be accepted as a criterion of statehood. Since this would lead us into a vicious circle: defining of international law through states and of states through international law. The acceptance of the thesis that only states are directly subordinated to international law (or only to customary law) would provide an answer to the question of what is a state only on the condition that it would be possible to define the notion of international law without using the notion of state, which, however, is impossible.

Neither the theory of basic rights and duties of state can provide the basis for definition of state, even in its traditional sense as a set of absolute exclusive and inalienable rights and duties.[62] Logically speaking, first there must be a state which can then enjoy rights and carry out obligations. The relationship of dependence is onesided—the possession of rights and obligations is dependent on whether a given organism is a state and not *vice versa*.

In conclusion one can accept the hypothesis that the distinguishing and inalienable characteristic feature of state is sovereignty. Thus in order to establish whether a given political-territorial corporation is a state, one should establish first whether it is sovereign. The definition of state involves therefore the definition of sovereignty. Sovereignty, however, is not an obvious feature, it must be first defined and its manifestations ascertained. The question of sovereignty is one of the most controversial in international jurisprudence. A positive solution to that problem can be expected only under the condition that international practice in this field will be accepted as a basis and starting point for theoretical generalizations and not as a material in support of *a priori* adopted assumptions. The road to the definition of sovereignty and thereby to the definition of state leads through the examination of legal international status of all territorial-political corporations. As a result such a definition of state which would allow objectetively to establish the number of states existing at present should be elaborated. This, in turn, will permit to record all changes in the register: extinctions and births of states.

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[61] P. GUGGENHEIM, *Traité de droit international public,* Geneva 1953, vol. I, p. 173.

[62] G. GIDEL, *Droits et devoirs des nations. La théorie classique des droits fondamentaux des Etats,* "Recueil des Cours," 1925, vol. 10, p. 542.

THE LEGISLATIVE COMPETENCES OF THE COUNCIL OF MUTUAL ECONOMIC ASSISTANCE

by JAN SANDORSKI

The General Characteristics of the Resolutions of CMEA

The statute of an international organization regulates the problems of the form, the legal validity and the scope of decisions made by organs of that organization. The member-states are bound by the relevant provisions of the statute and the foregoing three interconnected elements are essential for the legal character of the decisions of international organizations.

Opening remarks. The legal character of resolutions of the organs of CMEA is to a large extent defined in Article 4 of the Statute of the Council of Mutual Economic Assistance as amended at the 16th and 17th sessions of CMEA.[1] This article is entitled "Recommendations and decisions" (Zalecenia i uchwały).[2] The Polish text of the statute of CMEA uses the term "decision" (uchwała) in relation to resolutions having the character of binding acts. The binding resolutions of CMEA are in the majority of cases called in Polish literature "decisions" (decyzje). The present paper uses also the term "decision" (decyzja) in relation to binding resolutions whereas the general term "resolution" is applied both to recommendations and decisions (zalecenia i decyzje).

In connection with those terminological clarifications it is worthwhile to recall the just observation by Usienko[3] that "besides recommendation (zalecenia)... the organs of CMEA adopt decisions (decyzje, riesheniya). The decision (decyzja, riesheniye) within the meaning of the statute should not be mixed up with the term resolution (uchwała, riesheniye) as the joint term commonly used for describing any decisions (uchwały, postanovleniya) of any organ. Under this last meaning the Standing Rules of the Council and its organs use the term resolution (uchwała, postanovleniye)."[4] As can be seen in the Polish text of the

[1] The Communiqué of the 16th Session of CMEA of 6 June 1962 and the Communiqué of the 17th Session of CMEA of 14—20 December 1962, "Trybuna Ludu" of 10 June and 22 December 1962 respectively.

[2] "Dziennik Ustaw" (Dz. U. — "Journal of Laws") 1960, No. 35, text 197.

[3] K. T. USIENKO, *O yuridicheskoy prirodie rekomendaciy Soveta Ekonomicheskoy Vzaimopomoshchi* (*On the Legal Nature of the Recommendations of CMEA*), "Sovetskoye Gosudarstvo i Pravo" 1963, No. 12, p. 88.

[4] The remark quoted makes possible the proper understanding of Art. 27 of the Standing Rules of the Council's Session; it should read "... the recommendations (*rekomendaciy*) and decisions (*reshenya*) are adopted through resolutions (*postanovlenya*) of the Council's Sessions. The recommendations and decisions (*reshenya*) do not apply to the countries..." etc. as above (*The CMEA documents*, Moscow 1963, vol. 1, p. 30).

Statute the Russian word "riesheniye" translated as "decision" (uchwała) is not completely adequate.

The resolutions are diversified by the organs of CMEA as to their form and can be divided under provisions of Article 4 of the Statute into recommendations and decisions (zalecenia i decyzje). A separate and specific type of decisions are the amendments to the Statute of CMEA. Under Article 16 of the Statute they can be adopted by the Session of the Council. For their entry into force it is necessary that they be ratified by all member-states.

The scope of decisions and of recommendations is not the same. Recommendations are adopted by the CMEA organs, generally speaking, on matters of economic and technical-scientific co-operation (Article 4 paragraph 1 of the Statute). On the other hand decisions are taken on organizational and procedural matters (Article 4 paragraph 2).

The decisions, unlike recommendations, enter into force after the signing of the protocol from the session of the CMEA organ at which they were taken. The recommendations constitute only the wishes of the CMEA organs addressed to the member-states concerned. The CMEA organs cannot invest them with a binding legal force This can be done only by member-states under an established procedure. Thus the recommendations, unlike decisions, are not legal acts of the CMEA organs and as such are not binding upon members of CMEA. The Secretary of CMEA Fadeyev stresses that the adoption of recommendations by representatives of states (not by persons independent from them) and the binding character of those recommendations only after their adoption by the states is the main argument against the thesis of the supranational character of CMEA.[5]

The Validity of the Sessions of the CMEA Organs. The statute of CMEA does not contain provisions on the validity of the sessions of CMEA organs. This problem is solved under the Standing Rules of the Sessions of the Council (Article 20), the Rules of the Executive Committee (Article 18)[6] and the Rules of Procedure of the Standing Committees (Article 28).[7] They provide that the sessions are validly held when all member-states of CMEA are present. From this stems the conclusion that only at such sessions can the legally binding decisions be taken.

During the 15th Session of the Council in December 1961, Albania made a declaration which said i.a. that she will no longer take part in the work of CMEA organs. The position of Albania which did not cease to be the member of CMEA in the light of the above mentioned provisions contained a threat that it will not be possible to hold valid sessions of the CMEA organs. The decisions taken at such sessions would not be legally binding in view of the Albania's absence.

This contingency was dealt with at the 16th extraordinary session of the Council in June 1962. A resolution was adopted to the effect that decisions

[5] N. V. FADEYEV, *Sovet Ekonomicheskoy Vzaimopomoshchi* (*The Council of Mutual Economic Assistance*), Moscow 1964, p. 24. Similar presentation is given by P. KALENSKY in *Rada Vzájemne Hospodarské Pomoci ve světe mezinarodného prava* (*The Council of Mutual Economic Assistance in the Light of International Law*), "Papers of the Czechoslovak Academy of Science" issue No. 10, pp. 30—31.

[6] *The Basic Documents of the Council of Mutual Economic Assistance,* Moscow 1963, vol. I, p. 33 (hereinafter called Basic Documents).

[7] *Rada Wzajemnej Pomocy Gospodarczej. Wybór materiałów i dokumentów* (*The Council of Mutual Economic Assistance. Selected Materials and Documents*), Warsaw 1964, p. 216 (hereinafter called as CMEA—Selected Documents).

taken with the participation of all delegations present at a meeting of a CMEA organ are valid. There does not exist therefore any longer the requirement of the presence of all member-states.

Among the states having influence over the decision making by the CMEA organs one should include, besides the member-states, also Yugoslavia. Pursuant to Article 1 of the Statute in September 1964 an agreement was signed on the participation of Yugoslavia in the work of certain CMEA organs.[8] The contacts between CMEA and Yugoslavia date from the 7th and 8th sessions of CMEA in 1956 and 1957 when Yugoslavia took part as an observer in the plenary Session and in various committees. At present in accordance with this agreement the relations of Yugoslavia with CMEA have all the characteristics of an associate member.[9] Yugoslavia shares in the decision making of the organs of which she is a member with an advisory vote. Whenever the question dealt with concerns problems on which Yugoslavia declared its co-operation, her representative in the CMEA organ may voice his consent. The recommendations of the CMEA organs concerning Yugoslavia become binding upon her after they have been adopted by the Yugoslav government or some other competent body.[10]

The Voting Principles in the CMEA Organs. As we have already mentioned, the presence of all member-states of CMEA is not required for the validity of decisions taken by organ of the Council. A member-state may declare itself not interested in the matter under discussion. In such a case it does not participate in the voting on a given problem, but may join the decision later if it thinks it advisible. The declaration of desinteressment may, but not necessarily so, cause the striking of a given item from the agenda. This may happen when, for substantial reasons, the adoption of a decision without the participation of the disinterested state would hamper or prevent the implementation of the resolution.

The declaration of desinteressement should not be construed as equivalent of the right of veto possessed by every member-state. The principle of unanimity of voting on a resolution is binding upon member-states which are present at the session of a given CMEA organ and at the same time are interested in a given matter. The interested states opposed to the resolution have therefore the right of veto. The principle of unanimity stems from the principle of the sovereign equality of all member-states of CMEA embodied in Article 1 paragraph 2 of the Statute. Its absence however would not cause, as can be presumed, the infringement of the state sovereignty but at most would limit the territorial scope of the resolution. CMEA belongs to the gradually decreasing number of international organizations where the principle of unanimity is still binding.[11]

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[8] "Trybuna Ludu," 18 September 1964.

[9] Cf. W. MORAWIECKI, *Organizacje międzynarodowe* (*International Organizations*), Warsaw 1961, p. 394.

[10] Cf. R. BIECZLEJAC, *Co-operation between Yugoslavia and CMEA,* "Mezhdunarodnaya Politika" 1964, No. 348, p. 14.

[11] Cf. K. SKUBISZEWSKI, *Kompetencje prawodawcze Wspólnot Europejskich* (*The Law-making Competences of European Communities*, "Przegląd Zachodni" 1962, No. 5. He writes that "in the law of international organizations of today the principle of unanimous decisions was forsaken and the right of veto for every member eliminated" (p. 28).

Recommendations of the CMEA Organs

The CMEA organs making recommendations. CMEA makes recommendations through organs acting within their terms of reference defined under the Statute. The organs empowered to make recommendations are main organs of CMEA with the exception of the Secretariat viz. the Council's Session, the Executive Committee and Standing Committees.

The Session of the Council as the supreme organ of CMEA discusses all problems within the competence of the organization as defined under Article 3 of the Statute.

The recommendations are adopted by the Council's Session on matters concerning economic and scientific-technical co-operation (Article 25 of the Standing Rules of the Session).

The Executive Committee besides the right to adopt recommendations may also put forward postulates which are then dealt with by the Council's Session (Article 7 paragraph 3 of the Statute). The postulates of the Executive Committee do not have the binding force but may help the Council in making a recommendation or a decision.

The standing Committees besides the recommendations on the economic and scientific co-operation may also put motions for discussion at the sessions of the Council and the Executive Committee (Article 8, paragraph 3 of the Statute). Under Article 36 of the Rules of Procedure of the Standing Committee of the Council the motions, besides the necessary background material, should contain also draft resolutions of the Council or the Executive Committee.

The recommendation of an organ of CMEA is an act which the Council expresses its wish through for member-states to follow a certain course of action described in that act; the recommendation suggests also that member-states, through their acceptance of the recommendation, make the advocated course of action obligatory. The recommendations constitute also the wishes of the Council's organs (of the Executive Committee and the Standing Committees) adressed to other organs (to the Sessions of the Council and to the Executive Committee). The recommendation of the CMEA organs concerns not only member-states but also the organs themselves. The Executive Committee performs the functions stemming not only from the Statute but also from the recommendations of the Council's Session (Article 7 paragraph 4 of the Statute). Likewise the Standing Committees may be given certain tasks to perform under the recommendation of the Council's Session or of the Executive Committee. The recommendations of the CMEA organs are also taken into consideration in the work of the committees on economic co-operation of the countries-members of CMEA[12] and of other economic organizations of the socialist states.

[12] Art. 1 of the Statute of the Polish-Hungarian Commission on Economic Co-operation which forms the annex to the Agreement between the Government of the Polish People's Republic and the Government of the Hungarian People's Republic on the setting up of the Polish-Hungarian Commission of Economic Co-operation (25 January 1958) provides that "the Commission shall act pursuant to the principles of CMEA... It is guided in its work by the recommendations of CMEA." "Zbiór umów międzynarodowych Polskiej Rzeczypospolitej Ludowej" ("Collection of International Agreements of the Polish People's Republic"), 1958, p. 87. Likewise, Art. 1 of the Agreement between the Polish People's Republic and the Government of the People's Republic of Bulgaria on the setting up of a Polish-Bulgarian Commission of Economic Co-operation of 30 December 1958. "Zbiór umów..." 1958, p. 124, and Art. 3 para. 1 of the Agreement between the Government ot the Polish People's Republic and the Government of the Czechoslovak Socialist Republic on the economic and scientific-technical co-operation of 10 September 1960, "Zbiór umów..." 1960, p. 110.

The Office for Joint Problems of Economic Plans as the auxiliary organ of the Executive Committee does not have the right to make recommendations. But under Interim Orders[13] (Article 5 paragraph 1) the Office may put forward motions for consideration by the Executive Committee and the Standing Committees of the Council.

The Legal Consequences of Recommendations. The Statute of CMEA does not provide for any legal differentiation between the recommendations by various CMEA organs. This allows to conduct their legal analysis as a whole. The recommendations are taken at the sessions of the CMEA organs duly empowered to make them. A different situation is envisaged only under Article 32 of the Rules of Procedure of the Standing Committees. It provides that "in exceptional cases the decisions of a Committee may be made through consultations with the delegations of all member-states of CMEA. Such decisions are subsequently included into the records of the Committee's next session."

We deal with recommendations at the stage of their adoption by the CMEA organs and of their acceptance by member-states. That is why we should differentiate between the recommendations adopted and accepted. Having been adopted by an organ of CMEA, upon the acceptance of all states concerned the recommendation under rules of procedure becomes binding. It is, however, a generally accepted fact[14] that adopted recommendations are not legally binding upon states. This stems from Article 4 paragraph 1 of the Statute. The recommendations adopted as wishes and as offers of the CMEA organs are binding only in the political-moral sense and not in the legal one.[15] This is not altered by the fact that the adoption of a recommendation entails certain obligations on the part of the CMEA members.[16] These obligations follow from Article 2 paragraph 4 of the Statute, from the Rules of the Session (Article 25), the Standing Rules of the Executive Committee (Article 23) and the Rules of Procedure of the Standing Committees (Article 33). They refer to problems connected with the adoption of recommendations and their implementation. After its adoption the recommendation is sent to the countries concerned for consideration. A member-state is bound to inform the Secretary of the Council within 60 days after the signing of the protocol of the Council's organ on the results of its consideration. These results may be negative, in spite of the consent voiced by the representative of a state at the moment of the adoption of recom-

[13] *The Basic Documents*, p. 43.

[14] One should omit the differing views based on false interpretation of the provisions of the CMEA statute. Cf. H. O. BRAUTIGAM, *Die wirtschaftliche Zusammenarbeit der Ostblockstaaten im Rat für gegenseitige Wirschaftshilfe*, "Zeitschrift für öffentliches Recht und Völkerrecht," 1961, No. 4, p. 710; M. KEMPER and J. KIRSTEN, *Rechtsfragen der neuen Etappe internationaler ökonomischer Beziehungen zwischen den Mitgliedstaaten des Rates für gegenseitige Wirtschaftshilfe*, "Staat und Recht," 1962, No. 12, p. 2179; W. SCHARNDORF, *Wirtschaftliche Integration des Ostblocks*, "Rheinischer Merkur," 1960, No. 5, p. 5; E. HOFFMAN, *Comecon — der gemeinsame Markt in Osteuropa*, Opladen, 1961—although he notices the provisions of the Statute on the non-binding character of the adopted recommendation, he treats them as safeguards for the USSR (p. 17).

[15] Cf. V. I. MOROZOV, *Legal Aspects of the Work of the CMEA Organs*, "Sovetskoe Gosudarstvo i Pravo," 1961, No. 10, p. 150.

[16] Cf. E. T. USIENKO, *op. cit.*, p. 90; *Mezhdunarodno-pravovoye formy sotrudnichestva socyalisticheskikh gosudarstv (International Legal Forms of the Co-operation of Socialist Countries)*, Moscow 1962, p. 84, and A. USCHAKOV, *Der Rat für gegenseitige Wirtschaftshilfe*, Cologne, p. 45. This is one of the few West-German publications which in spite of its critical attitude towards the CMEA makes an attempt at a thorough legal analysis of the provisions of its Statute.

mendation. In such a case the recommendation has no legal force with respect to that state. In practice there was not yet a case when a government has rejected a recommendation adopted earlier with the consent of its representative. The recommendations are being implementated by member-states on the basis of decisions taken by respective governments or by other state organs in accordance with domestic legislation (Article 4 paragraph 1 of the Statute).[17]

The supervision over discharge of obligations resulting from accepted recommendations is done by the main executive organ of the Council, i.e. its Executive Committee (Article 7 paragraph 4 of the Statute). This supervision consists first of all in ascertaining the fact of non-implementation or improper implementation of accepted recommendations and in drawing attention of member-states to those facts. The Secretariat of the Council carries the records of the implementation of recommendations by the organs of the Council (Article 9 paragraph 2e of the Statute). Its remarks concerning the implementation of recommendations are formulated in conclusions sent to the Executive Committee and to the Standing Committees. The work of the Secretariat in this field is not of a supervisory character. The Statute of CMEA does not provide the sanctions for non-implementation of obligations stemming from accepted recommendations.

The wording of Article 4 paragraph 1 of the Statute provided the ground for the appearence in literature of a difference of opinions as to the character of the recommendations. Particularly often one may encounter the thesis that the accepted recommendation is a kind of international agreement.

In his writings Usienko devotes considerable place to this problem.[18] He divides the recommendations into two groups: those which after adoption entail obligations for one state only, and those which are binding for a larger number of states. In the former case the obligations, besides the state concerned, are binding only upon the Council. The purpose of recommendations in the latter case is to establish legal relationship not between the member-state and the Council but among member-states themselves. In certain circumstances this legal relationship becomes an international agreement. These circumstances are: the establishment in the form of a recommendation of rights and duties for the states and the acceptance of their recommendations by the states concerned, in accordance with their domestic legislation. Usienko attempts to trace the binding legal force of a recommendation to an international ageement. In his opinion the obligations resulting from recommendations derive their legal force from an agreement among the members of the Council. A question arises wherefrom derives the binding force of the recommendations belonging to the first of the above mentioned groups? Usienko tries to establish here an agreement between that organ of the Council which adopted the recommendation and a particular state. The organ of the Council becomes, as it were, a party to an international agreement.

Uschakov[19] while discussing the problem of the legal forms of recommendations, wrote that the protocol from the session of the Council's organ, because

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[17] K. GRZYBOWSKI, *The Socialist Commonwealth of Nations, Organizations and Institutions*, 1964, states that only a formal acceptance is binding upon members states with regard to the policy recommended by CMEA. He adds, however, without substantiating his position, that from the technical point of view the recommendations form "a little more" than proposals on the action to be taken by one or several states (p. 80).

[18] USIENKO, *op. cit.*, p. 90—92.

[19] USCHAKOV, *op. cit.*, p. 46. Likewise MOROZOV, *op. cit.*, p. 153.

it is signed by the representatives of member-states, acquires the characteristics of an international agreement. All recommendations should be treated as international agreements, whose depositary is the Secretariat of CMEA. In his opinion the adoption of recommendation by the state performs the role of ratification.

Interesting views on this question can be found in deliberations by Ciamaga and de Fiumel.[20] These authors consider that "the recommendation accepted by the member-states constitutes a kind of international agreement in the case when that recommendation, by its very nature, refers to all member-states and confirms in its very contents, certain specific rules of action of a general character." Later on the opinion of Ciamaga and de Fiumel underwent some changes.[21] At present the authors hold the view that international agreements are established by declarations of the states concerned and the recommendation alone does not yet constitute an international agreement.

The opinions of some authors presented here on the form of recommendation by the CMEA organs give rise to polemics. In particular it would be difficult to agree with the statement that the protocols (records) from the sessions of the CMEA organs have the character of an international agreement. The stipulations contained in the protocol reflect the agreed will of that organ and not, as it is the case of an international conference convened for the purpose of concluding an agreement, the will of particular states. That is why the comparison of a protocol (records) to an agreed and signed text of an international accord is not very correct. The recommendation adopted by an organ and contained in the records does not cease to be an act of a CMEA organ. Such a recommendation, like those of a majority of international organizations, is not binding upon member states.[22] A question arises whether the recommendation of a CMEA organ after its acceptance by the member-states loses its original character and becomes an international agreement. All the above quoted authors, with the exception of Ciamaga and de Fiumel, reply to that question in the affirmative. Ciamaga and de Fiumel consider at present that recommendations do not change their character and do not become international agreements. This view seems to be the correct one. The accepted recommendation does not become an international agreement also in the case when it imposes obligations on one or several states. Its character does not change. Besides, this change is not necessary either on practical or statutory grounds. For neither from the Statute nor from the recommendations and statements of their acceptance does it stem that states which accepted recommendations wanted to make international agreement out of them. Adoption of a view to the contrary would constitute an extensive interpretation of those legal acts and give rise to reservations. Of course, all this is not invalidated by the fact that quite often the acceptance of a recommendation is followed by the actual conclusion of an international agree-

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[20] L. CIAMAGA and H. DE FIUMEL, *Struktura i formy prawne Rady Wzajemnej Pomocy Gospodarczej* (*The Structure and Legal Forms of the Council of Mutual Economic Assistance*), "Studia Prawnicze" 1962, No. 2, p. 253—254.

[21] L. CIAMAGA and H. DE FIUMEL, *The Legal-economic aspects of the development of CMEA, Documents of the Scientific Session of the Polish Academy of Sciences*, Warsaw, November 1964, p. 14.

[22] I. TUNKIN, *Problemy teorii prawa międzynarodowego* (*The Problems of the Theory of International Law*), Warsaw 1964, p. 157, justly criticizes different views of M. Virally expressed in his work *La valeur juridique des recommandations des organisations internationales*, "Annuaire Français de droit international" 1956, pp. 87—88.

ment. Szer[23] draws attention to the communiqué of the 9th Session of CMEA of 1958 from which it stems that the Session "clearly recognized as advisable that, in case of need, member-states transform their obligations resulting from the CMEA recommendations into international agreements." If the recommendations were already international agreements, such a directive in the communiqué would be redundant.

Now we should devote our attention to the question whether declarations by particular member-states accepting recommendations and thus providing basis for their acquiring binding force, have the character of an international agreement. The act of acceptance of a recommendation constitutes a unilateral declaration of the will of a state in which the state undertakes to obey this recommendation. In the light of the above mentioned views of Usienko the acceptance by a unilateral act of a recommendation, from which stems the obligation only for the state concerned, brings into being an agreement between that state and this organ of the Council which adopted the recommendation. The views of Usienko lead to the opinion that particular organs of the Council are co-authors of the law based on recommendations adopted by them. This conclusion is contrary to the provisions of Article 4 paragraph 1 of the Statute which provides clearly that the implementation of recommendations depends on their acceptance by the states and consequently only states are co-authors of the law based upon adopted recommendations. In case of adoption of a recommendation from which stems obligation for one state (e.g. concerning special production), the basis of its implementation is the unilateral act of acceptance on the part of the state concerned.[24]

When the recommendation requires of the member-states to undertake mutual obligations (e.g. concerning the conclusion of an international agreement), then it can be said that unilateral acts accepting those obligations form *sui generis* agreement on the basis of which arise the obligations between states.

In conclusion we can state that the acts of acceptance of recommendations are being transformed into non-binding norms couched in the form of rules of behaviour binding upon accepting states. The accepted recommendations become binding decisions of CMEA and not a new kind of international agreements. Their distinction as compared with the majority of recommendations of other organizations consists in the fact that the recommendations of CMEA acquire binding force through their acceptance by the member-states. The recommendations of other organizations in most cases become legal norms only when the principles contained in them become rules of customary law.

The Decisions of the CMEA Organs

The decision making CMEA organs. The organs of CMEA authorized to make decisions are: the Session of CMEA, the Executive Committee, the Standing Committees and the auxiliary organ of the Executive Committee—the Office for Joint Problems of Economic Plans.

The Session of the Council decides on questions connected with the admission of new members of CMEA (Article 2 paragraph 2 of the Statute) and the estab-

[23] S. SZER, *The Joint Enterprises of Members States of CMEA, Documents of the Scientific Session of the Polish Academy of Sciences*, Warsaw, November 1964, p. 20.

[24] It should be assumed, bearing in mind the special legal position of unilateral acts, that no international obligation of states would arise here. In practice states in their own interest fulfil such obligations.

lishment of organs necessary for the proper functioning of CMEA (Article 6 paragraph 6 of the Statute). Such organs are the Standing Committees, auxiliary organs of the Session (drafting committees) and the specialized agencies.[25] The Session of the Council establishes its own rules of procedure (Article 6 paragraph 7 of the Statute). These rules are contained in the Standing Rules of the CMEA session adopted at the 13th Session of the Council on 29 July 1960 and amended at the 17th Session of the Council on 20 December 1962.[26]

The Executive Committee may also establish its auxiliary organs. However, unlike the Council's Session it does not establish organs necessary for the functioning of CMEA but only such ones which it considers necessary for the performance of its functions (Article 7 paragraph 5 of the Statute). The Executive Committee decides on all financial matters with the exception of determining the share of particular states in the expenses connected with the maintenance of the Secretariat and the conduct of its activities. In such cases the decisions rest with the CMEA Session (Article 12 paragraph 1 of the Statute). The Executive Committee establishes also the controlling organs[27] for auditing the financial activities of the Secretariat (Article 7 paragraph 4g of the Statute). The procedural provisions of the Executive Committee are contained in the Standing Rules adopted by it on 12 July 1962.[28]

The Standing Committees take decisions on the adoption of the rules of procedure on the basis of the Typical Rules of the Standing Committees of CMEA[29] as well as decisions on the setting up of the working organs, convening of scientific-technical and other conferences. It belongs also to the competences of the Standing Committees to determine the membership, the tasks, the place and time-table of the sessions of the working bodies, conferences and meetings (Article 8 paragraph 6 of the Statute).

Under the Interim Decision adopted by the Executive Committee on 28 September 1962[30] the Office for Joint Problems of Economic Plans takes decisions on organizational and procedural matters in accordance with Article 4 of the Statute. Under this regulation the Office for Joint Problems of Economic Plans adopted its own Standing Rules on 26 February 1963.[31]

The Secretariat of CMEA has no right to make decisions.[32]

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[25] We may quote here as an example the decision of the 17th Session of the Council which established the Office for Co-ordination of Freights. The activities of this Office and of other specialized agencies is presented by CIAMAGA, *Od współpracy do integracji. Zarys organizacji i działalności RWPG w latach 1949—1964 (From Co-operation to Integration. The Outline of Organization and Work of CMEA in 1949—1964)*, Warsaw 1965, pp. 79—104.

[26] *CMEA—Selected Materials and Documents*, p. 208.

[27] In this case the controlling organ is the Auditing Committee established pursuant to the decision of the Council on the establishment of such committee to supervise financial activities of the CMEA Secretariat. This decision was adopted by the Conference of the Representatives of the Member-States on 16 February 1962 and amended on 28 September 1962 by the Executive Committee—*The Basic Documents*, p. 101.

[28] *The Basic Documents*, p. 33.

[29] *CMEA — Selected Documents and Materials*, p. 216.

[30] *The Basic Documents*, p. 45.

[31] *The Basic Documents*, p. 49.

[32] The lack of powers to take decisions caused that the Secretariat of the Council could not adopt for itself the Rules of Procedure. The role of its Standing Rules is being performed by the Resolution on the Secretariat of CMEA adopted by the Conference of the Representatives of Member-States of 3 March 1961 and amended by the Executive Committee on 12 July, 28 September, and 20 December 1962. *The Basic Documents*, p. 59.

The binding force of the decisions by the CMEA organs and the types of those decisions. The questions of the decision-making organs and of the principle of unanimity were already discussed on the occasion of the general legal description of the decision-making process of the CMEA organs. We should also say that those decisions become binding through an another process than recommendations. A separate expression of will by a member-state, made outside the organ concerned, is not required here. The decisions became binding on the day of the signing of the protocol (records) from the session of the relevant organ of CMEA (Article 4 paragraph 2 of the Statute). The decisions themselves, however, may contain different stipulations on that matter, in other words their entry into force may take place at some other date. This does not invalidate the rule that the binding force of decisions depends exclusively on their adoption by a CMEA organ.

The fact of the decisions having binding force is of considerable importance for CMEA and also indirectly for all member-states. One has the impression that this importance is not always sufficiently appreciated. In his work on decisions of international organizations Tammes wrote correctly that: ". . . decisions as such have only rarely become the subject of a comparative and generalizing study as to their functions and their effect."[33] Also the decisions of the CMEA organs have—in the literature—remained by and large overshadowed by recommendations. A short legal analysis of those decisions seems therefore purposeful.

The Statute of CMEA in Article 4 paragraph 2 divides the decisions of its organs into procedural and organizational ones. A separate type of decisions is that concerning the admission of new member-states of CMEA. The above division of the decisions by particular organs of CMEA allows us to state that procedural decisions deal with the course of action by the CMEA organs, while the organizational decisions refer to the structure and the proper functioning of those organs. The role of procedural decisions is not as important as that of the organizational ones. But procedural decisions can make possible or prevent the inclusion into agenda of the meetings of items important for the interests of member-states.[34]

Situations in which the CMEA organs are entitled to make procedural or organizational decisions, are described in the Statute and in the Standing Rules of those organs. The Standing Rules define the place and the time of convening the sessions of the CMEA organs, the mode of drafting and adopting the agenda, the composition of the delegations of member-states in particular organs, the functions of the chairman, the procedure of establishing the auxiliary organs, the role of the Secretariat of the Council in the work of various organs, the procedure of the sessions, the mode of taking decisions and introducing amendments to the Standing Rules, the drafting on the records. The Standing Rules of the CMEA organs next to the Statute "exert the most important and most

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[33] A. J. P. TAMMES, *Decisions of International Organs as a Source of International Law*, "Recueil des Cours" 1958, vol. II, p. 266.

[34] This phenomenon is known not only in CMEA but also in international organizations where the unanimity is not required for the adoption of decisions. The significance of the procedural decisions of the United Nations is discussed by P. C. JESSUP, *Parliamentary Diplomacy. An Examination of the Legal Quality of the Rules of Procedure of the United Nations*, "Recueil des Cours" 1956.

direct influence over the everyday practice, structure and general character of the Organization."[35]

The decisions of the CMEA organs, both procedural and organizational, may be divided into those of an executive and general character.

The decisions of an executive character regulate the strictly defined situations and formulate the rights and duties of the member-states in a single, often unique case. They implement *in concreto* the provisions of the Statute and of general decisions. An example of an executive decision is the one of the Council's Session on the convening of an extraordinary session or on the establishment of a drafting committee.

The decisions of general character deal with the general rules of action, structure and correct functioning of the CMEA organs. They constitute an extension, interpretation and a supplement of the provisions and principles of the Statute. The possibility of making executive decisions is provided by general decisions. They may take the form of the Standing Rules of the CMEA organs, of the provisions establishing the specialized agencies of CMEA,[36] of financial provisions,[37] of the provisions regulating the legal position of the international functionaries of CMEA,[38] the provisions concerning the rights and duties of the representatives of states performing definite functions in a CMEA organ,[39] and other provisions the adoption of which is envisaged under the Statute. General decisions are those which deal with the amendments or changes in the Standing Rules of the CMEA organs.

Decisions of the CMEA organs and its internal law. The general decisions constitute the internal law of CMEA while the executive decisions do not have this character.

The internal law of CMEA consists of the ensemble of legal norms established through decisions of the CMEA organs regulating the activities of those organs, of their members as well as the structure, functioning and the procedure of the Council. This law applies therefore primarily to the CMEA organs and to their members. The question arises whether it is binding upon member states.

There are opinions[40] that the internal law of international organizations is also binding for the states. These views are largely based on the statement

[35] J. KOLASA, *Rozwój regulaminów organizacji międzynarodowych* (*The Development of the Rules of Procedure of International Organizations*), "Ruch Prawniczy, Ekonomiczny i Socjologiczny," 1965, vol. 3, p. 81.

[36] To such rules belonged the Interim Decision on the Standardization Institute of CMEA—*The Basic Documents*, p. 91.

[37] The basic principles of the financial activity of the CMEA Secretariat were adopted by the Conference of the Representatives of Member-States on 15 December 1961 and amended by the Executive Committee on 28 December 1962—*The Basic Documents*, p. 97. Mention should be made also of the Decision on the Archives Fund adopted by the Executive Committee on 28 September 1962—*The Basic Documents*, p. 107.

[38] These rules are to be found in the resolution on the Secretariat of CMEA and in the annex to the resolution on the emoluments of the employees of the Secretariat, *The Basic Documents*, p. 65. The legal situation of the international functionaries of CMEA is discussed by J. SANDORSKI, *Położenie osób wchodzących w skład organów RWPG* (*The Legal Situation of Persons Employed by the CMEA Organs*), "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1965, vol. 1, p. 105—109.

[39] Such a rule is the Interim Decision on the rights and duties of representatives of states in the CMEA Executive Committee. The decision was adopted by the Executive Committee on 21 February 1963—*The Basic Documents*, p. 43.

[40] K. SKUBISZEWSKI, *op. cit.*, writes that among the rules of internal law "also the interests of state protected by law may be subject of regulations. Thus the internal law of international

that the internal law of international organizations is binding upon representatives of the member-states not in their capacity as physical persons but as delegates of states acting on their behalf. Consequently this law is binding also upon states. Further it is pointed out that the provisions of internal law of organizations often concern important interests of member-states.

It seems that although member-states of CMEA are not directly affected by the norms of the internal law of the Council, those norms create for them certain rights and obligations.

A further problem is the question whether the decisions creating internal law constitute a new source of international law. The opinions in this respect are divided. Some authors[41] consider that the decisions creating internal law do not constitute international law but only apply the provisions of the statutes of international organizations. Others[42] while acknowledging the statutory rights to adopt the norms of internal law, recognize these decisions as sources different from all those known before. Unquestionable therefore is only the fact that internal law of the organizations is derived from the statutory mandate. Even if there existed broader basis for its emergence, based upon customary law, in the statutes of contemporary international organizations this basis became, as it were, codified.[43]

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organizations is also binding for the states through granting of rights and imposition of duties upon them"—p. 18—19. Also there a reference is made to the concurrent views of H. T. ADAM, *L'Organisation Européenne de Coopération Economique*, Paris 1949, p. 183; P. REUTER, *Organisations internationales et évolution du droit, L'évolution du droit public, Etudes offertes à Achille Mestre*, Paris 1956, p. 449; M. SOERENSON, *Cours Général sur principes de droit international public*, Académie de Droit International de La Haye, p. 57—58; A. HOLD-FERNECK, *Lehrbuch des Völkerrechts*, part II, Leipzig 1932, p. 138. Also W. N. DURDENEVSKY and S. B. KRYLOW point to the importance of decisions by international organizations for states—*Podręcznik prawa międzynarodowego (Manual of International Law)*, Warsaw 1950, p. 31.

[41] In Polish literature this opinion is prevalent. Cf. C. BEREZOWSKI, K. LIBERA, W. GÓRALCZYK, *Prawo międzynarodowe publiczne (International Public Law)*, 1962, p. 71. The characteristics of a source of international law are being denied to decisions establishing international law also by A. KLAFKOWSKI, *Prawo międzynarodowe publiczne (International Public Law)*, Warsaw 1964, p. 37. M. LACHS, *Współczesne organizacje międzynarodowe i rozwój prawa międzynarodowego (Contemporary International Organizations and the Development of International Law)*, "Państwo i Prawo" 1963, p. 12, describes international law of an organization as a system of norms of organizational-administrative character. "Although they may not constitute norms of international law stricto sensu they have an influence over the shaping of international organizations and consequently over their further development"—p. 833.

For the Soviet science characteristic are the views of P. T. LUKIN, *Istochniki Mezhdunarodnogo Prava (The Sources of International Law)*, Moscow 1960. Resolutions and decisions of international organizations and international organs are not, in his opinion, a source of international law. The legal character of such decisions and resolutions consists in that they represent instances of the application of the existing international law and not the acts of creation of new norms of such law (p. 124).

[42] Cf. A. VERDROSS, *Völkerrecht*, 1955, p. 129; H. KELSEN, *Principles of International Law*, 1952, p. 365; P. FAUCHILLE, *Traité de droit international public*, 1922, vol. I, p. 48, T. TAMMES, *op. cit.*, pp. 266 ff.; K. SKUBISZEWSKI, *op. cit.*, writes that "the act of law-making by international organization cannot be considered as one of the three sources of law and therefore is the fourth source of international law" (p. 29). L. EHRLICH, *Prawo międzynarodowe (International Law)*, Warsaw 1958, regards "treaties and sets of norms established on the basis of treaties..." (p. 21) as a formal source of international law.

[43] A different view is presented by J. KOLASA, *Regulamin Zgromadzenia Ogólnego ONZ (The Rules of Procedure of the United Nations General Assembly)*, "Państwo i Prawo" 1963, No. 10, coming out in favour of the thesis that "the right of an international organization to adopt its internal rules derives from a broader basis than that which can be provided by the very text of a treaty establishing a given organization and defining its aims and purposes" (p. 566).

The statutory right to establish norms of internal law does not invalidate the thesis that it may be considered as a separate source of law.

The norms of internal law of international organizations apply not only the provisions of the statutes. Many norms of internal law do not stem from statutes of organizations. The Standing Rules of the CMEA organs are a convincing proof of that. For example among 34 articles of the Rules of the CMEA sessions only 14 are based upon provisions of the statute or constitute their exact repetition. One can say that decisions creating internal law of CMEA constitute an indirect source of rights and duties of a general administrative character for member-states.

The creation by the CMEA organs of the norms of internal law binding for the states does not limit their sovereignty. This is protected by the principle of unanimity required both for taking decisions or recommendations. It prevents the imposition upon states of rights and duties against their will.

The participation of the CMEA organs in the law making process. The law-making competences of international organizations have an influence over the legislative processes, i.e. the establishing of norms of international law both within the organizations and outside of them.

The deliberations presented here earlier allow us to draw certain conclusions concerning the participation of CMEA in the law-making process resulting from legislative competence.

1. The legislative competences of CMEA under which one should understand its competences to establish norms of international law for member-states, are narrow and defined under the Statute.[44] The internal law of CMEA established on the basis of that competence deals only with organizational-administrative problems without touching upon questions of substance, concerning the work of CMEA.

2. The norms of international law resulting from the recommendation adopted by an organ of CMEA do not stem from the law-making competences of CMEA. But the adoption of such recommendation by a CMEA organ is important link in the process of adoption of the norms of international law by member-states.

3. The adopted recommendations of the organs of CMEA provide very often the basis for conclusion of bilateral and multilateral international agreements between the CMEA members.[45] Thus CMEA exerts its influence over member--states by stimulating the law-making processes. The recommendations made by the CMEA organs increase the number of norms of international law binding among socialist states.

The legislative competences are, however, not the only factor causing the CMEA to participate in the process of establishing norms of international law.

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[44] The establishment of the legal basis for the binding force of the General Conditions of Deliveries of CMEA of 1 January 1958, poses a serious problem. Cf. J. JAKUBOWSKI, *Legal Framework of Trade between the Socialist Countries*, "Państwo i Prawo" 1961, No. 2.

[45] At a press conference on 3 February 1965, the Secretary of the Council N. W. Faddieyev while discussing the period between the 18th and 29th sessions of the Council stated that it was characterized by "a further expansions on a bilateral and multilateral basis, of economic and scientific-technical cooperation between the Member-States". He pointed out i. e. to the agreements of Member-States concluded in accordance with the CMEA recommendation with Mongolia on the assistance in geological surveys and in agriculture. "SEW — Biuletin Ekonomicheskoy Informaciy," No. 2, pp. 6—13.

Next to the legislative competences we should mention:

1. the drafting by the CMEA of international agreements to which the Council is not a party. The Statute and the convention on legal capacity, privileges and immunities of CMEA of 14 December 1959 were adopted by the Council established in 1949.

2. the *ius tractatum* possessed by CMEA. Under Article 10 of its Statute CMEA has the right to conclude agreement with non-member-states. This right was invoked during the signing on 17 September 1964 of an agreement with Yugoslavia on her participation in the work of the Council. At the same time CMEA concludes agreements with member-states. We have here the agreement between the CMEA and the Polish Government on the settlement of questions resulting from the legal posistion of the CMEA institutions in Poland,[46] and an analogous agreement between the Soviet Government and the CMEA of 7 December 1961.[47] The capacity to conclude agreements ensuring the discharge by the CMEA of its functions (among them should be included the above two agreements) may be inferred from Article 3 paragraph 3*e* of the Statute. These competences, as is justly deducted by Lachs, need not necessarily be inscribed in the statute of an international organization. They may derive from the interpretation of the statute or from the decisions of the organs of that organization.[48]

Under Article 11 of its Statute the CMEA may establish and maintain relations with economic organizations of the United Nations and other international bodies. So far CMEA has not concluded agreements defining the forms and character of contacts with those organizations. Nevertheless such contacts are becoming increasingly close.[49] Pursuant to the resolution of the United Nations Economic and Social Council the representatives of CMEA participated as observers in the Geneva Conference of UNCTAD (23 March—15 June 1964). Ever since 1959 the Secretariat of CMEA maintains unofficial contacts with the United Nations Economic Commission for Europe. The representative of the CMEA Secretariat takes part in the work of some organs of the ECE.[50] In 1964 the CMEA established contacts with the UN Economic Commission for Asia and Near East, the Economic Commission for Africa and with the International Atomic Energy Agency. In all probability these relations will find their expression in relevant agreements. This will still further enhance the participation of CMEA in the law-making process.

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[46] They are being discussed thoroughly by DE FIUMEL, *W sprawie położenia prawnego instytucji RWPG w Polsce* (*On the Legal Situation of the CMEA Institutions in Poland*), "Państwo i Prawo" 1964, No. 4, pp. 662—665.

[47] "Vneshnaya Torgovla" 1963, No. 12, pp. 49—51. The agreement was discussed by V. I. MOROZOW, *SEW — soyuz ravnykh* (*CMEA—a treaty of equals*), Moscow 1964, pp. 57—58.

[48] Cf. M. LACHS, *Umowy wielostronne* (*Multilateral Agreements*), Warsaw 1958, pp. 60—69.

[49] A. Bykow describes the contacts of CMEA with other international organizations, "Mezhdunarodnoya Zhizn" 1965, No. 2, p. 29—31.

[50] *EEC resolutions*, 1963, Supplement No. 1, 963 (XXXVI).

SETTING UP THE UN FORCES AS ENVISAGED AT THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION

by JERZY SAWICKI

In the system of the United Nations great importance is being attached to the problems of mechanism whose function would be the use of military force for safeguarding peace and security in the postwar world. This mechanism was conceived as an integral part of the system of collective security based upon the principle of co-operation of all permanent members of the Security Council, aimed at ensuring a speedy and decisive counteraction in case of a threat to or a violation of peace.

The events after World War II have taken a different course than was envisaged at San Francisco. Attempts to replace the principle of co-operation by imposition of particular interests required looking also for legal arguments.

The principle of unanimity and its ultimate consequence—the competence of the Security Council in actions aimed at maintenance of international peace and security, have become subject of sharp criticism. Both these problems have been touched upon directly or indirectly in the course of discussion now being held on the so-called peace-keeping operations of the United Nations. It seems that the examination of the idea of setting up the UN forces in the form conceived at the San Francisco Conference will serve a useful purpose from the point of view of providing comprehensive background for an analysis of the proposals advanced so far.

The present paper proposes to deal with the two sets of problems. The first concerns the powers of the United Nations, in particular the question of the organ to which the founders of the organization entrusted the establishment of military force for the maintenance of peace. The second deals with the totality of rights and obligations connected with the setting up of the UN forces which accrue to or are binding upon the Members and the Organization itself.

The Organ Setting up the UN Forces

The setting up and the use of forces given at the disposal of the Organization by its Members is entrusted by the Charter to an organ which is bound by the principle of the unanimity of great powers. The tendency to supplant this principle by the majority rule led to the questioning of the exclusive competence of the Security Council in those matters. In connection with the competence of setting up the UN force two questions has arisen. First: what organ according to the Charter of the Organization, has the competence to establish, in case of need,

the military force? Second: does the selection of that organ exclude the same or analogous competence of other organs?

The basic article of the UN Charter in the question of setting up the UN force is article 43.[1] It contains provisions which describe the role of the Security Council in setting up such force. These provisions are the function of the type of military force which the Organization was to have at its disposal: the force was not meant to have a permanent character and was to be composed of the contingents of member-states made available to the Security Council in case of need.

The foundation on which the setting up of the UN military force is based under the Charter, are agreements on the basis of which member states were to undertake to make available to the Security Council their military contingents at the Council's request. These agreements were to be negotiated as soon as possible on the initiative of the Security Council. The parties to the agreements were to be the United Nations represented by its Security Council on the one hand, and particular member states or groups of states on the other. These agreements were called in the Charter the special agreements. For their entry into force a procedure applicable to the conclusion of treaties was envisaged, i.e. independently of the signing of the agreement its ratification was also required in accordance with constitutional procedure of the signatory states.

Already from such an approach to the question of setting up the UN force certain conclusions can be drawn. Article 43 does not envisage a possibility of member-states making available all, or part, of their military forces to an organ other than the Security Council. It does not provide for such forces being made available without prior conclusion of a special agreement with the Security Council nor even after conclusion of the agreement such forces could be made available otherwise than at the Security Council's request.

Article 43 of the Charter differs slightly from paragraph 5, Section B, Chapter VIII of the Dumbarton Oaks Proposals which constituted its model. The basic difference in methods of establishing UN force consists in the fact that under Dumbarton Oaks Proposals special agreements were to be concluded among the member-states themselves and the Security Council was only to approve them.

Several motions and amendments to paragraph 5, Section B, Chapter VII, were put forward and they became subject of a broad discussion. Attention was drawn i.a. to the fact that leaving the question of concluding agreements to the discretion of the member-states might cause delays. It was therefore suggested to empower the Security Council to take initiative in negotiating such agreements so that they be concluded by the Council with individual member-states or groups of states. This opinion gained support and consequently a relevant amendment was included in the revised paragraph 5 and adopted unanimously by the Committee III/3.[2]

Does the change in the wording of paragraph 5, Section B, Chapter VIII, throw any additional light upon the role which the Conference assigned to the Security Council in the field of setting up UN forces? To a certain extent, yes. The change in paragraph 5 led to the transformation of the Security Council from an almost passive observer of the agreement-making process into one of

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[1] Paul Boncour defined it as the "corner-stone of the whole system" (*Documents of the United Nations Conference on International Organization*, (UNCIO), San Francisco 1945, vol. 12, p. 575).

[2] UNCIO, vol. 12, p. 433.

the subjects of that process, moreover, exerting upon it a preponderant influence.

Under the Charter the initiation of negotiations on the conclusion of agreements, the right to ask members to enter into such agreements were reserved for the Security Council as representing the Organization. Although the original wording of the Dumbarton Oaks Proposals already designated the Security Council as an organ which, on behalf of the Organization, was entitled to claim for its disposal military contingents from states which concluded the agreements, but the basis for those claims would be, in such cases, decisions *in favorem tertii*. The amendments introduced here made of Security Council as representative of the Organization, the subject of rights reserved to Organization under agreements to which it was a party.

During the conference discussions were held on ways and means of assuring a possibly efficient system of providing the Security Council with military force and on the participation of the Council in setting up of such force. But the very fact that it was the Security Council itself and not some other organ which was called upon to deal with those problems, was accepted as an obvious premise of all considerations on that subject.

The UN Charter does not contain any provisions envisaging a possibility of the Security Council asking Members that they provide military contingents with a view of carrying out an enforcement action if they have not entered into prior commitments by concluding special agreements with the Council. However, the practice knows already of instances when military contingents have been provided by Members, although no special agreements were signed by them to such effect before.

There is nothing in the Charter which would prohibit the use by the Council of military contingents offered in that way. There is no provision concerning such an eventuality probably not because it was consciously admitted as possible to arise. The delegates to the San Francisco Conference did not take into account the possibility of voluntary offers without prior signing of special agreements. They rather expected attempts to shirk away from the obligation to provide contingents or even from signing of special agreements and, consequently, put all their efforts in inscribing into the Charter of provisions preventing such evasions. But the fact that in the UN practice such contingents were supplied on voluntary basis rather than on the basis of obligations under special agreements, has an important legal meaning which can be assessed in the light of Article 106. This article states that the Security Council may recognize, that it is able to take over responsibility for the implementation of the provisions of Article 42 only when a certain number of special agreements of appropriate importance have been signed. It is of course up to the Council itself to decide what number, of what special agreements, should be in such a case considered as enabling it to begin the exercise of its responsibilities under Article 42. But Article 106 does not provide for the possibility of the Security Council expressing itself in this respect if no special agreements have been signed at all. That is why the voluntary putting at the disposal of the Organization of military contingents by member states irrespective of the fact whether this could be a repeated practice, will not change the situation. Its gist consists in the fact that—from the formal point of view—the temporary security provisions contained in Article 106 remain valid.

The Charter assigns to the Security Council the decisive role in setting up the military force of the Organization imposing at the same time upon the

Members the obligation to co-operate with the Council in this respect through onclusion of special agreements.

This obligation stems, first of all, from the provisions of Article 43. We have analyzed above the legal consequences of a situation in which the Members, without signing of special agreements, have given to the disposal of the Security Council a part of their military contingents and the Council uses them for the restoration of peace. Going further in this direction we could ask whether member states could not legally, out of their own will, put their military contingents at the disposal of another UN organ, e.g. the General Assembly or the Secretary General?

Interesting problems of interpretation are connected with this question. Taking an extreme example one can ask whether the lack in the Charter of provisions empowering other organ, besides the Security Council, to set up military forces would make the setting up of such a force by other organs an infringement of the Charter? May the Organization establish international military forces exclusively by virtue and within the limits of provisions of its constituting act? Or, are the competences of inter-governmental organizations in general, and thereby of the United Nations, not limited only to the powers delegated to it and indispensable for achieving the purpose of the organization but are rather nearer to the rights of subjects of international law viz. the states?[3] Bearing in mind the well-known principle that one should not try to interpret what does not require interpretation, an attempt is made in the present paper to find the answer to this question first of all on the basis of the text of the Charter.

Let us revert then to the provisions of Article 43 of the Charter. It says that the Security Council will obtain at its disposal military forces from Members on the basis of special agreements. These special agreements constituted, under the Charter, a cornerstone on which the military forces of the Organization were to be created. Specifying obligations of the Members in connection with the setting up of military forces, the Charter invokes the special agreements in Articles 43, 44 and 45. The special agreements have been also mentioned in Article 106 of the Charter in the chapter on transitional security arrangements. The context in which the special agreements are mentioned in Article 106, the genesis of the provisions of this article and the discussion in Committee III/3 point to the importance which was attached to those agreements not only in the process of setting up the military forces of the Organization but also in the much broader aspect of passing over from the transitional stage to the moment when the mechanism of collective security of the Organization will have acquired its full effectiveness.

Article 106 divides the life of the United Nations, from the point of view of its function as the guardian of peace, into two periods. The first, transitional stage is characterized by the fact that, in spite of the entry of the Charter into force, the Security Council is still not able to perform its functions under Article 42, i.e. it has no possibility of using military force for the maintenance or the restoration of peace. Conversely, the second stage is characterized by the ability of the Council to perform its duties under Article 42.[4]

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[3] Cf. Finn SEYERSTED, *United Nations Forces. Some Legal Problems*, "The British Yearbook of International Law," 1961.

[4] Cf. the statement by the Delegate of Uruguay at the Twentieth Meeting of the Committee III/3 (UNCIO, vol. 12, p. 535).

The dividing moment, under Article 106, is linked with the entry into force of such special agreements which in the opinion of the Security Council will allow it to begin discharging its obligations under Article 42. The entry into force of the provisions of the Charter on the application of the military force was made dependent on the conclusion of such agreements. Otherwise these provisions would remain a dead letter.

The text of Article 106 is not identical with that of paragraph 1, Chapter XII of the Dumbarton Oaks Proposals. Paragraph 1 begun as follows: "Pending the coming into force of the special agreement or agreements referred to in Chapter VIII, Section B, paragraph 5, and in accordance with the provisions of paragraph 5 of the Four-Nation Declaration signed at Moscow 30 October 1943 the states parties to that Declaration should..." Certain reservations were voiced in connection with this paragraph. After some discussion at the Conference the wording of the paragraph was modified. Already during the first day of discussion in the Committee III/3 at the San Francisco Conference attention was drawn to certain ambiguities concerning conditions of the transfer of responsibility for world peace from the Five Big Powers[5] to the United Nations and the time which might elapse before such transfer. The delegate of Canada pointed that paragraph 1 of Chapter XII entrusted to the Four Powers interim authority for a period which may be very long and which will come to an end only when special military agreements envisaged under Chapter VIII, Section B, paragraph 5 will enter into force. He asked in conclusion for a reply to several questions in order to clarify the meaning of provisions of paragraph 1, Chapter XII. Two among those questions pertained directly to the problem under discussion here:

—Does paragraph 1 mean that the Security Council may take over the responsibility only after all special agreements envisaged under Chapter VIII, Section B, paragraph 5 will have come into force?

—What shall consist in the role of the Security Council in the period between the establishment of the Organization and the coming into force of special agreements?[6]

The "provisional" answers to those questions were given first by the delegate of the United Kingdom. He stated that although one could construe paragraph 1 in the sense that for the taking over of the responsibility by the Council the prior coming into force of all special agreements is indispensable but the intention of the authors was that the Four Big Powers act on behalf of the Organization only till the moment the Security Council will be able to assume its responsibilities. And that by no means signifies that to this end all special agreements must come into force.[7]

The reply of the US delegate run as follows: "It was not necessary for all the special agreements to come into force before the Council took the full responsibility. Some of these agreements might never come into force... The role of the Council during the interim period would include all its functions listed in the Charter in so far as the Council could perform these functions".[8]

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[5] The amendment to Chapter XII, para. 1 supplementing the words "States, parties to the declaration" with the words "and France" proposed by France and supported by the US delegate was adopted unanimously by the Committee III/3 at the very outset of discussion on the transitional arrangements (UNCIO, vol. 12, p. 400).

[6] UNCIO, vol. 12, p. 401—402.

[7] *Ibid.*, p. 402.

[8] The US delegate while speaking on the same subject stated, at one of the subsequent meet-

"Use would be made of forces supplied under special agreement only in so far as they were made available... In respect to the temporary responsibility of the Four Powers for enforcement actions... pending the availability of forces at the disposal of the Organization, the Four Powers themselves would have to furnish the forces needed to take action."[9]

These explanations were considered satisfactory by the delegate of Canada[10] and to some extent by the delegate of Australia,[11] but they were not satisfied with the wording of the paragraph 1, Chapter XII, which in their opinion should have been amended. During the voting the Committee III/3, without questioning in principle its contents, rejected the wording of paragraph 1, Chapter XII by 21 votes to 9.[12]

When two weeks later the Committee III/3 returned to the item of Chapter XII, the United Kingdom delegate presented the revised version of paragraph 1, Chapter XII, which, with only slight modifications, was incorporated into the Chapter as its Article 106.[13] Judging from the records of the meeting one could think that it was the proposal of the United Kingdom seconded by France, Norway, Peru, Turkey and the United States. But the Report of the Rapporteur of the Committee III/3 presented this as a proposal of the Five Big Powers.[14] The new version first of all took into account all the reservations voiced during the debate as to the nature of conditions which had to be fulfilled before the Security Council could take over the function of applying force by deciding that not all special agreements must come into force to make that possible. It would suffice that only such number and of such agreements should enter into force which would enable the Security Council to use force. Secondly, it gave to the Security Council the competence to decide whether the coming into force of a given number of agreements of specified character is sufficient for the Council to take over the enforcement functions. In spite of certain reservations voiced in subsequent discussions, this version gained wide support and was adopted by the Committee III/3 by a majority of 29 votes with 3 abstentions and none against.[15]

We can now set out to supplement the conclusion stemming from the provisions of Article 43 of the Charter with the conclusion derived from Article 106. The conclusion from the former one was that Article 43 did not take into account the possibility of placing by Member state of a part or the totality of its armed forces at the disposal of an organ other than the Security Council. This assertion, undoubtedly true, is, however, rather narrow in this scope. It does not provide an answer to the question whether, after all, it would not be possible, without

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ings of the Committee III/3, as follows: "The Security Council will delay in exercising its functions only with respect to those functions whose performance would be impaired by the non-existence of appropriate special agreements under para. 5, Section B, Chapter VIII" (UNCIO vol. 12, p. 534). This clarification was registered in some modified form by the Rapporteur of, the Committee III/3 in his Report for the Third Committee: "The Security Council would refrain from the performance of its responsibilities only with respect to those functions the exercise of which would be suspended until the conclusion of the special agreements..." (UNCIO, vol. 12, p. 559).

[9] UNCIO, vol. 12, p. 403.
[10] *Ibid.* pp. 403—404.
[11] *Ibid.*, p. 411.
[12] *Ibid,* vol. 12, p. 421.
[13] *Ibid.*, p. 533.
[14] *Ibid.*, p. 558.
[15] *Ibid.*, p. 536. Those abstaining were: Australia, Egypt and Uruguay.

infringing upon the Charter to supply another UN organ with military force.

One could maintain, with reason, that the answer to this question stems already from the fact that the Charter provides for a detailed procedure of setting up armed forces by the Security Council. The establishment of such a procedure, with the simultaneous lack of any provisions containing any allusions to the possibility of setting up military force by another UN organ, amounts to the exclusion of the competence of other organs in the setting up of military forces.[16] But Article 106 provides a much more important argument. According to its provisions the only alternative to the setting up of the UN military force precisely by the Security Council is the competence of the signatories of the Moscow Declaration and France. As long as the Security Council will not conclude appropriate special agreements, the burden of responsibility for the use of military force rests upon the Big Five Powers. Article 106 does not leave room for any other possibilities. Therefore the stage, which from that point of view could be called transitional, continues. The competence of the Big Five Powers is to expire only when the Security Council will recognize that the coming into force of a sufficient number of special agreements of specified kind enables it to take over the responsibility for the use of military force. The putting by Member states their forces at the disposal of an organ other than the Security Council would not remove therefore from the Big Five Powers their responsibility for the use of military force nor would deprive them of that competence. It would only create a situation pregnant with the conflict on prerogatives possessed jointly by the Big Five Powers.

However, what would be the situation if the Security Council concluded special agreements enabling it to set up a sufficient military force but because of the lack of required majority the Council could not take an important decision? Would not such a situation constitute sufficient justification to look for other ways to circumvent a procedure preventing the taking up of enforcement action? Would it not favour rather the ceding of that competence to the General Assembly where the rule of the unanimity of all Big Powers does not apply?

It would be difficult to maintain that the authors of the Charter did not envisage such situations, that only the practice of the United Nations has demonstrated the gap in the provisions of the Charter which was not perceived at San Francisco. The materials of the Conference show that a number of delegations were against the requirement of the unanimity of Big Powers and that the above quoted arguments were not lacking during the discussions at that time. Nevertheless the Conference rejected draft amendments to paragraphs 2 and 3, Section C, Chapter VI of the Dumbarton Oaks Proposals.[17] The Rapporteur of the Committee III/3 stated that "the representatives of the five permanent members did not try to minimize the seriousness of the situation which might arise in case of the use of veto. . . Moreover, they have repeatedly explained that assessing the situation realistically it was obvious for them that absolute unanimity of the Big Powers was absolutely indispensable for the implementation of the Security Council's decisions aimed at the maintenance of international peace and security."[18]

[16] That line of reasoning was applied by the Soviet delegate in discussion on the Belgian amendment to para. 4, Section B, Chapter VI of the Dumbarton Oaks Proposals (UNCIO, vol. 12, p. 394).

[17] UNCIO, vol. 11, p. 613.

[18] *Ibid.*, p. 609.

The above deliberations should be ended by discussing yet another eventuality. If the Charter does not envisage the possibility of setting up UN military forces by an organ other than the Security Council viz. the General Assembly or the Secretary General; if the military forces of the Organization can be established only by an organ defined in its constituting act, do not the provisions of the Charter exclude thereby also a collective enforcement action applied by the UN members with the omission of the UN machinery?

The provisions of the Charter on self-defence may apparently suggest such an idea. The Charter confirmed the inherent right to self-defence, both individual and collective, but only in case of an armed attack. Moreover, nothing points out that the Charter empowers Members to take up armed action outside the mechanism created by it, in situations other than entitling to collective self-defence and only till the moment when the Security Council undertakes measures necessary for the maintenance of international peace and security. One could argue that in case of an armed attack and the lack of unanimity on the part of the Council, a collective action by Members would not contravene the provisions of Article 51 of the Charter and that it was enough if it was taken in self-defence. But from the legal point of view even in such a case the difference is by no means insignificant. For one could not describe such a move as an enforcement action by the Organization.

Self-defence is an old institution of international law which the mechanism of collective security of the Charter not only did not try to eliminate, but built it into its system so that it could supplement it in case of emergency till the time the UN mechanism starts working properly. The Members of the Organization acting in self-defence do not represent however the Organization. Their action is not tantamount to the action of the Organization.

The question of collective action by the UN members became subject of discussion at the San Francisco Conference in connection with the problem of the legal consequences of aggression. New Zealand proposed to add in Chapter II of the Dumbarton Oaks Proposals, after paragraph 4, a new paragraph running as follows: "All members of the Organization undertake to resist collectively any act of agression against any other Member."[19] This proposal met with strong opposition. The delegates of the United States[20] and the United Kingdom[21] spoke against it. The latter stated that the proposal changed the whole basis of the United Nations, since it was introducing an obligation of automatic resistance to agression. But the very foundation of the Organization, then being established, were the findings by the Security Council on threats to peace, followed by action of the Members, taken up at the request of the Council and according to its plans.

The New Zealand's proposal was popular among many delegations. In the Committee I/1 it obtained 38 votes for, with 18 against.[22] It seems that in the course of unofficial conversations it became possible to convince delegations, including that of New Zealand who were favouring the amendment that this proposal could undermine the very foundations of the new Organization. Consequently the New Zealand's delegate in the Committee I/1 modified substantially the sense of his proposal, making it devoid of its initial meaning.[23]

[19] *Ibid*, vol. 3, p. 487.
[20] *Ibid.*, vol. 6, p. 344.
[21] *Ibid.*, p. 356.
[22] *Ibid.*, vol. 6, p. 346.
[23] *Ibid.*, vol. 6, p. 81.

Thus the Conference saw the danger inherent in the possibility of taking up collective action by Members outside the Organization. By rejecting finally the New Zealand's amendment the Members agreed—to use the words of the United Kingdom delegate—that it would infringe upon the foundations of the UN system of collective security.

The Rights and Obligations of the UN Members in Connection with the Setting Up of UN Military Forces

Two stages are clearly discernible in the process of setting up the UN military force, as outlined in the Charter. The first covers the creation of legal and organizational basis for a number of measures which the Security Council might be forced to take in future, at a very short notice. Of course it could not have been foreseen when such a situation was likely to arise. It was vital however that, should need arise, the Council would already have vis-a-vis to the Members the rights which would allows it to set up the required military force and obtain appropriate backing without undue delay. This role was to be performed by special agreements.

The second stage—generally speaking—was to consist of implementation of the rights acquired by the Security Council under the Charter and the special agreements, in a way adapted to the requirements of the situation with which the Council might be faced. Neither the Charter nor the special agreements could regulate in advance the actions of the Security Council in such a case. Only a concrete situation could dictate which of the signatories of special agreements should be approached with the request for a given type of military force, in what strength and succession of their supply.

The obligations of the UN Members in connection with the setting up of military forces of the Organization are of fundamental importance for the effectiveness and efficiency of enforcement actions. They constitute a function of the type of military forces of the Organization which were conceived as composed of national contingents, supplied by Member states. The provisions setting out these obligations, both from the point of view of their scope and origins, can be divided into two groups.

Some obligations stem from undertakings which the states have accepted while joining the new Organization. These are the obligations towards Organization itself. They do not refer exclusively to the moments when the Organization—in practice, its Security Council—is about to set up a military force, but there is no doubt that they cover also such situations. Other provisions, on the other hand, outline the obligations connected exclusively with the establishment of military forces.

The provisions falling into these two categories can be found in the Charter. It is characteristic, however, for the second group of obligations that they are referred to as stemming not only from the Charter. On the contrary, the Charter says that the modalities of services to which the Members obligate themselves will be outlined in separate agreements. Thus, according to the Charter, the Members undertake to make available to the Security Council at request "armed forces, assistance and facilities including rights of passage," however "make available" not *tout court* but "in accordance with special agreement or agreements." The number and types of forces, their degree of readiness and general location, and the nature of facilities and assistance to be provided are to be

governed also by special agreements. The Members are to hold immediately available national air force contingents for immediate use by the Security Council. The Council is to determine the strength and degree of readiness of these contingents and plans for their combined action "within the limits laid down in the special agreement or agreements."

From the practical point of view, it might seem that after conclusion of special agreements the finding whether a given obligation stems from the Charter or the special agreement was not a priority issue. It becomes, however, an important problem in view of the fact that no special agreements have been concluded. A question arises whether the obligation of the Members under Article 43 to make available armed forces etc. and an undertaking under Article 45 to hold in state of readiness defined contingents of national air force to be used by the Organization are valid in spite of the lack of special agreements. Or, more specifically, whether the provisions of Articles 43 and 45 by themselves, without any additional legal act, give to the Organization the right to ask from Members to perform the services enumerated in those articles.

It seems that we deal here with special norms. Their validity begins with the coming into force of the Charter. But they can not come into force with respect to those states which have not concluded special agreements. This impossibility is above all *questio facti*. We cannot ascertain whether the Security Council has the right to ask from the Member, e.g. to make available two armoured divisions, if there is no special agreement specifying the size and type of the promised military contingent. Therefore the signing of a special agreement is a precondition for making, by the Security Council, of the request to supply the troops.

Does this mean that as long as the special agreements have not been signed, the Organization does not have any rights vis-à-vis to its Members with respect to the setting up of the military forces? Such a conclusion would not be justified. Article 43 entitles the Security Council to request that the Members conclude with it special agreements whose subject and, to a certain extent, the contents were established in advance. The Security Council has the right to show initiative on the conclusion of special agreements and the Members are bound, in good faith, to enter into negotiations and conclude such agreements. As long as the agreements have not been signed, the Security Council can not ask for military contingents from the Members. Should however such agreements be concluded then not only the provisions of the special agreements but also those of Articles 43 and 45 become enforceable.

The general sense of the obligations of the UN members with respect to the setting up and the use of the Organization's armed forces is outlined in paragraph 6 of the Preamble to the Charter. Article 2, paragraph 5, and Article 25 impose upon the Members an obligation to give to the United Nations every assistance and to carry out all decisions of the Security Council, i.e. also in this field. These obligations are of a broad character and are by no means limited to the phase of the setting up of military forces. Moreover, it would not be possible to single out from all these obligations those related to the establishment of UN military contingents. The provisions dealing directly with the process of the setting up of military forces are contained only in Articles 43 and 45 of the Charter.

Article 43, paragraph 3 entrusts to the Security Council the task to negotiate and conclude special agreements with the Members or groups of Members.

Entrusting this task to the Security Council the signatories of the Charter have undertaken to react positively when the Council will take appropriate initiative. This undertaking includes the participation in negotiations aimed at the conclusion of an agreement, the signing of the agreement and submitting it for ratification to the organ to which the respective constitutional processes gave the right to ratify international treaties. Article 43, paragraph 1 makes it clear that this obligation is binding upon all members of the UN.

At the beginning of this paper attention was drawn to the changes introduced in the last sentence of paragraph 5, Section B, Chapter VIII of the Dumbarton Oaks Proposals before it became paragraph 3 of Article 43 of the Charter. This question was discussed from the point of view of the rights of one of the subjects of special agreements, i.e. the Organization. Since to these rights *ex definitione* correspond the obligations of the other subject or subjects of these agreements—these were to be the UN Members or groups of Members—there is no need to invoke once again the genesis of Article 43, paragraph 3 nor the conclusions stemming therefrom.

The provisions of Article 43, paragraphs 1 and 2, and Article 45 constitute an elaboration of the obligation to conclude special agreements, contained in Article 43, paragraph 3. This obligation is not only elaborated upon but also made much more specific. These provisions list the range of problems the special agreements were supposed to regulate and—in broad outline—ways and means of such regulation. Consequently the undertaking contained in Article 43, paragraph 3, is not an obligation to conclude any special agreement but such an agreement which could settle specific problems outlined in the Charter and also—at least as some of them were concerned—to show the way for their solution. Let us try on the basis of provisions of Article 43, paragraphs 1 and 3, and of Article 45 outline the text of such an agreement.

Under paragraph 5, Section B, Chapter VIII of the Dumbarton Oaks Proposals a state concluding special agreement was to make available to the Security Council, on its call, its armed forces, facilities and assistance necessary for maintaining international peace and security. The special agreement was to determine also the type and size of military contingent, and the nature of facilities, and assistance mentioned above. At the beginning of the discussion on that item the delegate of Australia pointed that the mention of "armed forces, facilities and assistance" in Paragraph 5 was none too clear. He asked for explanations so that the Members would know to what they obligated themselves.[24] He was supported by the delegates of Canada,[25] New Zealand[26] and Greece.[27] Since the second sentence of Paragraph 5 said that the special agreement will specify the members and types of military contingents to be made available to the Security Council and the nature of assistance and facilities—the request by the delegate of Australia and those who seconded him seemed difficult to understand and found no support. The proposal of France, on the other hand, was adopted in a large measure.[28] It asked that the special agreement: a) obligated the signatory state to accord to the UN forces the right of passage, b) fixed the delay in which the state would make available its contingents to the Security

[24] UNCIO, vol. 12, p. 382.
[25] *Ibid.*, p. 391.
[26] *Ibid.*
[27] *Ibid.*, vol. 12, p. 392.
[28] *Ibid.*, vol. 3, p. 386.

Council and, should need arise, also the zone where they would be normally stationed, and c) defined also the nature of facilities, assistance and means of communications which the Council was to receive from the Members. Not all of these French postulates were bringing something essentially new to the text of the Dumbarton Oaks Proposals. The third postulate expressed in different words the stipulations contained in the second sentence of paragraph 5, Section B, Chapter VIII, listing only in addition means of communications. The new version of paragraph 5 proposed at the Eighteenth Meeting of the Committee III/3 by the delegate of France[29] on behalf of the inviting powers, France and Australia,[30] and adopted unanimously by the Committee[31] included mention on the right of passage and the second French postulate, although in a slightly modified form.

As a result of the conference, the text of the Dumbarton Oaks Proposals concerning the special agreements was extended. The provisions concerning the facilities which should be accorded in case of the conclusion of a special agreement, include now also the right of passage. The provisions regulating the number and type of military forces which the Council would be entitled to ask from the signatories of the agreement extends now also to the determination of the degree of their readiness and general location. Since these additions were made on the initiative of the French delegate,[32] by the degree of readiness one should understand the delay of time which may elapse from the call by the Security Council till the moment the forces will be actually made available, and by the general location—the zone of their stationing.

By virtue of paragraph 6, Section B, Chapter VIII of the Dumbarton Oaks Proposals the state-signatory of the special agreement was to undertake to keep in immediate readiness a defined contingent of its national air force so that the Security Council could use it together with the air force contingents of other states for "combined international enforcement action" in instances calling for prompt military measures. A special agreement was to determine also the limits of obligations of the signatory state with regard to the size of this contingent, its state of readiness and the modalities of its use.

However the stipulation providing for holding immediately available air force contingents was questioned since the opinion was expressed that limiting the type of forces held immediately available to the air force alone was illogical because the aggressor could use any type of military force he wanted.[33] This thesis was opposed by the delegates of the United States and the United Kingdom who explained that the stipulations of paragraph 6, Section B, Chapter VIII of the Dumbarton Oaks Proposals were not limiting the scope of paragraph 5. Paragraph 6 constituted only a supplement of paragraph 5, putting particular emphasis on the special character of the air force as a weapon which could be used immediately.[34] Consequently paragraph 6 was adopted without changes.[35]

In spite of the fact that the few proposals for amending paragraph 6 referred only to the type of armed forces which were to be held in state of special readi-

[29] *Ibid.*, vol. 12, p. 432.
[30] *Ibid.*, p. 509.
[31] *Ibid.*, p. 433.
[32] *Ibid.*, p. 432.
[33] *Ibid.*, p. 433.
[34] *Ibid.*, pp. 433—434.
[35] *Ibid.*, p. 434.

ness, its wording could evoke doubts which are equally pertinent in relation to Article 45 of the Charter. The wording of Article 45 is not simple. It entrusts to the Security Council the determination, with the assistance of the Military Staff Committee, of the strength and degree of readiness of the contingent as well as the working out of the combined operational plan for all national contingents which were to be used in a given action. What does remain, however, for the Council to determine as regards the degree of readiness of the contingent, if the Charter itself stipulates that they are to be held ready for immediate action? What degree of readiness could envisage a special agreement in such conditions? What may be the freedom of the Security Council to decide, within the limits of the special agreement, if the Charter itself uses the rigid formula "immediately available?"

As we have mentioned above, in the process of setting up the UN military forces two stages could be discerned: the stage of working out the legal basis for the Council's actions in case of an emergency, and the moment when a threat to peace, its extent and the danger of its spread or intensification confront the Council with the task of putting the UN military force in the state of combat readiness.

The rights of Members under the Charter, connected with the process of setting up the UN military force, could be supplemented under special agreements. The time for exercising those rights, irrespective of their source, would fall however in the second stage.

Of course it is difficult to foresee what additional rights could the Organization grant to its Members under special agreements. Certainly they could not be conflicting with the obligations of Members enumerated in those agreements or in the Charter. On the other hand Articles 44, 47, 49 and 50 speak of the rights foreseen under the Charter and consequently not dependent on the will of the parties to special agreements which were to be signed only later.

Article 48 of the Charter provides that the Security Council shall decide i.a. which UN Members will take part in the enforcement action, i.e. shall be called upon, under the special agreements, to provide military force, assistance and facilities. By virtue of Article 44 those Members have the right to participate in the decisions of the Security Council concerning the employment of their military contingents.

Of course, the Members represented on the Security Council at the time would pariticipate automatically in the decision-making should the Council ask them to provide military forces. In case, however, the Council would ask a Member not represented on the Security Council, that Member would have the right then—precisely under Article 44—to participate in the decision--making concerning the use of its contingents.

The genesis of Article 44 has much wider background. The provisions of that article were not found in the Dumbarton Oaks Proposals at all. The question of participation of Members, called upon to provide troops, in the decisions of the Security Council concerning the employment of their military contingents was put forward by the delegation of Canada. In its memorandum it proposed in Section B, Chapter VIII of the Dumbarton Oaks Proposals to insert between paragraphs 7 and 8 the following paragraph: "Any member of the United Nations not represented on the Security Council shall be invited to send a representative to sit as a Member at any meeting of the Security Council which is discussing under paragraph 4 above the use of the forces which it has undertaken to make

available to the Security Council in accordance with the special agreement or agreements provided for in paragraph 5 above."[36]

The delegate of Canada has initially put this proposal in a concise form in the Committee III/3, in the context of discussion on the New Zealand's amendment concerning the relations between the competences of the General Assembly and the Security Council in taking up enforcement actions. He proposed "to insert provisions on the participation in the decisions of the Security Council by Members not represented on it, when request is being made for them to engage in major enforcement action by virtue of those decisions."[37] After lengthy debate the delegate of Canada has withdrawn his proposal. But the Canadian amendment to paragraphs 7 and 8 was transmitted to the Subcommittee III/3/A which proposed to insert it between paragraphs 4 and 5 Section B, Chapter VIII in the version almost identical with the wording of the present Article 44.[38]

The rights granted under this new proposal were to refer exclusively to cases when the Security Council would ask the Member not represented on it to make available its military forces. The delegate of Egypt tried to convince the Committee III/3 to grant analogous rights also to the states which would be asked to provide "facilities and assistance."[39] Against this proposal arguments were advanced—somewhat enigmatically presented in the Report—saying that the rejection of this proposal will not signify that the requests for "facilities and assistance" will be made without consultations with the states concerned.[40] Also the delegates of the United Kingdom, Canada, the Soviet Union, France and Greece spoke on this proposal. In connection with the above clarifications the Egyptian delegate withdrew his proposal under condition, however, that the clarifications by the delegates of the United Kingdom and Greece will be inserted in the Report, whereupon the Committee III/3 adopted unanimously the text prepared by the Subcommittee III/3/A.

The right of the Member not represented on the Security Council to participate in the decisions concerning the employment of its military force was stressed in the Charter as a result of two divergent tendencies. One of them aimed at including all Members into the decision-making process. This could be brought about also by giving to the General Assembly some competences in setting up the UN military forces. Other states—among them expecially the Big Powers of the anti-Nazi coalition—saw in the limited membership of the organ which was to make request to the Members to provide military forces, the guarantee of the efficiency of that organ. The Egyptian proposal aimed, within the framework of the latter variant, to extend the rights of Members to share in the decision-making process on the use of their forces, also to Members which were to provide only "facilities and assistance." The final outcome of the debate on this subject could be summed up, to use the words of the Dutch delegate, as a vote for the principle: "no military action without representation."[41]

The right of the Member not represented permanently on the Security Council, which under the Charter and the special agreement was called upon

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[36] UNCIO, vol. 3, p. 591.
[37] UNCIO, vol. 12, p. 297.
[38] *Ibid.*, p. 417.
[39] *Ibid.*, pp. 307, 417, 418.
[40] *Ibid.*, pp. 418—419.
[41] *Ibid.*, p. 316.

to participate in an enforcement action taken by the Council includes, besides the right to participation in the Security Council meetings and decisions on the taking up of military action, also the right to participate in the work of the Military Staff Committee, when the efficient discharge by the Committee of its tasks requires the participation by that Member in its work. This right was formulated in Article 47, paragraph 2 of the Charter. It could be already found in paragraph 9, Section B, Chapter VIII, of the Dumbarton Oaks Proposals. The proposal by the delegate of the Philippines to compose the Military Staff Committee of all UN members did not gain any support and was rejected.[42]

The UN members taking part, with their armed forces, in actions initiated by the Security Council have the right, under the Charter, not only to participate in the meetings of the Council at which decision is to be taken on the use of their military contingents but also to assist in overcoming the obstacles which they may encounter in implementing measures initiated by the Council.

This right stems from Articles 49 and 50. The former imposes upon Members the obligation to assist one another in such situations. The latter empowers the state which took part in the preventive or enforcement action and, as a result of this was faced with special economic problems, to ask the opinion of the Security Council with a view of solving those problems. The scope of rights under Articles 49 and 50 is in many respects different. The rights under Article 49 may belong only to the Members of the Organization while all states, irrespective of whether they belong to the Organization or not, can avail themselves of the rights under Article 50. Article 49 bestowes the rights indirectly by requesting the joint efforts to render mutual assistance in definite cases. The rights stem precisely from that obligation. The subject of those rights is every Member participating in implementation of measures initiated by the Security Council. The subject of the obligation can be any other state belonging to the Organization. Article 50 grants direct rights by stating that the Member participating in carrying out preventive or enforcement measures may turn to the Security Council. The subject of this right is every state engaged in carrying out such actions. The subject of obligations is the Organization and not other member-states. Also the situations under which these rights arise are different. Article 49 grants the right in case of participation in actions decided upon by the Security Council. The article certainly refers not only to military enforcement actions but the exact nature of these measures has not been given in detail. Article 49 provides clearly that the right arises in connection with the participation in the preventive or enforcement action. As to the object of rights, Article 49 was formulated in very broad but also imprecise terms. It is affording assistance. In Article 50 the object of rights is defined rather clearly: it is asking for an opinion or consultation. This precision does not enhance, however, the value of that right which may be of problematic significance for a state confronted with serious economic difficulties.

Of course, one could question the inclusion of Article 49 among provisions on economic assistance. Nothing in the text of the Article 49 says that the assistance mentioned there should be of economic character. In the text the word assistance was used *tout court*. The whole problem is seen however in a different light when confronted with the deliberations of the Committee III/3 at the San Francisco Conference. The minutes of the Fifteenth Meeting of the Committee

[42] *Ibid.*, p. 382.

III/3 show under the heading "The costs of the enforcement action" discussion on the draft amendment of the Union of South Africa. The delegate of the Union proposed the inclusion after paragraph 10, Section B, Chapter VIII (now Article 49 of the Charter) of a new paragraph which read: "Every state which has not regulated a dispute by peaceful means in accordance with provisions of Section A, Chapter VIII, and against which as a result an enforcement action was taken under paragraphs 3 and 4 of this Section shall be obligated to reimburse the costs of such enforcement action and to pay reparations for damages and losses suffered as its result. The states participating in enforcement action should submit their claims concerning the expenses borne by them as well as reparations for losses and damages to the Security Council for approval and for initiating action for their recovery."[43] The delegation of the Union of South Africa explained its proposal by the need to come with assistance to states called upon to carry out the Security Council decisions, for which the participation in such actions could represent too big a financial strain. The amendment was rejected.[44] Paragraphs 10 and 11, Section B, Chapter VIII, were once again treated as a framework for dealing with economic problems of enforcement actions in the Interim Report by the Rapporteur Paul Boncour, concerning Chapters VIII, Section B,[45] in Minutes from the Nineteenth Meeting of the Committee III/3[46] and in the Report of the Rapporteur on Section B, Chapter VIII.[47]

Discussion in the Committee III/3 showed that paragraphs 10 and 11, Section B, Chapter VIII, were construed at the Conference as dealing with problems of costs or, more broadly, of financial and economic burdens in general, which might arise in connection with the participation by members in the carrying out of the Security Council's decisions on the application of enforcement measures.

Conclusions

The above, somewhat abridged, review of the genesis of those Articles o the Charter which contain provisions on the setting up of the UN military force allows us to formulate certain conclusions.

1. The way in which the question of the organ empowered under the Charter to set up the military forces of the Organization was settled, remains in direct relation to the Charter's structure in which a separate chapter was devoted to actions of the UN in case of a threat to peace, act of aggression or other breaches of peace. Various UN organs can deal, in one way or another, with the question of maintenance of international peace and security. One aspect however was singled out, i.e. eventual actions in the above mentioned three types of situations. The question connected with actions were regulated in the chapter which entrusted all functions connected with them to the Security Council.

2. The setting up of military forces with a view of taking enforcement actions under Article 42 of the Charter is one of the forms of the UN actions aimed

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[43] UNCIO, vol. 3, p. 478.
[44] UNCIO, vol. 12, p. 393.
[45] *Ibid.*, p. 455; this texts omits paragraph 10, Section B. This ommission was perceived and corrected at the 19th meeting of the Committee III/3 on the basis i. a. of an erroneous premise that on page 455 "Art. 11" was left out.
[46] *Ibid.*, p. 493.
[47] *Ibid.*, p. 513.

at the maintenance of international peace and security in cases when a threat to peace, act of aggression or other breach of peace occured. Every such action was reserved under the Charter to the competence of the Security Council and consequently also the setting up the UN military forces remains the responsibility of the Council.

3. The exclusive competence of the Security Council in applying military force on behalf of the Organization is in full harmony with the provisions of Article 106 of the Charter. This article divides the history of the United Nations—from the point of view of responsibility for actions under Article 42—into two periods: the one preceding the conclusion of the special agreements envisaged under Article 43 and the one following the conclusion of such agreements. Article 106 excludes, in application of the military force, the competence of any other UN organ except the Security Council. The only alternative of the competence of the Council is—under Article 106—the joint responsibility of the parties to the Moscow Declaration of 30 October 1943 and France. The competence of any UN organ other than the Security Council cannot be reconciled with the provisions of Article 106.

4. The documents of the San Francisco Conference show that it was not the intention of the founders of the Organization to allow the competence of other UN organs in those matters even if the Security Council would not be able to take a decision. The question of the unanimity principle of the permanent members of the Security Council in taking decisions on the maintenance of international peace and security was among the most controversial issues at the Conference. A number of proposals were put forward aimed at eliminating this principle through modification of the so-called Yalta formula on the voting in the Security Council, or through empowering also the General Assembly to take decisions on such questions. The Conference did not accept any of those amendments but agreed that such decisions shall be taken only by the Security Council, the sole organ of the Organization where the principle of unanimity of the permanent members applies.

5. The materials of the Conference show that it rejected also suggestions to allow Members to take up enforcement actions with the omission of the Security Council.

6. The provisions of the Charter defining the rights and obligations of the Members in the process of setting up the UN military forces are based upon the premise that the only UN organ competent to set up the military forces of the Organization is the Security Council. These provisions are to be found in Chapter VII dealing with the functions of the Security Council and point to the Council as an organ representing the Organization in all legal relations between Members and the Organization, concerning the rights and obligations connected with the establishment of the UN military forces.

LEGAL MOTIVATION OF THE DECISIONS OF INTERNATIONAL ORGANS

by KAZIMIERZ KOCOT

Introduction

Peace was for many centuries thought to be a static category e.g. *tranquilitas ordinis*. The atomic age and the organizational revolution have revealed the dynamics of that phenomenon and consequently the dynamics of the elements of its definition. Peace conceived in this way is a superior value and the international organization merely a means to that aim. Symptoms of the upsetting of the balance of this well ordered movement permit to determine their causes which—for the sake of that superior purpose—must be subjected to international control. It may be said then that peace and the question of its maintenance form a constituent ideological element of the international organization.

The student of international law is interested above all in those methods of the organization of peace which govern relations among sovereign states. In accordance with Article 2/4 of the Charter of the United Nations the principle of the balance of forces has been replaced by the concept of the community of force; side by side with traditional diplomacy "parliamentary diplomacy" has appeared, and along with it its administration—the international civil service; national security has been inseparably linked with collective security; traditional direct negotiations have been called "private" negotiations[1] as against resolutions of the General Assembly of the United Nations which have "definitive legal effect"[2] and decisions which cannot be annulled by judgment of the Court[3] "whatever the motivation of the General Assembly in reaching the conclusion,"[4] for "it was acting within its ackonwledged competence."[5]

The basic question arises: to what extent are the activities of international organizations limited by law (the limits of the rule of law) and to what extent may those organizations make law.[6] Both these questions relate to the problem of the sources of international law in connection with acts of international organizations. In those acts the relationship and interdependence between inter-

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[1] ICJ, Case concerning the Northern Cameroons, Reports 1963 (Sep. Opinion Sir Gerald Fitzmaurice), p. 126.

[2] *Ibid.*, Judgment of 2 December 1963, p. 32.

[3] *Ibid.*, p. 33

[4] *Ibid.*, p. 32.

[5] *Ibid.*, p. 32.

[6] Cf. LONGCHAMPS, p. 226.

national politics and international law find their expression. "It is the perception of these common interests by national decision-makers that constitute the principal bond between law and political behaviour in the contemporary world."[7]

Comprehension or solution of the question of the nature of legal force and, particularly, of legal binding force[8] of various categories of international organizations' decisions is possible only when account is taken of the fact that their decisions are the result of a complex process of interaction of interests of individual states and peoples expressed in legal values forming constitutive ideological elements of a given international institution.[9]

This article is intended to draw attention to the role which motivation of acts of international organizations can play in this theoretical and cognitive process. Out of a great number of those acts executive material and technical activities[10] have been excluded altogether, attention being exclusively focussed on verbal acts containing declarations of will of organs of international organizations. Those declarations are then decisions of those organs *sensu largo*[11] as, for example, formulated in article 18 of the Charter of the United Nations.[12] Since, as a rule, we deal with collective organs, those decisions appear in the form of so-called resolutions, and the motivation in their preambles. Solutions have been restricted principally to acts of the General Assembly of the United Nations, and it is clear that this fact bears upon the scope of possible conclusions.[13] Naturally, the point is merely to formulate the problem, systematize the issues and determine the possibilities of research rather than to arrive at ultimate conclusions.

The Present State of Knowledge

Decisions of international organizations may be treated from many points of view. In recent manuals and monographs on international law they are mainly dealt with in connection with the sources of international law.[14] This, as a rule, reduces the issue to answering the question whether decisions of international organizations constitute a source of international law. The answer is sometimes preceded by an analysis of legal documents.

The role of decisions of international organizations with regard to sources of international law is obviously much more complex. This is so, because it is a new political and legal phenomenon connected with a number of formal

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[7] SCHACHTER RLP, p. 200.

[8] Distinction between those terms is emphasized e.g. by W. Zamkowski.

[9] On this, see KOCOT POM, pp. 92—94; SCHACHTER RLP p. 169. Cf. in this connection a very essential statement of Myres S. McDOUGAL, pp. 222, 223, 232. He speaks about the pervasive role of complementarity in principle (and adaptability in legal principle) in contemporary processes of authoritative decision. He believes, however, that a synthesis of opposites is possible, owing to the "creative choice made at various levels by authoritative appliers" (pp. 227—229). Cf. also MANNING, pp. 45—50 and 144—145; LACHS draws attention (p. 165) to the work of Manning in connection with the role of international organizations in the process of "formation du droit international."

[10] See e.g. ZIMMERMAN, p. 91—92.

[11] See e.g. ICJ: Certain Expenses of the UN, Advisory Opinion, Reports 1963, p. 163; Cf. p. 250: South-West Africa—Voting Procedure, Advisory Opinion, Reports 1955, separate opinion Klaestad, pp. 87—88. See also AIDI-44/I, p. 227, and KOCOT NT, p. 187.

[12] ICJ, as above.

[13] Cf. e.g. FAWCETT, p. 321.

[14] This is, however, not a rule any more. See, above all, SERENI. Regarding organizations as subjects of a functional character he devotes a large chapter to their acts, pp. 1029—1038.

question concerning legal force and legal binding force: both *erga omnes* and particular. Further, there are problems of the autonomy or the subordination of norms, of the hierarchic superiority of norms, of active and passive enactment, that is, of power to abrogate normative acts in general and the ability to abrogate a certain act by another. This being so, it is necessary to include in the study a wide range of empirical phenomena without an *a priori* determination of their positions within formal structures of international law.

The Permanent Court of International Justice established beyond any doubt that a resolution of the Council of the League of Nations had decisive significance for the legal relations between states which took part in its adoption.[15] Already in the period of the League on the basis of a limited judicial practice, writers were inclined to see in decisions of international organizations an embryonic stage of international quasi-legislation. However, little was done to probe deeper into the problem. Anzilotti thought that those decisions were a new form of international agreement achieved not directly between parties but through a common organ.[16]

After World War II the number and importance of decisions has greatly increased. Essentially new elements have been introduced by the practice of international organizations,[17] statutes of the new organizations, case law of the International Court of Justice and a rich literature on the subject.

Most commonly known is the view attaching moral and political significance to resolutions that are not decisions in the strict sense. This view[18] was upheld even by learned judges like Lauterpacht and Klaestad. Lauterpacht believed that a resolution does not have full legal binding force to be "fundamental and rudimentary."[19] He tried, however, to point to the non-binding legal force and the legal effectiveness of a resolution, which nevertheless exist. He drew attention, above all, to the variety of decisions.[20] He maintained, *inter alia*, that recommendations "provide a legal authorization" for the activities of member states, though they "do not create a legal obligation to comply with them."[21] He also regarded resolutions of the General Assembly as "one of the principal instrumentalities of the formation of the collective will of the General Assembly and judgment of the community of nations."[22] He thus did not admit of treating

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[15] Railway traffic between Lithuania and Poland, Advisory Opinion, PCIJ, A/B 42, p. 116; this opinion is commonly cited. See SØRENSEN, p. 68. Also some judges quote it in other separate and individual opinions, see e.g. Klaestad in ICJ, Reports 1955, p. 87.

[16] A more detailed presentation of these views, see Kocot NT, pp. 196 and 194, of some more recent views, p. 197.

[17] Concerning the importance of recommendations in diplomatic language under the influence of the practice of international organs, see, among others, ICJ, Corfu Channel Case; Judgment on preliminary objection, separate opinion by Judges Besdevant Alvarez, Winiarski, Zoricic, De Visscher, Badavi Pasha and Krylov, Reports 1948, p. 32.

[18] Cf. BAILEY, p. 3.

[19] ICJ, South-West Africa Voting Procedure, Advisory Opinion, Reports 1955, Sep. Opinion Klaestad, p. 88; Sep. Opinion Lauterpacht, p. 116. Cf. JOHNSON, p. 100. Cf. Lachs in UN.C.VI, GA XIV, p. 100. Concerning the lack of legal force of recommendations see, first of all, ICJ, Corfu Channel Case; Preliminary Objection, Judgment, 25 March 1948, Reports 1948, Sep. Opinion by Judges Basdevant, Alvarez, Winiarski, Zoricic, De Visscher, Badavi Pasha and Krylov.

[20] *Ibid.*, p. 115. Fitzmaurice, pp. 4—5, speaks in connection with this about "direct effect" and "permissive effect."

[21] *Ibid.*

[22] *Ibid.*, p. 122; about "the collective will of the GA" a mention also in the opinion of the Court itself, *ibid.*, p. 72.

resolutions as devoid of any significance in the field of legal-international claims.[23] As a member of the United Nations a state "is bound to give it due consideration in good faith."[24]

Those views and that approach to the question of the legal binding force are in conformity with the principle formulated in the Economic and Social Council of the United Nations in connection with the wording of article 64 of the Charter.

It was held that "it was the duty of all Member Governments to give full consideration to all recommendations."[25] The position taken by the Court and by some judges in the matter of the binding force of recommendations as regards states which participated in the adoption of a recommendation, as well as the idea of the legal force, though not binding, find confirmation in certain provisions of the statutes of international organizations and in writings on the subject. Thus for instance, Usienko[26] emphasizes that the statute of the Council of Mutual Economic Assistance treats recommendations of all the organs of the Council as recommendations of the Council itself and makes a distinction between recommendations and provisions which do not directly concern relations between states but refer to organizational and procedural matters (Article IV p. 1 and 2).[27] Both kinds of decisions are made exclusively with the consent of the states concerned. The author distinguishes between the substance of a recommendation and the very act of its adoption, the latter being a legal event indispensable to produce the effects specified in the statute. A recommendation has a moral and political force. It is only a legal event in the form of the adoption of a recommendation by a state that creates definite legal effects (relations).

Statutes of the regional organizations of Western Europe, containing a full enumeration of their acts with definitions of their legal force, have also contributed to a development in this respect. They gave rise to a number of works of a theoretical character[28] and to the growth of internal legal acts.[29]

Generally, it should be stressed that by the development of international organizations attention is drawn to the internal constitutional aspect of this problem which has been completely neglected so far and which is essential among the others from the point of view of substance of democracy. We find the first references to decisions of international organizations in the constitutions of particular states;[30] increasingly often do such references appear in internal judicature.[31] Instructive in this respect is a questionnaire prepared by UNESCO[32]

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[23] *Ibid.*, p. 122.

[24] *Ibid.*, p. 119.

[25] UN. Repertory of Practice, Vol. III, G77, p. 404. Cf. KOCOT POM, p. 201-202.

[26] USIENKO, pp. 386—393.

[27] Concerning the misunderstanding inherent in the thesis that recommendations are binding upon the organs of the Organizations though not upon the states, see EHRLICH, p. 346. Organs of the Organization are common organs of the member-states. This refers even to the theories that admit the corporate existence of the UN separate from the subjectiveness of its members (ICJ, South-West Africa Cases, ...Preliminary objections, Judgment of 21 December 1962, Reports 1962, Dissenting Opinion of Judge Morelli, pp. 571—572).

[28] E.g. Lissau—Martin, Catalano.

[29] See KOCOT POM, p. 200.

[30] WILSON, p. 433; PANHUYS, p. 88.

[31] See KOCOT POM, pp. 200—201.

[32] On the basis of archive material of the Department of Social Sciences of UNESCO. Cf. in the first place: National Administration and International Organizations: IALS/54/Munich; IIAS/50; IIAS/52/Brussels (1) Reunion d'experts sur les problèmes juridiques, sociologiques

on form of co-operation between state administration and international organizations. It confirmed the real effectiveness of recommendations also in the sphere of internal affairs of the member states. Particular states take care in order to ensure effectiveness of formally non-binding resolutions by means of appropriate administrative acts and an adequate organizational structure. At the same time the questionnaire has confirmed the belief that, also from this point of view, the problem has not been examined at all as regards universal organizations, and the significance of recommendations in domestic law has not, in principle, been explored.[33]

In the works of the Institute of International Law the importance of the problem has been repeatedly underlined, attention being focussed on the possibility of judicial control of the legality of international organizations' acts. We find there the first complete enumeration of the sources of legal norms binding upon international organizations.[34]

It is also worth-while noting that the problem has been throughly probed in works and discussions on the application of international law by political organs.[35]

Statements predominant in the first period which, in fact, were only a sort of propagation of "World Government" plans[36] have been replaced by often toilsome studies which aim it has been to define, on the basis of positive law material, the nature of the legal force of decisions of international organizations.[37]

Among the very ample theoretical and legal documentation of particular importance for the matter under consideration are the Advisory Opinion of the International Court of Justice of 28 May 1948,[38] together with the enclosed joint dissenting opinion of four judges,[39] and the works of Sloan,[40] Virally,[41] Johnson,[42] and Skubiszewski.[43]

These four theoretical works drew attention to the complex character of the phenomenon and to the possibility of, and need for research in this field. Particularly Sloan emphasized that one should not speak about the lack of binding

et administratifs des Etats ayant récemment accedé à l'independance, 27—29 XI 1952. (The file contains answers of Governments); SS/NIS/CONF./2, and SS/SS/SIC. See also: *L'Administration nationale dans ses relations avec les Organisations internationales. Conclusions d'une enquête effectuée dans quatorze Etats.* UNESCO, Paris. See also "Raports et documents de sciences sociales," No. 1/1955, *Enquête sur la manière dont les Etats conçoivent leurs obligations internationales*, par Paul GUGGENHEIM.

[33] As regards Polish practice in this respect see Stanisław KAŹMIERCZYK, *International Agreement as the Source of Law of Poeple's Poland,* Chapter III, passim.

[34] AIDI, see, first of all, AIDI-1952 (44-I), pp. 224—252 (Wengler); but chiefly: Observations de M. Ladislas Gajzago, *ibid.*, pp. 305—308; and others: pp. 395 and 275. See also 1954 (45-I), p. 302; 1957 (47-I), pp. 28—30, as well as (47-II), pp. 274—326.

[35] PASIL, 1948, cf. supra Gajzago, p. 32.

[36] See KOCOT NT, pp. 194, 196, 200.

[37] TAMMES, passim; SKUBISZEWSKI, passim. The meaning of the theory on the legislative power of collective organs has been essentially refuted in works of sociologists, who argue that there are no ground for treating the will of those organs in terms of positive law as an expression of public opinion, a juridical conscience and the like. Manning, for instance, has shown that the General Assembly is not so much an organ voicing public opinion as a factor shaping it. MANNING, p. 143. Cf., however, PASIL 1964, p. 171.

[38] ICJ, Admission of a State to the United Nations (Charter, Art. 4), Reports 1948, p. 57, Avis consultatif, 28 May 1948.

[39] *Ibid.*, pp. 82—93.

[40] See SLOAN, passim.

[41] See VIRALLY, passim.

[42] See JOHNSON, passim.

[43] See SKUBISZEWSKI, passim.

force but, at the most, about the lack of presumptive binding force of recommendations, indicating at the same time the complicated character of and the difficulties in defining the attitude of states to resolutions.[44] Virally attempted to define the binding force on the basis of the contents of resolutions, taking particularly into account whom they are addressed to. Among those works it is also worth-while to draw attention to the systematization presented by Krzysztof Skubiszewski who believes that a classification of acts of an organization based on the criterion of the importance and the name of documents is of little usefulness. The classification suggested by him is based, above all, on the criterion of the contents of the acts. In this respect he distinguishes among law-making acts of organizations: a) acts creating a new norm which does not involve a treaty revision, and b) other acts, substance of which does entail a revision of existing agreements, that is, such acts which create a new treaty norm. Johnson pointed out that a large number of views on the legal force of recommendations are too extreme and tend to simplify the problem. His work points to the importance of attempting to construct general theoretical structures of significance for the investigation of the phenomenon as a whole. He emphasizes that it is necessary to distinguish legal force from effectiveness. A recommendation may have legal and moral force but not political, although it may be politically effective. Legal effects of a recommendation may be of a quasi-legal character (an obligation to consider them in good faith), or they may have full legal effect, that is to say, impose a legal obligation to comply with them. Thus resolutions may be both a means for the determination of rules of international law in the sense of Article 38 paragraph 1, point d, of the Statute of the International Court of Justice or they may create completely new relations and situations.

The Advisory Opinion of the Court of 28 May 1948 and the enclosed joint dissenting opinion of four judges justify the attempt of investigations concerning the significance of motivation in decisions of international organizations, and it formulates in an extremely penetrating way the fundamental theoretical and legal aspect of this question.[45]

Irrespective of the achievement credited to each of the existing trends, notwithstanding their drawbacks, the present state of research seems to point to:

a) the need for searching solutions through an analytic study of the contents of resolutions and of their effectiveness;
b) the need for searching theoretical solutions concerning the entire problem, that is, for a theoretical treatment, and not only a casuistical treatment by the dogmatic legal method, of all the issues involved;
c) the possibility of applying new approaches to the study of the phenomenon such as the decision-making theory, the conflict theory, the negotiating theory.[46]

Remarks on Some Basic Notions

New social phenomena cannot be examined exclusively by means of traditional devices. On the other hand, new methods cannot disregard the essence of the legal method, i. e. the way of ascertaining the law. In other words, one

[44] Cf. KOCOT SIKNZ, p. 145.
[45] See below, p. 246 and 254.
[46] Cf. GOULD, p. 979. See, first of all, SNYDER, passim.

cannot identify the method of determination of the law (let us call it the legal method) with the method of scientific examination of the law. This distinction is of particular importance as regards the new phenomena in respect of which the rule of method of determination of the law has not been enacted yet.[47]

This article is to provide an answer to the question whether the study of motivations can be utilized for a scientific examination of the essence of resolutions or recommendations and also as a method of determination of their legal force.

The article does not deal with the whole problem, but only with formal and legal motivation contained in the text of a resolution itself, that is, most often in its preamble. It omits, however, motivations in the broader sense, which are so often dealt with by experts in the decision-making theory and which in the course of the work of international organizations may appear, e. g. in discussions, in declarations made in connection with voting, in government instructions, in communications submitting draft resolution and the like. These motivations are often less important for legal investigations, at any rate as regards the determination of the will of an organ or an organization, that is, the assenting will of the members, and not only of the will of individual members. This holds particularly true of statements made in discussions on a resolution, since it is precisely in the course of such a discussion that a state may change the opinion previously expressed.[48]

It is necessary to distinguish motivations in the psychological and sociological sense from those in the legal sense. The relationship between them is variously defined by different schools.

Among legal motivations of international acts one should distinguish between motivations in judicial proceedings and those in diplomatic acts.

It should be stressed that in the present article motives are strictly distinguished from motivations. By motives in the narrower sense we understand "all that may help to cause any action."[49] Here, however, we are interested only in those motives which science defines as "a awakened value which should be realized."[50] Thus, generally speaking, by a motive one should understand the reason of action. The notion of motivation is different. Psychologist define motivation as a process parallel to the process of will. There are various definitions: the relation between motives and purposes, the process inciting and maintaining behaviour etc. It may be elucidating to think of the notion of motivation as it is used in physics, where it denotes "the process of generating motion by releasing energy." In physics "to motivate" means to move or to set into motion.[51] From motives one should, first of all, distinguish causes because only those of them are motives which "having been submitted to our evaluation, incite a certain action."[52] They are thus "reasonable judgments." One of the elements of motivation as a process is the "gathering together of motives, or motivation proper." Moreover, motives should be distinguished from values which, though being ideals, do not direct behaviour in a given case.

In the field of international law we can take as the basis of our present con-

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[47] More on this question, see KOCOT POM, pp. 145—150.

[48] MANNING, pp. 143—145. Cf. the answer of Skubiszewski, PASIL, 1964, p. 172, cf. pp. 45—50.

[49] DYBOWSKI, p. 246, after Ossowska.

[50] *Ibid.*

[51] DYBOWSKI, pp. 37—40.

[52] *Ibid.*

siderations statements of the International Court of Justice as developed critically by the joint dissenting opinion of judges: McNair, Read, Basdevant and Winiarski. The Court distinguishes motives in the social and psychological sense from formal motivations *sensu stricto* of decisions, holding that only the latter are the subject of interest to the Court. Judge Winiarski and the others object against this dichotomy on the ground that the very admission of the possibility of legal differentiation is in itself a breach of the principle of good faith.[53] This does not, of course, exclude a scientific criticism of that formal truth from the point of view of its concordance with actual motives. In this respect of very essential significance are Snyder's remarks relating to the applicability of the decision-making theory to the study of international politics. Being interested in decisions of organs whose activities are ascribed to the state, he attempted to find formulas for the "combination of psychological and sociological levels of analysis."[54] He sought to avoid simplifications in thinking as regards the forms of interaction between personal motives and the so-called "spirit of state." In Snyder's view, personal motives are concealed and outwardly there appear only social justifications of a given decision. Their examination gives no insight into the personal motives but, on the other hand, it provides a relatively true picture of the ideological values prevailing in the social groups involved.[55]

Those observations of Snyder can be fully referred also to decisions of international organizations, for the essence of motivations in international law consists in that they are attributed directly to states or to their common organs.

Fundamental in the study of the legal force of international organizations' acts in the light of motivation is the juridical question of the obligation of a formal legal motivation and that of the place of legal values in the series of collected motives.

Motivation of Decisions of Judicial Organs

The question of formal verbal motivation in general and legal motivation in particular is of primary importance in judicature. *Nullus iudex causam audire praesumat, que in legibus non continetur.*[56] The judge decides *secundum ius*, although the substance of the judgment may be influenced by various factors, from political to irrational. This holds true even of those legal and theoretical systems, which ensure to the judge a large share in the law-making process.[57]

Closely connected with this is the question of the obligation of legal motivation of judgments which was regarded, within the civil procedure, as an effective means against arbitrariness of the courts.[58] Nowadays, the obligation to point to "les raisons des conclusions du Tribunal" is regarded as one of "les principes généraux de la procédure judiciaire."[59]

In international law the introduction of the obligation to motivate arbitration awards has—in the view of most authoritative specialist—fulfilled a particularly great role and has been most instructive for the understanding of the nature of motivation of resolutions of political organs.

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[53] See below, p. 532-533.
[54] SNYDER, p. 138.
[55] *Ibid.*, cf. MANNING, pp. 45—49.
[56] WRÓBLEWSKI, p. 375.
[57] *Ibid.*, pp. 371—377.
[58] HLÉIE, pp. 17—18.
[59] SCHIFFER, p. 297.

The obligation or necessity to motivate arbitration awards contributed in the nineteenth century "à la substitution graduelle de la forme judiciaire à la forme politique de l'arbitrage internationale."[60] The Jay treaty chiefly accounted for the necessity of motivation because it transferred the settlement of disputes from the sovereigns to commissions. As a result, by the end of the nineteenth century, a considerable number of sovereigns' awards contained also motivations. Their value cannot, however, be assessed generally: their legal value should be appraised in each case separately. Increasingly often *compromis* acts contain an indication of the reasons for decisions,[61] and an obligation of motivation.[62] Renault urges that international arbitration shall be transferred from the political and diplomatic domain into the judicial.[63] He assigns a special role in this process precisely to the obligation of motivation of arbitral awards. The doctrine of the law of nations concludes that a statement of motives, concerning the facts and the law, is not only a requirement of due process of law, but that it is a principle following from the needs of the international community.[64]

Following the conferences in Geneva and at The Hague (1874 and 1875), the Institute of International Law adopted the Projet de règlement pour la procédure arbitrale, which in Article 18 provided that "Le Tribunal arbitral juge selon les principes du droit international,"[65] and in Article 23 stated that "La sentence arbitrale doit etre redigée par écrit et contenir un exposé des motifs."[66] A discussion on principles was held at the I Hague Conference in connection with the objection by Martens. In consequence, however, the predominant opinion prevailed and Article 52 of the III Hague Convention provided that "la sentence. . . arbitrale est motivée." The number of motivated decisions in the nineteenth century seems to indicate that the obligation to motivate awards became part of the common law of nations. Also the contents of arbitral awards changed; they became more and more juridical. The matter is no longer, as of old, evclusively one of equity of the arbitration but it is the *viva vox iuris gentium* that finds expression in the awards. Similar provisions are to be found in Article 79 which provides for the obligation to pronounce "sur la base du respect de droit," and in Article 28 of the draft of the Cour de Justices Arbitrale of 1907.[67] As a result, the Advisory Committee of Jurists introduced in 1920 that regulation as article 55 of their draft Statute of the PCIJ in accordance with the draft of five neutral powers.

The Statute of the PCIJ in Article 56 and the Statute of the ICJ, as well as the Regulations of the Court of 1922[68] also contain appropriate provisions. It is generally known of what significance in this respect is Article 38 of the Statute of the Court. Likewise, the International Law Commission in its draft arbitration procedure requires that the award shall state the reasons on which it

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[60] LAPRADELLE—POLITIS, I, pp. XLIV—XLVIII; cf. HÉLIE, pp. 13—18 (16) and VERZIJL, pp. 10—12.

[61] KOCOT, Chapter III, pp. 114—151.

[62] HÉLIE, passim.

[63] RENAULT, p. X.

[64] HÉLIE, p. 20.

[65] Article 18 referred in its Geneva formulation to "principes de droit des gens." In the course of work of the Commission it was changed, however, on the motion of Goldschmidt. The phrase "principes de droit des gens" was substituted by "principes du droit international comme plus larges." The proposal was adopted without discussion. AIDI, I, pp. 84—85, and 131.

[66] *Ibid.*, p. 126.

[67] LEMONON, p. 255.

[68] See HUDSON, p. 297.

is based, failure to meet this obligation being regarded as "a serious departure from a fundamental rule of procedure."[69] A similar position is taken by a number of scholars of the greatest competence, and in international practice. Consequently it is held that the interpretations of the "dispositif d'une sentence arbitrale par les motifs qui s'y rapportent" is permissible,[70] since a statement of reasons constitutes nowadays an integral part of the award itself. The obligation to state the reasons in point of law can be regarded in modern international law as a binding rule of common international law in relation to the international judicature in the wide sense of the word. That development is not—on account of the principle of sovereignty—as distinct in international law as it is in domestic law. Attention was rightly drawn[71] to the fact that the principle *iura novit curia* unquestionably accepted in the decision of the PCIJ on the Lotus case does not solve the question of the admissibility of arguments other than those brought in by the parties. There appears a clear distinction between motivations, arguments and sources of law, a distinction between *obiter dicta* and *ratio decidendi.* This leads to a conflict between the common will of the parties and the effectiveness of international law. In the Nottebohm case the ICJ resolved this question for international tribunals *sensu stricto*, stating that it took decisions "on the basis of such reasons as it may itself consider relevant and proper."[72]

That process of transformation[73] of arbitration—from a political institution to legal procedure—is particularly instructive in the consideration of what may be called "parliamentary diplomacy."

Remarks on Motivations in Traditional Diplomacy

The problems of motivation in traditional diplomacy differ fundamentally from those in "conference" or "parliamentary diplomacy." The differences are to a great extent the result of the varying functions of law on these two planes.

The function of law in traditional diplomacy resembles the system of the supremacy of parliament. Parliamentary diplomacy suggests analogies rather with the role of law in administrative organs or in parliamentary systems in which legislative acts are subject to judicial control, and a change of the constitution is substantially limited. In the former domain we deal with *ius aequatorium*, while in the latter—with *ius rectorium.*

As regards traditional diplomacy, the doctrine laid down by the Court in the Lotus case is fully valid: the rules of law binding upon states emanate from their own will, and restrictions of sovereignty cannot be presumed.[74] The limits of the rule of law[75] are determined by the will of states and by the character of the relations to be regulated. It is, therefore, particularly important, precisely in this context, to distinguish between "policy-making" and "decision-making." As regards the former, the point concerns principally the relation of "legal thinking" to "pragmatic," political,[76] purposeful thinking. In international relations this concerns, above all, the role of law in negotiations *sensu largo*,

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[69] Art. 24 (2): AJIL, 1955 (48-1), p. 24; cf. SMITH, p. 17.
[70] SCHIFFER, p. 298; SMITH, p. 17.
[71] SMITH, p. 11.
[72] ICJ, Nottebohm case (second phase), Judgment of April 1955, p. 16. Cf. SMITH, p. 11.
[73] Cf. in connection therewith the interesting remarks of ISERZON, pp. 51—62.
[74] PCIJ, A. 10, p. 18.
[75] See LAUTERPACHT, pp. 385—434 and pp. 153—163.
[76] Cf. GSCHNITZER, pp. 308—313.

that is, those identified with diplomatic activity in general.[77] The diversity of the role of law grows here in proportion to the diversity and wealth of relations between states, and the importance of legal motivation varies in accordance with the methods of diplomacy. In our time, fundamental limitations follow from the principle of good faith and from such treaties like, for instance, the United Nations Charter or the Vienna Convention of 1961 concerning diplomatic relations.

The role of law in diplomatic negotiations is defined in greater detail.[78] At any rate, in both spheres distinguished here, that is in policy-making and decision-making, there arises not only the question of values and legal motives of action but also that of the practice of providing international decisions with legal motivations.

In order to mark only the problems is sufficient to recall the role of motivations contained in the works of classics of international law in the behaviour of nations—beginning with the earliest, exclusively legal treatise on the law of war;[79] and conversely, how the necessity of legal motivation influenced the development of the science of international law[80] and its place among subsidiary means of determining rules of law.

Obviously, legal motivations did not play any significant role in the period of the Italian school of diplomacy.[81] On the other hand, the French school derived from Grotius' ideas, and regarding its chief theoretician Callières, it was permeated by juridical thought concerning the principles of diplomacy.[82]

The system of Mably, presenting its "principes de négotiations" as principles of policy, links them with the law of nature adapted to *raison d'état*. The duties of an ambassador consist, first of all, in that he is "Ministre de la paix et de l'Union entre les peuples." "Les connaissances les plus sublimes du droit naturel et du droit des gens" rank first among the ambassador's qualifications.[83] Negotiations should be carried on in writing, since this form favours most "qu'il s'établisse des principes fixes entre nations." From this juridical and naturalistic approach derives the thesis that "rien n'est plus digne d'un Prince... que de publier dans un Manifeste les motifs... c'est pour ainsi dire, entrer en négociation avec toute l'Europe."[84] In consequence, states have "trois règles pour juger leurs différends: le Droit naturel, le Droit des Gens, et les conventions particulières."

The manual of diplomacy by Martens-Geffcken of the second half of the nineteenth century contains a long argument on the function of motivation in written "style diplomatique." States guided by considerations of their self-interest prefer, however, to present their actions as the result of more noble motives and support the considerations of self-interest by respectable motives, among them, primarily, legal. They often support their arguments with legal proofs.[85] In the part discussing public acts, Martens devotes a separate chapter to "l'exposé

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[77] See e.g. LACHS LID, passim; cf. MOUSSA, p. 127; see also WILDNER, p. 186.

[78] See KOCOT RD, pp. 86—87.

[79] See EHRLICH PWPW, pp. 12—14; cf. pp. 77—78, and EHRLICH, p. 45.

[80] The theory of the 19th century enumerates the writings of "official jurists" among sources of international law. See KOCOT, Chapter II, passim.

[81] See NICOLSON, pp. 48—70.

[82] CALLIÈRES, pp. 85—87.

[83] MABLY, p. 173.

[84] MABLY, p. 135.

[85] MARTENS—GEFFCKEN, II, 1, p. 3.

de motifs de conduite" by which he means "un mémoire justificatif, au moyen duquel les cabinets font connaître au public les raisons qu'ils ont eues pour suivre la ligne de conduite adoptée par eux en formant une alliance, en ordonnant un armement, en rompant des négociations entamées, en refusant de ratifier un traité, etc."[86] He expresses similar ideas on documents such as manifests, declarations of war and proclamations. He was, however, a realist, since he mentioned that very often the motives officially stated constitute but a pretext having nothing in common with the real motives.[87] In written negotiations, in notes and in diplomatic memoranda, even if the subject of negotiation is of such a kind that the envoy "soit obligé d'appuyer ses représentations par des arguments tirés *du droit des gens* ou fondés sur des *traités* ou des *conventions*, il doit cependant éviter soigneusement de donner à ses notes un tour *juridique*." It is so because persuasion based on consideration for common interest and mutual benefits is more convincing than proofs of injustice of the other party.[88]

The system of the League of Nations gave rise to a new diplomacy.[89] It meant the beginning of new methods in traditional diplomacy and the origin of parliamentary one. The Charter of the United Nations was in its conception a realistic document, but it fully recognizes international law as the basis of all international relations.[90]

It is the so-called realistic school[91] that now most strongly objects against legal motives in the making of decisions concerning foreign policy. This, in fact, denotes nihilism in legal international relations and this trend has been rightly described by some scholars—as neomachiavellism.

Representatives of this so-called "realism" argue that the only right and justified motive of foreign policy from the point of view of ethics is national interest, and they try to restore to it its proper moral dignity. They believe that abstract principles of morality and law constitute only an ideological rationalization and justification, a mere pretext for the pursuit on national policy. They have served in history and continue to serve only as long as they are useful and sufficient to justify current policy. Solutions in diplomacy consist in agreeing on the limits of mutual interests and power. The UN, however, which in its conception was to put an end to "power politics," has merely become its legalistic substitute, that is to say, merely "a legal forum for legalistic exercise." In the UN—according to the view—the point is merely to justify national policies by means of supra-national ideologies.

One thing is beyond doubt. This so-called "realism" is a trend critical of the present legal system. Its criticism of "legalism" and of "utopia" implies a recognition of the immense role of legal motives and motivation in international activities of present-day individual and parliamentary diplomacy. It questions, however, the conformity of motivations with the essential values which constitute the actual reasons and motives of the activity of governments.

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[86] *Ibid.*, p. 109.
[87] *Ibid.*, p. 32; cf. also pp. 33—34, with reference to public opinion.
[88] MARTENS, pp. 116—118. As regards the role of the principles of Grotius see NICOLSON, p. 49.
[89] NICOLSON, passim.
[90] KOCOT ZKL, p. 233.
[91] MORGENTHAU, passim; KENNAN, passim.

The principal form of an agreement reached by negotiations are treaties of all kinds.[92] In accordance with existing practice, they contain a number of traditional parts. They are generally divided into a preamble and contents (*dispositio*). From the point of view of our considerations, the most important part of the preamble is the statement of motives (the so-called arenga); it comprises "a presentation of general reasons which incline a state to make an agreement."[93] The judicature of the Permanent Court held that the Preamble constitutes an essential part of an agreement. It is of particular significance for the interpretation of a given act. It may, however, also include stipulations equally binding as those contained in the *dispositio*. According to the Court the object of the Preamble is to show "les motifs des dispositions" of the agreement.[94]

Motivation of Resolutions of the General Assembly

The meaning of legal motivation in "conference" negotiations in the period of prevailing naturalistic legal notions is connected with the conception of "higher law." Wolff, for instance, compares resolutions of conferences with the search for scientific truth.[95] In the middle of the nineteenth century Despagnet criticized diplomacy for treating congresses and conferences in an opportunistic way "instead of following rational principles of international law or ensuring to these principles application in the future."[96]

The literature on the function of international law in the UN is very rich, however its scientific value is different. The range of views is broad: from Morgenthau's thesis describing the UN organs as a forum for legalistic exercise,[97] up to the following conclusions of Sohn: "From the very beginning it was clear that it [international law] should repose quietly in a corner, ready to serve when called upon, but that it was not entitled to play any leading role of its own."[98]

Sohn stresses that out of 600 resolutions of the General Assembly only 20, up to the year 1950, referred to general international law. It is known, however, that this number is not fully reliable, since it does not include references to the Charter. As early as at the Third Session of the General Assembly of the United Nations, the Secretary-General emphasized in his report that during the first two years of the UN activity there had been hardly any question which would not have required resolving legal issues of the Charter. There are, however, in the decisions themselves no considerations relating to legal questions, i.e. legal motivations of particular decisions. In many cases resolutions of the Assembly do not refer to any provision of the Charter. Sometimes it is only an analysis of the terminology or phraseology used in the resolution that reveals a connection with a relevant provision of the Charter.[99] There are, on the other hand, resolutions of basic significance which refer to international treaties, to principles of international law and the like.

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[92] See e.g. KLÜBER, p. 512; CALVO, p. 406; LISZT, p. 300; HALLECK, p. 138.
[93] EHRLICH, p. 257.
[94] PCIJ, A. Np. 15, p. 27; cf. EHRLICH, p. 287.
[95] WOLFF, V, 5, § 562.
[96] DESPAGNET, p. 507.
[97] Cf. above, p. 526—21 [10]
[98] See KOCOT POM, p. 132.
[99] KOCOT KNZ, p. 121; RUNP, I, p. VII; cf. VALLAT, p. 67.

The problem develops in practice and no legal act regulates it. The scope of application of international law is very vast here. Every submission of a question or dispute to an international organ means a limitation in the exercise of sovereignty. Because, although the organ or the decision is of a political nature, both the question and the discussion are kept within the limits of the Statute and Regulations, first of all, as regards the required "formal legality."[100] Of primary importance are provisions concerning the powers of the organ as the minimum of legal requirement.

Differently than in the case of relations covered by traditonal diplomacy where there is no presumption of limitations of sovereignty[101] the Permanent Court stated: The international institution possesses only such powers as are assigned to it by the Statute to make it possible for the institution to fulfil its purposes which it may exercise only in accordance with its statutory functions.[102]

It thus follows that legal and diplomatic methods of international organizations do not exclude each other as some proponents of supra-national solutions assert,[103] but that they complement one another. As the International Court of Justice declares: "The political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgment. To ascertain whether an organ has freedom of choice for its decisions (liberté de choisir les motifs de ses décisions) reference must be made to the terms of its constitution. . . There is, therefore, no conflict between the functions of the political organs, on the one hand, and the exhaustive character of the prescribed conditions on the other."[104]

The so far most complete study of the function of international law in the UN, made by Schachter,[105] attempts to show how such notions like obligation and legality "interact with political demands and institutional action,"[106] "how law operates in the political system of the Charter."

International law is not, in his opinion, a system independently regulating decisions. It should be regarded rather as a process by which states promote their interests and undertake collective actions according to necessity and institutional action. In my opinion, although Schachter greatly contributes to the solution of the problem, nonetheless, a full answer to the question posed by him can be given only by a complete analysis of teleological and normative elements contained in the preamble of a resolution. Such an analysis can contribute to the elucidation of the question whether legal force of a recommendation actually "depends upon degree of objectivity surrounding the circumstances."[107]

Unlike to what is the case in judicial settlement, questions relating to the form and contents of resolutions of the UN General Assembly (particularly as regards their preambles) are not regulated by any legal act. As a rule, however,

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[100] ICJ, Certain Expenses of the United Nations, Advisory Opinion of 20 July: Reports 1962, Dissenting Opinion of Judge Bustamante, p. 290.

[101] Cf. above, p. 248.

[102] PCIJ, B. 14, p. 64.

[103] See e.g. DELBEZ, p. 6.

[104] ICJ, Admission of a State to the United Nations (Charter, Art. 4), Reports 1948, Advisory Opinion, p. 64; cf. also e.g. ICJ, Certain Expenses of the United Nations,... Advisory Opinion of 20 July 1962, Dissenting Opinion of President Winiarski, p. 229.

[105] SCHACHTER, passim. Cf. SCHACHTER LF, p. 173.

[106] SCHACHTER, p. 169.

[107] JOHNSON, p. 122.

they contain two fundamentally different parts, though closely connected with each other. In practice, they are called: "the preamble of the resolution" and "operative paragraphs" or the "operative section."[108] "The preamble is designed to explain the purpose of the resolution. . . In it an effort is made to rally as much support as possible for the operative paragraphs which follow."[109]

The drawback in investigating the legal force of resolutions on the basis of preambles consists in the fact that the method itself of preparing a resolution has not been determined in any normative way either. The Rules of Procedure provide only that "all items proposed for inclusion in the agenda shall be accompanied by an explanatory memorandum and, if possible, by basic documents or by a draft resolution" (the General Committee may revise resolutions adopted by the General Assembly but only in respect of their form). It is known however, that rule 20 of the Rules of Procedure has not always been observed. The contents and form of particular resolutions were often shaped in the fervour of public discussion at plenary or Committee meetings. Needless to say, this affects very adversely the legal value of the motivation. Because, frequently, the purpose of discussion is not to convince the opponent by reasoned argument, but to appeal to public opinion or simply to make propaganda.[110]

According to current practice of preparing texts of resolutions, the position of the sponsor is of primary importance in determining the value of the legal construction of the resolution. His way of thinking about resolutions and the function of law, his legal culture are decisive. The differences resulting therefrom are disposed of the practice that has been established in the course of more than 20 years. Some influence on the uniformity of resolutions is exercised also by the Chairman.[111] The most essential thing, however, is that the sponsorship of a resolution is becoming a matter of prestige. Originally, the number of sponsors was small, but in current practice, sponsoring states try to ensure success to documents submitted by them by securing the co-sponsorship of a large and representative group of states: in 1959, for example, the draft resolution on disarmament was sponsored by all the 82 member-states.[112] In such resolutions the preamble is based on more mature conceptions. This, among others, prevents hasty changes in the course of discussion which are the result of attempts to reconcile conflicting views through verbal amendments blurring the clarity of certain formulations.

Opinions of the International Court of Justice and of particular judges of the Court justify the utilization of preambles in research on the legal force (and the place among sources of law) of decisions of international organizations on the basis of their motivation. The same holds true of research on the role of international law in the activity of political organs.

Theoretical problems relating to this question were formulated by the Court with reference to the statements of some UN Members. The view of the Court may be defined as a dualistic doctrine as regards the relation of motivation in the socio-psychological sense to formal motivation. In other words, the Court treats formal motivation merely as a justification, or more precisely, a verbal

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[108] See e.g. ICJ, Reports 1962, p. 158, 178, passim. Cf. also e. g. HADWEN—KAUFMANN, p. 36; BAILEY, p. 143.

[109] HADWEN—KAUFMANN, p. 36.

[110] BAILEY, p. 111.

[111] In connection therewith cf. UN-GA VIII, Doc. A/5243, pp. 9, 59, 60.

[112] BAILEY, p. 147.

justification[113] or as a teleological or normative foundation of an act.[114] It can be said that the Court makes a distinction between "subjective" and "objective justification" of an action, without setting any legal requirements as to their conformity, and focussing interest exclusively on the latter.

The Court speaks about "reasons in the mind of a Member," which "enter into mental process" and contrasts them with motivations included in "statements made by a Member" ("déclarations faites par un Membre"). The Court believes that "reasons which enter into a mental process are obviously subject to no control" by the Court, "motifs, qui relèvent du for interne échappent manifestement à tout contrôle."

The position taken in this respect by four judges in their joint dissenting opinion is different.[115] These judges, while admitting the possibility of the distinction itself, emphasize, however, that from the legal point of view reasons which enter into the mental process of a member cannot be irrelevant. Separating them from the motivations contained in statements made by a member would constitute a breach of the principle of good faith.[116] In that opinion we read, *inter alia*: "This distinction which it has been attempted to introduce. . . cannot be accepted. . . and its recognition would involve the risk of undermining that respect for good faith which must govern the discharge of the obligations contained in the Charter" (Article 2, paragraph 2). In the opinion it is admitted that subjective motives are intangible, but on the basis of good faith the presumption is created of their accord with the motives contained in the statements of the members. The judges hold the view that statements of member-states are secondary as regards the principle of good faith, which being a foundation of any statement is its "truth-ground," that is to say, it creates a presumption of concordance of motivations with real motives of the states voting for a resolution. It is only within this scope that motivations contained in a resolution *pro veritate habentur*. This does not in the least diminish the right to examine its formal and intrinsic legality by an international organ, e. g. a judicial one when the question of the legal force of a resolution arises.[117]

In my view, a confirmation of this reasoning can be deduced also from the position taken by the Court. The Court applied it in a concrete case to the points of fact ascertained in the preamble of a resolution, which became the basis of the decision, since the decision was made within the competence of the organ and "had definitive legal effect." The Court stated even the irreversibility of of that kind of decisions.[118]

From the point of view of the examination of resolutions on the basis of the contents of their preambles, the distinction introduced by the Court between decisions containing the judgment of an organization and other decisions is also important.[119] Criteria for what has been called judgments of the organization

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[113] Cf. in this connection APOSTEL, pp. 273—274.

[114] Cf. WRIGHT, pp. 350—359.

[115] ICJ, Admission of a State to the United Nations (Charter, Art. 4), Reports 1948, Advisory Opinion, Dissenting Opinion of Judges Basdevant, Winiarski, Sir Arnold McNair and Read, pp. 82—83.

[116] Cf. on this point EHRLICH, pp. 40—47, and 273: *in fide quid senseris, non quid dixeris cogitandum*, Cicero.

[117] Cf. ICJ, Certain Expenses of the United Nations, Advisory Opinion of 20 July 1962, Reports 1962, Dissenting Opinion by Judge Koretzky, pp. 253—254.

[118] See footnotes 2, 3, 4 and 5.

[119] Cf. Charter, Art. 4 (1)

must take into account legal motivations, but those for other resolutions may include all "compelling reasons." In other words, it can be deduced from the reasoning of the Court that on the basis of motivations contained in the preamble the political or legal character of a decision can be determined. This thesis should not be identified with the question of the duty of the organ to observe international law. It may, on the other hand, be of great significance for the determination of obligations that result for states, which voted for the resolution also *erga omnes*, because such a motivation may indicate that an agreement in principle has been reached.

In practice the differences do not come out sharply in a preamble, simply because motivation of judgments and of other absolutely binding decisions need not be limited to legal values, and the political character of decisions does not exempt the organ from the duty to respect the law. As is stated in the joint dissenting opinion of four judges: "The main function of a political organ is to examine questions in their political aspect, which means examining them from every point of view... It follows that the members of such an organ who are responsible for forming its decision must consider questions from every aspect, and, in consequence, are legally entitled to base their arguments and their vote upon political considerations... That does not mean that no legal restriction is placed upon this liberty. We do not claim that a political organ and those who contribute to the formation of its decision are emancipated from all duty to respect the law."[120] Judge Krylov associated himself with this view.[121] It follows therefrom that in the choice of motives appearing in a motivation there are no restrictions under the present rules of procedure. It is, therefore, not always easy to determine whether the action of an organ is determined by reasons of political experiency or by the conviction of those voting that the law so requires or allows.[122] Judge Azevado went even further and believed that a question treated by an organ exclusively in its political aspect may be for the Court a par exellence legal question.[123] Naturally, the conclusion suggests itself here *de iure condendo* as regards the determination of formal requirements of legal motivation of the preamble of a resolution. Difficulties connected with the determination of the legal force of the resolutions on the Congo provide here a clear justification.

But even a statement to the effect that legal obligations are involved, does not remove doubts as to their scope, particularly in connection with the concrete provisions of the Charter whose binding force is beyond doubt.

In the 29 resolutions quoted in the request for an Advisory Opinion, the General Assembly or the Security Council "does not indicate the articles of the Charter on which its resolutions are based."[124] The Court has solved the difficulties resulting therefrom on the basis of implications from the wording used in the preambles ("... since the language used in most of them might imply...").

Both in judgments of the Court, as well as in separate and individual opinions of particular judges, we find direct or indirect confirmation of the significance of the preamble.

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[120] ICJ, Reports 1948, p. 85.

[121] *Ibid.*, p. 109.

[122] ICJ, Certain Expenses of the United Nations, Advisory Opinion..., Reports 1962, Dissenting Opinion of President Winiarski, p. 232.

[123] ICJ, Admission..., Reports 1948, p. 76.

[124] ICJ, Certain Expenses of the United Nations..., Advisory Opinion of 20 July 1962, Reports 1962, p. 172. See also Dissenting Opinion of President Winiarski, p. 233.

First of all, the Court attaches great importance to the preamble of resolutions containing a request for an advisory opinion. It was, therefore, rightly provided that such resolutions should be drafted in co-operation with the Legal Committee of the General Assembly.[125] The Court explicitly states that a resolution requesting an advisory opinion includes in its preamble a definition of the extent of the request.[126] The Court notes the importance of the fact that the resolution does not indicate the article of the Charter on which it is based.[127] It refers here to the fact that much importance was attached in the course of discussions in the General Assembly to the "statement included in the preamble of the General Assembly resolution."

The Court clearly distinguishes the two parts of a resolution, considers them in connection with each other and attaches equal importance to each of them.

Also individual judges[128] often refer to the preamble of a resolution as such. However, the significance they attach to it is very differently conceived. For instance, Lauterpacht expressed the view, as regards the preamble of a resolution, that the principle *cessante ratione cessat lex ipsa* constitutes "un lieu commun juridique."[129] Judge Morelli, however, emphasized that "the Charter confers finality on the Assembly's resolution irrespective of the reasons, whether they are correct or not, on which the resolution is based."[130] These are not contradictory points of view with regard to the significance of motivation included in the preamble as might seemingly appear. It is not only that judge Morelli does not deny the significance of the preamble, but he believes that an interpretation *ad casum*[131] of the Charter contained in it, just like the facts ascertained in the preamble, is binding in the case in question, as is the whole resolution. To put it differently, he states that questioning the correctness of the interpretation of the Charter contained in the preamble of a resolution does not affect the validity of the resolution. As can be seen from this, the difference of opinion between him and Lauterpacht consists in a basically different evaluation of the legal force of a resolution. With this modification one may formulate the thesis that an interpretation *ad casum* often contained in the preamble is of significance only in respect of the legal force of the resolution itself, but in this respect it is of decisive significance.[132]

This is connected with the meaning of the *ad casum* interpretation contained in the preamble for the parties to a dispute or for all states which have voted for the resolution, because resolutions may have legal force binding upon some members, though not binding upon others.[133]

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[125] As to further questions which this procedure has been established for, see KOLASA, p. 145.

[126] ICJ, Certain Expenses of the United Nations..., Advisory Opinion of 20 July 1962, Reports 1962, p. 155-156.

[127] Ibidem, p. 172.

[128] See e.g. Winiarski in ICJ, 1962, p. 227; Lauterpacht in ICJ, 1956, p. 56; Fitzmaurice in ICJ, Reports 1962, p. 198.

[129] ICJ, Reports 1956, p. 57.

[130] ICJ, Certain Expenses of the United Nations..., Advisory Opinion of 20 July 1962, Reports 1962, Separate Opinion of Judge Morelli, p. 224.

[131] See KOCOT SIKNZ, pp. 117—125, and 90—100.

[132] *Ibid.*

[133] ICJ, Reports 1962, pp. 233—234; Dissenting Opinion of President Winiarski. Cf. with reference to this also the problem of the meaning of declarations of the principles of international law, KLAFKOWSKI, pp. 45—46. Cf. KOCOT NT, p. 199 conventions (rules); HATSCHEK, p. 4; LACHS, p. 165. Differently BOBROV, passim. Basic materials relating to this field are contained in UN documentation pertaining to Consideration of principles of International Law concerning friendly relations among states in accordance with the Charter of the UN.

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There are omitted here the generally used abreviations, such as: AJIL., BYBIL., ICJ., RCADI., UN-GA.

B O O K R E V I E W S

Leon Babiński, Jacek Siedlecki, *Konosament bezpośredni w rozwoju obrotu międzynarodowego* (*Through Bill of Lading in the Development of International Trade*), Szczecin 1963, 100 pp.

The work whose authors are experts in maritime law has appeared in print in a series of publications of the Department of Social Sciences of the Szczecin Scientific Association. Its subject, as indicated in the title, is of great interest to both theoreticians and practitioners in the field of foreign trade and maritime transport. For it is an interesting problem whether and, if so, to what degree the through bill of lading—developed by the practice and finding expression only in a few national shipping regulations — meets the needs of international trade.

Although neither the simple bill of lading nor even the through bill of lading is by definition a document of international transport, nevertheless, in practice both appear almost exclusively in international trade and that is why they can be appraised above all from the point of view of the needs of that trade.

The problem as indicated in the title of the work seems to be quite legitimate. It has so far not been the subject of study either in Poland or abroad. And that is why there is no doubt as to the timeliness of the subject taken up by the authors.

It should, however, be pointed out that the writers overestimate the role in international trade to the through bill of lading and in particular to the combined bill of lading appearing in cases of transportation by various means. Whereas railway, air or motor consignment notes which can serve international trade only when they are international notes, every bill of lading — irrespective of its type—is, as a rule, a document of international transport. On the other hand, bills of lading used in coast trade play a relatively modest role.

From the Introduction we learn that the authors did not intend to deal with all the issues relating to bills of lading in general and with through bills of lading in particular, referring the reader in this respect to other studies.

In Chapter I entitled "The need for direct calculation and documentation in international trade" (pp. 5—24) the authors point to the existence already from the middle of the 19th century "of a social need for a simplified legal-transport documentation which would limit brokerage and its costs and facilitate economic exchange on a world scale" (p. 6). The authors explain only generally the reasons for that need and the conditions making it possible to meet them. As regards through bills of lading it is worth-while to draw attention to the role played by steam and then motor navigation and the development of regular shipping lines based on them.

In Chapter II (pp. 24—36) the authors discuss "through carriage contract as a legal institution," and in Chapter III (pp. 36—62) "the through bill of lading as a document of through carriage and of through combined carriage."

It should, however, be pointed out here that every bill of lading regulates only the legal relation between the consignee and the consignor. The rights of the consignee on the other hand, that is, the rights of each possessor of a bill of lading are determined by the contents of that bill of lading irrespective of the contents of the contract concluded between the freighter and the carrier.

In Chapter IV (pp. 63—80) entitled "The through bill of lading as seen against the evolution of other forms of the through combined transport document" the authors present in an interesting way the endeavours evident for many years on the international scene but so far unsuccessful intended to develop—on the basis of the bill of lading—a uniform document covering all types of carriage. Such an objective could be attained only by means of an appropriate international convention.

Chapter V of the work (pp. 80—90) relates to "the through bill of lading in the Polish practice to-date." Apart from that this chapter gives a summary of the provisions of the Polish maritime code of 1961 relating to the through bill of lading.

As follows from the foregoing, the work under review—in accordance with the authors' intention—is not a monograph which would cover all the economic and legal aspects of the problem relating to through bills of lading. Therefore, the work in question should be regarded, above all, as a treatise showing the need of an international convention which would provide for a uniform and universal document of through carriage based on the bill of lading.

There are formulations in that work which it would be difficult to agree with. And thus, for instance, one cannot share the view that it is possible to become a shipowner on the basis of a time charter contract (p. 28). The contention that "through carriage has developed primarily as an institution of maritime law" (p. 26 and similarly p. 28) gives rise to doubts. It is also difficult to accept as correct the definition of through carriage (p. 26) or the definition of the through bill of lading (p. 27). In those definitions an essential feature both of the through carriage and of the through bill of lading has been disregarded. It consists in that such carriage is effected at its particular stages by *different carriers*. Also the contention that "maritime laws make it the duty in principle of the shipmaster to issue a bill of lading" (p. 48) finds no justification in legal provisions. For, as it is well known, such duty rests with the carrier.

Despite its shortcomings the work as a whole should be positively appraised, especially its informative value should be pointed out. The authors have gathered and made use of rich literature on the subject and sources difficult of access. The view represented by them on the advisability of internationally regulating the question of through bills of lading, including the through combined bills of lading, is fully justified. It should also be expected that despite of the existing objections that goal will be reached in the future.

Józef Górski

Cezary Berezowski, *Międzynarodowe prawo lotnicze* (*Droit international de l'aviation*), Varsovie 1964, p. 286.

Le professeur Berezowski vient de consacrer son important ouvrage aux problèmes de droit aérien (de l'aviation)[1]. Il est spécialiste dans la matière, il a rédigé maints articles sur le sujet — spécialement dans la revue polonaise "Państwo i Prawo," il a été éditeur de recueils de textes (en particulier celui, très connu et apprécié, publié en 1951), il a participé aux travaux des organismes internationaux s'occupant du droit aérien (C.I.T.E.J.A. en 1946/47, comité juridique de l'O.A.C.I., etc.); comme titulaire de la chaire de droit international public à l'Université de Varsovie il a repris les travaux de l'Institut polonais de droit aérien en le liant à sa chaire à l'Université. Ainsi, il mérite bien d'être cité à la tête de savants polonais, spécialistes de droit aérien.

[1] En polonais on emploie plotôt le terme moins vaste "droit de l'aviaton," cependant dans mon exposé je me sers de l'expression plus connue: "droit aérien."

Son dernier ouvrage est en même temps une monographie qu'un ouvrage de base pour tous ceux qui s'intéressent au droit aérien, aussi bien les étudiants que les juristes praticiens et théoriciens et même les laïques.

Pour ces derniers, l'ouvrage se prête aussi bien qu'aux spécialistes. L'exposition est claire, compréhensible, pour ne pas dire attrayante, à la lecture. L'ouvrage peut être considéré comme la première présentation en langue polonaise du sujet sur lequel en langues étrangères ont écrit des auteurs connus et éminents, tels Ambrosini, Lemoine, Pépin, Pieretierskij, Riese, Shawcross-Beaumont, Verplaetse, Charles et Fernand de Visscher, etc. La tendance de notre auteur et son point de départ dans la présentation de la matière est la distinction entre le droit aérien international et le droit aérien interne, il ne veut s'occuper que du premier aspect c'est-à-dire du droit international. Au point de vue théorique on ne peut pas avoir d'objection à une telle distinction, cependant est-il possible d'oublier que le droit aérien interne a suivi partout les chemins du même droit international, dont les solutions ont précedé la formation du droit interne? Ces enchaînements sont tellement forts que M. Berezowski lui-même est forcé à citer dans maints endroits de son ouvrage les solutions et les exemples puisés au droit interne polonais (v. entre autres sur les pp. 205, 216, 217, 220, 224). Dans mon opinion, il est impossible de dissocier les deux côtés du problème. L'ampleur de l'analyse contenue dans le livre de M. Berezowski ressortira bien du rappel de la division des sujets de la matière traitée par l'auteur. Elle est présentée sous les titres suivants: 1. La notion, l'essence et le développement du droit aérien international et l'historique de ses recherches scientifiques; 2. L'espace aérien; 3. L'aéronef; 4. L'accès dans l'espace aérien étranger; 5. Les organisations internationales; 6. Les lois et les coutumes de la guerre aérienne. Cette division est sûrement le résultat d'une profonde analyse de M. Berezowski, mais elle me paraît bien individuelle. On rencontre d'autres critères de division, par exemple la distinction entre le droit administratif et le droit civil appliquée au droit aérien, ou encore la distinction entre les sujets et les objets de droit par rapport au droit aérien (personnes et choses). Quoi qu'il en soit et abstraction faite du choix de tel ou tel critère de division, il faut constater et souligner que toutes les questions juridiques qui apparaîssent à l'étude de la théorie et de la pratique du droit aérien sont amplement traitées dans les chapitres qui leur sont consacrés dans l'ouvrage. Remarquons cependant que les questions de pur droit international public, traitées dans le dernier chapitre ("Les lois et les coutumes de la guerre aérienne") ont été présentées d'une manière plutôt succincte en comparaison avec les chapitres précédents. On a l'impression que l'auteur a voulu se limiter autant que possible au droit aérien du temps de paix. La présentation de l'organisation internationale en ce qui concerne l'aviation civile est très développée et détaillée. La structure de l'agence internationale spécialisée que constitue l'O.A.C.I. est décrite d'une manière parfaite, témoignant de la collaboration de M. Berezowski avec les services juridiques de l'O.A.C.I. Par contre, l'historique et les précédents, c'est-à-dire le système d'avant-guerre de la C.I.N.A. et l'analyse de la convention de 1919 portant réglementation de la navigation aérienne, ne me semblent pas suffisamment épuisés, car le lecteur ne reçoit pas l'impression que l'acte et l'organisation de 1919 constituent un "milestone" dans le développement, sans lequels tout progrès, y inclus la Convention de Chicago de 1944 et l'organisation de ses services (O.A.C.I.), paraît impensable. Les autres conventions internationales, préparées au sein du C.I.T.E.J.A. avant la guerre, et continuées dans les travaux actuels de l'O.A.C.I., sont décrites et analysées en détail par M. Berezowski, en particulier la Convention de Varsovie de 1929 pour l'unification de certaines règles relatives au transport aérien international, modifiée sur quelques points par le Protocole de La Haye de 1955; la Convention additionnelle de Guadalajara de 1961 relative au transport aérien effectué par une personne autre que le transporteur contractuel a reçu aussi une large place dans l'exposé de M. Berezowski.

Pour conclure, nous pouvons dire que la littérature juridique polonaise s'est enrichie par la savante étude de M. Berezowski, et non seulement celle de notre pays, car dans la perspective de droit comparé l'ouvrage présente un intérêt considérable. Les résumés en langue française et russe sur 10 pages qu'on trouve à la fin du livre, faciliteront au lecteur étranger de prendre connaissance et apprécier la valeur internationale du livre de M. Berezowski.

Léon Babiński

Jan Balicki, *Problemy kolizyjne prawa spadkowego* (*Problems of Conflict of Laws in the Law of Succession*), Warsaw 1963, pp. 106, with Annex and summaries in Russian and English.

The work under review contains a preface ("From the author") in which the author explains that the objective of the work is clearly defined in its title. The author does not discuss in it either the substantive provisions of the law of succession ("apart from exceptionally referring to certain provisions necessary to illustrate problems of the conflict of laws") or problems of international civil process ("save for a short reference in Chapter II to the jurisdiction of Polish courts in succession cases with a foreign element"), or—finally—the basic concepts of private international law ("such as the conflict rule, the connecting factor, the renvoi, the exception of public policy and the like"). The author first of all has attempted—as he makes it subsequently clear—to facilitate the finding of an answer to the question which legal system should be applied to succession problems with a foreign element. That is why he begins his treatise with a presentation of the sources of private law in the field of the law of succession (Chapter I). Then he deals with such problems as: the law governing succession (the Succession Act); the capacity to inherit, the former question being dealt with by the author in Chapter II, the latter in Chapter III; capacity to testate (Chapter IV); the form of the will (Chapter V); the heirless inheritance (Chapter VI); the principle of public policy (Chapter VII); the renvoi (Chapter VIII); the problem of classification (Chapter IX). Problems covered in Chapters VI—IX are defined by the author as exceptional situations which waive the application of general conflict rules. In addition to those problems the author deals also with the question of change of status, that of the choice of law, and the connecting factor. His remarks (contained in Chapter X entitled "Further Exceptional Situations") are devoted to those questions. Then the author (in Chapter XI) deals briefly with the question of deduction (*prélèvement*, *privilegium germanicum*). The final Chapter XII contains remarks de lege ferenda.

The writer discusses primarily the provisions of the Polish Act on Private International Law of 2 August 1926[1] as well as the rules contained in conventions ratified by

[1] It should be recalled that translations of the Polish Act of 2 August 1926 have appeared in the German language (apart from that by Makarov and Bergmann) also in Niemeyers "Zeitschrift für internationale Rechte" XXXIX, 1928—1929, pp. 191ff.; ACKERBERG, *Rechte und Pflichten der Ausländer in Polen*, 1933, p. 149; in the French language (apart from Makarov)—in "Revue de droit international privé," 1928, p. 190; "Journal de droit international," t. 58, p. 249; in the Italian language — as an annex to the treatise by UDINA entitled: *La legge polacca... sui conflitti di diritto interregionale privato*, "Il Foro delle Nuove Provincie," Anno VIII (1929) VII, fasc. 1, in separate copy pp. 14; in Portuguese — R. POZNAŃSKI's: *O dereito internacional privado na legislação da Polonia*, "Panadectas Brasileiras," Rio de Janeiro 1929. It is worth recalling that the Polish Act of 1926 was on many occasions discussed in foreign writings. This relates to such publications as: E. FRANKENSTEIN, *Ostrecht*, Berlin 1926, pp. 1087, M. UDINA, *Il diritto internazionale privato della republica polacca*, "Rivista di diritto internazionale" 1927, p. 213ff., the above quoted R. POZNAŃSKI, R. K. KURATOWSKI, *A General Outline of Some Principles of Conflict of Laws in Poland*, "Studies in Polish and Comparative Law," London 1945, p. 11, and E. RABEL, *Conflict of Laws*, vol. IV, Ann Arbor 1958, p. 292.

the Polish People's Republic. These are largely conventions on legal exchange in civil, family and criminal matters signed by the Polish People's Republic with the European socialist states.

The author attempts to give an account of practically all more important issues of Polish conflict succession law, he presents the controversial nature of some of them and expresses his views on these issues. He follows efficiently this course of scientific presentation on the whole and displays great knowledge of the subject and of the problems of (not only) the conflict of laws in the law of succession. It should be borne in mind that the treatise is, to a great extent, a pioneer work in Poland.

Some of the author's remarks are original. And thus, for instance, while reflecting upon the question of the basic connecting factor of the Polish conflict succession law, the author anticipates complications where the establishment of nationality under Article 28 comes up against difficulties. As the author points out, this would relate to cases where "the testator was a stateless person or possessed double nationality, or multi-nationality, or, lastly, where there is a presumption, but no certainty, that the testator was a citizen of one state or another (e.g. where doubt arises as to the nationality of the testator in the course of proceedings before a court and there is no adequate documentation). Similar difficulties may occur at the testing of the heir's capacity to inherit, at establishing the nationality of the testator at the time of the drawing up of the will (for the purpose of evaluating his capacity to testate)." The problem is relatively simple—as the author sees it—where the person in question possessed (at the time of his death or at the time of the drawing up of the will), double or multi-nationality including, however, also Polish nationality, because a Polish court would then apply Polish law. Likewise, where among those nationalities Polish nationality is not included this—according to the author—would not cause any major obstacles. The problem would, however, become more complex where no nationality can be established. The author rejects in such event the possibility of applying the *lex domicili* of the testator at the time of his death or of the drawing up of the will, but on the basis of an analysis of Articles 1, 28 and 29 of the Act of 1926 comes to the conclusion that "in Article 1 of the Act of 1926 no satisfactory answer can be found to the question of what law should be applied in cases where it is not possible to establish the national law pointed to by Articles 28, 29 and also 31." Consequently, Article 39, paragraph 2, of the Act should be applied; this means that where the criterion of nationality cannot be applied to succession cases—the Polish court should apply Polish law.

In the opinion of the author in order to evaluate the form of will Article 5 of the Act of 1926 should be applied, however—according to the view held by the author—"the choice between two legal systems in respect of the form of the will, recognition of both forms as valid is possible only where there is no doubt as to the territory of the state on which the will was drawn up." While analysing Article 5 the author comes to a more general conclusion, namely, that Article 29 is applicable only to the capacity to testate and that Articles 5 and 29 are two conflict exceptions relating to testamentary succession, however, in all other problems of inheritance Article 28, paragraph 1, of the Act of 1926 is applicable.

One may, of course, disagree with the views of the author. One thing is, however, certain—one cannot pass over them indifferently. They contain ideas which are thought-provoking. This holds true not only of the issues referred to above. The Polish Act on private international law of 12 November 1965 (Dziennik Ustaw, No. 46, text 290) did not introduce in this respect any spectacular changes (save for the deletion of paragraph 2 of Article 28 of the Law of 1926), hence Balicki's treatise "Problems of Conflict of Laws in the Law of Succession" has not lost its relevance.

It may well be that it will for long retain its priority (as it is the first thorough presen-

tation of that issue in the Polish literature on the conflicts of laws), because it has paved the way to be followed by other research workers to arrive at new solutions.[2]

Bronisław Walaszek.

Lucjan Ciamaga, *Od współpracy do integracji. Zarys organizacji i działalności RWPG w latach 1949—1964* (*From Co-operation to Integration. An Outline of the Organization and Activities of the Council of Mutual Economic Assistance ‹CMEA› in the Years 1949—1964*), Warsaw 1965, 250 pp.

In the work under review L. Ciamaga has made rather a difficult but, in effect, successful attempt to give a comprehensive presentation of the legal and economic aspects of the activities of the CMEA in the years 1949—1964.

Chapter I dealing with questions relating to the setting up of the CMEA and discussing its character, principles and tasks—constitutes, as if, a broad introduction to the other two chapters. In that chapter the author devotes much attention to the principles governing the activities of the CMEA, that is, to questions relating to the legal-international aspects of those activities. Particularly valuable are the author's observations concerning the nature the CMEA as an international organization. The participation of non-socialist states in the CMEA may be, however, limited by the fact that those states do not have a planned economy. None the less, they may acquire the status of an observer or associate member of the CMEA and participate in the activities of the International Bank of Economic Co-operation and in the specialized agencies (p. 33).

In the light of the provisions of its Statute, the activities of the CMEA are based on the principle of the sovereign equality of member states, and on the principle of mutual benefits and fraternal mutual assistance. The latter principle does not come within the scope of universal international law. It follows from the principle of socialist internationalism adopted by the member states of the CMEA. L. Ciamaga is right in treating it as a moral-political principle.

Discussing the objectives and tasks of the CMEA, L. Ciamaga deals with the question of the attitude of states which are not concerned in a matter under consideration by an organ of the CMEA, to a decision adopted in connection with such a matter (p. 45). The author treats a declaration on the lack of interest in a matter like a right of veto in other international organizations. Such identification gives rise to objections. Because—according to the principle of unanimity adopted in the Statute (Art. IV, paragraph 3)—the right of veto is vested in the state voting on the decision in question, that is, in the interested state.

In Chapter II the author discusses the various organs of the CMEA, their structure and competence. Among the main organs, apart from the Session of the Council, the Executive Committee, standing commissions and the Secretariat of the Council, the author includes the Office of the Executive Committee for Joint Problems of Economic Plans (page 65). This does not seem to be in accord with Article 5, paragraph 1, of the Statute enumerating the main organs of the CMEA and with an analysis of the provisions of the Provisional Decision of 28 September 1962, relating to the activities of the Office.

Dealing with the question of the structure and terms of reference of the Session of the Council, L. Ciamaga arrives at conclusions pertaining to the recommendations and deci-

[2] A review on the treatise discussed here appeared in "Państwo i Prawo" 1964, No. 8—9, pp. 373—377, prepared by W. Ludwiczak; cf. also the reply of the author in No. 1 of 1965 of that periodical, pp. 108—112, and W. Ludwiczak's reply in response thereto in No. 4, 1965, p. 638.

sions of the organs of the CMEA. They are proper conclusions. Some doubts are raised only by the fact that the author considers a decision on the acceptance of a state as a member of the CMEA to be an organizational decision (p. 69) and an act consituting the adoption of a recommendation (p. 70) to be of a formal character. It would have been advisable if the author, while discussing recommendations of the Session of the Council, had drawn attention to the fact that the Statute does not provide for a legal differentiation between the recommendations of the various organs of the Council. Hence the observations made with reference to the recommendations of the Session of the Council are applicable to those of the other organs.

In Chapter II the part on specialized agencies of the Council merits particular attention. Those agencies whose number has been growing and whose work has been increasingly effective, now play an important part in the economic and scientific-technical co-operation of the member states of the CMEA. It is a good thing that those agencies have for the first time been so thoroughly discussed in Ciamaga's work. An excellent illustration to Chapter II is an annex constituting a calendar of sessions of the Council, of consultations Communist and Workers' Parties' representatives and of meetings of the Executive Committee. It is striking here, just as in the whole work, that such a considerable number of most essential facts relating to the activities of the Council have been assembled.

In Chapter III, devoted to economic analyses, the author makes use of statistical material and makes on its basis observations on the achievements hitherto attained and the deficiencies in the economic co-operation of the member-states of the CMEA. Some of the views based on economic analysis may arouse doubts or polemical remarks which is often the intention of the author.

In his right endeavour for accuracy and precision of reasoning the author makes use of extensive statistical material, an analysis and discussion of which occupies much place in his work. As regards the empirical analysis it could be suggested that from the point of view of the objective of research it is not so important at what rate the entire industry and its particular branches in the various states have been developing as to what degree the economic co-operation of the states concerned has contributed to that growth and what are the further possibilities in this respect.

The major part of those remarks and doubts relate to the general theoretical problems. It should, on the other hand, be pointed out that this work, though in its basic conceptions designed to present an outline of the activities and organization of the CMEA in a form accessible to a wide range of readers, provokes theoretical reflections which is undoubtedly the author's great achievement. It is a matter of satisfaction that the legal-international and economic problems of the CMEA have been so thoroughly presented by an outstanding expert in this field.

Marian Guzek and Jan Sandorski

Ludwik Gelberg, *Kryzys karaibski 1962 roku. Problemy prawa międzynarodowego* (*The Carribean Crisis 1962. Problems of International Law*), Warsaw 1964, 204 pp.

The book by Professor L. Gelberg deals with the events which took place six years ago. For two entirely different reasons, however, the passage of time has not diminished its topical value. First of all because although the Carribean crisis has been resolved in its most acute form still in 1962, its main reason, the hostile US policy towards Cuba remains unfortunately unaltered to this very day. Secondly because the author deals with the Carribean crisis in the context of many important problems of international law and policy the meaning of which is universal.

The book is composed of a foreword and

seven chapters. Chapter I deals with the background and factual presentation of the Carribean conflict, Chapter II is devoted to the problem of "offensive" weapons and military bases, Chapter III discusses the United Nations system of collective security, Chapter IV—the security system of the Western Hemisphere, Chapter V presents the Cuban problem in the United Nations, Chapter VI deals with the problems of the law of the sea, and Chapter VII with several other legal-political aspects (the problem of the "status quo" and the "balance of power," the NATO, the principle of equality of states, the big powers).

Special stress should be laid on the extensive use of reference materials. The author quotes numerous and almost always original documents and data relevant to the problem under review. The book contains also critical appraisal of the already existing, although at that time still very limited scientific literature on the subject. In his desire to give a possibly comprehensive presentation of particular aspects of the problem the writer seems to be even too prone to enter into details (e.g. the Cuban question in the UN).

The subtitle of the book—"Problems of international law"—may not be wholly adequate as it deals with both legal and political aspects. Among the former ones the most important and valuable is the part in which it convincingly proves that the contained main tenance of the US base in Guantanamo has no legal justification; that the Monroe doctrine has never formed a part of international law; that an affirmative answer should be given to the question whether in the Western Hemisphere could exist a socialist state; that the conception of excluding from a international organization of a government instead of a state, like the conception of "quarantine" is, from the legal point of view, artificial; that the naval blockade in peace-time is illegal.

In connection with the latter thesis is, however, difficult to agree with the author that the United States, while introducing the blockade around Cuba, was guilty of a threat of using force forbidden under Article 2, paragraph 4, of the UN Charter but did not commit an act of aggression. It seems that the institution—and not only the declaration to that effect—of naval blockade constitutes an aggression even though no force was used, simply because of the fact that nobody tried to run this blockade.

Lech Antonowicz

Wojciech Góralczyk, *Szerokość morza terytorialnego i jego delimitacja* (*Limits of the Territorial Sea and Its Delimitation*), Warsaw 1964, 392 pp.

The problems dealt with by the codification conferences of the United Nations on the law of the sea have now become subject of a number of monographs. After several Polish publications in this field,[1] in 1964 appeared the book by W. Góralczyk: "The limits of the territorial sea and its delimitation."

The subject of this work continues to be a topical problem of international law in spite of the two conferences held in 1958 and 1960. For they produced no agreement on the limits of the territorial sea and in such circumstances scientific research is of considerable importance for the practice.

From the point of view of international law the limits of the territorial sea are conditioned by three elements: the fixing of the baselines of that sea, determination of its breadth and of its final limits. The above three elements have been taken into consideration by the author as the basis of the book's structure which besides the general

[1] R. BIERZANEK, *Morze otwarte ze stanowiska prawa międzynarodowego* (*The High Seas from the Point of View of International Law*), Warsaw 1960. L. EHRLICH, *Suwerenność a morze w prawie międzynarodowym* (*Sovereignty and the Sea in International Law*), Warsaw 1961. R. ZAORSKI, *Konwencje genewskie o prawie morza* (*Geneva Conventions on the Law of the Sea*), Gdynia 1962.

part contains also: Part II—inner limits of the territorial sea, Part III—the breadth of the territorial sea, and Part IV—technical methods for fixing the outer limits of the territorial sea.

The general part deals with the notion of the territorial sea, its breadth as function of the interests of the coastal state, the principle of the freedom of the seas and the relation of the territorial sea to the contiguous zone and continental shelf. In discussing the practice of states to extend their rights beyond the outher limits of the territorial sea the author rightly says that at present the rights of states in fisheries are not decisive for fixing the limits of state territory. Full sovereignty (with limitations in its exercise stemming from the customary norm of the right of innocent passage) constitutes now the criterion allowing for the recognition of the coastal water belt as the territorial sea.

Part II contains detailed presentation of the modalities of fixing the baseline of the territorial sea which influences the size of the area submitted to the territorial sovereignty of the coastal state on the one hand and on the other of the area of the high seas. On the basis of draft codifications prior to 1958 Geneva conference and of Geneva convention on the territorial sea and the contiguous zone, decisions of the courts and the doctrine, the author analyses particular principles of fixing the baseline depending on geographical and hydrological conditions.

The norms of international law on the fixing of baseline of the territorial sea are of a general character and it is up to domestic legislation to adapt them to natural conditions of the sea-coast. The author states that certain freedom of the coastal state in fixing the baseline of its territorial sea recognized in the judgement of the International Court of Justice in British-Norwegian dispute in 1951 was incorporated into the 1958 Geneva codification. The principles on the territorial sea, established by the Geneva convention, concerning the fixing of the baseline of the territorial sea may be now considered as generally accepted.

Part III of the book is devoted to the question of the breadth of the territorial sea. This aspect was presented in its historical development beginning with the first methods of establishing this breadth in the 15th century, with the use of the criterion of visibility, median, criterion of the depth of water, of the reach of the canon ball—in the opinions of Grotius and Bynkershock—up till calculating it in nautical miles. The above deliberations were based on state practice, decisions of the courts and the doctrine. Subsequently the author discusses the attempts at codification: the Hague Conference in 1930, the work of the Inter-American Conference of Jurists, the work of the Commission on International Law and two Geneva Conferences of 1958 and 1960.

A characteristic feature in the shaping of norms regulating the breadth of the territorial sea is the influence of the socialist states and countries liberated from under the colonial rule. These states aim at safeguarding their interests through fixing the limits of their territorial seas at 12 miles from the coast line. The author defends the thesis that the maximum breadth of the territorial sea admissible in contemporary international relations are 12 nautical miles. For there is no clear-cut norm regulating this breadth, but only its outer limits from 3 to 12 miles. The state practice shows a clear tendency to expand the limits of the territorial sea towards the maximum expanse. The fixing of the breadth of the territorial sea by a unilateral act of the coastal state "is binding for all states and does not require a recognition on their part" (p. 363).

Part IV of the manual is devoted to the fixing of the outer limits of the territorial sea. Chapter one discusses the method of parallel line, the polygonal method and that of the contingent curve. The second chapter deals with the principles of dividing territorial sea between neighbouring states.

The work by W. Góralczyk is thoroughly documented. One should stress in particular that the author based his deliberations on the reference materials often not readily accessible.

Besides its theoretical value the work has also practical importance giving, as it does, a large amount of factual material, for instance extensive data on the breadth of territorial sea in particular countries. The monograph by W. Góralczyk constitutes a further contribution on Polish science to the development of the international law of the sea.

Remigiusz Zaorski

Jan Hołowiński, *Umowa o przewóz ładunku drogą morską. Istota i charakter prawny* (*Contracts for the Carriage of Cargo by Sea. The Essence and Legal Nature*), Gdynia 1964, 246 pp.

The maritime economy with every year plays an increasingly large role in the economic life of People's Poland. Along with the expansion of our maritime economy grows also the significance of the legal problems relating to that field. This is shown, in the first place, by the development in Poland after World War II of a wide legislative activity in the field of so-called maritime law which culminated in the adoption on 1 December 1961 by the Sejm of the Polish People's Republic of the Maritime Code (published in Dziennik Ustaw, No. 58, text 318), which entered into force on 15 June 1962. Also the Polish jurisprudence has taken an increasing interest in the problems of maritime law, which is illustrated by a considerable number of publications in this field. One of them is the monograph by J. Hołowiński.

In his comprehensive book J. Hołowiński deals with one of the most important institutions of maritime law—the contract for the carriage of cargo by sea. Although the subtitle of the treatise indicates that the work relates to the essence and legal nature of contracts on the carriage of cargo by sea—the author covers in that work almost the entirety of questions relating to contracts on the carriage of objects (or cargo) by sea. Neither has the author confined himself to discussing the Polish system of maritime law alone; the writer considers the problems in question in the historical and in the legal-comparative aspects in the light of a number of contemporary legislations both capitalist as well as socialist.

The historical remarks are contained primarily in Chapter I of the treatise under review. In it J. Hołowiński outlines the question of contracts for the carriage of cargo by sea in pre-capitalist systems and, more precisely, in the system of slavery (taking into account Rhodian law, the law of Athens, Roman law and the law of the Eastern Empire of Byzantium) and the feudal system (drawing attention, above all, to the so-called maritime statutes and customs of the Italian cities of the early Middle Ages, to the collection of the Laws of Oléron of about the twelfth century, to the codification of maritime law of the harbour town of Wisby, and particularly to the Gdańsk maritime legislation and to Prussian law).

In the most comprehensive Chapter II the author discusses the contract for the carriage of cargo in contemporary maritime law of some capitalist states. J. Hołowiński presents in that chapter the maritime law of only those capitalist states "whose influence on maritime practice and on the doctrine of maritime law is considerable." The author divides the maritime law of capitalist states—as regards the problems of interest to him—into three basic groups: 1. Anglo-Saxon law (the maritime law of the United Kingdom, the USA, the British Dominions, and also the maritime law of Liberia and Panama); 2. the law of the Romanic area (the French, Belgian, Italian laws and the Moroccan law); 3. the law of the Germanic-Scandinavian area (the German law, the law of Denmark, Norway, Sweden and Finland).

On the legal systems of maritime law of the socialist countries the author takes into consideration, in Chapter III, the maritime law of the Soviet Union, Bulgaria and Yugoslavia.

The contract for the carriage of cargo by sea in the light of Polish maritime law is the

subject of Chapter IV of the treatise here discussed. In it the author deals in turn with the parties concluding the contract for the carriage of cargo by sea, the legal position of the shipper and of the consignee in the light of the law and of the contract for the carriage of cargo by sea; with the basic contents and legal nature of the contract for the carriage of cargo by sea; with the influence of regulations relating to the responsibility of the carrier on the legal nature of the contract for the carriage of cargo by sea (pp. 177—184); with the contract of affreightment by bill of lading, and, lastly, with the contents and legal nature of the contract for the carriage of complete cargo.

The author's basic thesis on the legal nature of the contract for the carriage of cargo by sea within the meaning of Article 94 (and subsequent sections) of the Polish Maritime Code is the following: it is a contract similar to a contract for work and it relates both to a booking as well as to a charter contract for the carriage of cargo by sea. That well formed—as it seems—view of the author is of considerable practical significance. Because under Article 1, paragraph 2, of the Maritime Code, in civil-legal relations connected with maritime shipping provisions of civil law are applied in the absence of provisions of the Maritime Code. This means that the author, so defining the legal nature of the contract for the carriage of cargo by sea in Polish maritime law, has indicated that should there arise the need to apply the provisions of civil law (primarily of the law of obligations), application should be made in connection with Article 1, paragraph 2, of the Maritime Code, of those provisions which regulate the contract for work.

At this point attention should, however, be drawn to the fact that the treatise by J. Hołowiński under review here was written and published before the adoption by the Sejm of the Polish People's Republic of the law of 23 April 1964—the Civil Code (published in the Journal of Laws No. 16, text 93) which entered into force on 1 January 1965. That is why the author referring in his reasoning to the provisions of civil law (outside of the Maritime Code) sets forward the relevant provisions of the Code of Obligations (of 1933) in force that time, or to the Commercial Code (of 1934). At present, the relevant provisions are included in the Civil Code. In particular, provisions relating to the contract for work are contained in Articles 627——646 of the Civil Code, and general provisions on carriage, and provisions relating to the carriage of objects are contained in Articles 774—775 of the Civil Code and in Articles 779—793 of the Civil Code. The above mentioned change in the normative base in Poland is, however, of no essential significance for the substance of the question discussed in the treatise under review and does not impair the basic conclusions which the author reaches in the question of the legal character of the contract for the carriage of cargo by sea in Polish law.

In the last Chapter V the author makes some interesting generalizations which are, as if, a summing-up of the theses of his treatise. And they have their significance not only from the point of view of the Polish system of maritime law. Just like the reasoning presented in the preceding chapters, those generalizations should be of interest also to the foreign reader.

Sylwester Wójcik

Alfons Klafkowski, *The Potsdam Agreement*, Warsaw 1963, 340 pp.[1]

The subject-matter of the book are legal questions relating to the Potsdam Agreement which—as is well known—is one of the basic international acts regulating relations in post-

[1] The French edition *L'Accord de Potsdam* has been published in 1964 by PAX-publisher in Warsaw (374 pp.).

-war Europe and determining the territorial foundation of the Polish State. This is the most comprehensive and most thorough monograph on that issue in the literature of international law. Its author, professor of international law at Poznań University and rector of that University in the years 1956——1962, has for many years focussed his scientific interests on international-legal questions relating to the termination of World War II, and published a number of works on that subject.

In his work on the Potsdam Agreement the author covers a wide range of problems for he presents the provisions of that Agreement as "law in action," that is to say, he shows in what way they were conceived and implemented in practice. In the foreword to the book the author defines the premise underlying his research in the following words: "the most eloquent commentary upon it has been written by 19 years of practice, particularly that of the four big powers—parties to that Agreement."

The first Chapter of the book is of the nature of preliminary remarks. They refer to the tasks of interpretation as a process for determining in an objective way the contents of the Agreement and deal with the preparatory work to the Yalta and Potsdam Agreements as well as available documentation allowing to define the historical and political background against which the Potsdam Agreement was concluded. The attitude of the big powers towards the publication of archives has been discussed in detail as were the criteria according to which the publication of documents was effected. The author attaches great importance to this matter starting from the premise that "the two basic international agreements—Yalta and Potsdam—did not materialize in a vacuum, but were the result of conditions which had been documented by the controversial publications, discussed above, of a part of the German archives."

Chapters II and III are devoted to the most important, key legal questions relating to the conclusion of the Potsdam Agreement and its binding force. The first question is the international-legal nature of the Potsdam Agreement. Replying to the arguments of some West-German authors alleging that the provisions of the Potsdam Agreement are not of the nature of international legal obligations in the full meaning of that word in view of its name ("Potsdam Communique") and of the fact that it was not subject to ratification, the author shows—on the basis of doctrine and practice and, in particular, on the basis of opinions expressed in the course of the work of the International Law Commission of the United Nations—that the name of an agreement is of no consequence for the legal substance of the international one. And as regards rafitication, the development of international law shows an increase in the number of agreements not being subject to ratification. Neither is the legal nature of the Potsdam Agreement changed by the fact that it has been considered by some authors as a declaration: also declarations have had, on many occasions in the course of history, the character of international agreements and have been recognized as such by international courts (the author cites as an example the Polish-Czechoslovak Declaration on the question of Jaworzyna recognized by the Permanent Court of International Justice as "two agreements"). The basis for the binding character of an international agreement is the "consensus" of the parties, because according to the generally accepted definition an international agreement is an express statement of the will of two or more states, in which they create a binding link and legal effects connected therewith. The author states in conclusion that the "Potsdam Communique" cannot be regarded as something different from other international agreements and in that sense it creates rights and obligations for the parties to the Agreement. Among the arguments in favour of such a position the author adduces opinions of outstanding lawyers expressed in the poll conducted in 1950 by the Institut de Droit International. While discussing this part of the work a gap in the argumentation should be pointed out which consists in: omitting the positions of the big powers—parties to the Potsdam Agreement, which were officially expressed in diplomatic

notes. And thus the Government of the United States in its notes of 5 January 1947 addressed to the United Kingdom and the Soviet Union requests—"as a signatory of the Yalta and Potsdam Agreements"—the execution of the provisions relating to the question of elections in Poland stating, inter alia: "...what is involved here, is the sanctity of international agreements, a principle upon which depends the establishment and maintenance of peace and the reign of justice under law... The essential fact is that it constitutes an international agreement on the basis of which all four nations concerned here have acted. Therefore, my Government believes that, for any of the parties to this agreement refrain from the most energetic efforts to see to its proper execution would be to fail in a most solemn obligation."

In this part of the work we find a penetrating analysis of the particular role of the big powers which in the course of World War II were the originators of a new international-legal order and were parties to the Potsdam Agreement. While discussing in detail the attitude of each of the big powers towards the Potsdam Agreement, the author does not confine himself to the period of the conclusion of the Agreement, but considers in detail the attitude of the powers towards the execution of the Agreement. The analysis covers the following questions in relation to each power: a) who concluded the Agreement on behalf of that power; b) "consensus"—intention and expression of will to conclude the Agreement; c) the attitude towards facts of non-execution or violation of the Agreement, and d) the attitude towards the provisions of the Agreement pertaining to Poland. That analysis leads, inter alia, to conclusions of a formal-legal nature, that is to say, that the Potsdam Agreement is binding upon the powers from the moment of its signing, and—upon France—from the day of the accession of that power to the Potsdam Agreement.

Questions relating to the period of time for which the Potsdam Agreement is to remain binding, have been discussed also in Chapter VI of the book which carries the title "For How Long Is the Potsdam Agreement Binding." The author defends here the thesis that the Potsdam Agreement, as one not concluded for a fixed period of time, continues to be binding although it is not being executed. That Agreement cannot be regarded as having expired because there occurs none of the circumstances which cause the expiry of an agreement according to the principles of international law. In particular, there cannot be any question of the annulment of the Agreement or of the application to it of the clause *rebus sic stantibus*. The author states in conclusion of his reasoning in that part of the book that the big powers continue to take the position that the Potsdam Agreement is valid and binding as they refer to that Agreement directly or indirectly in their international activities, just like they refer to other four power agreements concluded after the unconditional surrender of the German Reich, and that the big powers continue to play the role as organizers of world peace and security, and the other United Nations members recognize that role.

The reasoning contained in Chapter IV and V is to a lesser degree of a formal-legal nature and concerns the definition of the legal and political situation of Germany and of Poland in the light of the provisions of the Potsdam Agreement and of the execution thereof. The author has discussed extensively the questions connected with the execution of the Potsdam Agreement in the national laws binding in Poland and in Germany. In the Chapter pertaining to Germany the author had to cope with the solution of a number of difficult and contentious issues, like the transformation of the Potsdam Agreement into provisions of law binding "Germany as a whole," the question of the position of the legislation of the Allied Control Commission for Germany towards the principle *lex retro non agit* and other questions. In the Chapter devoted to Poland we find a systematization of legislative acts and international agreements designed to execute the Potsdam Agreement. Of a theoretical nature only is the part presenting Poland's rights as rights following from the Agreement *in favorem tertii* and a criticism of the thesis alleging that the Potsdam

Agreement was, for Germany, *res inter alios acta*.

In the final part of his work the author formulates the thesis that the Potsdam Agreement constitutes the main legal basis for the peace treaties which were concluded after World War II. In detailed studies on the peace treaties following World War II the connection between those treaties and the Potsdam Agreement was indicated. All those treaties were concluded by the allied nations participating in the coalition against the Axis Powers and a considerable part of the preparatory work was executed by the big powers—parties to the Potsdam Agreement. On the basis of an analysis of the attitudes and documentation relating to the liquidation of war the author states in his conclusions, based on international practice, that there are different ways of terminating a war and one of them, but not the only one, is the conclusion of a peace treaty. In the relations between Poland and Germany it could be said that after so many years numerous issues connected with the liquidation of war have been solved despite the absence of a peace treaty. Poland maintains diplomatic and consular relations with one of the German states. The question of the frontiers, of reparations and other issues are among those definitely settled. Many issues, however, await settlement with the German Federal Republic. Among those is, i.a., the question of the restitution of Polish property and Polish cultural assets seized from Poland during the time of occupation. The future peace treaty by settling those questions in relation to others would be a confirmation of the execution of the Potsdam Agreement and of executive bilateral agreements concluded in this matter. The basis for Poland's claims under the Potsdam Agreement is reinforced by the fact that the Polish Government was consulted by the big powers at the Potsdam Conference and, consequently, the provisions of the Potsdam Agreement "were thus adopted with the participation of the Polish Government." In the light of the facts which occurred after the Second World War, "the implementation of the Potsdam Agreement is equivalent to a peace treaty with Germany."

The author's thesis on the existence of various ways of terminating a war, besides the conclusion of a peace treaty, reflects the facts of various epochs in history when many state frontiers existing to this very day were fixed without treaty provisions. It also corresponds to what is held in law at the present time.[2] In the relations between Poland and other States-members of the coalition of World War II on the one hand and Germany on the other, the state of war was undoubtedly terminated despite the fact that a peace treaty has not so far been concluded. All other legal constructions lead to conclusions contrary both to the sense of reality as well as to the principles of international law.

To sum up, it should be said that professor Klafkowski's book presents a logically coherent legal construction of the Potsdam Agreement as an agreement retaining to this day its binding force, and at the same time it discusses in an interesting way a number of legal questions relating to that Agreement and to its implementation.

Remigiusz Bierzanek

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[2] Such a position was also held by the Western powers at the time of the termination of the war. The Attorney-General of the USA, Curtis C. Shears, in connection with the discussion in April 1949 on the legal forms of terminating World War II, referred to the legal consequences speaking in favour of the choice of "unconditional surrender" in the following way: "It is possible to terminate the war without an armistice, or, for that matter, without a peace treaty... The war may be terminated without any agreements with the Nazi Government... There is no need for a puppet government or a dictated peace treaty. The Allied Governments are left free to proceed with the demilitarization, demobilization, disarmament, political reorganization, or division of all territories now legally under German control by unilateral declarations." "Proceedings of the Washington Meeting of the American Society of International Law," 13—14 April 1945, pp. 47—49.

Kazimierz Kocot, *Nauka prawa narodów w Ateneum gdańskim* (*The Science of the Law of Nations at the Gdansk Athenaeum*), Wrocław 1965, 255 pp.

In the expanding range of research on the history of the science of the law of nations in old Poland the book by docent K. Kocot constitutes an important accomplishment. Historical studies carried on in this field by internationalists allow for an increasingly proper evaluation of the contribution of the scholars of our country to the development of the science of *jus gentium*. The team of workers of the Wrocław chair of international law directed by professor S. Hubert has had important achievements in this field. It suffices to recall as examples the works: *Views on the Law of Nations in Poland of the Period of Enlightenment* by prof. S. Hubert; *The Place of Stanisław of Skarbimierz in the History of the Law of Nations* by docent K. Kocot; *The Law of Nations in Polish Schools of the Age of Enlightenment* by docent J. Kolasa. The study *The Science of the Law of Nations at the Gdansk Athenaeum* is thus another stage in the work initiated in the second half of the nineteenth century by prof. F. Kasparek (*The Contribution of Poles in the Pursuit of International Law*) and now continued by the Wrocław University Centre to which the author belongs.

Docent K. Kocot's interest in the topic, expanded in the book was revealed as far back as 1959 in his bibliographical note entitled "The Gdansk Science of the Law of Nations of the Seventeenth Century in Defence of Poland's Rights to Silesia." The book *The Science of the Law of Nations at the Gdansk Athenaeum*, based on exhaustive source material and taking into account the complete bibliography available in Poland is a systematic and comprehensive study of the science of the law of nations at the Gdansk Gymnasium in the years 1580—1793.

That school of an academic type was set up in 1558 and in its two additional grades ensured instruction on the level of initial university studies. Lectures were given there, among others, also in history and in law relating to it. The object of lecturing on *jus gentium* was closely connected with the political and economic situation of Gdansk united, as it was, with the Polish Republic. In the introductory chapter, docent K. Kocot outlines that situation of the "city-potentate" which even at the time of the decline of other Polish cities retained its complete royal privileges and preserved the conditions for a successful development.

Following 1793 the Gdansk Athenaeum was treated by the Prussian partitioning power as a centre emanating Polish culture, a bastion of ideas of freedom and progress, endangering the policy of violence and cynicism of the partitioning power. The lectures on *jus gentium* at the Gdansk Gymnasium were terminated, they lost their meaning, just like the Athenaeum itself lost its *raison d'être*, because its fate was closely connected with that of independent Poland.

Docent K. Kocot divided the two centuries (1580—1793) during which the law of nations was lectured on at the Gdansk Gymnasium, into four periods according to the criterion of the importance attributed to that law as a separate subject of studies.

In the initial period covering the end of the sixteenth and the first decade of the seventeenth century Bartłomiej Keckermann became a figure of prominence; in his lectures on the law of nature and in his books (chiefly in "politics") he introduced publicistic elements.

The years 1609—1652 marked a period of the evolution at the Athenaeum of the science of the law of nations in the modern sense. In the development of that law civilistic and publicistic elements were combined. Whereas at the German Universities the first half of the seventeenth century was a period of the epigones commenting on the Justinian texts, at the Gdansk Gymnasium the views of Bodin, Gentilis and Grotius were gaining ground, and lecturers referred also to the works of Polish political writers, lawyers and historians, as well as to Polish practice. Among the professors active at that time the names of Krzysztof Riccius and Piotr Oelhaf should be mentioned.

The next century constituted the third period (1652—1748) in which a separate science on the law of war and peace developed at the Athenaeum. Following the first difficult years a number of outstanding figures appeared at the Gdansk School who ensured a high level and standing to the science of the law of nations. Thus, Schultz-Szulecki, introducing at the School lectures on the law of nature and the law of nations based on the work of Grotius, carried out a legal-international analysis of the independence of Poland in his work *De Polonia nunquam tributaria.*

Thus, Gabriel Groddeck, professor of philosophy at the Gdansk Gymnasium in the years 1699—1709, an authority on the contemporary law of nations, author of several works in that field, promotor of a number of theses in the field of *jus gentium.* And finally, Samuel Willenberg (1663—1748) who adapted the works of Grotius to the didactic needs of Gdansk, author of numerous dissertations in various fields of law and of several monographs, writer of the first textbook on the law of nature and the law of nations in Poland: *Sicilimenta iuris gentium prudentiae...* All those scholars associated with the progressive trend in the science of international law were through the contents of their works deeply rooted in the native Polish-Gdansk culture. It is, however, with great caution that they approached German science and its representatives.

As regards the last fifty years of the existence of the Athenaeum, mention should be made of Gotfryd Lengnich, the most renowned of the Gdansk professors of law, closely associated with the family of King Stanisław August Poniatowski. The last professor who lectured on the law of nations at the Gdansk Gymnasium was Daniel Galath, author of a polemical treatise directed against the arguments of the Prussian partitioning power as regards Polish rights to the lands of Pomerania, a man who in the difficult times preceding the second partition of Poland and the seizure of Gdansk by the Prussians publicly declared his Gdansk-Polish patriotism, condemning at the same time the cynicism and violence of "the rulers of the world."

It is fortunate that docent K. Kocot took up the suggestion of prof. S. Hubert in 1949 to make some research into the work of the group of the Gdansk writers in the law of nations. In his book the author collected a rich material drawn from the old folios, saved it from oblivion, made it subject to a detailed and thorough assessment. The work of docent K. Kocot *The Science of the Law of Nations at the Gdansk Athenaeum* disproves the false notions about the neglect of the science of the law of nations in the Poland of the seventeenth and of the first half of the eighteenth century.

The author treated the subject in question in a comprehensive way and demonstrated that in Gdansk the influence of the German school of *jus gentium* was truly negligible, and that the learned lecturers of the Gdansk Athenaeum genuinely attached to their city worked out a doctrine of the law of nations associated with the progressive trends of science and ideology. Their works offer at the same time a lasting and incontestible proof of the links existing between the Gdansk school of *jus gentium* and the great political and cultural community of the Polish Republic.

Mieczyslaw Grzegorczyk

Leszek Kubicki, *Zbrodnie wojenne w świetle prawa polskiego* (*War Crimes in the Light of Polish Law*), Warsaw 1963, 186 pp.

During the Nazi occupation the territory of Poland was an arena of crimes whose extent and degree in respect of cruelty are unparalleled in modern history. The German occupation authorities transformed the entire country into one huge "death combine" in which it had been decided to put into practice the mad racial theories and to annihilate millions of Poles, Russians, Jews, Greeks, Frenchmen and people of other nationalities. It was in Po-

land that Oświęcim (Auschwitz), Treblinka, Majdanek existed. The interest of Polish practice and theory from the first days of liberation in the problem of war crimes is, therefore, fully understandable. As far back as mid-1944, i.e. two years before the Nuremberg judgement was delivered, Polish courts on the liberated territory proceeded with the punishment of war criminals who had perpetrated criminal acts on the territory of Poland or acts which had been directed against the Polish State or its citizens. It should be pointed out that in the first post-war years the allied occupation authorities in principle complied with Poland's requests for extradition and handed over runaway Nazi war criminals in order to have them tried by Polish courts. It was only the beginning of the "cold war" and its intensification that led to the activities of these circles which aimed at assuring impunity for Nazi war crimes.

In the book under review, to which Jerzy Sawicki wrote the preface, the author has set himself the task to make a survey, a critical analysis and a preliminary balance sheet of Polish criminal jurisdiction relating to the responsibility of the individual for committed war crimes. The book consists of five chapters preceded by a short introduction. In the introduction the author emphasizes that he intends to clarify the following basic issues: 1. whether and, if so, to what extent the Polish administration of justice fulfilled the duties expressed in the Moscow Declaration of 1943 and in the London Agreement of 8 August 1945; 2. the relation of Poland's criminal legislation and judicial decisions on the question of war crimes to international law; 3. the directions of the main interpretatory tendencies of the judicature as regards the interpretation of provisions relating to war crimes, and 4. whether the contribution (if any) of Polish judicature in this field which could have significance for the further development of the law of war (p. 18). To this latter question the author replies in the affirmative referring, in particular, to a typification of acts which come under the notion of "participation in murder," a typification of offences of functionaries of the occupation authorities and to the determination of jurisdiction in respect of the perpetrators of war crimes (p. 19). In Chapter I the author presents the first steps taken by the organs of People's Poland in the field of sanctions for Nazi crimes. On 31 August 1944 there was issued a decree concerning the extent of the punishment to be imposed on fascist-Hitlerite criminals guilty of murdering or persecuting civilians or prisoners of war and on traitors to the Polish Nation. That was one of the first criminal laws relating to the responsibility for war crimes committed in the course of World War II. At the same time special criminal courts were set up in which representatives of the community participated. Those courts began their activity forthwith. The first trials against members of the staff of the camp at Majdanek took place between 27 November and 2 December 1944. The work of the special courts was intensive. In the course of two years about 45,000 cases were filed with the prosecutors' offices, bills of indictment were brought, however, only in 9,449 cases, and 2,471 persons were convicted (pp. 40—41). In connection, *inter alia*, with the views expressed by jurists' circles that special courts were unnecessary, they were abolished in October 1946 and their functions were transferred to courts of general jurisdiction rendering decisions with the participation of people's assessors. In that Chapter I the author discusses the work of the Central Commission for the Investigation of Nazi Crimes in Poland and questions relating to international co-operation in the field of prosecution and trying war criminals. Also there has been discussed the question of the evolution of the Anglo-Saxon states' position as regards extradition to Poland of Nazi criminals, that evolution terminated in an actual cessation of the handing over of those criminals which constituted a flagrant violation of international obligations (p. 56). Chapter II is devoted to a detailed analysis of the "August" Decree whose promulgation had been necessitated by the need to fill the then most glaring legal gap which did not permit a proper treatment of a new criminological phenomenon without precedence in the history of criminology. The August Decree was

repeatedly modified which was in some way to attenuate the principle of responsibility established in the first drafts in an exceptional and harsh way and to adapt Polish legislation to the provisions of the "Nuremberg Law" binding also upon Poland. Particularly interesting are the author's reflections relating to the scope of the binding force of the Decree as regards time, place and persons (pp. 69—78). In Chapter III the author makes a legal analysis of war crimes committed in Poland in the years 1939—1945, comparing it with the appraisal contained in judicial decisions and in legal doctrine. He rightly criticises some views of the Supreme National Tribunal adopted by that court under the influence of the position taken by some representatives of the doctrine (e.g. on the unlawful occupation following unlawful war). The author makes a detailed analysis of Article 1, paragraph 1, of the August Decree relating to "participation in murders" and of Article 1, paragraph 2, of that Decree relating to the offence of "informing against or detaining persecuted persons" (pp. 89—120). Also interesting is the fragment dealing with the participation in criminal organizations as a *sui generis* war crime (pp. 137—155). In Chapter IV the author deals with the circumstances excluding criminality of an act in case of war crimes, such as war-time necessity, meeting of needs of the occupation army, reprisals, order of a superior, command, threat and a state of higher necessity. Chapter V (the last) discusses penal sanctions applied in Poland for war crimes. Also statistical figures have been given here, which relate to convictions for crimes under the August Decree in the years 1946—1960. A total of 16,819 persons were convicted. As the author rightly indicates, the prosecution and punishment of perpetrators of war crimes was actually terminated in Poland in the 1950's. "If not all war criminals acting in Poland or against values protected by Polish law did appear before Polish courts, this follows solely from the fact that the Western states ceased extraditions" (p. 184). In the meantime four amnesty acts have been issued which, however, do not extend to acts covered by Article 1, paragraph 1, of the August Decree—"participation in murders."

The book by L. Kubicki is a very interesting, valuable publication acquainting the reader with Polish legislation and the practice of Polish courts in the field of penal sanctions for war crimes.

Ludwik Gelberg

Manfred Lachs, *The Polish-German Frontier. Law, Life and Logic of History*, 1st ed. 1964, repr. 1965, Warsaw, 80 pp.

The scope and contents of the work have been defined by the author in the sub-title: "Law, Life and Logic of History." In order to fulfil the task—not a small one—the author presents to the reader the consecutive elements which make up the full picture. Having drawn a general historical background in the introduction, Professor Lachs then discusses the following questions: population transfer, the Potsdam Agreement, the road that led to it and its consequences. The further issues which are subject to analysis are indicated by the titles of the four succeeding chapters: Whence the Question Marks?, Law and Politics, The Case for Final Recognition, and finally Conclusions—summing up the reflections. At the end a three-part bibliography is annexed in which the author presents 1. documents and treaties, 2. table of cases, 3. books and articles. Among 58 items to which Professor Lachs refers the reader there are works directly relating to the question of the Polish-German frontier on the Oder and Neisse, but also works written long before the Polish Western frontier after World War II became the subject of interest of jurists and diplomats.

The logic of history is an iron-clad logic. Equally iron-clad are the arguments by which the author disposes of those who deny Poland's right to her present Western frontier.

The unequivocal nature of the consequences of the decisions adopted over 20 years ago, also in the light of historical examples, can be questioned today only by fanatics.

In analysing the text of Potsdam Agreement and its binding force the author shows that the view of some West-German jurists that it is not binding for Germany, as well as attempts at interpreting its wording in the sense that it was meant as provisional only, is both from a doctrinal and factual point of view devoid of foundation. The author quotes interesting historical examples, also of agreements of a provisional nature, e.g. the British-Italian treaty of 1924 on the frontier between Kenia and the Italian Somali. According to that treaty if it is found that the well on one side of the frontier dries up—then the actual frontier line shall be so changed as to assure the access to a source of water to that side on which a shortage of water occurs. However, the reasons, as well as the formulations on account of which that treaty could and should be regarded as provisional are in no way analogous to the Potsdam Agreement, which—as its origin and formulations indicate—constitutes an agreement of a final nature and provides that "the following understanding has been reached on the Western frontier of Poland."

In the second part of his work Professor Lachs indicates the political background of all the activity aimed at questioning Poland's Western frontier; identifies those who are interested in the policy of some states refraining from the final and at the same time the only possible step—recognition of the frontier on the Oder and Neisse. At the same time he points to the fact that voices of reason are becoming ever more frequent even in Western Germany. The necessity for a speedy and unconditional recognition of Poland's Western frontier cannot be drowned in a flood of pseudo-scientific arguments and political slogans. The sooner this takes place the better for the cause of peace. For there exists a close and inseparable link between Poland's Western frontier and peace of Europe.

In his conclusions the author states that the intention of the book is not to manifest an anger shared by all Poles against those who pursue ideas of revanchism. The book is intended to show the danger resulting from the continuation of that policy for the maintenance of peace in Europe, for not only Poland's peaceful future. Its object is to show that the reluctance by some states to recognize the frontier on the Oder and Neisse is unjustified and contrary to their previous pledges, that the duty of recognition is backed by law, life and logic.

The book is carefully edited which will undoubtedly facilitate the foreign reader to get acquainted with it.

Janusz Šach

Stanisław Matysik, *Podręcznik prawa morskiego* (*Manual of the Law of the Sea*), 2nd ed., Warsaw 1963, 334 pp.

The Manual of the law of the sea by S. Matysik (first edition 1959) was rather late in appearing when viewed against the background of the growing didactic and practical need for such a manual in Poland, which after World War II became a maritime country in the true sense of that word.

The late publication was due to the prolonged deliberations of the maritime commission working on the Code of the Polish law of the sea.

The first edition of the manual testified to the still uncrystallized state of the law of the sea obtaining in Poland, while the second was adapted to the rules of the Polish maritime code (Act of 1 December 1961).

That is why, already at the outset words of recognition are due to the author for taking up such a pressing and at the same time not easy task.

The book meets all the requirements of a good manual: its presentation is logical,

while clear and precise language enhance the value of the concise exposition of the subject.

The manual has been divided into 16 chapters. It contains also the author's foreword (pp. 5—6) and index (pp. 327—329). The basic contents of the manual consists of four parts (although not marked in this way by the author), *viz.*: introductory part, part devoted to the personal and real law of the sea, a part dealing with contracts, accidents at sea and liability.

The introductory part (pp. 7—76, comprising the chapters: introductory information, the sources of contemporary law of the sea and the international private law of the sea, shipping organizations in Poland) contains both the definitions, historical outline, presentation of methodological conceptions adopted by the author as well as the description of institutions and organs of state and local administration in Poland dealing with maritime questions.

The subsequent three parts are an exposition of the law of the sea binding in Poland. They refer to the Titles into which the Polish Maritime Code was divided.

The second part covering the Titles I, II and III of the Code (pp. 77—145, the chapters: "Sea Vessel," "Owner," "Broker and Agent," "Ship Master and the Crew") besides the technical description of the vessel from the point of view of the law of the sea contains also administrative regulations e.g. registry, classification, measurements and safety regulations. Contained herein are also deliberations on the personal and real law and also on labour code.

Part three which covers Title IV of the Code (pp. 146—244, chapters: "Cargo Shipping Contract," "Passengers' Passage Contract," "Time Charter Contract," "Hauling and Piloting") presents different types of contract covering various shipping activities. It should be stressed that the author has justly abandoned here the systematization adopted in the Code by excluding from that part questions connected with broker and agent and including them into Part two.

Part four (pp. 245—326) covers Titles V and VI (accidents at sea and maritime insurance) and contains moreover a number of problems concerning liability in maritime questions including the outline of sea arbitrage (chapters: "Joint Average," "Collision of Ships," "Sea Rescue Operations," "The Limitations of Shipowner's Liability," "Maritime Insurance," "Maritime Arbitrage").

The manual covering such wide subject-matter was not limited exclusively to the presentation of the maritime code but gives also broad picture of maritime commercial relations regulated by international agreements which Poland is a party of. The rich bibliography of the subject, the law of the sea of other countries provided the author with an opportunity for using comparative methods in advancing scietific conclusions.

Marian Iwanejko

Stanisław Ordon, *Kampania wrześniowa 1939 r. na morzu w świetle prawa międzynarodowego* (*The 1939 September Campaign at Sea in the Light of International Law*), Gdynia 1963.

The work of S. Ordon is by all accounts very useful, being one of the few books in Poland concerning the law of naval warfare and at the same time the unique work analysing the legal aspects of the Polish-German war at sea in September 1939.

It is to the indubitable credit of the author that he amassed all the facts relative to these operations which had significance in international law, including especially valuable accounts of direct participants in those events. Their accounts, after careful analysis allowed for drawing the conclusion that "Kriegsmarine and Luftwaffe have actively participated in preparation of the aggression and that already in the first days of the war they have violated the laws and customs of war" (p. 8).

While their participation in the prepara-

tion of aggressive war is generally known and has been repeatedly disccussed in detail on the basis of documents from the Nuremberg Trial, the presentation of the role of Kriegsmarine and Luftwaffe in the September campaign amounts to pioneer work by the author.

The sinking of unarmed merchant ships, shelling of survivors, non-recognition of the Red Cross emblems, the activities of "Schleswig-Holstein" during the courtesy visit to Gdansk violating international norms (p. 58—65)—these are the facts which, as presented by Ordon, do not leave any doubt as to the clear violation by the Nazis of the rules of the law of nations. These facts are in glaring contrast with the activities of the Polish navy which not only observed the rules of the sea warfare, e.g. the London Protocol of 1936 (cf. instruction of the Navy Command on the use of submarines, pp. 96 and 98), but has not even availed itself of all the existing rights in order not to cause losses in civilian life (cf. the order forbidding the shelling of "Schleswig-Holstein" and the New Port, pp. 93—94).

In principle the author presented and analysed almost all facts and problems connected with the book's subject-matter. It seems, however, that while discussing legal questions connected with the internment of the Polish ships in Sweden, he should have devoted some attention to the legal status of Polish ships which sought refuge in Great Britain in September 1939.

Next to these positive features the work is not devoid of a number of shortcomings which besides, taking into consideration its pioneering character, seemed unavoidable. The author has ommitted i.a. the "Urkunden zum Seekriegsrecht (1.9.1939—31.12.1940) zusammengestellt vom Oberkommando der Kriegsmarine," Berlin 1941, and the German "Prisenordnung" of 28 August 1939 (BGB-I-S-1585), and some works containing materials relevant to the book under review.

The ommission of these works has caused some gaps in the factual material. Thus, in discussing the limitations resulting from the provisions of the Versailles Treaty, Ordon has ommitted i.a. the establishment of clandestine courses for staff officers of the German Navy (the so-called "Führergehilfenlehrgang"), the creation of the section of Navy air arm and the purchase of the first planes already in 1923, as well as the establishment of the Airline "Severa." Furthermore the author did not mention the establishment in the Maritime Transport Department of the section financing the firms engaged in making equipment prohibited under the Versailles Treaty.

In his account of the beginnings of the expansion of the naval program after Hitler's coming to power the author did not mention the fact that as far back as 1932 the von Papen government has agreed semi-officially to break the prohibitions of the Versaille Treaty and accepted the plan of Admiral Reader envisaging the construction in the years 1933—1938 of i.a. 9 battle ships, 6 cruisers, 32 destroyers and 16 U-boats. In connection with the problems related with the British-German naval treaty Ordon ommitted the official visit in Berlin of the representatives of British Admirality Adm. Cunningham and Cmdr. Phillips, during which (30 December 1938) the British side have allowed to raising the limit of the German U-boat construction to the level equal with that of the Royal Navy.

While discussing the preparations for the aggressive actions of the Kriegsmarine against Poland, the author did not mention that already as far back as 1928—1932 Admiral Reader has worked out a plan of naval operations against Poland under the pretext of the defence of the Reich against the Polish-French "aggression." These were: a) Studie Ost under which the battleships of Kriegsmarine were to shell Gdynia and blockade the port through sinking of ships with the simultaenous mining of the Bay of Gdansk, and b) Studie Ostseeverteidigung consisting in laying of mines in the Baltic straits and concentrating in their vicinity of light naval forces against the French squadron with the simultaneous carrying out of operations envisaged under "Studie Ost."

In the chapter concerning the "Violation of laws and customs of naval warfare by Kriegsmarine and Luftwaffe" yet another example should have been quoted by the author. In

spite of the fact that the "Prisenordnung" of 28 August 1939 has been based in principle on the London Declaration, its Article 22 concerning *prima facie* contraband was modified on 12 September 1939, so that in fact it covered almost all goods and raw materials serving both for war purposes and civilian needs and could moreover be extended at will. Thus the goods transported after that date to Poland were subject to regulations clearly in contravention of the customary law of the sea as contained in Chapter II of the London Declaration.

Summing up, in spite of the above shortcomings the work under review merits a positive assessment and points at the same time to the need of further research on all legal aspects connected with the actions of the Polish Navy during World War II.

Zbigniew Rotocki

Rozprawy prawnicze. Księga pamiątkowa dla uczczenia pracy naukowej Kazimierza Przybyłowskiego (*Essays in Law. Commemoration Book to Honour the Scientific Work of Kazimierz Przybyłowski*), Cracow—Warsaw 1964, 553 pp.

This is an impressively rich collection of essays on many fields of legal science. It contains 43 contributions to the theory of law, history of law, constitutional law, administrative law, criminal law and criminal procedure, civil law and civil procedure, and private international law. This is a worthy way of marking the fortieth anniversary of the scientific work of the eminent scholar, outstanding specialist in civil law and private international law—Professor Kazimierz Przybyłowski.

On this occasion it is worth-while to say a few words about his scientific career.

Prof. Kazimierz Przybyłowski began his didactic and scientific work in 1923 at the Faculty of Law of the Jan Kazimierz University in Lwów. In 1929 he was appointed associate professor and in 1936 professor of civil law. From October 1945 onwards he has been lecturing at the Faculty of Law of the Jagellonian University in Cracow where he is now the head of the chair of civil law and private international law.

Prof. Przybyłowski is author of numerous scientific works in the field of civil law and the history of law. Let us mention, in particular: *The Effect of a Change of Relations on Obligations* (1926), *The Rebus Sic Stantibus Clause in its Historic Development* (1926), *Basic Issues in the Field of Protection of Ownership* (1929), *History of the Polish Science of Private International Law* (1948), *The Development of Polish Science of Private International Law* (1949).

Prof. Przybyłowski's contribution to the development of Polish science of private international law has been of particular and fundamental importance. He is not only the author of classical works in this field (of which should be mentioned above all: *The Significance of the Law Prevailing in the Place of Contracting in Testing the Conditions of Intrinsic Validity of Marriage,* 1932; *Private International Law. General Part,* 1935; *The Application of Foreign Conflict Rules,* 1959; *Codification Issues of Polish Private International Law,* 1964), but also the inspirator of the development of that branch of Polish science. He has also greatly contributed to the development of comparative law in Poland.

Prof. Przybyłowski also co-operated in the codification of civil law and private international law in Poland both before the war as well as in the post-war period. He was the rapporteur of the draft Statute on Private International Law of 1965.

His great contribution to the science of law in Poland, of which only fragments could be mentioned here, has been marked in a worthy way for the collection of essays is impressive both quantitatively as well as qualitatively.

Let us confine ourselves here to discussing the works relating to private international law. Docent J. Fabian discusses the question of *the location of movables in private international law* (pp. 57—65). After presenting the history of the problem and an analysis of so-

lutions in contemporary law, the author speaks for a return to the principle *mobilia personam sequuntur*, at least where rights over goods *in transitu* or over goods to be transported abroad are in issue, and further in case of rights over things serving personal needs or permanently carried on by the person entitled to them.

Prof. Z. K. Nowakowski discusses *some aspects of the law of sale in international trade* (pp. 181—190). He dwells upon the General Conditions of Delivery of the Council for Mutual Economic Assistance 1958 and upon attempts to unify contractual practice in international trade.

Dr M. Pazdan writes *on the substantial conditions of marriage in bilateral conventions concluded by Poland* in the years 1949—1962 (pp. 251—264), and prof. W. Siedlecki—*on some aspects of the recognition in Poland of foreign judicial decisions in civil cases* (pp. 265——274). Both authors endeavour to define the notions current in this field. Though prof. Siedlecki deals with the problem of the recognition of the judicial decisions in the light of the provisions binding before the entry into force of the new code of civil procedure (1 January 1965), his work has not lost its significance as the author deals with theoretical aspects of the problem and in particular with the question of the distinction between the recognition and execution of foreign judgements. He also makes a number of remarks *de lege ferenda*.

Docent J. Skąpski in his work *Selected Topical Problems of Polish Private International Law in the Field of Contractual Obligations* (pp. 275—292) refers to some questions relating to the legal character of the CMEA General Conditions of Delivery 1958 and their provisions, and to patterns of contracts drawn up under the auspices of the United Nations Economic Commission for Europe.

Prof. L. B. Sohn (USA) discusses *The Rules of Private International Law Applicable to Torts Committed in One State which Cause an Injury in Another State* (pp. 293—304, in the English language). The author confines himself to USA law and practice. He contemplates the question whether the principle of the application of the *lex loci delicti commissi* is sufficient in this respect. He replies to this question in the negative, maintaining that simple connecting principles are useful only in respect of simple situations and that in more complex situations more complex principles should be applied and without formalism and conservatism, in accordance with the requirements for rational solutions.

Prof. H. Trammer writes *on the Unification of Conflict Rules relating to Sale as Effected by the Hague Conference of Private International Law* (pp. 389—398). The author discusses the Convention of 15 June 1955 on the law applicable to international contracts of sale of tangible movables and the Convention of 15 June 1958 on the law applicable to the transfer of the right of ownership of tangible movables in international contracts of sale. Polish translations of both conventions constitute an annex to the work.

Apart from that, the collection contains some scores of essays from other fields of the science of law. The collection as a whole is a valuable survey of the interests and achievements in a number of legal disciplines in Poland.

Jerzy Jakubowski

Józef Skąpski, *Autonomia woli w prawie międzynarodowym prywatnym w zakresie zobowiązań z umów* (*The Autonomy of the Parties in Private International Law as Regards Contractual Obligations*), Jagellonian University Scientific Papers, CVI, Essays in Law, paper 19, 207 pp.

On the subject of the autonomy of the parties in private international law quite a lot has been written in Polish literature. But it is for the first time that we come across a monographic study of the problem covering, moreover, such a wide thematic scope. The fact that the author deals in his work with the choice of law in respect of contracts cre-

ating obligations, while omitting the choice of law in respect of unilateral acts-in-law, cannot be regarded as an undue limitation since contracts have been so exhaustively discussed. As regards its scope, the subject has been correctly presented.

In his monograph the writer has taken into account, as broadly as he could, comparative law material discussing even legislation of geographically distant countries like that of Brazil, Panama, Chile and so on. That is why the work under review will be extremely useful also for the foreign lawyer not trained in the Polish legal system. The fact that a broad comparative material has been covered, is an asset of the work, particularly since the author—while taking into account a wide range of foreign legislation—did not lose the main line and course of his reasoning in which, as is obvious, Polish legislation has been its point of departure and main basis. The author has widely drawn upon judicial decisions of various countries. He has also referred to decisions of the Hague Tribunal (p. 67). From the doctrinal point of view Skąpski's work is almost above criticism (although one cannot subscribe to all the author's views). In his monograph the writer has proved to be an excellent doctrinaire of law presenting extremely penetrating arguments. May be, however, that the author takes into account in too small a degree the economic background of the phenomena which he deals with. He rejects the generally accepted view that Domoulin was the originator of the conception of the autonomy of the parties in the choice of law. But placing the beginnings of that conception on the continent at a later period the author has not sufficiently explained in what way the contemporary economy influenced the emergence and development of the principle of the parties' autonomy in private international law. It seems also that at times the writer puts perhaps too great an emphasis on purely theoretical elements. On the other hand, I consider as very pertinent the author's remarks relating to the question of obligations in the foreign trade of the Polish People's Republic and of the USSR.

The author correctly defines the nature of Articles 8 and 9 of the Polish Act on Private International Law of 2 August 1926, explaining that *de lege lata* the point here concerns the rule *iuris dispositivi* (pp. 70—71). He does not take into account, however, all the Polish literature relating to this matter (he omits, for instance, the different view of Babiński in his *Outline Lecture on Private International Law*, Warsaw 1935).

It is to be regretted that the writer did not devote more attention to the currency law so frequently nowadays chosen and applied in the West, which must be compatible with the *lex loci solutions* only when the monetary obligation has to be discharged within the territory of the state whose law declares the clause on payment in foreign currency to be inapplicable. The brief reference on page 184 does not exhaust the problem.

In interpreting Article 11, paragraph 1, of the maritime code of the Polish People's Republic (pp. 72—75), the writer asserts that the provision referred to above admits a choice of law only in respect of contracts creating obligations, despite the fact, that the literal text of the provision refers in general to the legal relationship connected with maritime shipping. The question arises whether the authors of the maritime code could have intended to restrict the possibility of choice of law by the parties to contracts creating obligations if the question of so-called maritime privileges or more precisely of privileged claims on a ship were to be left unexplained. Preferential payments arising out of contracts creating obligations are, however, effective not only *inter partes*, that is why they may be regarded as having the nature of an obligation as well as that of claims in rem. In any case their essence is contentions in the science of law.

The appearance of Józef Skąpski's monograph is a great and positive event in the newest Polish literature on private international law. This monograph will be extremely useful both for the world of science and for representatives of legal practice. I would be inclined to emphasize that it will also be certainly of great service to those who actually operate in the field of foreign trade.

Jerzy Fabian

Krzysztof Skubiszewski, *Uchwały prawotwórcze organizacji międzynarodowych. Przegląd zagadnień i analiza wstępna* (*Law-Making Resolutions of International Organizations. Survey of Problems and Preliminary Analysis*), Poznań 1965, 201 pp.

This study is the result of research carried out by the author in Poland and abroad. In spite of its modest subtitle, the book contains a very ambitious analysis of all the main problems arising in connection with the law-making activity of international organizations.

Professor Skubiszewski discusses in ten chapters, among others, the various forms of this activity, the process of law-making by international organizations, the classification of law-creating acts, the validity of such acts and their binding force after dissolution of the organization, their place in municipal law and the question whether they constitute a distinct source of law. The book ends with thirty five conclusions. Here are only the main points: International organizations participate in the creation of international law in two basic forms, 1. when they act in collaboration with states or other organizations and 2. when they create law by virtue of their own acts. The author deals mainly with the latter cathegory of acts, more precisely, with those by which the organization "enacts general rules legally binding on and directly addressed to states." Such acts are termed "law-making decisions" or "regulative acts."

As the author states, the power to make law is not to be presumed. In order to adopt such acts the organization must have an explicit authorization in its statute or other treaty. This does not, however, mean that those acts can be assimilated to treaties, since they are brought about not by the concurrence of the "wills" of the contracting states, but they emerge as "the creation of one juristic person." Moreover, law-making acts of organizations do not require ratification and, as a rule, they are not registered in the United Nations. The author concludes, therefore, that such acts constitute a "separate source of international law, distinct from treaty, custom and general principles of law."

Among international organizations enacting law for states Professor Skubiszewski finds eight which enact law by virtue of resolutions adopted unanimously by the organs in which all members are represented, four which enact legal rules by virtue of majority decisions, subject, however, to the right of dissenting states to reject the enactment or accept it with reservations (the so-called system of contracting out), and, finally, three organizations, the European Communities, which enact rules in several matters by virtue of binding majority decisions. The latter are supra-national, since the law enacted by them has immediate binding force on the territories of member states.

In view of the novel and highly controversial character of the problems discussed in this book the author's prudence deserves praise. It manifests itself, among others, in that he avoids too far-reaching generalizations and too easy, hence misleading, analogies with municipal law.

Still, Professor Skubiszewski's book will provoke to polemic, not only on the part of conservatists. And this, in view of the subject, seems unavoidable. For instance, from the realistic point of view, one might reproach the author that he overestimates the objective personality of international organizations. One gains the impression that he has been excessively influenced by the few exceptional cases which, as he admits himself, are not likely to be followed in the next future. As far as the author's argumentation is concerned, it certainly will not have the same convincing power for all readers either. This does not, however, detract in the least from the virtues of Professor Skubiszewski's book as an interesting, topical, and well documented work of true scholarship.

Karol Wolfke

Dr. Bolesław Wiewióra, *The Polish-German Frontier in the Light of International Law*, preface by Prof. Alfons Klafkowski. Poznań, 1964, 225 p.

The work under review is the second English edition of the book which appeared first in Polish in 1957, and in English translation in 1959.

The author—prominent expert in legal aspects of the German problem—intended to enlarge considerably the material of his book for the second English edition, taking into account the new material which became available after 1959 as well as the results of his own further research into the problem, connected i.a. with the preparation of his other book on the recognition of territorial acquisitions in international law which appeared in Polish in 1961. Untimely death in 1963 at the age of 37 took him away at the early stage of his work on this enlarged edition. From the first English edition it actually differs only by the first two chapters (extended version of the first chapter in the first edition) and by five or six insertions made by the editor in the remaining chapters, with references to documents and writings published after 1959, including relevant publications of the author himself.

Strange as it may seem, Wiewióra's book at the time of its first publication in 1957 was the first comprehensive Polish legal study on the Oder-Neisse frontier although a number of articles, including prof. Klafkowski's small study (1947), were published in the preceding years. It remained the only Polish book devoted exclusively to this subject also at the time of its first publication in English. And the same was true still in 1964, which in itself would warrant its reedition although in the meantime a comprehensive study on the Potsdam Agreement in general was published by prof. Klafkowski (1960).[1]

The book consists of nine chapters: I. The Anti-Fascist Coalition in the Second World War (p. 19—33); II. Territorial Changes after the Second World War (p. 34—63); III. The Yalta and Potsdam Agreements as the Legal Basis of the System of International Relations after the Second World War (p. 64—80); IV. The Question of the Polish-German Frontier at the Yalta Conference (p. 81—92); V. The Potsdam Agreement as the Legal Basis of the Polish-German Frontier (p. 93—113); VI. The Question of Delimitation of the Polish-German Frontier (p. 114—129); VII. The Legal Basis of the Transfer of the German Population from the Polish Recovered Territories (p. 130—164); VIII. The Question of the Recognition of the Frontier on the Oder and Western Neisse (p. 165—201); IX. The Polish-German Frontier and the Peace Treaty with Germany (p. 202—211). Bibliography (p. 212—225) includes over 200 items—Polish and foreign.

The Potsdam Agreement on the Western Frontier of Poland is projected in chapters I—IV (partly also in chapter V) of Wiewióra's book on a broad historical, political and legal background. The author analyses the war aims of the anti-nazi coalition as formulated in international documents and official statements. He substantiates the legality of the territorial changes effected after World War II in general also through confrontation with the principle of self-determination and of territorial integrity. Special attention is given to the analysis of the role and the competence of the Great Powers to take legally valid decisions on territorial changes. In the specific context of the German frontiers reference is made to the Berlin Declaration of 5 June 1945.

Against this broad background the author scrupulously traces the development of views on the post-war Polish-German frontier—from the London Conference in September 1941 (p. 22) through the exchange of letters between Mikołajczyk and Cadogan in January—February 1944 (p. 70), up to the discussions held and decisions taken in Yalta and Potsdam. The main stress is put here on the considerations of European security and preventing a possibility of a new German aggression, with

[1] In the same year 1964 Prof. Lachs study: *The Polish-German Frontier*; *Law, Life and Logic of History* (published also in French and Spanish) has appeared.

due account taken also of historical and ethnic factors.

These chapters are extensively documented and although an additional portion of relevant materials was published only after the work on the book had been interrupted, those referred to and quoted provide a sufficient evidence in support of the author's thesis that regardless of some alternative proposals made by the Western Allies during the 1944—1945 period as to the exact extent of the territory to be recovered by Poland, the extent finally agreed upon and binding is that described in the Potsdam Agreement, and that the fluctuations of the position of the Western Allies as to the exact extent of the territory to be transferred to Poland reflected their attitude towards the internal political development in Poland which was being shaped not according to their wishes.

The author also shows that as Poland firmly stepped on the road of socialist development after 1945, the Western Powers continued to use the Western Polish frontier question as a tool of an external pressure on Poland—apparently in an attempt at weakening the internal and international stability of this new socialist country. Since the question of the *extent* of territorial settlement was exhausted in Potsdam, the question of the *finality* of that settlement has been raised in 1946 and in the years that followed. A total revision of their policy in the German question in general has become another factor behind this attitude of the Western Allies toward the Western frontier of Poland. The author qualifies this attitude as a purely political manoeuvre having no legal ground in the text of the Potsdam Agreement.

In chapters V and VI the author conclusively proves the final character of the territorial settlement agreed upon in Section IX of the Potsdam Agreement—both through scrupulous analysis of its wording and through its interpretation in the context of other decisions arrived at in Potsdam. In this connection particular attention is given to the analysis of the meaning of the words "delimitation" and "administration" as used in the context of the Potsdam Agreement as well as to the decision regarding the transfer of the German population—unconceivable if the territorial settlement had been meant only as a temporary one.

The question of the transfer of population is thoroughly discussed in chapter VII—not only in the specific context of the Potsdam Agreement, but also as a phenomenon in international relations and an institution of international law in general.

The reference to the future peace treaty with Germany is to be understood in terms of the formal confirmation of the decisions taken—as peace treaties usually contain a description of frontiers between parties—and not in terms of a possibility to reopen a discussion on the substance at a peace conference. Since in 1949 there emerged two German states and the peace treaty was not early forthcoming, the final delimitation "of the established and existing frontier" has been effected in the Zgorzelec Agreement between Poland and the German Democratic Republic on 6 July 1950.

The entire chapter VIII—the largest in the book—is devoted to "The Question of the Recognition of the Frontier on the Oder and Western Neisse." And it must be admitted that some legal constructions contained in this chapter may seem controversial and challengeable. Territorial decisions agreed upon in Potsdam were validly taken and, first of all, are to be respected. They hardly give rise to the question of recognition—at least on the part of the signatories of the Potsdam Agreement, who acted on behalf of the anti-nazi coalition. The attitudes taken later by some powers and qualified by the author himself as political manoeuvres do not amount to the renunciation of the agreement, are of no legal value and do not call for any subsequent recognition of one's own continuing commitments.

In this connection it is worth-while to go back to chapter V of the book in which the author's analysis of "Poland's Legal Status in the Potsdam Agreement" (§ 1) leads him to the conclusion that this Agreement constitutes *pactum in favorem tertii* as regards Poland which accepted and implemented it.

The book deals with a subject which is essentially and actually closed, while attempts are being made to keep the issue open. Under the circumstances—and having also in mind the political importance and impact of the subject—the book is bound to be, and indeed is, at least in some parts, a polemical one. At the same time the scrupulous legal analysis and strictly scholarly argumentation remain its most outstanding features.

Wiewióra's book is preceded by a preface by prof. Klafkowski who sketches a portrait of the late Mr. Wiewióra as a scholar (p. 7—10) and gives a clear-cut synthesis of the problem dealt with in the book (p. 10—18).

Jerzy Sztucki

C H R O N I C L E

POLAND AND INTERNATIONAL ORGANIZATIONS

REVIEW OF TOPICAL PROBLEMS WHICH ARE THE SUBJECT OF POLAND'S PARTICULAR INTEREST IN THE UNITED NATIONS AND ITS SPECIALIZED AGENCIES*

I. *Questions Relating to Membership Structure and Budget of the United Nations*

1. The active participation of Poland in the activities of numerous international organizations stems from the deep conviction that international co-operation within their framework constitutes an important form of practical realization of the principle of peaceful co-existence of states with different political, social and economic systems. The characteristic feature, distinguishing international organizations from other forms of international co-operation, is that they allow for the unification on a lasting basis of efforts by the states with a view of achieving definite goals. The United Nations Organization has become a particularly important forum for the exchange of opinions, for rapprochement of the points of views and taking of decisions of considerable importance for international peace and security.

The United Nations Organization is already twenty years old. In this period, on many occasions, it became the scene of sharp polemics and discussions. Not all United Nations actions were in full agreement with its underlying principles, contained in its Charter. Well known became the practice of some Western powers which, having a mechanical majority in the General Assembly, tried to push through resolutions advantageous to them but detrimental to the interests of other states, to the idea of international co-operation in the broadest sense of that word. Thus

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* Covering the period 1964—1966.

the United Nations became the focus of opposing trends and tendencies. The past two decades of the United Nations activities show clearly that only those decisions became lasting achievements of the Organization that were taken with the observance of the basic United Nations tenet—the principle of unanimity of the Five Big Powers—and which gained the approval of states representing different political, legal and social-economic systems of the world.

While assessing positively the 20 years history of the United Nations, the Chairman of the Polish delegation to the 20th Session of the United Nations General Assembly, Deputy Foreign Minister Józef Winiewicz, enumerated among its achievements, i a., the Universal Declaration on Human Rights,[1] the Resolution on General and Complete Disarmament,[2] the Declaration on the Granting of Independence to Colonial Countries and Peoples,[3] the Declaration on the Elimination of All Forms of Racial Discrimination.[4] One should stress also the positive influence of the existence and the activities of the United Nations and its specialized agencies on the expansion of international co-operation in the economic and social fields, in the fields of health, education, science and culture, as well as in providing technical and financial assistance to the developing countries. The United Nations Organizations and its specialized agencies proved to be a useful instrument for solving various political and economic problems which are of considerable importance for further peaceful development of friendly relations and international co-operation.

2. To assure, however, that the United Nations could properly and without undue obstacles perform its functions, the Organization must be assured of complete universality. Its membership should be made open to all states of the world. And even before this fundamental goal is achieved, every state should be permitted to maintain observers at the Headquarters of the Organization. "All countries—to quote the words of the United Nations Secretary-General—should be encouraged and enabled, if they wish to do so, to follow the work of the Organization more closely."[5] This would be beneficial both to the states concerned and to the Organization as a whole. Therefore, it is high time that the limitations which make the realization of this requirement impossible were abolished. It is necessary to take an appropriate action to correct the present situation in which only certain governments have been permitted to maintain their observers at the United Nations Headquarters.

3. Still outside the United Nations remain the People's Republic of China and some other socialist countries. This amounts to inadmissible discrimination of those countries in international scene. The absence of the People's Republic of China and of some other socialist states in the United Nations and its specialized agencies has further negative consequences. Only member-states are—as a rule—invited to various international conferences convened under the auspices of the United Nations or one of its specialized agencies. Thus, non-member states are deprived of the possibility of participating in many international gatherings. That practice is particularly detrimental when it concerns conferences the success of which depends precisely on the participation of all states or the largest possible number of them. This is particularly true of conferences which deal with problems of interest to all nations of the world (*viz.* questions relating to disarmament, the work on the codification and progressive development of international law, etc.). Particularly harmful is the absence of the representatives of the People's Republic of China and of some other socialist states (The German Democratic Republic, The People's Democratic Republic of Korea and The Democratic Republic of Vietnam) in those specialized agencies which if only because of their character and scope of activities should embrace all countries of the world.

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[1] General Assembly Resolution 217/III of 10 December 1948.
[2] GA Resolution 1378/XIV of 20 December 1959.
[3] GA Resolution 1514/XV of 14 December 1960.
[4] GA Resolution 1904/XVIII of 20 November 1963.
[5] Document A/6301/Add. 1.

This is true in particular of the Universal Postal Union and International Telecommunication Union.

The admission to the United Nations and to its specialized agencies of all states which desire it would not only eliminate the discrimination of certain socialist states, which is contrary to international law, it would also have beneficial effects on the efficiency and effectiveness of the work of those bodies. For the United Nations and its specialized agencies will be able to properly fulfil their important tasks only when they will encompass all those states.

As to the United Nations Organization it shows a marked evolution towards universalism. Its membership increased from 51 states in 1945 to 117 in 1965. And now it has a membership of 121 nations. This more than doubling of the membership required appropriate changes in the structure of the Organization. It was also necessary to increase the membership of some United Nations organs to ensure the equitable representation of the new countries of Asia and Africa.

To that end the General Assembly, pursuant to Article 108 of the United Nations Charter, adopted at its 18th Session in 1963 a resolution on the expansion of the membership of the Security Council from 11 to 15 members and of Economic and Social Council from 18 to 27 members. The procedure of voting in the Security Council was changed accordingly. Decisions of the Council on non-procedural matters are now being adopted by a majority of 9 votes (instead of 7 before) including the concurrant votes of all permanent members. The amendment to the Charter adopted by the General Assembly entered into force on 31 August 1965, i. e. on the day on which were deposited the instruments of ratification by 2/3 of all member states, including all permanent members of the Security Council.

Concerning the states still outside the Organization, Poland considers it just to speed-up the admission to the United Nations of all states which so desire, including in their number the two German states : The German Democratic Republic and The German Federal Republic. Poland is of the opinion that every sovereign country should have the right to send its observers to the United Nations and should not be discriminated against in its contacts with the Organization. This attitude was emphatically stressed in the speech delivered by the Chairman of the Polish delegation to the 19th Session of the General Assembly on 14 December 1964, and was maintained ever since both in the United Nations and in the specialized agencies.

4. The implementation of the principle of universality and the restoration of the proper representation to the states which have been deprived of it, could to a large extent contribute to the proper discharge by the Organization of the tasks confronting it. Another indispensable condition for improving the work of the United Nations and its specialized agencies is a consistent implementation of the principle of the equitable geographical representation in the distribution of administrative-executive posts in their Secretariats.

In spite of certain progress made in this respect the present composition of the United Nations Secretariat is far from being satisfactory. Especially under-represented are the countries of Africa and of Eastern Europe. Disproportionately high on the other hand is the representation of the nationals of some highly developed capitalist countries. Among 1491 higher posts subject to nominations according to the criterion of the equitable geographical distribution, the citizens of Western countries hold as much as 720 posts. The changes in the national composition of the Secretariat are very slow, and as far as the representation of Eastern Europe is concerned, almost nil.

The situation is even worse in the specialized agencies. Suffices to point out that the International Civil Aviation Organization does not employ a single citizen from socialist countries.

The composition of the United Nations Secretariat and of the Secretariats of the specialized agencies should reflect the changes in the membership of those organizations. Otherwise the confidence of states in the secretariat is undermined and justified misgivings are evoked as to its impartiality, whereas the maintenance of this impartiality by a secretariat is an indispensable condition for the functioning of the organization as a whole. Such an impartiality can only be

achieved and secured through observation of the truly international character of the secretariats of international organizations.

That is why Poland considers it extremely important to observe the principle of the equitable geographical distribution of posts in the Secretariat of the United Nations and of the specialized agencies. It is highly desirable that steps be taken to restore to the United Nations Secretariat the character consistent with the provisions of Article 101 of the Charter and to ensure that the principle of equitable geographical representation is accepted and observed with respect to the secretariats of all the organizations related to the United Nations.

It seems that the present difficulties in implementing the principle of equitable geographical distribution of posts in the United Nations Secretariat stem, to a large extent, from the current system of permanent contracts for the personnel employed. Under this system the employees of the Secretariat are kept in their posts till their retirement age. This system has in fact made the present inequities in the distribution of posts in the Secretariat a lasting phenomenon. In such a situation the only practical way to improve the situation is through creation of new posts in the United Nations Secretariat. This in turn leads to a steady increase in the number of jobs and the accompanying rise in the expenses. That is why it has been suggested to limit the system of permanent contracts to staff members of professional categories, occupying posts requiring special qualifications such as précis writers, interpreters and so on, and to adopt in all cases where this is possible the system of contracts valid for a period of several years only. The adoption of that principle could lead gradually to a desired change in the composition of the Secretariat.

The system of contracts for a fixed period only has also considerable advantages from the point of view of the developing countries which, as a rule, suffer from the lack of qualified cadres. The employment in the secretariats of international organizations of ever new specialists cause their exodus from the developing countries. This undesirable situation gives rise to a tendency to recruit new personnel in the highly developed countries which in turn only deepens the present inequity in the geographical distribution of posts. Moreover, the system of permanent contracts causes the alienation of people from the countries of their origin, from their social and economic problems. In this way the principle of equitable geographical representation, in the way it was conceived under Article 101 of the Charter, is further undermined.

At its 21st Session the General Assembly noted with satisfaction the efforts already made by the Secretary-General to improve the geographical distribution of posts in the Secretariat of the United Nations. Considering nevertheless that arrangements should be made to ensure an even more equitable distribution of posts, the Assembly expressed its belief that, as a temporary measure and under the existing conditions, increased recruitment on the basis of fixed term contracts, especially in the case of developing countries, might help to achieve a balanced geographical distribution of posts. The General Assembly invited the Secretary-General to give preference to candidates from inadequately represented countries. It further invited the Secretary-General, in his capacity as Chairman of the Administrative Committee on Co-ordination, to draw the attention of the competent authorities of the specialized agencies to this problem.[6]

The Polish delegation voted in favour of the above-mentioned resolution, although it was not fully satisfied with the provision of the paragraph which states that it is only "as a temporary measure and under the existing conditions" that an increased recruitment on the basis of fixed-term might help to achieve a balanced geographical distribution of posts.

5. The United Nations Organization and the specialized agencies play now a much more important role in international life than ever before. This stems not only from the fact that the membership of those organizations increased in recent years. The tasks entrusted to them have also steadily expanded. No one can deny the importance of those tasks. Nevertheless, it seems that the great administrative apparatus of the United Nations Organization and its specialized

[6] GA Resolution 2241/XXI of 20 December 1966.

agencies could perform all those tasks with less financial outlays, through a better organization and co-ordination of work.

In recent years we observe a very big increase in the budgets of the United Nations and its specialized agencies. In 1956, the total expenditure of the United Nations amounted to 50 508 000 dollars. Five years later, in 1961, the overall costs were 71 000 000. The expenditures in 1967 amount to over 130 000 000 dollars.[7] In 1957 the member states contributed a total amount of approximately 180 000 000 dollars for the budget of the United Nations and the specialized agencies and to the voluntary programmes. For 1967 the member-states were urged to contribute, for the same purposes, a total amount of 530 000 000 dollars.

In the same period the manning table of the United Nations—which to some extent is a reflection of the activities of the Organization—has increased from about 4000 in 1957 to 6147 in 1966.

This steady increase of the expenditures imposes upon member-states ever greater financial burdens. If this increase is not checked, it may well happen that numerous member-states will no longer be able to pay their dues, all the more so since payments are to be effected in convertible currencies.

Another important factor directly responsible for the permanent rise of expenditures is the continuous expansion of United Nations activities. During the 21st Session of the General Assembly, the Polish delegation felt it necessary to express once again its concern over the trend toward a growing number of more and more expensive, and hardly justified, conferences, meetings and related documents. No one can question the necessity of a limited number of all the basic meetings. But there is an obvious need to achieve a proper balance between the number of meetings to be held each year and resources, both human and material, available to the Organization and to the member-states for this purpose. Therefore, the General Assembly, which is the only body able to deal with this problem, established—as a practical step aimed against the burden of excessive number of meetings—a special Committee in charge of co-ordination of all kinds of meetings and conferences which in the final result should reduce their number.[8]

It is also worth mentioning that the General Assembly requested the Secretary-General to instruct appropriate bodies to review the present practice of preparation and publication of Official Records and other related documents of all organs of the United Nations with the aim of determining whether any economy can be achieved.[9]

6. There are several reasons which account for the difficult financial situation of the United Nations. They are :

(a) Expansion of the Secretariat in excess of actual demand for personnel ;

(b) Excessive freedom of the auxiliary organs in taking decisions with financial implications ;

(c) Growing number of conferences and meetings held every year within the United Nations;

(d) Inclusion into the United Nations budget of expenditures contrary to the Charter (see below, item II).

The setting up by the General Assembly of an Ad Hoc Committee of Experts to Examin Finances of the United Nations and the Specialized Agencies[10] points to the growing sense of responsibility in the important fields of streamlining and improving of all aspects of financing United Nations activities, as well as the activities of the specialized agencies.

The Polish delegation endorsed the recommendations made by the Ad Hoc Committee of Experts, contained in its report submitted to the General Assembly.[11] In particular, the Polish

[7] Cf. GA Resolution 2242/XXI of 20 December 1966.
[8] Cf. GA Resolution 2239/XXI of 20 December 1966.
[9] GA Resolution 2247/XXI of 20 December 1966.
[10] GA Resolution 2949/XX of 13 December 1965.
[11] Document A/6343.

delegation supported the proposals concerning the elimination of possible duplication and overlapping of activities and conferences, the improvement of budget preparation and presentation, the establishment of an inspection unit empowered to conduct investigations in all matters having a bearing on the efficiency of the services and proper use of funds, as well as the proposals pertaining to better administration, long term planning and evaluation, and to the best utilization of available resources, both human and material.[12]

At its 21st Session the General Assembly approved the report of the Committee of Experts and the recommendations and comments therein. The General Assembly urged that the recommendations and comments of the Committee are to be given the most attentive consideration by member-states, by the United Nations organs, as well as by the organizations related to the United Nations, with a view to the earliest implementation of all the recommendations.[13]

II. *Questions Relating to the Financing of United Nations Peace-Keeping Operations*

Besides the reasons for United Nations financial dificulties, mentioned in the preceding paragraph, it should be pointed out that *particular difficulties*, connected with the financing of United Nations activities, arose during the 19th Session of the General Assembly. They were due to the attempts made by the United States to attribute the difficult financial situation of the Organization to the refusal of the Soviet Union, and many other states, to share in meeting the costs of the so-called peace-keeping operations of the United Nations.

It was already at the 17th and 18th Sessions of the General Assembly that the Polish delegation, in a detailed account, had pointed out to the unjustified inclusion into the United Nations budget of the costs of maintaining the United Nations Commission for the Unification and Rehabilitation of Korea, the United Nations Truce Supervision Organization in Palestine, the so-called United Nations Field Services, the costs connected with the emission of the United Nations Bonds, as well as the costs of the United Nations Emergency Force in the Middle East and the United Nations Operations in the Congo.

During the 19th Session of the General Assembly a serious crisis was provoked by the United States which asked for the application of Article 19 of the Charter with respect to those states that refuse to finance United Nations peace-keeping operations, and in particular, the operations in the Middle East and in the Congo.

Article 19 provides that a Member of the United Nations which is in arrears in the payment of its financial contributions to the Organization shall have no vote in the General Assembly if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. The point is, however, that Article 19 refers to Members' dues. It applies to arrears in the regular budget only. Poland and other socialist states have been regularly meeting their obligations in this respect.

As it was rightly pointed out by the USSR Government, no legal ground existed for the compulsory collection of any contribution from Member States for financing United Nations operations in the Middle East and in the Congo, all the more that they had been either undertaken or conducted in the way contrary to the Charter.[14]

Under the United Nations Charter it is only the Security Council that can adopt legally binding decisions concerning *action* to maintain or restore international peace and security. And it is only the Security Council that can establish United Nations forces and to lay down the procedure for financing their maintenance and operations. The peace-keeping operations, like those

[12] Cf. Statement made by the representative of Poland, Mr. S. Soltysiak, in the General Assembly on the 1967 Budget Estimates, 31 October 1966.

[13] GA Resolution 2150/XXI of 4 November 1966.

[14] Cf. Letter of 11 September 1964 from USSR transmitting memorandum from Ministry of Foreign Affairs of USSR on question of financial situation of the United Nations—Document A/5729.

carried out in the Middle East and in the Congo, are undoubtedly covered by the word "action," as it is conceived in Chapter VII of the Charter. Therefore, the resolutions of the General Assembly dealing with the expenditures incurred for peace-keeping operations could not create any obligations for member-states.

Expenditures incurred for such action as the United Nations operations in the Middle East and in the Congo do not come within the scope of Article 17 of the Charter. The frase "expenses of the Organization," as used in that article, refers only to the regular budgetary expenses. And Article 19 refers only to the arrears in the payments of expenses under Article 17. Therefore, Article 19 of the Charter has no relevance to the expenses involved in peace-keeping operations.

The interpretations of Article 19, as presented by the United States, was also questioned by some Western countries, i. a. by France. And the United States delegation had in the end to change its attitude. The voting in the General Assembly on the applicability of Article 19 never took place.

On 18 February 1965, the General Assembly established a Special Committee on Peace-keeping Operations to undertake a comprehensive review of the whole question of peace-keeping operations in all their aspects, including ways of overcoming the present financial difficulties of the Organization.[15] And the matter is still under consideration.

It should be stressed, however, that such moves as the artificial crisis provoked by the United States during the 19th Session of the General Assembly involve grave risks. They can still further complicate the already difficult financial situation of the United Nations and prevent the continuation of its normal functions.

III. *The Definition of the Principles of Peaceful Co-existence*

On the initiative of the socialist countries the United Nations General Assembly has decided to take up the question of the principles of international law concerning friendly relations and co-operation among the states with a view of their further development and codification as well as their more effective application. The General Assembly resolution on that question[16] contained also the initial enumeration of principles which were to become the subject of subsequent studies.

As its next step the General Assembly established a Special Committee for the purpose of detailed examination of the principles of friendly relations and co-operation among the states with a view of their further development and codification. The Committee, which was composed of the representatives of 26 states including Poland, held its session in Mexico City from 26 August to 2 October 1964. The report of the Committee together with other relevant materials was discussed in the Six Committee during 20th Session of the United Nations General Assembly. Taking the floor in the Six Committee the delegate of Poland, Professor Dr Z. Resich, gave an exhaustive theoretical explanation of the need for making more specific the principles of friendly relations and co-operation among states (the principles of peaceful co-existence).

Already to the past belongs the epoch when states could, with immunity, satisfy their particular egoistic interests irrespective of whether this was detrimental to the interests of other countries or not, or whether or not it threatened the peace. In the modern era the egoism of actions of individual states must give way to the principle of friendly relations and co-operation among states. The development and concretization of that principle is an indispensable condition of maintaining peace among nations of the world.

The principles of peaceful co-existence, at least at the present stage, should not be burdened with too many detailes, since they should be of a universal character and—like in the case of the Universal Declaration on Human Rights—they should serve as the basis for the drafting of the more detailed principles and for the conclusion of relevant conventions.

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[15] Resolution 2006/XIX.

[16] Resolution 1815/XVII of 18 December 1962.

The following basic principles of friendly relations and co-operation among states were the subject of discussion in the Six Committee of the General Assembly :

— the principle of non-aggression,
— the necessity for peaceful solution of international disputes,
— the prohibition of interference in the internal affairs of states,
— the obligation of co-operation in accordance with the United Nations Charter,
— the principle of sovereign equality of states,
— the principle of self-determination of nations,
— the duty to carry out in good faith the obligations entered into, in accordance with the United Nations Charter.

Among these principles of particular importance from the point of view of international peace and security is the principle of non-aggression which to-day has won general recognition. According to this principle an aggressive war is considered the gravest crime against humanity. The principle, however, requires further concretization. In 1939 Poland fell victim to the German aggression in spite of the fact that at that time existed legal norm prohibiting the recourse to war (The Paris Pact of 1928). The German aggression had been prepared for a long time, first of all through large-scale armaments. In the light of that historical experience the basic problem is a disarmament which would eliminate the material basis for infringing the provisions of Article 2, paragraph 4, of the United Nations Charter. An important stage in that direction could become also the implementation of partial steps, viz. the establishment of zones of limited armaments.

Poland has repeatedly taken initiatives on the latter issue having in mind the safeguarding of the security in Europe. To this end have been directed Polish proposals on the setting up of an atom-free zone and the freezing up of armaments in Central Europe known respectively as the Rapacki and the Gomulka plans. Towards this objective aims also the idea of convening an international conference devoted to the question of European security. The implementation of Polish proposals could contribute to a large extent to the lessening of international tension and increase of mutual trust and consequently to the attainment of principal goal, i. e. the general and complete disarmament.

The ban on the use of force contained in Article 2, paragraph 4, of the Charter requires further concretization also because this ban should extend to all forms of violence and not only by military force. The ban should apply in particular to political and economic forms of pressure. Their omission would amount to ignoring the contemporary realities.

The question of disarmament and the prohibition of the use of force is therefore linked very closely with the principles governing friendly relations and co-operation among states. From the principle of non-aggression in particular stems for all states the obligation of co-operation with a view of reaching general and complete disarmament under effective international control. Because only in this case will be eliminated radically the material basis and means for waging wars while the principle of peaceful co-existence will decidedly prevail.

The principle of non-aggression is closely linked with another one *viz.* that of the prohibition of interference in the internal affairs of other states. This issue is very topical in view of the usurpation by some capitalist countries of the right to interfere in vital problems and interests of other states.

A logical consequence of the principle of non-aggression and the ban on intervention in the matters which lie within the internal jurisdiction of states is the mandate for peaceful settlement of international disputes.

The obligation of mutual co-operation and fulfilment in good faith of the assumed duties, these are the principles underlining the active character of peaceful co-existence. They express a positive mandate for maintaining peaceful relations and co-operation among states.

Peaceful co-existence does not signify a passive existence, side by side, of states with different social and political systems. On the contrary, it entails the necessity of co-operation of states

in all fields where their interests coincide. This necessity of co-operation stems from the level of development reached and interdependence of the countries and the nations of the world. Peaceful co-existence has a firm basis in the right of every state to participate in international relations on the principle of equality and non-discrimination. This concerns in particular international economic relations. The obligation of co-operation thus conceived stems from the stipulations of the United Nations Charter.

The principle of sovereign equality of states and of self-determination of nations constitute the basic premise for all other principles; without it, those other principles would be devoid of any value. The principle of self-determination of nations has already ceased to be a political objective. It has become instead a universally accepted norm of international law.

The principles of peaceful co-existence thus conceived and codified will not be a mere mechanical restatement of the principles contained in the United Nations Charter neither a collection of abstract proposals. They will constitute an expression of the needs stemming from the actual development of international relations at the present stage. The point is to elaborate and codify such principles which will be able to steer international relations, in a lasting manner, onto the road of further peaceful development.

As to the form the formulation of such principles should take, it seems that the first step should be the declaration of those principles adopted by the General Assembly. Such a declaration would have great significance as a solemn document and as a source of inspiration for further actions by states, nations and individuals.

The General Assembly took note of the documents presented by the Special Committee. At the same time the Assembly extended the membership of the Committee and asked it to continue the work on the principles enumerated in the Resolution 1815/XVII of 18 December 1962. The work of the Committee will serve as a basis for adoption by the General Assembly of the Declaration of Principles of Friendly Relations and Co-operation among States.[17]

The principles of peaceful co-existence or, to put it in other words, the principles of friendly relations and co-operation among states have already found their expression in numerous documents of international law, but clear formulation and codification of those principles in a single and solemn document, i. e. their separation from a gamut of other principles and norms, would bring them to the foreground. The point is to confirm them and to raise them to the rank of basic tenets of contemporary international law and to make them play an important role in the process of further development and strengthening of friendly and peaceful relations among states.

IV. *The Problem of Disarmament*

1. The discussion on disarmament at the 20th Session of the General Assembly was concentrated mainly around the following points: non-proliferation of nuclear weapons, the cessation of all tests with nuclear weapons, the question of convening of a world conference on disarmament.

2. The item concerning non-proliferation of nuclear weapons was placed on the agenda of the General Assembly on the initiative of the Soviet delegation. On 24 September 1965, the Soviet delegation submitted in the General Assembly the draft of a relevant agreement.

The statement by the Polish delegate (Professor Dr. M. Lachs) devoted to the problem of non-proliferation of nuclear weapons evoked vivid interest. The Polish delegate recalled that his country has been for a long time engaged in the efforts leading towards that objective. Polish proposals on the establishment of an atom-free zone and the freezing-up of nuclear armaments in Central Europe had, *inter alia*, as their goal the prevention of proliferation of nuclear weapons at least with respect to a geographically limited area in that part of the world. That is why Poland welcomed the Soviet initiative on non-proliferation of nuclear weapons and gave it its full support.

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[17] Cf. GA Resolution 2103/XX of 20 December 1965 and Resolution 2181/XXI of 12 December 1966.

Why the problem of non-proliferation of nuclear weapons is such an urgent and important one?

We should bear in mind that on the one hand the manufacturing capacities of nuclear powers are increasing, and on the other hand, there exists the possibility of handing over those weapons by some nuclear powers to those states which as yet do not possess them. There exists therefore the dangerous probability of a quick increase of the number of states possessing nuclear weapons. In such a situation the possibility of an outbreak of war by accident or miscalculation will have been considerably increased. It might become then much more difficult to attain the solution of the existing contentious problems and the attainment of the complete and general disarmament will become even more distant than at present.

The stoping of the proliferation of nuclear weapons would constitute an important step on the road leading to further disarmament measures. Non-proliferation of nuclear weapons constitutes a partial or collateral measure which should be taken in order to bring about general and complete disarmament. Because of the dangers inherent in the spread of nuclear weapons the conclusion of a relevant international agreement on the non-proliferation of these weapons is a matter of utmost urgency.

Poland recognized the need or even the necessity of concluding the non-proliferation agreement. But she is ready to agree only to such an agreement which will not contain any escape clauses, which will not allow the access to nuclear weapons through the back door, *viz.* through multilateral nuclear force or other such plans, irrespective of whether they will be called co-partnership, integration or collective control. Particularly dangerous is the possibility of creating of a new category of states placed between the nuclear powers and the non-nuclear ones (*status mixtus*). The very fact of the recognition of such a new category of states would tend to blur the dividing line between the nuclear and non-nuclear powers and would make the non-proliferation treaty devoid of any sense.

It is a common knowledge that one of the main obstacles in achieving the conclusion of a treaty on non-proliferation is the position of the Government of the German Federal Republic. The aspirations of the German Federal Republic in the field of nuclear weapons are all the more dangerous that it is the only state in Europe which openly advances territorial claims against other states.

In view of its geographical position, Poland has a special right and duty to express its concern about the problems of peace and security in Europe. Europe, because of the existence of potentially explosive hotbeds of conflicts, is an area requiring particular efforts to promote of peace, security and disarmament. It is precisely in that spirit that Poland has been putting forward its proposals on the solution of European problems.

Well substantiated arguments of the Polish delegation at the 20th Session of the General Assembly, prompted by deep concern for the strengthening of peace and security in the world, have met with broad understanding and support. We should note with satisfaction that the General Assembly resolution on the matter of non-proliferation stated emphatically that the non-proliferation treaty should not have any loop-holes which would allow direct or indirect access to nuclear weapons to those countries which do not possess them as yet.[18]

3. An important achievement in the field of disarmament is the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and under Water, done in Moscow on 5 August 1963. That was the first agreement in the East-West relations limiting to some extent the armaments race and safeguarding humanity against detrimental effects of radioactive fall-out resulting from the tests. The treaty, however, does not include the underground tests. Moreover not all nuclear powers have joined it. Thus, there exists the vital need for introducing a complete ban on all nuclear tests, including those taking place underground.

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[18] Resolution 2028/XX of 19 November 1965 and 2149/XXI of 4 November 1966.

The General Assembly resolution on that matter stressed the desirability of extending the provisions of the Moscow treaty on all types of nuclear tests as well as the necessity of signing the treaty by all nuclear powers.[19]

4. Poland has supported the idea of convening the world disarmament conference. The delegate of Poland speaking in the First Committee at the 20th Session of the General Assembly pointed out that the intensified armaments race poses a constant threat to international peace and security. The most vital interests of nations are at stake. That is why all states, big and small alike, members of the United Nations and those remaining outside that organization, have the right and duty to contribute to the solution of the problem of such vital importance as that of disarmament.

For many years several countries have been deprived of the opportunity to participate in the disarmament discussions. That was the basic reason that prompted the non-aligned countries assembled at the Cairo conference in 1964 to put forward a proposal on the convening of a world disarmament conference with the participation of all states. This initiative gained the support of Poland.

The observance of the principle of universality in the efforts favouring disarmament is necessary not only because of the requirements of justice and international law. It is indispensable for securing the lasting and effective character of international agreements on disarmament.

The General Assembly has adopted a resolution asking for the convening of a world conference on disarmament.[20] This resolution demonstrates the growing consciousness that the progress in disarmament discussions is impossible without participation of all states whose concurrent action is necessary in order to safeguard the success of efforts towards that goal.

V. *The Liquidation of Colonialism in all its Forms and Manifestations*

1. The struggle for the liquidation of all remnants of colonialism has entered a new stage following the adoption by the General Assembly, on 14 December 1960, of the Declaration on the Granting of Independence to Colonial Countries and Peoples. This Declaration contains a categorical demand for a speedy and full liquidation of colonialism in all its forms and manifestations.

In spite of the rapid progress in that field, in recent years, not all the demands of independence by non-self-governing territories have been met. The implementation of the United Nations Declaration encounters many difficulties. The basic obstacle in this respect is the policy of colonial powers. In many cases the colonial exploitation is accompanied by the establishment of military bases in dependent territories which is incompatible with the vital interests of the local population.

Of particular concern is the policy of transforming smaller colonial territories into military bases and arsenals of the colonial powers. It is worth-while to mention here that while discussing the situation in Aden, the General Assembly adopted at its 20th Session a resolution in which it was stated that "maintenance of the military bases in the Territory constitutes a major obstacle to the liberation of the people of the Territory from colonial domination and is prejudicial to the peace and security of the region, and that the immediate and complete removal of these bases is therefore essential."[21] It was for the first time that such a clear wording had been used in a United Nations Resolution.

In a resolution adopted at its 21st Session the General Assembly requested all the colonial powers to dismantle their military bases and instalations in colonial territories, and to refrain from establishing new ones and from using those that still exist to interfere with the liberation of the peoples in colonial territories in the exercise of their ligitimate rights to freedom and independence.[22]

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[19] Cf. GA Resolution 2032/XX of 3 December 1965.
[20] Resolution 2030/XX of 29 November 1965.
[21] Resolution 2023/XX of 5 November 1965.
[22] Cf. para. 11 of the GA Resolution 2189/XXI of 13 December 1966.

In the case of South-West Africa and the Portuguese colonies there arises a distinct possibility of their total annexation by the metropolitan powers. In those cases we are faced with a clear rejection of the aims and principles of the United Nations Charter and of the Declaration on the Granting of Independence to Colonial Countries and Peoples.

It is worth to mention here that an important decision, concerning the status of South-West Africa, was taken by the General Assembly at its 21st Session.[23] The Assembly declared that South Africa had failed to fulfil its obligations in respect to the administration of the Mandated Territory of South-West Africa and decided to terminate the Mandate conferred upon South Africa. Thus South-West Africa came under the direct responsibility of the United Nations.

Another obstacle hampering the process of emancipation of the colonial countries and peoples is constituted by the policies, pursued by certain administering powers, of imposing or tolerating non-representative regimes in territories under their domination. An example of such a lawless act was the declaration of independence by the minority regime of white settlers in Southern Rhodesia. Their act met with strong condemnation by a majority of governments and the world public opinion. This illegal action, contrary to the interests of the indigenous population, was also emphatically condemned by Poland. The Polish Government expressed its full support for the just position taken on this matter by the United Nations and by the Organization of African Unity.

At its 21st Session the General Assembly noted with deep regret that six years after the adoption of the Declaration on the Granting of Independence to Colonial Countries and Peoples, many territories were still under colonial domination. The Assembly reaffirmed once again its recognition of the legitimacy of the struggle of the peoples under colonial rule to exercise their right to self-determination and independence, and urged all states to provide material and moral assistance to the national liberation movements in colonial territories.[24]

2. The consistent and full implementation of the mandate on the granting of independence to the dependent countries and peoples requires the liquidation of all those international legal institutions which are the remnants of the colonial system.

The existence of such institutions can make more difficult or even bring to nothing the efforts aimed at reaching full independence and equal rights by the colonial countries and peoples. Such institution is for example the colonial clause still encountered in some international agreements or even in the statutes of certain international organizations.

Particularly dramatic was the struggle for the removal of colonial clause from the statute of the International Labour Organization. This struggle was waged with the active participation of the Polish delegation and those of other socialist countries as well as of delegations from countries liberated from under foreign domination. This fight formed part and parcel of the struggle for the democratization of the structure and the improvement of the methods of work of the International Labour Organization.

Speaking at the 48th session of the ILO General Conference the delegate of Poland stated that a realistic analysis of changes taking place in the world should have led already long time ago to the conclusion that neither in the structure nor in the methods of work of the Organization is it possible to maintain any longer those aspects which aim at defending the interests and privileges of a number of states: the privileges of race, or the privileges based upon the economic or military might. All such vestiges of the past should be eliminated. It is necessary to free the Organization from all remnants of colonialism and to make it a truly universal, modern and democratic institution. One of such relicts of the past was precisely Article 35 of the Statute of the International Labour Organization. This Article made the extension of progressive labour legislation in the colonies dependent on the good will of the metropolies.

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[23] Resolution 2145/XXI of 27 October 1966.
[24] Resolution 2189/XXI of 13 December 1966.

The deletion of the colonial clause from the statute of ILO was requested by the Polish delegation already shortly after the end of war. And taking the floor at the 48th Session of the ILO General Conference the Polish delegate recalled that it was the delegation of Poland that already 18 years earlier had raised the question of the removal of Article 35 from the statute of ILO.

On 6 July 1964, the relevant amendment to the statute of ILO was finally adopted. Article 35 has been deleted and the wording of Article 19 modified accordingly.[25]

A new paragraph 9 was added to Article 19. It provides for, i. a., "with a view to promoting the universal application of the Conventions to all peoples, including those who have not yet attained full measure of self-government, and without prejudice to the self-governing powers of any territory, Members ratyfying Conventions shall accept their provisions so far as practicable in respect of all territories for whose international relations they are responsible." Where the subject-matter of the Convention is within the self-governing powers of any territory, the obligation of the Member responsible for international relations of that territory is to bring the Convention to the notice of the government of the territory as soon as possible with a view to the enactment of legislation or other action by such government. When requested by the Governing Body of ILO, Members concerned are to report to the Director General of the International Labour Office the position of the law and practice of territories for which the Convention is not in force in regard to the matters dealt with in the Convention and the extent to which effect has been given, or is proposed to be given, to any of the provisions of the Convention by legislation, administrative action, collective agreement or otherwise and stating the difficulties which prevent or delay the acceptance of the Convention.

The adopted solution is not entirely satisfactory. The Polish delegation submitted its own amendment aimed at the final and complete elimination of the remnants of colonialism. This amendment was however rejected. Bearing in mind the temporary character of the adopted solution and the possibility of its revision, and also taking into account the stand on this matter taken by newly independent countries, the Polish delegation voted for the adoption of amendments in the proposed wording, expressing at the same time its conviction that it will become possible to eliminate in the nearest future everything which still evokes doubts in the text of Article 19.

VI. *The Aid to Developing Countries*

Technical and financial assistance to the developing countries, through the United Nations and the agencies related to it, had been provided, *inter alia*, under the Expanded Programme of Technical Assistance, financed from voluntary contributions, and the United Nations Special Fund, also financed in the same way by states which are members of the United Nations and/or agencies related to the United Nations.

At its 20th Session the General Assembly decided to combine the Expanded Programme and the Special Fund in a single United Nations Development Programme, however, special characteristics and operations of the two programmes, as well as two separate funds, have been maintained.[26]

At the same time the General Assembly decided to establish another body to provide assistance to the developing countries—United Nations Industrial Development Organization.[27]

The United Nations Industrial Development Organization is an organ of the General Assembly. It will function as an autonomus organization, within the United Nations, in accordance

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[25] Instrument of Amendment No. 1 (International Labour Conference, Forty-Eighth Session, Geneva 1964. *Record of Proceedings*, p. 831).

[26] Resolution 2029/XX of 22 November 1965.

[27] Resolution 2089/XX of 20 December 1965.

with the provisions set forth in a resolution adopted by the General Assembly at its 21st Session.[28] It will have its Headquarters in Vienna.[29]

The purpose of this new organization is to promote industrial development and to encourage the mobilization of national and international resources to assist in, promote and accelerate the industrialization of the developing countries. Expenses for operational activities of the Organization will be met by voluntary contributions, through its participation in the United Nations Development Programme and by utilization of resources of the United Nations regular programmes of technical assistance. Expenses for administration and research activities will be borne by the regular budget of the United Nations.

It is perhaps worth mentioning here that at its 21st Session the General Assembly decided to bring into operation the United Nations Capital Development Fund which is to assist developing countries in the development of their economies by supplementing existing sources of capital assistance by means of grants or loans. Such assistance is to be directed towards the achievements of the accelerated and self-sustained growth of the economies of the developing countries and is to be oriented towards the diversification of their economies, with due regard to need for industrial development as a basis for economic and social progress.[30]

Thus, it has been recognized that the industrialization of the developing countries is essential for their economic and social development and for the expansion and diversification of their trade. And it is particularly important that the General Assembly, while defining the functions of the newly-established United Nations Industrial Development Organization, stressed the need for the utilization of experiences of all states, irrespectively of their economic and social systems, in the developing countries.

It seems to be particularly advisable to utilize the experience of socialist countries, which have successfully carried out accelerated programmes of industrialization during recent decades in the new economic, social and technical conditions.

Poland has always rendered its full support to the idea of international co-operation in the field of economic development, and in particular in the field of industrialization. Referring to the tasks of the United Nations Industrial Development Organization, the representative of Poland, Ambassador B. Tomorowicz, stated *inter alia* : "This new United Nations body should serve as an instrument for international co-operation in the field of industrial development with special stress on helping the developing countries in solving many complicated problems connected with accelerated industrialization. These problems seem to be more difficult than those which confronted in the past the industrialized countries of to-day. As a consequence of extraordinary development of technique in the XX century, the developing countries are faced today with the dilemma of the rapidly increasing population and the labour saving modern industry which cannot provide sufficient employment for an inflowing labour force. In this situation, the elaboration of a proper development policy is a matter of primary importance. The UNIDO should help them in this task. All the experience gathered by countries which have embarked earlier on the path of industrialization should be put at the disposal of developing countries. Poland which during the past 20 years was able to increase manifold, as well as diversify its industrial production, raising at the same time the level of agriculture, is ready to offer what is best of our experience to the use of UNIDO or any interested developing country."[31]

The economic development is certainly a long and complicated process. It will require different measures of political and economic nature in different countries. The success of industrialization depends largely on the availability of financial resources. To what extent and how fast the measures applied will bring successful results, depends in the first place upon the efforts

[28] Resolution 2152/XXI of 17 November 1966.

[29] GA Resolution 2212/XXI of 17 December 1966.

[30] Cf. Resolution 1521/XV of 15 December 1960 and 2189/XXI of 13 December 1966.

[31] Statement delivered in the Second Committee of the General Assembly on 8 October 1966.

made by the developing countries themselves. However, it should be the primary task of the United Nations Industrial Development Organization and of the United Nations Capital Development Fund to elaborate methods of better mobilization of resources, both internal and external, to enable the developing countries to reach an adequate volume of capital investment. It has also been the opinion of the Polish delegation that the United Nations Development Programme should participate more actively in financing capital investments in the developing countries—decreasing some of the stress it puts now on pre-investment projects.

VII. *Human Rights*

1. The elimination of all forms of racial discrimination. On 20 November 1963 the General Assembly of the United Nations adopted a Declaration on the Elimination of All Forms of Racial Discrimination.[32] The declaration confirmed the generally recognized principles of international law contained in the United Nations Charter and the Universal Declaration on Human Rights, and envisaged taking other specific steps with a view of completely eliminating all forms of racial discrimination.

A further step on this road was the adoption by the General Assembly of a resolution calling upon the Economic and Social Council to recognize as an absolute priority the preparation of a draft international convention on the elimination of all forms of racial discrimination.[33]

Pursuant to that resolution the Commission on Human Rights of the Economic and Social Council—basing on the Declaration on racial non-discrimination—prepared a draft of the relevant convention. The draft was then submitted by the Economic and Social Council to the General Assembly. It became one of the most important items of the agenda of the Assembly during its 20th Session. Polish delegation took an active part in those debates.

The General Assembly adopted unanimously the final text of the International Convention on the Elimination of All Forms of Racial Discrimination[34] and called upon all governments and non-governmental organizations to assure the convention the widest possible publicity through all available media.

The preamble to the convention listed various motives which made it necessary to take all indispensable measures in order to speedily eliminate racial discrimination in all its forms and manifestations. The preamble expressed in particular deep concern because of manifestations of racial discrimination evident in various parts of the world and of policy based upon assumptions of racial superiority, *viz.* apartheid, segregation or separation.

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

States, parties to the convention, condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms.

The convention gives a detailed enumeration of measures which should be taken to achieve that goal (Article 2). The convention provides for condemnation of all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form. States, parties to the convention, are to adopt immediate and positive measures designed to eredicate all incitement to, or acts of, such discrimination.

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[32] Resolution 1904/XVIII.
[33] Resolution 1906/XVIII of 20 November 1963.
[34] Resolution 2106A/XX of 21 December 1965.

The convention contains also the positive enumeration of rights which states should guarantee to all, without distinction as to race, colour, or national or ethnic origin. In this way was given the international model of rights which should be open to all in the political, economic, social, cultural and other fields.

The convention provides for a detailed mechanism for implementing its provisions. It constitutes, therefore, an important step forward as compared with the Declaration on the Elimination of All Forms of Racial Discrimination. At present, the condition on which full success of the United Nations efforts in this field depends is the ratification of the convention by the largest possible number of states.

The convention was open for signature on 7 March 1966 and already on the first day it was signed by a number of states, including Poland.

2. Declaration on the elimination of discrimination against women. The question of non-discrimination of women was inscribed into the agenda of the United Nations on the initiative of Poland. The General Assembly, in its resolution of 5 December 1963,[35] requested the Economic and Social Council to invite the Commission on the Status of Women to prepare a draft declaration on the elimination of discrimination against women. At the same time the General Assembly asked the member countries, the specialized agencies and appropriate non-governmental organizations to send their comments and proposals concerning the principles which could be embodied into the proposed declaration.

At its 18th Session, in 1965, the Commission on the Status of Women prepared its first draft of the declaration. The basis of the Commission's work was a draft declaration submitted by the Polish delegation and comments send in conformity with the above mentioned General Assembly resolution. The final draft was prepared by the Commission at its 19th Session in 1966.

The Polish delegation participating actively in the work of the Commission maintained the view that in the proposed declaration the point was not the formulation of generalities on the equal rights of men and women but the condemnation and elimination of all the phenomena and legal institutions which accepted the difference of sex as a criterion for granting different rights and duties within a family or community. These positive principles found their expression in the final draft prepared by the Commission.

Despite the Charter of the United Nations, the Universal Declaration on Human Rights and other instruments, and despite the progress made, there still remains considerable discrimination against women. The draft declaration states that "discrimination against women is incompatible with the dignity of women as human beings and with the welfare of the family and of society, and prevents their participation, on equal terms with men, in the political, social, economic and cultural life of their countries, and is an obstacle to the full development of the potentialities of women in the service of their countries and of humanity."

The draft prepared by the Commission stated emphatically that the discrimination based on sex is fundamentally unjust and offensive to human dignity. Therefore, all appropriate measures should be taken to eliminate all those existing manifestations and practices of discrimination against women. Legal guarantees should be established safeguarding equal rights for men and women in all spheres of human endeavour, both in private and public life.

The discussions in the Comission centered, *inter alia*, on the question whether the declaration should be addressed primarily to men and women throughout the world or, more specifically, to governments. The Polish delegation shared the view that it was primarily the task of governments to implement the principles set forth in the declaration and in matters such as political rights and education, and in all matters requiring legislative action provisions should be directed to states rather than to individuals. The most important thing is to safeguard equal rights for men and women under law. And this can be achieved only through legislation or through other appropriate

[35] Resolution 1921/XVIII.

acting taken by the governments. Besides, the direct appeal in the declaration to governments is in full conformity with the United Nations Charter. For in the Charter member-states pledged themselves to take joint and separate action in co-operation with the Organization for the achievement of universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion (Articles 55 and 56 of the Charter).

The final draft of the declaration, prepared by the Commission on the Status of Women, speakes about the necessity of establishing the legal protection of equal status of men and women. The principle of equal rights of men and women should be embodied in the constitution or another equivalent act of every state. The existing international documents prepared by the United Nations or specialized agencies on the non-discrimination of women should be ratified and implemented. While enumerating the measures which ought to be taken to eliminate particular manifestations of discrimination against women the draft points repeatedly to legislation as the most effective means for attaining that goal. In conclusion the draft calls upon all governments, non-governmental organizations and individuals to make everything possible in order to ensure the observance of the principles contained in the declaration.

The text of the draft declaration, adopted unanimously by the Commision on the Status of Women on 8 March 1966, was transmitted to the General Assembly by the Economic and Social Council.[36] The Assembly having been unable at its 21st Session to give adequate consideration to the question, decided that the draft Declaration on the Elimination of Discrimination against Women should be given high priority at its 22nd Session.[37]

3. International covenants on human rights. At its 21st Session the General Assembly adopted and opened for signature the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.[38] These two important and far-reaching instruments were directly inspired by the Universal Declaration of Human Rights adopted by the General Assembly on 10 December 1948. The Declaration set forth basic rights and fundamental freedoms to which all men and women everywhere in the world are entitled, without any discrimination. It was proclaimed by the General Assembly as "a common standard of achievement for all peoples and all nations."

The Universal Declaration of Human Rights was not, however, the end, but rather the beginning of the efforts leading to the concretization of basic human rights and fundamental freedoms and to the conclusion of appropriate international agreements on these subjects.

Both covenants confirm the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace of the world. They confirm the right of all peoples to self-determination; by virtue of this right all peoples freely determine their political status and freely pursue their economic, social and cultural development. They also indicate the steps to be taken by the parties to achieve the full realization of the rights contained therein.

In the covenant on economic, social and cultural rights there are provisions concerning the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts; provisions concerning trade union rights; the right to social security, including social insurance; rights relating to the protection of family, including special protection of mothers and children; right of everyone to enjoyment of the highest attainable standard of health; right to education and to take part in cultural life, to enjoy the benefits of scientific progress, etc.

Parties to the covenant on economic, social and cultural rights undertake to submit reports on the measures which they have adopted and on the progress made in achieving the observance

[36] Economic and Social Council Resolution 1131/XLI of 26 July 1966.
[37] Resolution 2199/XXI of 16 December 1966.
[38] Resolution 2200/XXI of 16 December 1966.

of the rights recognized in the covenant. All reports are to be submitted to the Secretary-General of the United Nations who in turn will submit them to the Economic and Social Council for its consideration.

In the covenant on civil and political rights there are provisions relating to the right to life; prohibition of slavery and servitude; the right to liberty and security of person; the right to a fair trial and treatment; freedom of movement; protection against interference with anybody's privacy, home and correspondence; the right to freedom of thought, conscience and religion; freedom of opinion and expression; the right of peaceful assembly and freedom of association; the rights relating to marriage and family; political rights of every citizen; equality before the law, etc. The covenant contains also provisions prohibiting any propaganda of war as well as any advocacy of national, racial or religious hatred that constitutes incitement or discrimination, hostility or violence.

There are provisions concerning the establishment of a Human Rights Committee, consisting of 18 members serving in their personal capacity. And parties to the covenant on civil and political rights undertake to submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have adopted to give effect to the rights recognized in the covenant. The Committee will study the reports received and will submit its own reports and comments to the states, parties to the covenant, and to the Economic and Social Council. The Committee may be asked to adjust differences regarding observance of civil and human rights between the parties which have recognized in regard to themselves such a competence of the Committee.

Speaking about the International Covenants on Human Rights, the representative of Poland, Professor Dr. Z. Resich, stated i. a. :

"Le décret des Droits de l'Homme doit être estimé comme un événement qui par son importance a dépassé de beaucoup le moyenne de l'histoire contemporaine. C'est un événement à la mesure de notre époque.

Le décret des Droits de l'Homme est la continuation de l'adoption en 1948 de la Déclaration Universelle des Droits de l'Homme, c'est l'expression donnée de la forme finale juridique de cette Déclaration. De cette manière, les Pactes comprenant l'ensemble des droits de l'homme et de ses libertés fondamentales dans le domaine social, économique et culturel ainsi que dans le domaine politique et civil, auront un caractére de Code International du Droit de l'Homme. Ce code rendra possible le développement régulier des sociétés, il servira de base au développement de législations internes des états particuliers ainsi qu'au développement des principes internationaux du régime de légalité."[39]

VIII. *The Question of Non-Applicability of Statutory Limitation to War Crimes and Crimes against Humanity*

In 1965, in view of the impeding entry into force of the statute of limitations in the prosecution of war criminals and persons guilty of crimes agains humanity in the German Federal Republic and in some other states, Poland decided to raise that question in the Commission on Human Rights. An appropriate item was added to the agenda of the 21st Session of the Commission.

The Polish delegation submitted to the Commission a draft resolution calling, i. a., all states to take measures with a view of preventing the application of statutory limitations to the prosecution of war criminals and persons guilty of crimes against humanity.

The Polish delegation pointed that the principle of liability for war crimes and crimes against humanity has been recognized in many acts of international law. It was recognized both in the documents of the anti-Nazi coalition and in those of the earlier period. The problem was also dealt with by the United Nations General Assembly in its resolution of 13 February 1946 on extradition

[39] Statement made on 7 December 1966.

and punishment of war criminals and in the resolution of 11 December 1946 on affirmation of the principles of international law recognized by the Charter of Nuremberg Tribunal and by its judgement. One should also mention here the Convention on the Prevention and Punishment of the Crime of Genocide, of 9 December 1948.

From those documents stems absolute obligation for the states to prosecute and punish persons which have committed war crimes and crimes against humanity, irrespective of where and when those crimes have been committed.

However, in spite of the demands of public opinion and the existence in this respect of clear cut norms of international law not all persons guilty of war crimes and crimes against humanity have been brought to justice. In some countries those criminals are being treated with open leniency.

The application of the statutory limitations to war criminals and persons guilty of crimes against humanity would have amounted to granting an amnesty for those criminals. This would constitute a shocking manifestation of contempt for the memory of the millions of victims. The application of the statutory limitations would have meant that the gravest crimes could go unpunished. The Commission on Human Rights was, therefore, faced with an urgent task of appealing to all countries for continuation of efforts with a view of bringing to justice all war criminals and persons guilty of crimes against humanity. Such was the basic idea behind the proposals put forward by the Polish delegation and amendments thereto advanced by the Ukrainian SSR and the Soviet Union. These amendments aimed at strengthening certain points of Polish proposals.

The Commission was unanimous as to the desirability of taking all necessary measures to prevent the possibility of recurrence of such outrages as those perpetrated by the Nazis during the World War II. Under the Charter of the United Nations it is the duty of all people "to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person." The Commission on Human Rights proved to be an organ particularly appropriate for dealing with the question of prosecution and punishment of war criminals and persons guilty crimes against humanity, for those crimes constituted the gravest violation of human rights.

The first step on the part of the Commission on Human Rights was the adoption of a resolution[40] in which the Commission asked the Economic and Social Council to urge all states to continue their efforts to ensure that, in accordance with international law and national laws, the criminals responsible for war crimes and crimes against humanity should be traced, apprehended and equitable punished by the competent courts. In the same resolution the Commission asked the Secretary-General to prepare a study on the questions of international law resulting from war crimes and crimes against humanity.

The Economic and Social Council adopted an appropriate resolution at its 39th Session[41] and the Secretary-General submitted, in February 1966, a well documented study on the "Question of non-applicability of statutory limitation to war crimes and crimes against humanity."[42] This study lends further support to the desirability of affirming, in international law, the principle that there is no period of limitation for war crimes and crimes against humanity. Therefore, the Economic and Social Council invited the Commission on Human Rights to prepare at its 23rd session a draft convention to the effect that no statutory limitation shall apply to war crimes and crimes against humanity, irrespective of the date of their commission.[43] However, for the lack

[40] Resolution 3/XXI of 9 April 1965.

[41] Resolution 1074/XXXIX of 28 July 1965. Cf. also ECOSOC Resolution 1158/XII of 5 August 1966.

[42] Document E/CN.4/906.

[43] ECOSOC Resolution 1158/XLI of 5 August 1966.

of time, it was not possible for the Commission to prepare the requested draft convention at its 23rd session, held in February and March 1967.

IX. *Codification and Progressive Development of International Law—the Law of Treaties*

1. Among the tasks of the United Nations General Assembly, enumerated in Article 13 of the Charter, there is "encouraging the progressive development of international law and its codification." The work in this field is carried out by the International Law Commission established by the General Assembly in 1947. The Commission is now composed of 25 members recruited from among specialists representing main legal systems of the world. Among them was a representative of Poland (Prof. Dr. M. Lachs).

The tasks of the Commission in accordance with its statute include both codification and progressive development of international law. The expression "codification of international law," as used in the statute, means the more precise formulation and systematization of rules of international law in fields where there already has been extensive state of practice, precedent and doctrine. The expression "progressive development," on the other hand, means 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. In fact these two elements intertwine.

The work of the International Law Commission is watched with interest by states and by individual lawyers, both practitioners and theoreticians. Shaping of international law is a slow process. And even in those domains where the law has taken its final form the lack of uniformity gives rise to many conflicts and misunderstandings. Against this background the efforts of the International Law Commission aimed at the codification and progressive development of selected branches of international law acquire growing practical importance. Through clear formulation and unification of the legal principles and norms they introduce to international relations the element of stability so much needed here.

The work of the International Law Commission is certainly not free from shortcomings. One can hear the opinion that the progress of work is too slow. It seems also that sometimes the Commission engaged in too ambitious schemes. For example, the drafting of a comprehensive declaration on the rights and duties of the states would in fact amount to the codification of the whole of international law. In spite of those shrotcomings, the overall assessment of the Commission's work is positive.

Among the achievements of the Commission particularly worthy of mentioning is the drafting of the maritime conventions and those on diplomatic and consular relations. They certainly constitute a lasting and substantial contribution of the Commission to the process of codification and progressive development of international law.

2. During the 20th Session of the General Assembly came under discussion draft articles on the law of treaties and articles concerning special missions (*ad hoc* diplomacy), prepared by the Commission. Taking floor in the Six Committee, the delegate of Poland stressed that ultimate success or failure of the Commission's work to a large extent depends on whether the Commission will take under consideration the views expressed by its members representing various social and legal systems of the world and whether the documents prepared by the Commission will reflect the needs of the progressive development of international law.

Concerning the legal status of the special missions, the Commission made in this respect a truly pionieer's work and submitted useful proposals. As far as the law of treaties was concerned, the delegate of Poland, while assesing highly the work done by the Commission in that field, expressed also hope that in its final text the Commission will come out against the practice of

imposing unjust or unequal treaties. The conclusion of international agreements should be governed by the principle of the free will of the contracting parties and that of the sovereign equality of states. The law of treaties should be universally applied and consequently the participation in multilateral treaties could not be made dependent on the membership in the United Nations. One should bear in mind that at the present epoch of interdependence of states in their struggle for peace and normal conditions of life multilateral treaties, and in particular treaties establishing international organizations, are the most important instruments of shaping international co-operation in political, economic, social and cultural fields. Consequently such treaties should be open to all states.

At its 18th Session, held in Geneva from 4 May to 19 July 1966, the International Law Commission completed its work on the law of treaties. The draft articles adopted by the Commission cover the questions of conclusion and entry into force of treaties, their observance, application and interpretation, as well as the questions of amendment and modification, invalidity, termination and suspension of treaties.

The draft articles on the law of treaties were part of the Commission's report submitted to the General Assembly. This important and far-reaching document was considered by the Assembly during its 21st Session in 1966. The draft articles on the law of treaties have rightly been regarded as one of the Commission's main achievements. Commenting on the Commission's report, the representative of Poland, Professor Dr. M. Lachs, described the draft articles as the Commission's *opus magnum*. He further stated : "For centuries States have been engaged in the practice of treaty making; thousands of treaties had come into being, they had aged and died, thousands lie forgotten in the archives of history. Some of them are recalled as important landmarks in the development of international law, symbols of progress, other as symbols of evil. One can hardly grasp the quality and quantity they represent—from, say, that pearl of the ancient world, that treaty between Ramzes II and Hatushil III—to the Charter of the United Nations. The elaboration of a set of rules, of a mother treaty for treaties is a special occasion—is a unique privilege our generation is permitted to share. No one can deny it. The more so, if one takes into account the many efforts, official and private, made in this field in the past."[44] The delegate of Poland also enumerated and dealt briefly with the following essential elements of the Commission's draft articles on the law of treaties : (a) Equality before the law; (b) The trend towards universality, which in fact is an element of equality; (c) The recognition of the everchanging conditions of life to which law is bound to adapt itself; (d) Good faith as the rock on which all legal relationship rests and is to be built in the future; (e) The recognition of the fact that freedom of action of States is not unlimited and that they are to an ever-growing degree bound by imperative rules of law. These are the basic premises on which the whole structure of the Commission's draft rests.

The General Assembly, believing that the successful codification of the law of treaties would contribute to the development of friendly relations and co-operation among states, irrespective of their differing constitutional and social systems, and would assist in promoting and implementation of the purposes and principles set forth in the Charter of the United Nations—decided that an international conference of plenipotentiaries should be convened to consider the law of treaties and to embody the results of its work in an international convention and such other instruments as it may deem appropriate. The conference is to be convened early in 1968 in Geneva or in any other suitable place for which the Secretary-General of the United Nations receives an invitation.[45]

3. The efforts of the United Nations in the field of codification and progressive development of international law are not limited to the work of the International Law Commission. However,

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[44] Statement made in the Six Committee of the General Assembly on 18 October 1966.
[45] Resolution 2166/XXI of 5 December 1966.

the work of the Commission, because of its planned and long-range character, is no doubt of basic importance and on its outcome will depend in the last resort the assessment of the United Nations activities in this field. It should be remembered, however, that for various practical reasons, viz. division of competence or exceptional urgency of the matter, some work on the codification and progressive development of international law is being done by other United Nations organs or by specialized agencies.

The activities of the United Nations and its specialized agencies in the field of human rights, labour conditions etc., have all the characteristics of the codification and progressive development of international law. The same is true about the work aimed at the defining of the legal principles of peaceful co-existence, mentioned above, as well as the work on the defining of the principles to govern the exploration and use of Outer Space.[46]

Mieczysław Paszkowski

JUDICIAL DECISIONS IN POLAND

THE SUPREME COURT OF THE POLISH PEOPLE'S REPUBLIC

1. *Nationality*

In its decision handed down in case No. 2CR 853/58 on 30 May 1960 a body of judges of the Supreme Court stated that *a person of indeterminate nationality is personally subject to the jurisdiction of the courts of his domicile.* The Court based its ruling on Article 1 of the Act on Private International Law of 2 August 1926 ("Dziennik Ustaw" No. 101, 1926, text 581), under which personal capacity of a natural person is tested according to the law of the state of which that person is a national, and—where the nationality cannot be established—according to the law of his domicile. That provision though pertaining to the applicable law, and not to the jurisdiction of courts was applied in this case *per analogiam.*

2. *The Form of an Act. The Property Law*

In its decision of 27 December 1962 handed down in case No. 2 Cr 1202/61 the Supreme Court held that because under Article 46 of the decree on property law of 11 October 1946[1] a contract for the transfer of ownership of immovable property should on pain of invalidity be drawn up in the form of a notarial act, *an act of donation effected abroad in respect of immovable property situated in Poland in a private form which was sufficient under the local law, did not*—in the light of Articles 5 and 6 of the Act on Private International Law of 2 August 1926[2]—*produce legal effects in Poland.*

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[46] Cf. GA Resolution 2222/XXI of 19 December 1966.

[1] "Dziennik Ustaw" (Dz. U. — "Journal of Laws"), 1946, No. 57, text 319.

[2] Art. 5 reads as follows: The form of a legal act is subject to the law which governs the act; however observance of the law binding in the place in which the act takes place is sufficient if there is no doubt regarding the place. Essential in this matter is,however, the provision of Art. 6. Art. 6, para. 3, first sentence reads as follows: acquisition, change or extinction of real rights in immovable property situated in Poland as well as obligations resulting from legal act on the basis of which such rights are to be acquired, changed or extinguished, are as regards the form, as well as other conditions of validity subject exclusively to the law binding in Poland.

3. *The Form of a Will*

In case No. III CO 50/63 brought by *A* against *B, C, D* and *E* to confirm rights to an estate, the Supreme Court having considered the legal issue, referred to it by the Voivodship Court in P. for decision under Article 388 of the Code of Civil Procedure[3] whether provision of Article 5 of the Act of 2 August 1926[4] on Private International Law relates also to the form of a will drawn up abroad by a Polish national, and particularly, whether a will drawn up abroad by a Polish national is valid when meeting only the requirements of the law binding in the place of the drawing up of the will, gave—in its decision of 16 October 1963—the following answer : *A will drawn up abroad by a Polish national in a form prescribed by the law of the place where the will was made, is valid as to the form on the territory of Poland.*

In the statement of reasons for the decision rendered, the Supreme Court held that the rule of Article 29 of the Act of 2 August 1926 on Private International Law to the effect that testamentary dispositions and pacts on succession were subjected to the national law of the testator at the time of performing those actions, did not apply to the form of such actions, but—as regards the conditions of validity of testamentary dispositions—regulated the question of freedom to testate and of limitations of that freedom, the capacity and will to testate and the like.

It is worth adding that this question was resolved in the same way in decisions of the Supreme Court in the interwar period.[5]

COURT OF ARBITRATION AT THE POLISH CHAMBER OF FOREIGN TRADE

1. *Capacity to Submit to Arbitration*

In case No. 164/1962 filed by a Polish foreign trade enterprise against an Italian merchant the Praesidium of the Court of Arbitration at the Polish Chamber of Foreign Trade (PCFT), acting on the basis of paragraph 10, sub-paragraph 4, point c, of the Rules of the Court of Arbitration,[6] resolved in decision of 2 November 1962 an interesting legal problem, namely, *whether an Italian merchant had—in the light of Article 2 of the Italian Code of Civil Procedure of 1940—the capacity to submit to arbitration which was to take place in Poland.*

The essential facts of the case were as follows:

The Polish enterprise which brought the action against the Italian merchant concluded with the respondent two contracts in Rome, both of which contained an arbitration clause to the effect that any disputes which might arise out of those contracts should be resolved by the arbitration court in Warsaw composed of two arbitrators, of which either party would appoint one, and of a presiding arbitrator elected by the arbitrators provided, however, that failing agreement between the arbitrators as to the person of the presiding arbitrator—he should be appointed by the President of the Polish Chamber of Foreign Trade.

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[3] Consolidated text, Dz. U. 1950, No. 43 text 394. Provision of Art. 388 reads as follows: Where the judgement in a revision, which falls within the competence of a voivodship court, depends on the solving of a legal question which is open to serious doubts or is differently solved by courts the voivodship court—at the motion of the prosecutor or *ex officio*—may refer the matter to the Supreme Court for decision.

[4] The content of that provision has been quoted above.

[5] Cf. e.g. decision of the Supreme Court of 5 November 1935, C. II 1299/35, "Przegląd Prawa i Administracji," 1936, text 139.

[6] Under that provision of the Rules of the Court of Arbitration a plea of non-competence made in the proceedings is considered not by the adjudicating body of the Court of Arbirtation which is set up to deal with the case itself, but by the Praesidium of the Court of Arbitration. In the case in question the plea of non-competence was made by the respondent, i.e. the Italian merchant.

In connection with the performance of the contracts a dispute arose between the contracting parties, as a result of which the Polish enterprise instituted an action for the payment of a specified amount of money in the Court of Arbitration at the Polish Chamber of Foreign Trade.

In his statement of defence the Italian merchant, as the respondent, first of all raised a plea as to arbitral jurisdiction in Poland in general and as to jurisdiction of the Court of Arbitration at the Polish Chamber of Foreign Trade in particular. Firstly, he argued that the arbitration clause contained in the contracts was invalid in the light of Article 2 of the Italian Code of Civil Procedure, forbidding an Italian national to submit to arbitration outside the frontiers of Italy. Secondly, he held that even if the arbitral clause was deemed valid, it followed from the content of that clause that the parties had undertaken to submit to an *ad hoc* arbitration court set up in Warsaw by means of a free choice of the arbitrators by the parties, and not to a permanent (institutional) arbitration court like the Court of Arbitration at the Polish Chamber of Foreign Trade where the selection of arbitrators was limited to persons included in the panel of arbitrators; that the function of the Polish Chamber of Foreign Trade and, in particular, this of its President—as provided for in the arbitration clause—was limited to the appointment of the presiding arbitrator in the absence of agreement thereon between the arbitrators.

Having considered the case, the Praesidium of the Court of Arbitration held that the first allegation of the respondent was incorrect because in Polish-Italian relations it is the Geneva Protocol on Arbitration Clauses of 24 September 1923 which is binding and—as an international agreement—it takes the place here of Article 2 of the Italian Code of Civil Procedure. *In this case, therefore, the question of the binding force of the arbitral clause should be assessed not in accordance with the Italian provision but in accordance with the provisions of the Protocol.* On the basis of the Protocol the Praesidium held that the questioned arbitration clause was valid.[7]

However, the second allegation of the respondent the Praesidium held to be correct : *from the contents of the arbitration clause included in the contracts between the parties it does not follow in the least that the parties have undertaken to submit their disputes to the Court of Arbitration at the PCFT, but it is clearly evident that it concerns an ad hoc arbitration court which is to take place in Warsaw and which is to become constituted under the provisions of the clause.*

2. *The Mode of Filing a Complaint in Respect of Quality*

In action No. 213/1963 brought by a foreign trade enterprise from the German Democratic Republic against a Polish enterprise, the Arbitrators of the Court of Arbitration considered the effects of non-observance of the requirement provided for in paragraph 70 of the CMEA General Conditions of Delivery, 1958, to file a complaint by means of a registered letter. In decision of 13 March 1964 the Arbitrators held that *provision of paragraph 70 was of an organizational nature and that the filing of a complaint by an ordinary letter or by teleprinter was sufficient, provided, however, that complaint arrived in due time.* The Arbitrators referred here to the practice firmly established in this respect by the Court of Arbitration (e.g. decision No. 88/1960).

The Arbitrators did not uphold the position of the claimant who argued that because of defects in the quality of the goods delivered to him by the respondent, he had the right to recede from the contract and to claim reimbursement of the purchase price, instead of claiming merely a reduction of that price, to which he had originally limited his claim.

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[7] In accordance with Art. 1 of the Geneva Protocol on Arbitration Clauses of 1923, each of the Contracting States recognizes the validity of an agreement between parties subject respectively to the jurisdiction of different Contracting States by which the parties to a contract agree to submit to arbitration, and in commercial and any other matters capable of settlement by arbitration—also the validity of an arbitration clause by which the parties to the contract agree to submit to arbitration all or any differences that may arise out of the contract, whether or not the arbitration is to take place in a country to whose jurisdiction none of the parties is subject.

The Arbitrators held that because the CMEA General Conditions of Delivery, 1958, dealt only with the reduction of the purchase price and contained no provision on the repudiation of a contract, a request to that effect should be assessed according to the law which, under paragraph 74 of the General Conditions, applied to any question which had not been regulated in the General Conditions or which had not been fully regulated therein, that is, by the law of the seller's country.

The question whether the claimant had the right to recede from the contract, was resolved by the Arbitrators as follows:

The seller being a Polish enterprise—Polish law is applicable. Under Article 325, paragraph 1, of the Polish Code of Obligations of 1933 [8] in the event the goods have physical defects the buyer can either recede from the contract or claim reduction of the price. In the case under consideration the buyer, that is to say, the claimant had thus the right to choose one of these two possibilities and made that choice by demanding in his statement of claim a reduction of the purchase price. Provision of Article 23, paragraph 2, of the Code of Obligations does not permit the buyer to change this decision without the consent of the seller. As the respondent did not agree to a change of the decision, the Arbitrators declared the unilateral change by the claimant of that decision, that is, his request for reimbursement of the purchase price instead of the previously claimed reduction of that price, inadmissible.

3. *Validity of an Arbitration Agreement*

In case No. 244/1964 filed by a Polish foreign trade enterprise against an Italian firm, the preliminary question arose the law of which state should pronounce on the validity of the arbitration agreement. This question was considered by the Praesidium of the Court of Arbitration,[9] because it had arisen in connection with a plea raised by the respondent as to the jurisdiction of the Court of Arbitration at the PCFT, and such pleas are—in accordance with paragraph 10, sub-paragraph 4, point c, of the Rules of the Court of Arbitration—dealt with by the Praesidium of the Court of Arbitration and not by the Body of Arbitrators appointed to consider the dispute.

The circumstances of the case were as follows:

A Polish foreign trade enterprise (the seller) initiated proceedings before the Court of Arbitration at the PCFT against an Italian firm for claims arising out of the contract of sale, arguing that the Court of Arbitration was competent because the General Conditions of Sale of the aggrieved party contained a clause providing for the jurisdiction of the Court of Arbitration to consider any disputes arising out of the contract, and that the parties moreover agreed in the contract that the General Conditions of Sale constituted an integral part of the contract. According to Polish law an arbitration agreement had been concluded, and—specifically so—on arbitration before the Court of Arbitration at the PCFT.

Apart from that the General Conditions provided that Warsaw be considered as the place of contracting and of payment.

In its statement of defence the Italian firm (the buyer), as the respondent—apart from raising pleas as to the substance of the case and a plea as to the set-off—called in question, above all, the jurisdiction of the Court of Arbitration arguing that the arbitration clause was not binding upon it, because it had not signed it separately and Article 1341 of the Italian Civil Code of 1942 as the *lex contractus* required for the arbitral clause contained in the general conditions of one of the parties to be effective that it be separately and clearly signed by the other party. The respondent, moreover, argued that Bologne placed next to the date of the contract should be considered as the place of contracting and that this fact justified the application of Italian law.

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[8] Dz. U. 1933, No. 82, text 598.
[9] Decision of 19 May 1964.

Thus the essence of the matter was the question according to the law of which of the states the Arbitration Court should test the validity of the arbitral agreement.

In considering this matter, the Praesidium held that *an arbitration agreement should, first of all, be governed by the law of that state, to which the parties had agreed to submit it. Failing such express choice of law by which an arbitral agreement should be governed*—and that was so in this case—*there should be considered as applicable to an arbitration agreement, as to an independent agreement of a quasi-jurisdictional nature, the law of the state on whose territory the arbitration proceedings were to take place and the arbitral award was to be given.*

In substantiating that view the Praesidium pointed to the views generally held on international commercial arbitration in the modern world. Both the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958, as well as the Geneva European Convention on International Commercial Arbitration of 21 April 1961—requiring for any arbitration agreements only an ordinary written form—accept that where the parties have made no choice as to the law governing the arbitration agreement, the court seized of the dispute shall examine the arbitration agreement under the law of the country in which the arbitration award is to be made (Article VI, paragraph 2, sub-paragraph b, of the Geneva Convention of 1961), and the enforcement court—under the law of the country where the arbitration award was made (Article V, paragraph 1, sub-paragraph a, of the New York Convention of 1958). The theoretical view contained in those provisions may serve—according to the Praesidium—as an interpretative indication even in states not bound thus far by any of those multilateral conventions.

Thus in order to determine the law governing an arbitration agreement the place in which the agreement should be deemed to have been contracted, is immaterial. The Praesidium remarked parenthetically that—as followed from the General Conditions of Sale, constituting an integral part of the contract concluded by the parties—Warsaw should have been considered as the place of contracting (as well as the place of payment); thus the allegation of the respondent to the effect that it was Bologne appearing with the date of the contract, which should have been considered as the place of contracting, seemed not to be precise.

The Praesidium having examined the arbitral clause under the law of the country of the seat of the arbitration court, that is, under Polish law—held that the arbitration clause was binding on both parties.

In conclusion the Praesidium of the Court of Arbitration states that of course its decision in no way prejudges the question whether or not the claims of the party which had introduced the request for arbitration as well as the plea of the respondent as to the offsetting of claims, were founded. In accordance with the Rules of the Court of Arbitration it was up to the arbitrators to decide this question.

4. *Surplus Delivery*

In its award No. 250/1964 made in proceedings instituted by a Polish foreign trade enterprise against a Dutch firm, the Arbitrators of the Court of Arbitration at the PCFT held that *consent on the part of the buyer to the delivery of a quantity of goods larger than that provided for in the contract imposed upon him the duty to fulfil in a proper way all duties which normally rested on the recipient of the goods and, in the first place, the duty to examine forthwith the state of the goods and in case of finding that goods signs of spoiling—the duty to request forthwith that railway protocol be drawn up and to call an expert to establish the degree of spoiling of the goods.*

5. *The Nature of the Provision of Paragraph 47 and of Subsequent Sections of the CMEA General Conditions of Delivery, 1958*

In its award No. 206/1963 of 16 November 1964 made in proceedings instituted by a Hungarian foreign trade enterprise against a Polish foreign trade enterprise, the Arbitrators of the

Court of Arbitration at the Polish Chamber of Foreign Trade held that *provisions of paragraph 47 and of subsequent sections of the CMEA General Conditions of Delivery, 1958, regulating the question of the responsibility for defects of goods delivered by the seller, were imperative (ius cogens) and could not be changed by the parties at will.* The Arbitrators, furthermore, held that *the discount on the purchase price as provided for in the contract on account of exemption from guarantee (Garantieablösung) exempted the seller only from responsibility for defects arising in the course of the exploitation of the equipment supplied, but did not acquit him of responsibility either for the defects revealed at the time of receiving the goods or for hidden defects.*

6. Contracts with a Foreign Party as against Contracts with a Domestic Party

In its award No. 256/1964 of 2 December 1964 in an action brought by a foreign trade enterprise of the German Democratic Republic against a Polish foreign trade enterprise, the Arbitrators of the Court of Arbitration at the PCFT held that *a circumstance known before the conclusion of a contract could not be effectively invoked by a party to the contract to become acquitted of an obligation undertaken by the conclusion of the contract.* Moreover, the Arbitrators expressed the view that *the time of delivery as provided for by provisions relating to the internal conditions of one country, did not constitute a circumstance which would free from the duty to pay conventional penalties due—under paragraph 59 of the CMEA General Conditions of Delivery, 1958—for failure to keep the delivery terms stipulated in the contract with a partner from another country.*

7. The Scope of a Counterclaim under Paragraph 65 of the CMEA General Conditions of Delivery, 1958

The Praesidium of the Court of Arbitration at the PCFT—seized of a counterclaim in case No. 355/1965 brought by a Polish foreign trade enterprise in principal proceedings initiated in connection with a dispute by a foreign trade enterprise from the German Democratic Republic—having examined on 6 July 1965 on the basis of paragraph 10, sub-paragraph 4, point c, of the Rules of the Court of Arbitration the plea raised by the enterprise from the GDR as to the jurisdiction of the Court of Arbitration to entertain counterclaims of the Polish enterprise, decided to sustain the plea and to reject the counterclaim.

The Polish enterprise, against which the proceedings were instituted by the enterprise from the GDR pleaded in its statement of defence a set-off of its counterclaims by virtue of conventional penalities and, moreover, entered a counterclaim for the payment by the principal claimant of a specified amount of money by which the pretension of the respondent against the claimant exceeded the claim advanced in the principal action. The enterprise from the GDR—as the respondent in the counterclaim—raised a plea as to the jurisdiction of the Court of Arbitration both to consider the plea of set-off as well as counterclaim, arguing that the subject of the plea of set-off and of the counterclaim were claims unconnected with the claims of the principal plaintiff.

As regards the plea of set-off the Praesidium of the Court of Arbitration held thae such a plea was one of substantial law: a regular set-off satisfies the claim just likt a payment, it is then a plea as to payment (by a set-off). It is thus always the court seized of the principal action which has jurisdiction to decide whether the plea of set-off is founded. It is for this court to pronounce on whether or not there has actually occurred a valid set-off of claims discharging the pretension advanced in the statement of claim.

The Praesidium stated that the matter was a different one as regards a counterclaim. This is a procedural mean of an offensive nature and not a plea of substantive law nature.

As the Praesidium of the Court of Arbitration previously clarified in its award of 23 May 1963 in case No. 189/1965, the notion of a "counterclaim" used in paragraph 65 of the CMEA General Conditions of Delivery, 1958, should be restricted to an action for a claim strictly bound up with

the principal action or arising out of the same legal relationship. Because if the exception to the principle that the arbitration court in the country of the respondent (*forum rei*) had jurisdiction to entertain a counterclaim—as provided for in that paragraph—were not construed in such a narrowing sense, it would lead to a complete abolition of the principle of bringing an action in the seat of the respondent. However, as the Praesidium stated, in the case under consideration it was beyond doubt that the claim covered by the counterclaim did not show any connection with the principal action. The fact that both parties maintained regular trade relations and that both actions concerned conventional penalties arising out of various transactions—did in no way create "a strict connection between the claims" as pleaded in the counterclaim.

INTERNATIONAL ARBITRATION COURT FOR MARINE AND INLAND NAVIGATION IN GDYNIA[10]

1. *Letter of Guarantee*

In an action brought by a Czechoslovak shipping agency *A* and a forwarding agency *B* against a Polish carrier (shipowner) *C* for the payment of damages for losses suffered by the recipient of the goods in India as a result of the non-execution of the contract of carriage and paid by them to the exporter of the goods, the body of Arbitrators of the International Arbitration Court for Marine and Inland Navigation in Gdynia held that *the writing out by the shipper of a letter of guarantee against delivery of a clean bill of lading in the event when the entire cargo had not been delivered to the carrier, though customary in sea-borne traffic, did not protect the carrier—even when acting in good faith—as against the recipient of the goods and the carrier could not invoke the letter of guarantee against the recipient of the goods.* The Arbitrators referred also to foreign decisions, e.g. to a British decision in Brown, Jenkinson and Co. Ltd v. Percy Dalton (*Lloyd's List Law Report*, 1957, vol. 2).

2. *Change of the Proper Law by Agreement of the Parties During the Proceedings. The Choice of Law and Intertemporal Law*

In cases No. 6/1963 and 7/1963 filed by an insurance company *A* against a carrier *B* and the Harbour Board *C* in Gdynia, decided in an award of 16 March 1964, there arose several interesting legal problems.

First of all *the Arbitrators held that the change by the parties in the course of proceedings of the law governing the contract was valid.* In the course of the proceedings the parties concurrently declared that the dispute should be settled on the basis of the Polish law. The Arbitrators held, therefore, that by their declaration the parties receded from the stipulation contained in the bill of lading, according to which the bill of lading was to be governed by the American Carriage of Goods by Sea Act 1936. The choice of law by the parties is clearly admissible under paragraph 28 of the Rules of the International Arbitration Court for Marine and Inland Navigation in Gdynia.[11]

There arose, however, a question related to intertemporal law. Though the parties concurrently stated that the Polish Maritime Code of 1 December 1961 (Dz. U, 1961, No. 58, text 318) should be applied and the plenipotentiaries of the parties in the course of the proceedings referred to the provisions of that code, however, it entered into force on 15 June 1962, while the legal event which gave rise to the loss in question had occurred at the beginning of March 1962, that

[10] Set up by a treaty of 17 June 1959 concluded between the Czechoslovak Chamber of Trade, the Chamber of Foreign Trade of the German Democratic Republic and the Polish Chamber of Foreign Trade.

[11] This paragraph contains, *inter alia*, the following provision: The arbitral body seized of the dispute applies the law of the state which has the closest connection with the dispute, account being taken, above all, of the will of the parties.

is to say, before the entry into force of the Maritime Code. Such being the case, *the Arbitrators had to decide whether the parties could invoke a law, which had no binding force at the time of the legal event. The Arbitrators held that this was not admissible.*

Before the entry into force of the Maritime Code the IV Book of the German Commercial Code of 10 April 1897 had been binding in Poland. Poland ratified in 1937 (Dz. U. 1937, No. 33, text 258) the Brussels Convention for the Unification of certain rules relating to Bills of Lading. *Article 10 of that Convention makes its application conditional upon the writing out of a bill of lading on the territory of one of the states, parties to the Convention. In the said case a bill of lading was written out in Cuba, that is, in a state, which does not participate in the Brussels Convention. Nonetheless, the Arbitrators held that it was applicable to the dispute on the basis of the will of the parties.*

3. *An Accident at Sea and the Carrier's Responsibility for the Cargo*

The circumstances of the case were as follows:

A Polish ship *X* accepted for carriage from Calcutta to Szczecin a shipment of dry-salted fells, writing out in respect of individual consignments clean bills of lading. Upon the arrival at Szczecin the recipient found during the unloading that parts of the cargo placed at the bottom of the hold got wet. After unloading of the fells it was established that about 10 per cent of the entire shipment got wet or showed signs of moisture up to 30—40 centimeters. The state of the fells which got wet was such that the expert called in by the recipient established that they must have been in water for a long time as the wrapping was rotten and the hair of the fells were falling apart at slight touch. According to the expert the damage was caused by the fact that the shipment of fells remained in water over a longer period of time.

The carrier was informed of the condition of the unloaded fells and he was made responsible for the damage which occurred in the hold through his fault within the period prescribed in the Brussels Convention for the Unification of certain rules relating to Bills of Lading of 25 August 1924, which was applicable to the carriage. The carrier rejected, however, the claim made against him.

In these circumstances the claimant: the foreign insurance company, and the respondent: the Polish carrier, concluded an agreement making the dispute subject to the jurisdiction of the International Arbitration Court for Marine and Inland Navigation in Gdynia.

The carrier, as the respondent, in his statement of defence did not acknowledge the petitioner's claim either as regards its substance or its amount and applied for the dismissal of the action giving the following reasons for his refusal: The ship *X* while crossing the Kiel Canal two days before calling at Szczecin collided with a ship flying the flag of the German Democratic Republic, as a result of which the ship's side plating suffered damage. Because of that the respondent claimed that following the collision water got into the hold, where the fells were kept, as the watertight bulkhead was staved in. He referred at this point to Article IV, paragraph 2 c, of the Brussels Convention which lays down that: "Neither the carrier not the ship shall bear any responsibility for damage or loss brought about or resulting from... c) perils and accidents at sea or in other navigable waters."

In accordance with the interpretation of the provision of Article IV, paragraph 2c, of the Brussels Convention invoked by the carrier, *it is upon the carrier that rests the burden of prima facie proof that loss of or damage to the cargo was caused by one of the perils enumerated in the bill of lading or in the Convention. Should the presumed cause of damage to the goods be so proved, then the recipient of the cargo may provide another proof (counter-proof) showing a different cause of damage to the cargo for which the carrier is responsible.*

The insurance company which brought the action submitted evidence of another cause of the damage to the cargo in the form of an expert's opinion and testimony of witnesses. The experts excluded the possibility of the damage having been the result of the collision; the collision

took place on 31 December, while the unloading of the fells from the ship took place on 7 January; the experts concurrently stated that the condition of the wrapping of the bales soaked in their lower parts showed that the fells had remained in water for at least 15—20 days since the wrapping was rotten and the hair was falling out.

In those conditions, the Arbitrators held the circumstance of the water having come through the staved in side plating to be likely but did not rule out the possibility of the water having got into the hold because of other reasons—not established in the course of the proceedings.

Thus there remained to be solved the question of the care of the carrier for the goods accepted for transport. What should the management of a ship do following a collision: should it care for the safety of the ship or also for the cargo thereon. In the opinion of the Arbitrators seized of the case, *the respondent, and in actual fact the ship's master, should have, directly after the ship's collision with another ship, spared no effort and taken care of the cargo.* First of all the shipmaster should have made measurements of the bilges in order to find out whether as a result of the collision the holds were not flooded with water. If so, he had the duty to order forthwith a pumping of the water gathering there. It was possible at any time during crossing to find out whether there was water in the holds and this did not present any real difficulties to the ship's crew. Such actions would have undoubtedly reduced the extent of the damage and might have even excluded the possibility of the damage occurring at all. In the course of the proceedings the carrier could not prove that he had taken proper care of the cargo following the collision, considering that the place of damage was visible (staved in side plating).

The Arbitrators—having considered all circumstances in which the damage occurred—held the carrier responsible for the damage to the cargo. The amount of compensation was adjudged from the respondent in favour of the claimant to cover the damage actually proved.

Jerzy Jakubowski

LA 52-e SESSION DE L'INSTITUT DE DROIT INTERNATIONAL (VARSOVIE 1965)

La 52-e session de l'Institut de Droit International s'est tenue à Varsovie entre le 2 et le 11 septembre 1965 sous la présidence de M. Bohdan Winiarski, juge et ancien président de la Cour Internationale de Justice, ancien professeur à l'Université de Poznań. A la session on a élu comme 2-e et 3-e vice-présidents: M. J. Andrassy (Yougoslavie) et J. Offerhaus (Pays-Bas); la place vacante du I-er vice-président est restée inoccupée en signe de deuil après le décès tout récent (août 1965) de M. Badavi Pacha, élu en cette qualité à la 51-e session, et ce n'est qu'à la dernière séance administrative le 11 septembre qu'on a procédé à l'élection du I-er vice-président pour la période subséquente en la personne de M. H. Valladão (Brésil). Les fonctions du secrétaire général et du trésorier sont restées entre les mêmes mains, à savoir Madame S. Bastid (France) pour le premier et M. P. Guggenheim (Suisse) pour le deuxième poste.

Le choix de la Pologne comme lieu de la réunion de l'Institut de Droit International a été hautement apprécié par les juristes polonais, non seulement par ceux qui s'occupent du droit international, mais par l'ensemble des collègues juristes, dont témoignait la réception spéciale organisée par l'Association des Juristes sous la présidence de M. M. Mazur, président de la Cour Suprême, dans l'après-midi du 6 septembre à l'hôtel particulier de l'Association. Les milieux gouvernementaux polonais, par leur participation aux manifestations d'accueil solennel de la session, ont temoigné aussi de l'intérêt général attribué au choix de Varsovie comme lieu de la réunion. A la séance d'ouverture le vice-président du Conseil des Ministres M. Waniołka a prononcé un discours de bienvenue en soulignant la grande valeur des travaux de l'Institut en ce qui concerne spécialement la paix et la justice dans le monde, conformément à la maxime de l'Institut JUSTITIA ET PACE. Parmi les participants à ladite séance on notait la présence du ministre de la Justice

M. S. Walczak, du ministre de l'Enseignement supérieur M. H. Golański, du vice-ministre des Affaires Etrangères M. J. Winiewicz, du secrétaire général scientifique de l'Académie des Sciences M. H. Jabłoński, du Recteur de l'Université de Varsovie M. Turski, du Directeur des Musées Nationaux M. S. Lorentz. L'Académie des Sciences qui à côté du Gouvernement a beaucoup aidé à l'organisation de la session en lui assurant e. a. la collaboration constante de son Institut des sciences juridiques et en réunissant les participants à une réception spéciale sous la présidence de M. J. Groszkowski, président de l'Académie, l'après-midi du 4 septembre, a marqué ainsi son vif intérêt aux travaux de l'Institut, conformes à l'évolution et au développement progressif du droit international, un de grands piliers et garanties pour la paix et l'avenir pacifique de l'humanité sous le signe de la coexistence pacifique entre Etats et Nations.

La session de Varsovie correspondait dans le temps à la 93-e année de l'activité de l'Institut, c'est la première fois qu'elle se réunissait en Pologne, après 51 sessions tenues dans 14 Etats du monde. Compte tenu de ce qu'actuellement les membres et associés de l'Institut ressortissent de 40 pays et que les invitations de grands centres historiques, célèbres pour les études de droit international, se répétaient plusieurs fois au cours de 10 décennies de l'existence de l'Institut, les chances pour chacun des pays représentés à l'Institut ne sont ni grandes ni égales. La Pologne méritait certes cette faveur par la collaboration ininterrompue de ses savants durant toute la période d'activité de l'Institut. En effet dans les annales de l'Institut nous trouvons déjà en 1882 c.-à-d. dans la première décennie de son existence, le nom du professeur G. Roszkowski élu alors associé, puis en 1891 membre, il est suivi par le professeur F. Kasparek, élu associé en 1883, devenu membre la même année 1891. De ces deux savants polonais, surtout le second a été très actif pour le dévéloppement de la science du droit international en Pologne, il attirait l'attention sur le rôle de l'Institut (v. entre autres sa communication dans le tome XVIII des Travaux de la section de philosophie de l'Académie des Sciences de Cracovie en 1884*). Ensuite vient le nom et la personne du professeur M. Rostworowski, juge à la Cour Permanente de Justice Internationale, qui fut associé aux travaux de l'Institut pendant de longues années (élu associé en 1898 il collabora avec l'Institut jusqu'à sa mort en 1940), il a exercé comme membre les fonctions du 2-e vice-président en 1928, du 1-er vice-président en 1936, fut président et rapporteur d'une des commissions sur la solution pacifique des conflits internationaux, dont le rapport intitulé "Règlement sur la procédure de conciliation", fut adopté à la session de Lausanne en 1927. Parmi les membres et associés d'aujourd'hui nous comptons le président de la 52-e session M. B. Winiarski, associé depuis 1929, membre en 1947, 3-e vice-président en 1947,[1] M. L. Babiński, élu associé en 1947, membre en 1952, président et rapporteur de la XIX commission (contrat de commission de transport en droit international privé) et ceux élus dernièrement en qualité d'associés — en 1963 M. M. Lachs et en 1965 M. S. Hubert. Le groupe national polonais compte ainsi 4 personnes, ce qui le met à la 10-e place (de pair avec la Grèce) dans le calcul du nombre des membres et associés de l'Institut. Ajoutons finalement le nom de J. Błociszewski citoyen français, mais fils d'un émigré polonais, élu associé en 1912, membre en 1923, qui pendant de longues années (jusqu'à sa mort) prenait une part active dans les travaux de l'Institut.

Après cette courte introduction et avant de clôre notre compte rendu sommaire par quelques indications statistiques sur la session et les données sur l'expédition des affaires courantes d'ordre administratif, nous passons à la présentation du fond des débats de la session de Varsovie.

L'ordre du jour prévoyait une discussion en séance plénière de 3 sujets

A. pour le droit international public — La protection diplomatique des individus en droit international : la nationalité des réclamations (rapporteur M. Herbert W. Briggs — USA)

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* non cité dans la publication de l'Institut: Tableau Général des Résolutions, édité en 1957.

[1] M. Winiarski a publié en 1932 à la revue juridique polonaise "Ruch Prawniczy" une étude sur l'Institut de Droit International, non mentionnée dans la bibliographie Wehberg (Année 1957, Recueil de Résolutions),

B. pour le droit international privé — a. Les sociétés anonymes en droit international privé (rapporteur M. George Van Hecke — Belgique), b. Le renvoi en droit international privé (rapporteur M. Georges Maridakis — Grèce)

Les débats ont commencé par la question traitée dans le rapport sur les sociétés anonymes. Dans les Etats développés entretenant des relations économiques intenses entre eux et aussi avec les Etats du tiers monde, ces problèmes sont d'une grande importance pratique, vu l'intérêt pour la communauté internationale d'une intensification des relations économiques par la possibilité pour les sociétés par actions d'exercer directement et sous le seul régime de la loi de la société leur activité dans les autres Etats. Le but ainsi poursuivi devrait être atteint par l'adoption du principe de base énonçant (Résolution art. 1) qu'une société anonyme est régie par la loi en vertu de laquelle elle a été constituée. Ce principe rejetant l'éventualité du choix préférentiel de la loi du siège d'exploitation ou de celui du lieu d'incorporation paraît le plus répandu en droit comparé, mais il n'exclut pas les cas, où le siège réel de la société se trouve hors du territoire, où est en vigueur la loi de sa constitution. Pour ces cas la Résolution prévoit une série d'exceptions au profit de la législation locale, c.-à-d. en complément de la règle de base de la Résolution que toute société formée conformément à la loi de sa constitution sera reconnue dans les Etats étrangers (contractants) comme un sujet de droit (art. 2). — La Résolution de Varsovie, adoptée le 10 septembre, est rédigée en 14 articles donnant les modalités et les précisions pour l'application des règles de base susindiquées ainsi que les exceptions répondant aux nécessités de sauvegarder certains droits de l'Etat, où est situé l'établissement. Le sens et la portée des exceptions deviennent plus compréhensibles à la lumière des Considérants (Préambu'e) de la Résolution, où on parle de limites que les Etats devraient respecter dans l'exercice de leur faculté d'appliquer aux sociétés étrangères les dispositions de leur propre législation, en se référant aux dispositions tendant à protéger les créanciers nationaux de ces sociétés et à assurer entre celles-ci et les sociétés de droit interne des chances égales dans la concurrence.

La seconde grande question, qu'on a discutée en détail à Varsovie en arrivant le 10 septembre au vote de la Résolution y relative, était celle de la protection diplomatique des individus en droit international: la nationalité des réclamations, aussi bien par la voie diplomatique que par celle de l'arbitrage ou de la juridiction obligatoire, s'est compliquée considérablement les temps derniers du fait que les réclamants changent souvent de nationalité au cours de la longue période de temps entre la date du dommage et la solution de l'affaire. Ce n'est plus comme dans l'affaire très connue Nottebohm, tranchée par la Cour Internationale de Justice en 1955, où la difficulté consistait dans l'appréciation du bien fondé du changement de la nationalité, mais le fait de la création en masse de nouveaux Etats et du changement des frontières et de nationalité dans maintes occasions. Déjà dans les travaux de l'Institut on a du réserver une étude spéciale aux réclamations des entreprises, dont s'occupe la 3-e commission sous la présidence de M. Ago. La tâche de la 1-e commission présidée par M. Briggs, dont le rapport était discuté à Varsovie, était limitée aux réclamations des individus, une seconde limitation consistait en ce qu'on a éliminé le problème du délit international comme tel, en traitant le sujet en question plutôt du côté procédural. On en est arrivé ainsi à maintenir en principe la condition de la continuité de la nationalité dans la procédure des réclamations qui doit être la même au moment du dommage qu'au moment de la présentation de la réclamation. Ce principe est assujetti à quelques exceptions — en premier lieu par l'éventualité d'existence d'un accord particulier entre les intéressés (Etats, Organisations internationales), de même dans les hypothèses de double nationalité. La difficile question du changement de nationalité où l'individu qui a subi le dommage a changé de nationalité soit par suite de modifications territoriales de l'Etat, dont il ressortit soit par suite de modifications de son statut de droit privé, a été réservée pour un exament ultérieur. L'ensemble de la Résolution, votée après l'examen et la discussion du Rapport de M. Briggs, est limité à l'énoncé de principes essentiels, rédigé en 4 articles, néanmoins nous y trouvons les précisions quant à la détermination de la date du dommage et de celle de la présentation de la réclamation.

La troisième grande question introduite pour la discussion en séance plenière était celle du Renvoi en droit international privé. Ici la situation était autrement compliquée, du fait d'un désaccord entres les membres de la commission sur le principe même de la solution à adopter. Le rapporteur (M. Maridakis) proposait le rejet pur et simple du renvoi par la confirmation de la Résolution de l'Institut, adoptée à la session de Neuchâtel en 1900. Tel n'était pas l'avis de la majorité des membres de l'Institut, exprimé déjà en 1961 à la session de Salzbourg lors de la première discussion de la question. Pour sortir de la difficulté on a voté une Résolution plutôt de procédure, sans entrer dans le fond de la question, pourtant significative, qui constatait que le problème du Renvoi en droit international privé ne peut être envisagé de nos jours sous sa forme classique, mais qu'il doit être étudié conjointement avec le problème plus large de prise en considération des règles de conflit étrangères, ce qui nécessite une nouvelle étude spéciale et détaillée. Ainsi il appartiendra au Bureau de l'Institut de décider, si cette nouvelle étude spéciale et détaillée restera dans les compétences de la 23-e commission actuelle ou qu'il y aura lieu de créer à ces fins une nouvelle commission en décidant que la 23-e commission doit cesser son travail.

Tels ont été les sujets de discussion en séances plenières (hormis les séances administratives) à la session de Varsovie. Mais à part cela, une place considérable, beaucoup plus étendue que lors des sessions précédentes de l'Institut, a été réservée à Varsovie aux séances de commissions. On a vu se réunir 12 commissions — A part naturellement des trois dont les rapports ont été discutés (la 1-e, la 23-e et la 28-e), les 9 autres, à commencer par les très importantes, où des rapports partiels étaient préparés, notamment, la 4-e sur l'égalité des règles du droit de la guerre aux parties à un conflit armé (rapporteur M. François), la 5-e sur le problème que pose l'existence des armes de destruction massive et la distinction entre les objectifs militaires et non militaires en général (rapporteur baron von der Heydte). Enfin il faut mentionner que 7 commissions ont pu discuter à fond les sujets qui leur ont été confiés—la 2-e commission sur le droit de l'espace (rapporteur M. Jenks), la 3-e sur les effets internationaux des nationalisations (rapporteur M. de la Pradelle), la 6-e sur les commissions internationales d'enquête (rapporteur M. Yassen), la 7-e sur l'adoption en droit international privé (rapporteur M. De Nova), la 10-e sur la succession testamentaire en droit international privé (rapporteur M. Monaco), la 19-e sur le contrat de commission de transport en droit international privé (rapporteur M. Babiński) et la 26-e sur les obligations délictuelles en droit international privé (rapporteur M. Offerhaus).

Les membres et les associés polonais ont participé activement aux travaux de la session (en particulier M. Winiarski dans la discussion sur le projet Briggs, M. Babiński sur la question du renvoi, M. Lachs sur les questions du droit de l'espace). L'élection à la première séance administrative d'un nouvel associé polonais en la personne de M. S. Hubert, professeur à l'Université de Wrocław a porté jusqu'à 4 le nombre des membres et associés polonais. — Les autres associés élus à la session sont: MM. J. Castañeda (Mexique), F. Feliciano (Philippines), V. Koretzky (URSS), P. Lalive (Suisse), P. Pescatore (Luxembourg), M. Ruda (Argentine), O. Schachter (USA), E. Szaszy (Hongrie), Sir F. A. Vallat (Grande Bretagne). Dix associés ont été promus aux places vacantes de membres, savoir: MM. Sir K. Bailey (Australie), J. Colombos (Malte), N. Feinberg (Israël), A. Gros (France), Kisaburo Yokota (Japon), J. Kunz (USA), G. Maridakis (Grèce), R. Quadri (Italie), A. Ulloa (Perou), Yuen-li-Yang (Chine), M. S. Planas Suarez (Venezuela) a obtenu le rang de membre honoraire.

La session de Varsovie s'est terminée par l'acceptation de l'invitation hellénique de se réunir pour la prochaine (53-e) session en 1967 à Athènes. M. Spiropoulos a été élu président de cette session et à côté de lui comme I-er vice-président M. Valladão. La session de Varsovie a réuni 55 membres et associés, nombre important, quoique un peu au-dessous de celui enregistré pour quelques-unes des sessions précédentes de la période d'après-guerre.

Tout compte fait il faut admettre que la 52-e session a eu plein succès et qu'elle a parfaitement répondu aux traditions de l'Institut. Ces traditions se sont exprimées également dans

les charmantes réceptions préparées par les collègues polonais et dans la part active de leurs épouses, organisées en comité des dames.

Léon Babiński

MEETING OF SCIENTIFIC STAFF OF CHAIRS OF PUBLIC INTERNATIONAL LAW

From 26 to 29 September 1966 the first national Meeting of scientific personnel of Chairs of Public International Law was held at Karpacz. The Meeting was organized by the Chair of the Wrocław University with the aid of the Ministry of Higher Education. Its participants included staff of university Chairs and the Chair of International Law of the Main School of Planning and Statistics. Also present were the dean of Polish international jurists, Professor Dr Ludwik Ehrlich, and a representative of the Ministry of Higher Education. The Meeting devoted its deliberations foremostly to problems of teaching international law, with special attention being paid to a new programme of law studies. At the session of the heads of Chairs which preceded the opening of the general gathering it was decided to include in the agenda, as an additional item, the question of research planning in the field of international law.

During the first day of conference the participants heard two brief introductory reports : one by Professor Dr A. Klafkowski on *International Law in the New Programme of Studies*, and the second by Professor Dr C. Berezowski on the *Role of a Lecture and a Textbook*. Both the speakers and participants of the ensuing discussion expressed the view that in the new programme of studies the number of hours devoted to the teaching of international law should be enlarged and brought back to the level envisaged in the programme of studies which had been in force before the introduction of the actually existing programme. This is essential from the point of view of the process of teaching, of the scope of the subject which is being constantly and dynamically developed, and because of the need for training lawyers in this direction. Poland's interests in Europe and the world, and an active policy of the Polish People's Republic's Government would be better understood had the knowledge of international law and the society's respect for this branch of law grow higher.

Practical Trainings: Their Role, Method and Teaching Materials—this was the title of an introduction made by Dr S. Nahlik at the morning session on the second day of the Meeting. In the opinion of all participants, practical trainings are one of the most important elements in the process of lawyers' education. They serve not only to prepare students for examinations, but in the first place, allow them to become accustomed to legal thinking, acquainted with documentary sources and trained in the interpretation of legal texts.

The afternoon meeting of the second day of deliberations was devoted to seminars and M. L. theses. The discussion was opened by Professor Dr R. Bierzanek's report entitled *The M. L. Seminars—A Technique and Method of Their Conduct*, and by Professor Dr. S. Hubert's report on *A Master of Law Thesis in the Training of Lawyers*. Although forms and methods of seminars and research courses vary at different universities, the five-year programme of studies of law in effect in the past, undoubtedly, permitted to significantly enrich forms of education of law students, as indicated by well-known achievements in the field. At the same time, however, attention was drawn to the fact that the new, four-year programme considerably limits the possibility of continuing seminars in the same form, and according to the method applied in the past.

A lively discussion took place on the Meeting's third day when the subject of training of young scientific cadres was taken up. An introduction on the subject was made by Professor Dr K. Libera.

Publications are the most important evidence of scientific research work. However, bearing in mind that there are only limited possibilities of works by junior scientific staff being published, a motion was put forward that the unpublished works should also be taken into consideration in assessing achievements of the younger scientific workers. The motion met with full support of the participants.

General acclaim was also given to the proposal for the establishment of so-called domestic training courses, namely scholarships for several weeks of work at other universities, especially by junior scientific personnel. An appeal was addressed to the Ministry of Higher Education requesting it to make an effort for fuller utilization of possibilities to obtain scholarships abroad, particularly for younger scholars at The Hague Academy during summer vacations.

Recognizing benefits which might be mutually derived from the closer co-operation between science and various governmental agencies, the possibility of inviting representatives of such agencies to the next gathering of the scientific staff of the Chairs of International Law was discussed. Their participation would permit the review of eventual forms and guidelines for such co-operation.

The fourth, and last, day of the Meeting was devoted to the discussion of a programme of scientific research for 1966—1970, as well as to an exchange of information on current works of various Chairs. At the close of the conference a resolution was adopted which formulated several important suggestions, made in the course of deliberations, with the view of their submission to the Ministry of Higher Education.

Several days of lively discussion in which all participants, from senior scholars to the youngest assistants and trainees, took the floor, was inspired by a deep concern for the adequate development of this branch of science. The discussion led to the belief that in spite of certain difficulties Chairs of International Law can fulfil their tasks.

Bolesław Paździor

REGARDING THE ROLE OF WEST GERMAN SCIENCE OF INTERNATIONAL LAW IN THE POLICY OF THE FEDERAL REPUBLIC OF GERMANY

A session of the Co-ordination Committee on Research in German Problems was held in Katowice on the 29th and 30th November 1965. The meeting was devoted to the theme "Destructive Tendencies in the Science of Law and External Policy of the FRG." Leading specialists—lawyers and historians, political commentators from all over the country and the representatives of science from the GDR took part in the session.

In the course of the session the following five introductory reports were presented:

— by Professor Dr. Manfred Lachs (the Institute of Legal Sciences of the PAS in Warsaw): "Peaceful Co-existence and Policy of the FRG";

— by Dr. Józef Kokot, Associate Professor (Silesian Scientific Institute in Katowice): "Destructive Tendencies in the Science of Law and External Policy of the FRG";

— by Dr. Krzysztof Skubiszewski, Associate Professor (the Adam Mickiewicz University in Poznań): "Transfer of the German Population after the Second World War. Legal Aspects";

— by Adam Daniel Rotfeld, M. A. (Polish Institute of International Affairs in Warsaw): "The Right of Nations for Self-Determination in Theory and Practice of the FRG";

— by Rudolf Buchała, M. A. (Silesian Scientific Institute in Katowice): "The Theory of So-called 'Recht auf die Heimat' in the Light of International Law."

The scope of topics discussed at the session was wide and extremely diversified.

As Professor Manfred Lachs observed in his introduction—in the FRG has emerged and is developing the whole system of the philosophy of lawlessness which is overtly contrary to the principles of peaceful co-existence of nations and states.

Referring to this fact, the Katowice meeting raised a number of problems falling within the scope of international law. Among other things, there was a detailed review of the question of the Potsdam Agreement, especially appraisal of its provisions concerning the Polish-German frontier as well as of the act of the surrender of Germany. Both these matters were considered in the report by J. Kokot, Associate Professor. In the subsequent debates participants reviewed problems connected with the ban on wars and eventual qualification of certain activities of the Allies against the Third Reich as reprisals. Questions of the recognition of State and Government were discussed and in this connection the Hallstein doctrine was assessed.

As it appears, the basic argumentation presently promoted by the West German doctrine of international law, around which, incidentally, evolved the main part of the meeting's discussion, can be subdivided—as suggested by Prof. M. Lachs—into three groups of problems:

1. German arguments derived from the principle of self-determination;

2. arguments derived from the "legal prohibition of transfers of population" and from human rights;

3. arguments based on the "right to homeland."

Regarding item 1. Arguments based on the right of self-determination are advanced in two directions:

a) against legality of decisions of the Allies regarding Germany in 1945;

b) against the existence of the GDR, and particularly against the attitude of the GDR and the whole socialist camp regarding the question of reunification of Germany.

Both directions of interpretation of the principle of self-determination—as has been stressed by Mr. A. D. Rotfeld in his introductory report—are false and contrary to the contents of the principle of self-determination and international law itself.

In the first place, one cannot omit the fact that it was precisely Germany who violated in the most brutal manner the right for self-determination of other nations. Therefore, one of the main tasks of the anti-Hitlerite coalition was restoration of the right of self-determination for conquered nations of Europe and simultaneously ensuring to neighbours of Germany—so painfully subjected in the past to the policy of aggression by German imperialism—a permanent state of security. All decisions of the member States of the anti-Nazi coalition in 1945 had to be subordinated to these major objectives. For Poland, particularly, the implementation of such a territorial move to the West which would in the future guarantee to the Polish nation the possibility of a peaceful life and would remove the threat of a new German aggression, was a condition of its security. Between the principle of self-determination and security there exists a link and close inter-dependence. The right for self-determination of one nation is restricted by the same right of another one. This is how self-determination is understood by the UN Charter (Article 1, paragraph 2). Thus, it seems that even if there were no specific provision in the Charter on the German question (Article 107), one could not speak about contradiction between the Allied Powers decisions on Germany and the principle of self-determination and international law.

It should be also stressed that although the Second World War was not fought with the aim to bring self-determination to the German nation, nevertheless, the defeat of Nazism was a necessary condition of the attainment of this right by Germans in Germany. The full implementation of the right of self-determination within the whole of Germany and in accordance with democratic decisions made at Potsdam was rendered impossible due to the cold war policy of the Western Powers and the West German possessing classes who placed their own narrow interests over the interests of the whole nation and preferred the partition of the country to democratic reforms in the whole of Germany. The present appeals of the FRG Government for reunification on the basis of self-determination (the demand for so-called "free elections") have nothing in common with the real principle of self-determination. By reunification in the FRG is understood the inclusion of the GDR into the Federal Republic. This would obviously amount to the violation of the free will of the fully sovereign state of the GDR, but even regardless of this fact, the objective of the

anti-fascist coalition, namely the creation of the democratic and peaceful German state, would be completely lost.

Regarding item 2. The second target of the offensive of the FRG doctrine of international law (as well as that of their historians) is the question of the transfer of the German population.

The matters related to the transfer of the German population were discussed at length by K. Skubiszewski, Associate Professor. The speaker recalled that the resettlement of German population had a conventional basis in the Potsdam Agreement which was preceded in past history by many instances of transfer treaties. Taking into account that none of the treaties formulating specific or general law contained a stipulation which would prohibit such transfers one can state that in the light of then existing international law the transfer of German population was absolutely legal. Mr. Skubiszewski has also drawn attention to the fact that there should be no antinomy between resettlement of German population and the principles of self-determination and human rights. Any attempt at questioning the legality of such transfer is excluded *expressis verbis* by the UN Charter in the already mentioned Article 107. Notwithstanding this, one can also point out that the Potsdam Agreement was signed even before the UN Charter came into force, embodying the provisions on human rights and the principle of self-determination,

Regarding item 3. The doctrine of the "right to homeland" is a supplement and expansion of the West German concept of complete illegality of an obligatory transfer. This doctrine was the subject of a report delivered by R. Buchała M. A.

In this connection we do not face yet a well defined doctrine but rather a complex of theories and assertions which are often contradictory, unclear and as though intentionally complicated, while seeking quite different sources of explanation. Thus, the "right to homeland" is genetically tied up either with the principle of self-determination or with human rights, it is also built on the prohibition of transfer. Some West German authors even spin this right from natural or divine laws. The doctrine of the right to homeland did not find any reflection whatsoever in world science. It is, one can say, an exclusively West German theory. But even its West German supporters feel compelled to admit that it is not yet sufficiently elaborated and that it does not have any roots in positive law, namely in existing international law, and that it amounts to only a proposition *de lege ferenda* which is yet to be included into the provisions of international law. Regardless of these objections based on international law, the West German science (and together with it also their propaganda and official policy) generally uses this doctrine as legal argumentation against the transfer of German population as though the "right to homeland" existed *de lege lata*. This fact has been already many times pointed out by Polish science of international law.

Mr. R. Buchała in his statement at the meeting raised and elaborated yet another, no less important argument. The doctrine of the "right to homeland" not only has nothing in common with existing international law and is contrary to its basic principles, but also constitutes an unnecessary concept detrimental to the development of this law. The destructive character of this doctrine follows even from a cursory analysis of its contents and objectives. While referring to the absolute prohibition of transfers and everlasting right of transferred people to return, the supporters of the doctrine of the "right to homeland" do not have in mind any humanitarian purposes but very concrete political objectives.

It may be said that the Katowice meeting fully demonstrated that the West German concepts of international law, as discussed above, despite their references to slogans of humanity, to criteria of morality and law, etc., have hardly anything in common with real humanism, progress and law but only serve the ends of current policy of the FRG. The aim of this policy is to eliminate sanctions imposed on Germany for destruction of peace between nations, to make a revision of the existing territorial order which was established at Potsdam in the interests of international peace and security, and to erase the progressive achievements attained by the German Democratic Republic. Such concepts are contrary to international law and principles of peaceful co-existence.

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P-1045

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