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Henryk de Fiumel (1925—1986)

On 17 April, 1986, at the age of 61 died suddenly in Warsaw a distinguished international lawyer, Professor at the Institute of State and Law of the Polish Academy of Sciences, a judge of the Constitutional Tribunal and the editor-in-chief of the *Polish Yearbook of International Law* — Henryk de Fiumel.

Professor de Fiumel was born on 9 February, 1925, in Chełm. In 1949 he graduated from the Warsaw University in Law and at this University he began his work as a teacher and a scholar.

He soon became specially interested in then a new arena of international life, namely in relations between socialist States. He was the first among Polish international lawyers to chose these problems as the main subject of his studies. And though during his fruitful life Professor de Fiumel successfully undertook many other important issues of international law, he remained loyal to this direction of research. His contribution to the studies on legal aspects of relations between socialist States and especially studies concerning legal aspects of economic integration is enormous. In this field he was a leading scientific authority both in Poland and all other socialist States.

In 1967 a monography entitled *The Council of Mutual Economic Assistance. A Study In International Law* was published in Polish. This book, first in Poland on this subject, confirmed his scientific position and has been received with great interest in other socialist countries and by scholars from Western Europe interested in the problems of economic integration.

In 1970 Professor de Fiumel joined the Institute of State and Law of the Polish Academy of Sciences and at the same time he undertook an important but very controversial problem of financial responsibility of States for their economic obligations. The realization of this ambitious task besides fulfilling his own cognitive passion had also a legislative aim. Professor de Fiumel believed it to be necessary to draft and later to implement a set of general rules and conditions of financial responsibility of member-States of the CMEA for their mutual obligations.

With this idea in mind he organized in Warsaw an international conference to discuss theoretical differences and overpass certain anxieties of political nature. Edited by him materials of this conference contributed to the solution of certain controversial points and were of practical value

for the legal organ of the CMEA which was preparing conditions of the financial responsibility of States.

This direction of his studies was crowned with the monography entitled *Financial Responsibility of States*. This book is not only concerned with certain, specific problems that arise within the CMEA in the process of socialist economic integration but also evaluates different elements of general nature connected with State responsibility in the light of progressive tendencies of international law. Thus it presents an important contribution to the general theory of international law. The same can be said about an extensive dissertation of Professor de Fiumel which was published (in Polish) in the collection of papers entitled *Responsibility of States in International Law* (1980, ed. by R. Sonnenfeld).

The question of the position of international norms in the internal law of States was yet another of Professor de Fiumel's scientific interests. As far as the Polish legal system is concerned he was an outspoken advocates of an opinion that international norms are binding *ex proprio vigore*. In this case also, according to the main direction of his research the starting point was the position of recommendations accepted by member-States of the CMEA in their internal legal systems. Professor de Fiumel's high scientific standards did not allow him to formulate any conclusions in this matter without a thorough analysis of the whole spectrum of relations between international and municipal law. Henryk de Fiumel was especially interested in the role played by resolutions of international organizations in the law-making process. He devoted a number of articles to this issue and conclusions contained therein are of significant importance.

It is not possible here to present the whole of Professor de Fiumel's interests. However, yet another aspect of his scientific activity should be mentioned. Henryk de Fiumel was continuously interested in the problems related to the external relations of the CMEA — with relations of this organization with third States and with other international organizations. In this wider context he studied also the relations between the CMEA and the EEC. Because of his comparative studies he became an expert in the field of legal problems of West European integration. He could therefore consider the question of bilateral relations between the CMEA and the EEC in the lights of legal systems of both of these integrations (as an example we should mention here his study entitled "The Competence of the European Economic Community to Conclude International Agreements", in Polish, *Państwo i Prawo*, 1980 No. 11).

Shortly before his death Henryk de Fiumel completed another monography on legal aspects of multilateral inter-state industrial cooperation within the CMEA.

Henryk de Fiumel initiated the establishment of and actively participated in the system of scientific cooperation between lawyers of socialist

States interested in problems of economic integration. Without any doubt he was one of the leading personalities of this cooperation. For many years he represented Polish lawyers in the Permanent Drafting Commission established by the Academies of Sciences of Socialist States. As a co-author he participated in a number of collective undertakings which were later published in the Soviet Union, Czechoslovakia, the German Democratic Republic. At the moment of his sudden death two collective monographies were being in the process of publishing, both initiated and edited by Professor de Fiumel. One of them is concerned with the cooperation of the member-States of the CMEA in the field of planning, the other with the relations between obligations of States and obligations of industrial enterprises in the system of socialist economic integration.

Henryk de Fiumel was often invited to present his views in many scientific centres of Western Europe, especially the results of his comparative studies on economic integration and on the problem of State responsibility. He also maintained a permanent contact with scholars of many countries from Western Europe, especially from Italy, Belgium, West Germany and West Berlin.

Henryk de Fiumel very soon established a broad contact with practice. He was, among others, a member of a college of arbiters of the Polish Chamber of Foreign Trade, a permanent member of the Polish delegation to the legal organ of the CMEA, he also actively participated in the activities of many international groups of experts. His opinions were frequently called upon by many organs of Polish administration.

Henryk de Fiumel was not only one of the creators of Polish science. He was the editor in chief of the *Polish Yearbook of International Law*, the vice-chairman of the Scientific Council of the Institute of State and Law of the Polish Academy of Sciences and the vice-chairman of the Committee of Scientific and Social Initiatives of this Academy.

In the social life of his country Henryk de Fiumel participated not only as a distinguished scholar. He was an active member of the Democratic Party, where he fulfilled many responsible political functions. In the years 1972—1976 he was a member of the Sejm (Parliament).

In autumn 1985 Professor de Fiumel was elected by the Parliament as a judge of the Constitutional Tribunal. This new judiciary organ of the Polish legal system began its activities on 1 January, 1986. Henryk de Fiumel accepted this nomination with the deep feeling of responsibility for ensuring that hopes connected with this Tribunal are fully realized. Unfortunately, his sudden death unabled him to fulfil his aspirations.

Le problème de la force obligatoire des normes du droit international dans l'ordre juridique national

par HENRYK DE FIUMEL, JERZY MAKARCZYK

I

La force obligatoire des normes du droit international dans l'ordre juridique national est un grand problème de la théorie et de la pratique du droit international qui continue à susciter un bon nombre de controverses dans la doctrine. Le fait même de poser ainsi le problème éveille des réserves de plusieurs auteurs. En effet, selon la conception traditionnelle, droit des gens règle seulement les rapports entre Etats en tant que tels, et non les rapports à caractère national interne, aussi serait-il difficile de parler de sa force obligatoire dans les rapports internes¹.

En admettant même que les normes du droit international aient, quant au fond, pour objet de régler des rapports qui normalement relèvent du droit interne, elles ne peuvent jamais avoir force obligatoire directe (en tant que telles) et être applicables à ces rapports. Il faut que dans chaque cas de ce genre elles changent de destinataires et soient adressées à des sujets de droit interne par l'intermédiaire de ce droit. C'est indispensable car le droit international en tant que tel ne peut jamais régler les rapports en question². Et on souligne parfois à ce propos que si l'on adoptait un autre point de vue, cela équivaldrait à faire de personnes physiques des sujets de droit international³, et puis ce serait contraire au principe de la souveraineté de l'Etat⁴.

¹ Cf. A. S. GAVERDOVSKIJ, *Implementacija norm meždunarodnog prava*, Kiev 1980, pp. 70, 91.

² Cf. R. A. MJULLERSON, *Sootnošenje meždunarodnog i nacionalnog prava*, Moskva 1982, p. 58.

³ Cf. GAVERDOVSKIJ, *op. cit.*, p. 69; A. M. KUPČIŠIN, *Sovetskaja Konstitucija i meždunarodnoe pravo*, Kiev 1983, p. 50.

⁴ Cf. l'opinion de Mohr, citée par H. J. MÜLLER, *Prawo międzynarodowe i prawo wewnętrzne w Niemieckiej Republice Demokratycznej* [Le droit international et le droit interne en République Démocratique Allemande], dans : *Prawo międzynarodowe a prawo wewnętrzne w świetle doświadczeń państw socjalistycznych* [Le droit international et le droit interne à la lumière de l'expérience des Etats socialistes. Matériaux d'une conférence scientifique internationale, Varsovie, octobre 1977], Wrocław 1980, p. 88.

Cependant il serait difficile de se rallier à cette opinion. L'analyse du droit international contemporain montre qu'il règle toujours davantage des rapports entre les personnes physiques et les personnes morales d'un côté et l'Etat de l'autre, et aussi entre les personnes physiques et les personnes morales. Il s'agit en règle générale de rapports avec un élément d'extranéité, donc entre l'Etat donné et des ressortissants d'un autre Etat, ou entre les ressortissants de différents Etats. R. A. Miullerson les appelle « rapports internationaux à caractère non étatique »⁵.

Aussi le terme de rapports « nationaux internes » n'est-il pas bien précis et peut-être est-il plus juste de se servir de la notion d'« ordre juridique national », qui ne suggère pas qu'il s'agit de rapports entre les ressortissants d'un même Etat. Remarquons toutefois que le droit international contemporain va parfois encore plus loin, en régissant les rapports internes dans le sens plein du mot, donc même les rapports entre les citoyens et leur propre Etat, ce qui se produit par exemple dans le cas de la protection internationale des droits de l'homme. Des cas de ce genre sont certes exceptionnels bien qu'on puisse citer des cas relevant du droit international du travail.

Les cas de régulation par le droit des gens des rapports avec un élément d'extranéité dont nous avons parlé plus haut, se rencontrent dans des situations relevant du droit international privé, des échanges économiques internationaux, de l'intégration économique, de la nationalité, des communications, de l'entraide judiciaire, etc.

Souvent, les dispositions des conventions internationales régissant les rapports en question sont rédigées de telle façon qu'elles peuvent être directement appliquées aux rapports qu'elles concernent. C'est dire qu'en particulier les personnes physiques ou morales peuvent en tirer leurs droits et obligations, tandis que les organes d'Etat et les tribunaux peuvent les appliquer directement. Nous disons « directement » parce que du point de vue technique en quelque sorte, ces dispositions se prêtent à une telle application directe sans qu'il faille le préciser davantage. Ce qui ne signifie pas que du point de vue juridique une telle application directe soit toujours possible. La condition première est la force obligatoire de ces dispositions dans l'ordre juridique national.

Ici il nous faut expliquer ce que nous entendons par force obligatoire des normes de droit international dans l'ordre juridique national. Certains auteurs emploient aussi, comme synonyme de force obligatoire, les expressions telles que l'application du droit international à l'intérieur de l'Etat, de leur efficacité (applicabilité) interne, etc.⁶. A notre avis, le terme adéquat est

⁵ R. A. MJULLERSON, *op. cit.*, pp. 25, 27.

⁶ Cf. Ch. de VISSCHER, *Les tendances internationales des constitutions modernes*, *Recueil des Cours, Académie de Droit International*, vol. 80 (1952 I), p. 559.

précisément la force obligatoire de ces normes, car pour être applicables à l'intérieur de l'Etat il faut avant tout qu'elles aient force obligatoire, c'est-à-dire que les organes d'Etat ainsi que les personnes physiques ou morales soient tenus de s'y conformer et y puiser leurs droits⁷.

Les normes de droit international ont force obligatoire à l'intérieur de l'Etat en tant que partie de l'ordre juridique national, ce qui est une notion plus large que la notion de droit interne, car elle englobe aussi — outre ce droit orienté sur la régulation avant tout des rapports internes au sens strict du mot — les règles de droit international qui ont pour objet de régler les rapports avec la participation de personnes physiques ou morales. Cela implique, évidemment, la nécessité de mettre en harmonie ces règles de droit international avec celles de droit interne, et, partant, assurer la participation de l'organe législatif d'Etat au processus conférant aux règles de droit international force obligatoire dans cet Etat.

II

Une question essentielle se pose : quel est le fondement juridique de la force obligatoire des règles de droit international dans l'ordre juridique national ? Le principe peut-il être déduit du droit international public en tant que principe général de ce droit ?

La doctrine souligne qu'un tel principe n'existe pas et que « le droit international ne se dote pas, avec effet dans la sphère nationale, d'une force obligatoire directe sur le territoire de l'Etat et dans les rapports qui s'y forment »⁸.

Cependant, dans la jurisprudence internationale on rencontre une autre opinion en cette matière. Ainsi l'arbitre Asser déclarait dans sa sentence concernant le litige franco-polonais relatif à la centrale varsovienne (1936) qu'« un contrat passé en bonne et due forme est une source du droit objectif dans les Etats contractants, ayant force obligatoire tant dans chacun de ces Etats que sur le terrain international... »⁹. En citant cette sentence, Skubiszewski affirme que sa thèse est un *desideratum* plutôt qu'un reflet d'une norme internationale et du devoir des Etats qui en découle¹⁰.

⁷ Cf. A. BLECKMANN, *Begriff und Kriterien der innerstaatlichen Anwendbarkeit völkerrechtlicher Verträge*, Berlin 1970, p. 59. A. KOLLER, *Die unmittelbare Anwendbarkeit völkerrechtlicher Verträge und des EWG-Vertrages im innerstaatlichen Bereich*, Bern 1971, p. 67.

⁸ K. SKUBISZEWSKI, *Prawo międzynarodowe w porządku prawnym państwa* [Le droit international dans l'ordre juridique de l'Etat], dans : *Prawo międzynarodowe a prawo wewnętrzne...*, p. 48; A. KOLLER, *op. cit.*, p. 59.

⁹ *Affaire de la Compagnie d'Electricité de Varsovie (fond)*, RIAA, vol. 3, p. 1696.

¹⁰ K. SKUBISZEWSKI, *Prawo międzynarodowe...*, p. 48.

Il convient de faire remarquer à ce propos que la plupart des auteurs soulignent que le droit international laisse aux Etats la liberté de choisir les méthodes et les moyens d'introduction de ses normes dans l'ordre juridique national, ce qui toutefois est autre chose que la force obligatoire dans cet ordre. Mais il est vrai que ces auteurs présupposent en règle générale que le droit international en tant que tel n'a pas de force obligatoire automatique à l'intérieur de l'Etat¹¹.

Il nous faut toutefois souligner que, parfois, une convention internationale prévoit elle-même que ses dispositions ont force obligatoire directe dans l'ordre juridique national des Etats contractants. A titre d'exemple on peut indiquer la convention multilatérale sur l'application des standards du Conseil d'Assistance Economique Mutuelle (C.A.E.M.) signée le 21 juin 1979 à Sofia¹². L'art. Ier, 1° statue que les Etats parties à la Convention assureront « une application obligatoire et directe des standards du C.A.E.M. [...] dans les rapports conventionnels de coopération économique, scientifique et technique entre les pays [...] ainsi qu'une application obligatoire des standards du C.A.E.M. dans leur économie nationale... ».

Le point 3° de cet article explique que par rapports conventionnels on entend non seulement les rapports interétatiques mais aussi entre « les organisations économiques d'Etat ».

Le point 6° précise — et c'est l'essentiel — que par application des standards du C.A.E.M. dans l'économie nationale conformément à l'art. Ier on entend en particulier « l'application directe d'un standard du C.A.E.M. sans changements ni réductions remaniées ». Voilà un net exemple de ce que la convention internationale prévoit expressément elle-même la force obligatoire de ses dispositions dans l'ordre juridique des Etats contractants.

Mais lors même qu'on partagerait l'opinion que le droit international universel ne connaît pas le principe d'après lequel ses normes (en particulier celles des traités) seraient automatiquement obligatoires dans l'ordre juridique national des Etats parties à une convention, il serait difficile d'adopter la règle d'après laquelle pour conférer une telle force obligatoire il faut toujours un acte de droit interne.

A notre avis, il n'est pas en général justifié de séparer trop rigoureusement les obligations juridiques internationales de l'Etat de son ordre juridique national. En effet, dans une norme de traité international s'extériorise la volonté de l'Etat entendu non pas de façon abstraite mais comme un ensemble d'éléments tels que les organes d'Etat, la population et le territoire. Dès lors que le fait par l'Etat de contracter des obligations

¹¹ Cf. K. SKUBISZEWSKI, *supra*, p. 49; A. S. GAVERDOVSKIJ, *op. cit.*, p. 75; Ch. de VISSCHER, *op. cit.*, p. 555.

¹² Le texte dans *Osnovnye dokumenty Soveta Ekonomičeskaj Vzaimopomošči*, vol. 2, Moskva 1983, pp. 309--313.

internationales doit avoir un sens pratique et qu'il résulte de leur contenu qu'elles ont en fait pour but de régler des rapports dans l'ordre juridique national, il est difficile d'imaginer que cet Etat ne veuille pas les reconnaître *ipso facto* comme obligatoires dans cet ordre juridique national.

W. S. Viériechtchetine écrit à ce propos que « les normes de droit international deviennent obligatoires à l'intérieur de l'Etat dès l'entrée en vigueur de la convention dans l'Etat donné »¹³.

S. Kaźmierczyk souligne que la convention internationale traduit la volonté de l'Etat réalisée à travers l'activité créatrice du droit et c'est pourquoi « elle doit *ipso facto* être obligatoire dans les rapports internes »¹⁴.

La conception erronée d'après laquelle l'Etat est quelque chose d'abstrait amène certains auteurs à affirmer que le droit international règle l'activité de l'Etat de façon générale « comme un phénomène social et nullement comme les activités des organes qui font partie de son système » (sic !)¹⁵.

On conteste donc non seulement la possibilité pour les normes de droit international obligatoires pour l'Etat de régler l'activité des personnes physiques ou morales mais aussi celle des organes de l'Etat donné. Mais avec une telle conception la notion même d'Etat semble privée de sens.

III

Les partisans de la thèse que le droit international en tant que tel ne peut jamais régler directement les rapports internes et exige toujours des actes de transformation adéquats, se réfèrent en règle générale, en dehors des prémisses théoriques, également à la pratique qui doit corroborer cette thèse. Mais, fait caractéristique, cette pratique (il s'agit en règle générale de pratique législative) est elle-même très diversement entendue et interprétée par la doctrine, et qu'à notre avis elle ne constitue pas une preuve suffisante à l'appui de la thèse susmentionnée. Et nous n'aurons pas

¹³ Cf. également E. M. AMETISTOV, *Mieżdunarodnoe pravo i trud*, Moskva 1982, p. 91, qui parle de l'absurdité de la séparation de l'Etat en deux sujets, national et international, de l'ordre juridique; cf. également G. SEIDEL, *Das Verhältnis von Völkerrecht und innerstaatlichen Recht. Zur Frage einer Rechtsdefinition*, «Staat und Recht», 1981, n° 7, p. 645.

¹⁴ S. KAŻMIERCZYK, *Umowa międzynarodowa jako źródło prawa wewnętrznego Polskiej Rzeczypospolitej Ludowej* [La convention internationale en tant que source de droit interne de la République Populaire de Pologne], Wrocław 1968, p. 46; cf. également K. SKUBISZEWSKI, *Miejsce traktatów w porządku prawnym PRL* [La place des traités dans l'ordre juridique de la R.P.P.], «Sprawy Międzynarodowe», 1973, fasc. 1, p. 89; VEREŠČETIN, *Meżunarodnoe Kosmičeskoe pravo i vnutrigosudarstvennoe pravo: problemy vzaimosvjazi*, «Sovetskoe Gosudarstvo i Pravo», 1981, n° 12, p. 108.

¹⁵ A. S. GAVERDOVSKIJ, *op. cit.*, p. 91, pareillement R. A. MJULLERSON, *op. cit.*, p. 71.

à démontrer ici combien variées sont les interprétations de la notion de « transformation » de normes de droit international en droit interne.

Cela se laisse nettement suivre sur l'exemple de la doctrine soviétique du droit international¹⁶ dont les représentants, dans leur grande majorité, contestent la possibilité pour les normes de droit international d'être directement obligatoires dans l'ordre juridique national, sans un acte interne.

Ce qui est frappant, c'est le fait que les exemples de la pratique législative cités par les différents auteurs connaissent une interprétation diverse. Cela concerne les dispositions de la Constitution de l'U.R.S.S. de 1977 laquelle, comme on le sait, ne contient aucune disposition déterminant la situation juridique des normes de droit international dans l'ordre juridique national¹⁷. Cependant, I. I. Loukachouk écrit que la force constitutionnelle du principe de l'exécution de bonne foi des obligations internationales signifie que tous les organes, organisations et particuliers se trouvant dans la sphère d'action du droit soviétique sont tenus de respecter les dispositions du droit international. Ce devoir découle de la Constitution elle-même et n'exige pas à être confirmé par un quelconque acte législatif additif¹⁸.

Viériechtchéline ajoute à ce propos que la législation soviétique ne rattache pas ce devoir à la condition préliminaire d'insertion de normes de droit international dans le droit soviétique interne¹⁹.

Il faut toutefois faire remarquer que le principe du respect des conventions internationales est un principe général du droit international qui oblige tous les Etats. Aussi son insertion dans la Constitution peut-elle avoir une valeur déclarative seulement et non constitutive²⁰. Et s'il en est ainsi, on n'est pas fondé à tirer des effets juridiques de ce principe précisément de la Constitution en tant que telle comme le fait Loukachouk.

Une assez grande importance revient en cette matière à la loi soviétique de 1978 sur le mode de formation, d'exécution et de dénonciation des conventions internationales de l'U.R.S.S.²¹. Certains auteurs attirent no-

¹⁶ Cf. de nombreux exemples d'une telle diversité chez E. M. AMETISTOV, *op. cit.*, pp. 85—88; A. S. GAVERDOVSKIJ, *op. cit.*, p. 69 et suiv.; R. A. MJULLERSON, *op. cit.*, p. 59; A. M. KUPČIŠIN, *op. cit.*, p. 57—58.

¹⁷ Cf. D. P. KOROVINA, *Priroda jedinoobraznyh norm meždunarodnyh Konvencij. «Pravovedenie»*, 1983, n° 1, p. 64.

¹⁸ I. I. LUKAŠUK, *Sootnošenie vnutrigosudarstvennogo i meždunarodnogo prava v svete novoj Konstitucii SSSR. Vestnik Kievskogo universiteta (Meždunarodnye otnošenija i meždunarodnoe pravo)*, Kiev 1979.

¹⁹ VEREŠČETIN, *op. cit.*, p. 110. Ailleurs, il écrit que «la force obligatoire des normes de droit international à l'intérieur de l'Etat est acquise dès l'entrée en vigueur de la convention pour l'Etat donné», *ibidem*, p. 109.

²⁰ Cf. A. S. GAVERDOVSKIJ, *op. cit.*, p. 219.

²¹ Le texte dans A. N. TALALAEV, *Zakon o meždunarodnyh dogovorah SSSR na službe mira*, Moskva 1979, pp. 87—95.

tamment l'attention sur l'art. 21 de cette loi aux termes duquel «les ministères, les comités d'Etat, les autres administrations de l'U.R.S.S., les Conseils des Ministres des républiques fédératives et les autres organes d'Etat, dont les compétences comprennent les affaires réglées par les conventions internationales de l'U.R.S.S., assurent l'exécution des obligations contractées par la partie soviétique...».

De l'avis de Gaverdovski la signification de cette disposition consiste en ce que non seulement elle constate l'obligation de l'Etat en tant que tel d'observer les conventions internationales mais aussi l'obligation de « tous les organes, organisations et unités restant dans la sphère d'action du droit soviétique d'observer les dispositions des normes de droit international »²².

Citant la même disposition Viériéchtchéine affirme qu'elle prévoit directement la force obligatoire internationale, mais « aussi interne des conventions auxquelles l'Union Soviétique est partie ». L'auteur ajoute que cette force obligatoire a un caractère inconditionnel et « ne dépend pas de l'insertion antérieure de normes de droit international dans le droit interne »²³.

Cependant il ne découle pas tout à fait clairement de cette affirmation que l'auteur considère la disposition citée de la loi comme seulement déclarative ou bien que les conventions sont obligatoires dans la sphère interne seulement sur la base de cette disposition.

Il est caractéristique que les différents auteurs soviétiques en appréciant la pratique législative en U.R.S.S. emploient divers termes pour désigner le processus de transformation des normes internationales en droit interne. Certains l'appellent «implantation» nationale de normes de droit international (Gaverdovskij, Mjullerson)²⁴, d'autres parlent de transformation et de renvoi (Mironov)²⁵, de réception générale de conventions internationales (Loukachouk)²⁶, de renvoi et d'incorporation (Mjullerson)²⁷, etc. Certains auteurs traitent la ratification comme une forme de la transformation largement entendue (Amiétistoff, Oussienko)²⁸.

²² A. S. GAVERDOVSKIJ, *op. cit.*, p. 222.

²³ VEREŠČETIN, *op. cit.*, p. 110.

²⁴ A. S. GAVERDOVSKIJ, *op. cit.*, p. 228 et suiv.; R. A. MJULLERSON, *op. cit.*, p. 74, qui qualifie l'implantation de «processus d'aide de la part du droit national à l'exécution des normes du droit international sur le territoire de l'Etat, dans la sphère d'action du droit national».

²⁵ N. V. MIRONOV, *Sovetskoe Zakonodatelstvo i mezhdunarodnoe pravo*, Moskva 1968, p. 44; IDEM: *Pravovye formy socialističeskoj integracii [Mezhdunarodnye mezvedomstvennye soglašenija]*, Moskva 1977, pp. 107, 115.

²⁶ I. I. LUKAŠUK, *op. cit.*, p. 11.

²⁷ R. A. MJULLERSON, *op. cit.*, p. 75.

²⁸ E. M. AMESTISTOV, *op. cit.*, p. 138; E. T. USIENKO, *Prawo międzynarodowe a prawo wewnętrzne w Związku Socjalistycznych Republik Radzieckich [Le droit international et le droit interne en Union des Républiques Socialistes Soviétiques]*, dans: *Prawo międzynarodowe...*, p. 58.

En même temps certains auteurs conviennent eux-mêmes que la situation en la matière n'est pas bien claire et peut susciter des doutes. Ainsi Amiétiostoff souligne qu'en U.R.S.S. on manquait naguère d'une procédure suffisamment précise de réalisation des conventions internationales, ce qui était dû à une régulation insuffisamment précise du processus de transformation de ces conventions²⁹. Gaviézdovskiï écrit qu'il n'y a pas d'approche uniforme du problème de la législation lié à l'exécution des conventions internationales³⁰.

Bien que — nous l'avons dit — la doctrine soviétique représente en principe l'opinion qu'en U.R.S.S. la règle générale c'est la transformation des normes conventionnelles en droit interne, cependant Mironoff, par exemple, partisan de cette opinion, reconnaît que «ni la loi ni les actes d'autres organes du pouvoir d'Etat ne prévoient de mode d'adoption d'actes de transformation»³¹ et qu'en U.R.S.S. «il n'y a pas et il n'y a jamais eu de forme spéciale d'acte de transformation»³².

Dernièrement, des auteurs soviétiques soulignent l'importance de la loi précitée de 1978 sur les conventions internationales qui règle réellement de façon détaillée plusieurs questions. En particulier, son article 19 réaffirme la règle universellement reconnue *pacta sunt servanda*³³.

Cependant, la loi ne règle pas de façon directe et expresse la question de la force obligatoire des conventions internationales à l'intérieur de l'Etat. Néanmoins on peut, à notre avis, déduire de l'art. 24 que la convention internationale est applicable dans l'ordre juridique national sans qu'il faille la transformer en droit interne. Nous lisons en effet dans cet article que «dans les cas où en vue d'exécuter une convention internationale par l'U.R.S.S. il faut voter une loi de l'U.R.S.S., un décret ou un arrêté du Praesidium du Soviet Suprême de l'U.R.S.S....», etc., les organes intéressés proposent l'adoption de l'acte utile.

Il en ressort que le législateur lui-même prévoit qu'il n'est pas toujours nécessaire de voter un acte spécial de droit interne³⁴. On peut donc supposer que dans plusieurs cas une convention internationale peut avoir force obligatoire sans qu'il faille adopter un tel acte.

Mais ici il convient de faire remarquer que dans la doctrine soviétique il est aussi des auteurs qui défendent la thèse de la force obligatoire directe de la norme conventionnelle dans l'ordre juridique interne. Dernièrement — nous l'avons signalé plus haut — cette opinion est représentée

²⁹ E. M. AMETISTOV, *op. cit.*, pp. 136—137.

³⁰ A. S. GAVERDOSVKIJ, *op. cit.*, p. 245.

³¹ N. V. MIRONOV, *Pravovye formy...*, p. 111.

³² *Ibidem*, p. 112.

³³ E. M. AMETISTOV, *op. cit.*, p. 139.

³⁴ Cf. D. P. KOROVINA, *op. cit.*, p. 64.

par Viériéchtchéline, et déjà auparavant elle l'a été par Miéchéra³⁵, Grievcora³⁶ et Blichtchenko³⁷.

A notre avis, l'opinion de la majorité de la doctrine soviétique sur la nécessité de transformation (diversement entendue) des normes de droit international en URSS, est fondée sur une interprétation spécifique des actes juridiques internes ainsi que sur les principes théoriques adoptés de l'impossibilité pour le droit international de régir les rapports qui se forment dans l'ordre juridique national.

Cependant, à notre avis, les exemples législatifs cités n'ont pas du tout à être nécessairement traités comme des actes «transformateurs» mais tout simplement comme des mesures visant à l'application pratique des dispositions des traités. Par exemple, Mironoff lui-même écrit qu'en U.R.S.S. un acte de transformation a la plupart du temps pour effet de compléter le droit existant ou de la modifier conformément aux exigences de la convention internationale³⁸.

Il s'agit en réalité du processus d'adaptation du droit interne aux obligations découlant des traités. Cependant il ne faut pas y voir une transformation de la norme conventionnelle pour lui conférer force obligatoire à l'intérieur de l'Etat mais tout simplement comme des mesures juridiques organisationnelles nécessaires pour permettre son application dans la pratique.

Qualifiant ce processus d'implantation de normes de droit international Mjullerson écrit qu'il s'agit en fait de «réalisation de normes de droit international»³⁹. Blichtchenko affirme que dans ce cas il s'agit seulement «d'améliorer la législation interne et cela n'a rien de commun avec la transformation»⁴⁰.

Or, si l'on partage l'opinion que c'est une réalisation de la convention internationale à l'intérieur de l'Etat, il faudrait en tout cas que la condition préalable est précisément la force obligatoire de cette convention dans l'ordre juridique national de l'U.R.S.S.

Outre les considérations qui précèdent, on peut poser la question suivante: comment se présente le cas de toutes ces nombreuses conventions internationales qui ne trouvent pas de reflet dans la législation interne de l'U.R.S.S.? Il serait difficile d'admettre que leur force obligatoire dans l'ordre juridique

³⁵ W. F. MEČERA, *O međunarodnom dogovore kak istočnike sovjetskogo prava*, «Pravovedenie», 1963, n° 1, p. 124.

³⁶ T. P. GREVCOVA, *Meždunarodnyj dogovor v sisteme istočnikov sovjetskogo vnutrigosudarstvennogo prava*, «Sovetskij Ežegodnik Meždunarodnogo Prava», 1963, Moskva 1965, p. 173.

³⁷ J. P. BLIŠČENKO, *Dejstvie međunarodnogo dogovora na territorii SSSR*, «Pravovedenie», 1968, n° 6, p. 106.

³⁸ N. V. MIRONOV, *Sovetskoe Zakonodatelstvo...*, p. 47.

³⁹ R. A. MJULLERSON, *op. cit.*, p. 74.

⁴⁰ J. P. BLIŠČENKO, *op. cit.*, p. 106.

national est contestable pendant qu'en même temps on manque d'argument sur leur transformation en droit interne.

Somme toute, il semble que le problème de la force obligatoire des conventions internationales dans l'ordre juridique national de l'URSS exige encore des analyses et des études approfondies.

IV

Avant de passer au problème de la force obligatoire des conventions internationales dans l'ordre juridique de la République Populaire de Pologne, il convient de consacrer un peu d'attention à la situation juridique en cette matière en République Démocratique Allemande. L'exemple est intéressant parce que la Constitution de la R.D.A. dans sa version de 1974 contient des dispositions relatives à ce problème: l'art. 8, al. 1 et l'art. 91⁴¹.

Aux termes de l'art. 8, al. 1 «les principes universellement reconnus du droit international, servant la paix et une vaste coopération des peuples, sont obligatoires pour le pouvoir d'Etat et pour tous les citoyens».

L'art. 91 déclare que «les normes universellement reconnues du droit international concernant le châtimement des crimes contre la paix ou contre l'humanité et les crimes de guerre, constituent le droit directement obligatoire».

Des auteurs de la R.D.A. soulignent que les dispositions constitutionnelles susmentionnées constituent l'exemple de la transformation générale du droit international en droit interne⁴². L'analyse de ces articles fait naître quelques problèmes. D'abord la question se pose de savoir si ces dispositions ont un caractère constitutif ou seulement déclaratif? Ensuite, le fait que l'art. 8 emploie le mot «obligatoires» au lieu de la formule «directement obligatoires» est-il international? Il n'est bien clair non plus pour qui sont directement obligatoires les normes mentionnées à l'art. 91.

Que les principes universellement reconnus du droit international soient obligatoires pour «le pouvoir d'Etat» cela semble évident, notamment quand on entend par ce terme l'Etat tel quel. Par contre, il n'est pas tout à fait clair comment entendre la force obligatoire de ces principes pour les citoyens, puisque, par leur nature, ils concernent les Etats en tant que tels et non les individus.

Ensuite, l'art. 91 peut paraître comme étant purement déclaratif pour autant que, comme le souligne la doctrine, c'est justement le droit de la guerre, notamment celui protégeant les victimes de la guerre, qui fait partie

⁴¹ Le texte dans GBL I, 1974, n° 47, p. 432.

⁴² Cf. H. J. MÜLLER, *op. cit.*, pp. 55—96; *Völkerrecht. Grundriss*, Berlin 1983, p. 90.

de ces exceptions où «il est obligatoire pour les destinataires nationaux, sans égard au point de savoir si, et comment, il a été inséré dans l'ordre juridique interne de l'Etat donné»⁴³.

Tout cela prouve que les formules employées dans la Constitution de l'Etat donné ne donnent pas à elles seules de réponse univoque à toutes les questions, si elles ne sont pas complétées par la pratique législative, administrative et judiciaire de cet Etat.

Il faut faire remarquer que dans les ouvrages juridiques de la R.D.A. on peut trouver des opinions selon lesquelles certaines normes de droit international en matière d'intégration économique socialiste doivent avoir une force obligatoire directe dans l'ordre juridique de la R.D.A. Les auteurs de ces opinions affirment que la transformation e doit pas être traitée comme un fétiche applicable comme principe dans toutes les conditions. Ils invoquent notamment l'argument que dans la communauté socialiste, aussi bien le droit international socialiste que le droit national des différents Etats socialistes servent les intérêts de la classe ouvrière et de ses alliés⁴⁴.

V

La Constitution polonaise de 1952 ne contient aucune disposition concernant la force obligatoire des normes du droit international dans l'ordre juridique national. En revanche, dans la pratique législative on rencontre des cas de renvoi aux conventions internationales sous différentes formes⁴⁵.

Il arrive qu'une disposition légale statue qu'au lieu du droit national il faut appliquer une convention internationale (p.ex. l'art 1096 du Code de procédure civile, l'art. 1, § 2 de la loi portant sur le droit international privé). Dans d'autres cas il n'est pas question de choisir entre la loi nationale et une convention internationale, la disposition nationale impose l'application de la convention internationale (p.ex. l'art. 24, al 1 du droit aérien, l'art. 11134 du Code de procédure civile). Il est des dispositions statuant tout simplement que la loi donnée ne porte pas atteinte aux conventions internationales liant la Pologne (p.ex. l'art. 15 du droit aérien).

Dans tous ces cas la disposition nationale ne parle pas de la force obligatoire des conventions internationales à l'intérieur du pays. Comme le souligne Skubiszewski, l'unique et évidente condition du renvoi susmentionné

⁴³ K. SKUBISZEWSKI, *Prawo międzynarodowe...*, p. 48.

⁴⁴ Cf. H. J. MÜLLER, *op. cit.*, pp. 92—93.

⁴⁵ Cf. K. SKUBISZEWSKI, *Miejsce...*, p. 81 et suiv.

« est le fait que le traité est obligatoire et que la R.P.P. en est partie »⁴⁶, s'agissant bien entendu de la force obligatoire en droit international.

Cependant, ces cas de renvoi aux conventions internationales ne concernent qu'une partie des conventions liant la Pologne ; du reste, ils n'éclaircissent pas expressément la question de la force obligatoire des conventions dans l'ordre juridique national.

La jurisprudence des tribunaux nationaux n'est pas riche⁴⁷, néanmoins ils ont plus d'une fois appliqué des conventions internationales liant la Pologne (tant ratifiées que celles n'exigeant pas ratification), également en l'absence de renvoi légal à ces conventions. Dans beaucoup de cas, les sentences n'indiquent pas expressément sur quelle base le tribunal applique la convention donnée.

Dans cette situation la question a attiré l'attention de la doctrine⁴⁸. La majorité des auteurs semble partager l'opinion de S. Rozmaryn, selon laquelle les conventions internationales, en liant la Pologne, produisent des effets juridiques dans l'ordre juridique national *proprio vigore*⁴⁹. Il est vrai que Rozmaryn lui-même précisait que les conventions ratifiées par le Conseil d'Etat et publiées au Journal Officiel sont efficaces dans les domaines législatifs (c'est-à-dire réservés à la loi ou déjà réglées par la loi), mais ne refusait pas l'efficacité aux autres conventions, tout en la limitant à la matière législative⁵⁰.

Rozmaryn appuie sa thèse sur la conception adoptée par le législateur constitutionnel polonais et par la pratique établie des organes directeurs de l'Etat. Skubiszewski, en adoptant en principe la thèse générale de Rozmaryn sur l'efficacité des conventions internationales en Pologne *proprio vigore*, attire néanmoins l'attention sur le point qui n'est pas clair de savoir quelles dispositions de la Constitution pourraient entrer ici en compte⁵¹,

⁴⁶ *Ibidem*, p. 84.

⁴⁷ Cf. II CR 458/72; OSPiKA, n° 1/1974, rubr. 6; OSPiKA, n° 11/1976, rubr. 202; III CR 714/73, PUG, n° 12/1974, rubr. 418.

⁴⁸ Cf. la bibliographie en cette matière dans K. SKUBISZEWSKI, *Miejsce...*, p. 85, note 12.

⁴⁹ S. ROZMARYN, *Skuteczność umów międzynarodowych w stosunkach wewnętrznych* [L'efficacité des conventions internationales dans les rapports internes], «Państwo i Prawo», 1962, n° 12, pp. 957—962; *ibidem*: *Ustawa w Polskiej Rzeczypospolitej Ludowej* [La loi en République Populaire de Pologne], Warszawa 1964 (chap. VI: «La loi et les conventions internationales»), pp. 319—346.

⁵⁰ S. ROZMARYN, *Skuteczność...*, pp. 960—961.

⁵¹ K. SKUBISZEWSKI, *Prawa jednostki, umowy międzynarodowe i porządek prawny PRL* [Les droits de l'individu, les conventions internationales et l'ordre juridique de la R.P.P.], 1981, n° 7, p. 19, note 38.

et fait encore ressortir l'imprécision de la notion de « matière législative », en particulier quand il s'agit de questions « réservées à la loi »⁵².

Nous trouvons en cette matière une résolution intéressante de la Chambre civile de la Cour Suprême statuant au complet, en date du 5 octobre 1974⁵³, bien que le cas ait porté non pas tant sur la force obligatoire d'une convention internationale dans l'ordre juridique national que sur la possibilité de son application et les conditions à remplir à cet égard.

La Cour s'est bornée à la question de l'application de la convention internationale en cas de renvoi par une loi et a déclaré que lorsque dans une telle situation il s'agit d'une matière législative, les conditions nécessaires de son application par le tribunal sont la ratification et la publication au Journal Officiel. Ainsi la Cour Suprême a laissé entendre qu'une convention internationale ne peut avoir force obligatoire *proprio vigore* que dans les matières non législative. Néanmoins reste toujours obscure la question des conventions internationales pour lesquelles il n'y a point de renvoi par une loi⁵⁴.

Rozmaryn parle de « l'efficacité » des conventions internationales dans l'ordre juridique interne. Mais que faut-il entendre par cette notion ? L'efficacité est-elle équivalente à la force obligatoire des conventions ? L'auteur ne répond pas expressément à cette question bien qu'une telle conclusion semble s'imposer.

C. Berezowski déclare que le droit international n'a pas de force obligatoire dans l'ordre juridique national mais y est appliqué⁵⁵. Il semble que cette expression n'éclaircit pas l'essentiel de la question. La norme de droit international est appliquée dans l'ordre juridique national précisément parce qu'il y a force obligatoire et son application en est une conséquence. Il en est autrement quand il s'agit de l'application par le tribunal d'une norme du droit national étranger. Là évidemment on peut parler seulement d'application d'une telle norme car un droit national étranger ne peut avoir force obligatoire dans l'Etat donné. La situation est encore tout à fait différente quand il s'agit d'une norme de droit international qui a en particulier pour auteur l'Etat donné et qui a été créée précisément pour obliger cet Etat.

Dans la doctrine polonaise on peut rencontrer l'opinion que le principe de la force obligatoire des conventions internationales *proprio vigore* ne

⁵² K. SKUBISZEWSKI, *Glose de la résolution de la Chambre Civile de la Cour Suprême statuant en date du 5 octobre 1974*, III CZP 71/73, «Państwo i Prawo», 1977, n° 8/9, p. 261.

⁵³ Le texte dans OSNCP n° 5/1975, rubr. 72 et OSPiKA, n° 11/1976, rubr. 202.

⁵⁴ Cf. K. SKUBISZEWSKI, *Glose...*, p. 265.

⁵⁵ C. BEREZOWSKI, *Wzajemny stosunek prawa międzynarodowego i prawa krajowego* [Le rapport entre le droit international et le droit national], «Państwo i Prawo», 1964, n° 8/9, p. 218.

concerne que les rapports entre les organes d'Etat mais non les relations entre ces organes et les citoyens ou entre ces derniers dans la mesure où la convention ne peut être qu'une source indirecte de ces rapports⁵⁶.

Or, en laissant même de côté le fait qu'il n'est pas clair ce qu'il faut entendre par source directe ou indirecte, une telle distinction n'est pas logiquement fondée, puisqu'on admet le principe de la force obligatoire d'une convention internationale dans les rapports intérieurs⁵⁷.

En analysant la situation juridique en R.P.P., Skubiszewski écrit que la Constitution de 1952 n'empêche pas, il est vrai, que les conventions internationales liant la Pologne soient appliquées par les tribunaux nationaux (ce qui réellement a plus d'une fois eu lieu), mais que ce n'est qu'une faculté et non un devoir que la Constitution ne formule pas⁵⁸. Dans cette situation, de l'avis de l'auteur, l'état de choses existant favorise le fait que les tribunaux omettent les traités au profit de la priorité de la loi⁵⁹.

Cependant, en un autre endroit du même article, l'auteur, tenant compte des dispositions du Pacte des Droits civils et politiques et des conventions relevant du droit international du travail affirme catégoriquement que « les organes administratifs et les tribunaux ont le devoir d'appliquer ces traités... »⁶⁰.

Or, à notre avis, si les conventions internationales liant la Pologne ont force obligatoire dans l'ordre juridique national *proprio vigore*, il faut admettre que les organes administratifs aussi bien que les tribunaux sont tenus de les appliquer et cela ne saurait dépendre de leur pouvoir discrétionnaire.

En faisant le point de tout ce qui précède, on peut se demander quel est le fondement juridique de la force obligatoire en R.P.P. des conventions internationales *proprio vigore*.

Skubiszewski souligne à ce propos que cette propre force ou le caractère direct sont la plupart du temps relatifs, « car ils dépendent en règle générale de la tolérance du système national, sinon tout simplement d'une norme nationale expresse »⁶¹. L'auteur désire souligner par là que la force obligatoire des normes des traités dans les rapports internes ne découle pas du droit international en tant que tel.

Or, tout en étant d'accord en général avec cette thèse il faut cependant apporter quelques précisions. A notre avis il s'agit non pas d'une tolérance

⁵⁶ S. KAŻMIERCZYK, *op. cit.*, pp. 81—82.

⁵⁷ *Ibidem*, p. 46.

⁵⁸ K. SKUBISZEWSKI, *Prawa jednostki...*, pp. 16—17.

⁵⁹ *Ibidem*, p. 17.

⁶⁰ *Ibidem*, p. 23.

⁶¹ K. SKUBISZEWSKI, *Prawo międzynarodowe...*, p. 48.

ou d'un impératif du système national au sens du droit national que d'un consentement tacite de l'Etat Polonais à la force obligatoire des conventions internationales qui le lient dans l'ordre juridique national du fait même qu'elles sont obligatoires en droit international. Autrement dit, on peut admettre la présomption générale que les conventions internationales passées par la Pologne qui ont acquis force obligatoire, sont *ipso iure* obligatoires dans l'ordre juridique national. Cela signifie à son tour que les organes d'Etat (administratifs) aussi bien que judiciaires sont tenus d'appliquer ces conventions, tandis que les personnes physiques ou morales peuvent y puiser leur droit et obligations et les invoquer.

Toutefois, indépendamment de cela, il convient de partager l'opinion que Skubiszewski avait déjà exprimée autrefois qu'il serait opportune adopter une norme (constitutionnelle de préférence) réglant généralement le problème de la force obligatoire et de l'application des conventions internationales dans l'ordre juridique national. Il semble aussi opportun d'introduire une disposition prévoyant la nécessité d'approbation par la Diète des conventions internationales concernant un objet réglé par les lois afin d'éviter les divergences entre la régulation par les traités et par la loi⁶².

VI

Le problème de la force obligatoire des normes du droit international dans l'ordre juridique national présente une haute importance pratique et ces dernières années a pris une importante signification politique. Cela résulte d'un côté de ce que la régulation juridique internationale s'étend à une sphère toujours plus large de questions concernant souvent la position de l'individu en tant que sujet fondamental de tous les droits et obligations impliqués par la vie sociale. Cela résulte aussi tout simplement du fait qu'à mesure que se développe la coopération entre Etats et qu'elle marque toujours davantage leur vie intérieure, un nombre toujours croissant de normes juridiques ont leur source dans les actes juridiques internationaux de rang très divers: a partiv des traités solennels jusqu'aux résolutions d'organisations internationales. Lors même le droit au développement économique commence à être de plus en plus largement traité comme un droit universel de l'homme, tout comme le droit à respirer l'air pur et à boire l'eau non polluée, il est clair que nous sommes en présence des processus irréversibles et relativement nets. A la lumière de ce que nous venons de dire et de nos considérations précédentes il devient nécessaire d'élaborer

⁶² K. SKUBISZEWSKI. *Miejsce traktatów....* 91; *Glose....*, p. 265.

une approche qualitativement nouvelle de notre problème. Quelle doit être cette approche et quelle est en cette matière l'opinion de la doctrine?

Ils semble qu'au préalable il faut tenter de saisir les dimensions du phénomène tant du côté quantitatif que de l'objet de régulation.

Aucune de ces tâches n'est facile. Quant à la première, de telles tentatives sont faites dans plusieurs pays et aussi à l'échelle internationale. Dans le cadre des recherches sur les sources du droit effectuées par le Centre européen de Coordination et de Documentation des Sciences sociales (Vienna Center), des chercheurs venant de l'Est et de l'Ouest présentent des rapports sur la part quantitative des différents types de sources dans les systèmes juridiques de leurs pays⁶³. Quant aux normes d'origine internationale les résultats des recherches sont révélateurs. Il apparaît que dans un pays tel que l'Autriche qui ne fait pas partie de la C.E.E., 2.943 actes normatifs publiés au journal officiel après 1945 sont d'origine internationale, et les dernières années on observe une tendance ascendante⁶⁴. Les recherches faites en R.F.A. ont démontré que la part d'actes d'origine internationale dans le système juridique de l'Etat dépasse 30%⁶⁵. La situation est semblable dans les autres pays de la C.E.E. Quant à la Norvège, les auteurs du rapport national déclarent qu'ils ne sont pas en état de fournir des données numériques en raison du fait que, malgré la domination de la doctrine dualiste il n'y a pas de technique unique de transformation, tandis que la majorité des traités « ...est difficile à déceler car ils sont soumis à publication comme toutes autres dispositions ». D'autre part, dans certains domaines, par exemple les droits de l'homme, est appliquée la forme dite passive de transformation, c'est-à-dire que des retouches sont apportées au droit interne avant la ratification du traité⁶⁶.

Le rapport hongrois constate que 297 traités internationaux ont été incorporés au système juridique national dans la décennie 1970—1979. Les données de Pologne indiquent 377 traités publiés au Journal Officiel entre 1952 et 1979.

Il résulte de ces chiffres — quoique, pour différentes raisons, l'image qu'ils donnent est loin d'être précise — les dimensions du problème sont considérables dans tous les pays enquêtés. Pour obtenir ces données de plus de

⁶³ Vienna Center — *Sources of Law, IV General Meeting*, 1983.

⁶⁴ Sur un nombre total de 12.248. Cependant, il faut se souvenir que cet Etat n'a recouvré sa pleine souveraineté qu'en 1955. Le rapport constate également que le nombre des actes d'origine internationale annulés ou amendés est nettement inférieur à celui des actes de droit interne. *Sources of the Law, Austrian National Report*, 1983, p. 26 et 33.

⁶⁵ Si l'on prend en compte les règlements d'application édictés pour la mise en vigueur des décisions de la CEE, ce pourcentage sera sensiblement supérieur; il n'est pas encore strictement évalué.

⁶⁶ *Sources of the Law — The Norwegian Report*, Oslo 1983, p. 30.

valeur, il faut soumettre le problème de la part du droit d'origine internationale à une analyse non seulement quantitative, comme l'ont fait les chercheurs de Vienna Center, mais avant tout du côté des rapports sociaux que les normes de cette origine règlent dans les différents pays. Il est évident qu'il faut à cet effet une large participation des spécialistes du droit international. Malgré les difficultés que rencontre la réalisation d'une telle tâche, bien plus grandes que celles affrontées lors de l'analyse quantitative, l'opportunité de cette tâche est incontestable pour deux raisons au moins.

Premièrement, le manque d'une image claire à cet égard est préjudiciable à l'Etat lui-même, où souvent même les organes appelés à appliquer, voire à statuer le droit ne connaissent pas les obligations internationales de l'Etat.

Deuxièmement, c'est seulement sur la base des données obtenues, celles de droit comparé y comprises, qu'il sera possible de mener à l'échelle internationale une politique opportune de la création du droit, de prévoir les orientations de développement, d'encourager les tendances progressistes et aussi, ce qui n'est pas moins important, de s'opposer aux courants conservateurs et de combattre l'inflation du droit, faits qui se font de plus en plus sentir dans le processus international de création du droit.

Telles sont, à notre avis, les tâches préliminaires de la science du droit international, réalisées bien entendu en coopération avec des spécialistes d'autres domaines dans l'élaboration d'une nouvelle approche du problème d'application et d'observation du droit international dans l'Etat. Mais, répétons-le, ce ne sont que des tâches préliminaires.

La tâche suivante que l'on ne saurait aborder avant de bien prendre conscience des dimensions du phénomène, consisterait à tenter de dégager de l'ensemble des normes d'origine internationale en vigueur dans les différents pays celles que l'on peut identifier comme une source directe de droit et obligations tant des particuliers que des organes d'Etat. Ce serait une nouvelle étape de l'analyse qualitative, ne constituant pas un but en soi, mais valable non seulement pour des raisons cognitives mais avant tout comme un pas dans la voie qui mène vers l'objectif principal : la tentative d'indiquer les orientations de la législation internationale qui, tant du point de vue des besoins de la coopération entre Etats que de ceux de l'individu, semblent les plus importants, en offrant en même temps les chances de réalisation directe dans les Etats qui auront accepté cette législation. On sait qu'une telle législation est en voie de réalisation dans certains domaines, p.ex. en ce qui concerne le droit à la nourriture, les essais d'introduire dans le droit international la conception du patrimoine commun de l'humanité, etc. Cependant, nous manquons d'un bon discernement des besoins et des possibilités. Et si l'on admet que l'un des objectifs du droit international contemporain est d'exercer, au nom de l'intérêt commun, une influence sur

les rapports intérieurs des Etats, la doctrine devrait tenter un tel discernement et tracer les directions des futurs travaux.

Et là apparaît la troisième tâche qui n'est technique qu'en apparence, à savoir celle d'améliorer la qualité des normes du droit international nouvellement créées du point de vue précisément de leur applicabilité dans les Etats qui ont adopté ces normes. Nous ne reviendrons pas aux questions relevant de la théorie du droit plutôt que du droit international, bien qu'importantes dans notre domaine également, comme la construction d'une norme. On sait que l'application directe du droit international dans l'Etat a encore de nombreux adversaires. Ils n'ont pas de meilleur argument — souvent non dénué de fondement — qu'une bonne partie des normes de droit international ne se prête pas à une application directe en raison de clarté, d'un caractère trop général, etc. Par exemple, les documents internationaux concernant les droits de l'homme prévoient l'hypothèse du travail forcé des hommes en cas de calamité ou de force majeure. Cela signifie-t-il que le travail forcé des femmes est prohibé dans quelques conditions que ce soit? Certainement. Mais alors pourquoi ne formule-t-on une disposition impérative en ce sens? On pourrait, malheureusement, citer beaucoup d'exemples de ce genre.

Les tendances contemporaines de la création du droit international n'incitent malheureusement pas à l'optimisme, et la question de la qualité des normes présente dans la pratique une importance non moindre que le discernement de l'état de choses existant et le jalonnement du développement du droit international du point de vue des besoins des sociétés contemporaines.

Le problème d'application de la Convention sur le statut juridique, les privilèges et les immunités des organisations économiques interétatiques fonctionnant dans certains domaines de coopération

par ZBIGNIEW SZANIAWSKI, WOJCIECH FORYSIŃSKI

Le 5 décembre 1980, les représentants de la Bulgarie, de la Mongolie, de la R.D.A., de la Pologne, de l'U.R.S.S., du Viêt-nam, de la Hongrie et de la Tchécoslovaquie ont signé la Convention sur le statut juridique, les privilèges et les immunités des organisations économiques interétatiques fonctionnant dans certains domaines de coopération. Cette Convention fut signée à Budapest, lors de la 19-ème session des Consultations sur les Problèmes Juridiques du C.A.E.M. Elle est entrée en vigueur le 17 juillet 1982, c'est-à-dire le soixantième jour après qu'au Secrétariat du Conseil d'Assistance Economique Mutuelle, étant en vertu de l'article XXIV de ladite Convention son dépositaire, eut été déposé le sixième instrument de ratification¹. La Pologne a ratifié la Convention de Budapest le 30 décembre 1982. Celle-ci est entrée en vigueur pour la Pologne le 14 mars 1983².

Les Etats parties à la Convention de Budapest ont agréé qu'elle sera applicable aux 12 organisations interétatiques dont les membres sont les pays membres du C.A.E.M. On a également convenu que les pays membres de chacune de ces organisations vont se consulter sur la date dès laquelle la Convention sera applicable à l'organisation donnée. Pour l'instant, la Convention ne s'applique pour autant à aucune de ces organisations. La première organisation qui s'est mise à considérer le problème d'applicabilité de la Convention de Budapest à son égard fut l'Organisation pour la Collaboration dans l'Industrie des Roulements à Bille. On a décidé d'analyser

¹ Le 17 juillet 1982, la Convention est entrée en vigueur pour la Bulgarie, la Mongolie, la R.D.A., l'U.R.S.S., le Viêt-nam et la Hongrie.

² Journal des Lois 1983, n° 32, textes 148 et 149. Le 30 octobre 1983 la Convention est entrée en vigueur à l'égard de la Tchécoslovaquie. Ainsi elle est applicable dans les rapports entre tous les pays qui l'ont signée.

les problèmes nés à cette occasion dans le cadre des Consultations sur les Problèmes Juridiques du C.A.E.M. En attendant, l'Organisation pour la Collaboration dans l'Industrie des Roulements à Bille ainsi que les autres organisations se sont abstenues de considérer la question d'applicabilité de la Convention de Budapest à leur égard.

Le problème d'application de la Convention de Budapest a été incorporé dans le plan de travail de la 24-ème session des Consultations sur les Problèmes Juridiques du C.A.E.M. qui s'est déroulée à Bucarest entre le 18 et le 22 novembre 1985. Les présidents des délégations des pays prenant part aux Consultations ont échangé leurs opinions sur l'applicabilité de la Convention aux organisations dont les membres sont uniquement des Etats parties à la Convention ainsi qu'aux organisations dont les membres sont également d'autres Etats.

Les problèmes apparus dans le processus d'application de la Convention de Budapest, leurs sources, leur nature et les tentatives de leur élimination nous incitent à procéder à leur analyse. Il faut aussi mentionner que la Convention, bien qu'elle comprenne des solutions tout à fait nouvelles et souvent controverses, n'a pas révélé grand intérêt aussi bien dans la littérature juridique polonaise que dans celle d'autres pays membres du C.A.E.M. Ainsi donc, les auteurs de cet article se trouvent affrontés à une nouvelle tâche — de la présentation et du commentaire des dispositions les plus importantes de la Convention. Sans cela, il ne serait pas possible de présenter des remarques au sujet de son d'application.

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Le processus de perfectionnement des fondements juridiques de l'activité du Conseil d'Assistance Economique Mutuelle, initié au début des années soixante-dix, enveloppa également ses relations avec d'autres organisations économiques interétatiques créées par les pays membres du Conseil et fonctionnant dans certaines sphères de l'économie, de la science et de la technique. Le perfectionnement des fondements juridiques de l'activité déployée par ces organisations est devenu également l'objet d'intérêt des organes du Conseil.

Lors de sa 78-ème session, le Comité Exécutif a décidé que ce problème sera considéré dans le cadre des Consultations sur les Problèmes Juridiques du C.A.E.M. On a agréé que les Consultations devront avant tout s'occuper de la question de rendre uniformes le statut juridique, les privilèges et les immunités de ces organisations économiques de branche des pays membres du C.A.E.M., car l'Accord sur le statut juridique et les facilités des organisations internationales de branche pour la collaboration économique, conclu à Varsovie le 9 septembre 1966, ne suffit plus aux besoins courants de la pratique. On a constaté que l'Accord de Varsovie a un caractère

limité car seulement six pays membres du Conseil (Bulgarie, Hongrie, R.D.A., Pologne, U.R.S.S. et Tchécoslovaquie) en sont parties et qu'en plus les statuts de seulement quatre organisations («Agromasz», «Interchim», «Interlektro» et le Conseil d'Utilisation Commune des Conteneurs) prévoient son applicabilité³. La situation juridique des autres organisations est réglée d'une façon différente et non uniforme. Ces organisations jouissent d'un statut juridique, privilèges et immunités différents dans chacun de pays du C.A.E.M. Il arrive aussi que les organisations fonctionnant sur le territoire du même pays sont soumises à des régimes juridiques différents.

En initiant les travaux tendant à rendre uniformes le statut juridique, les privilèges et les immunités des organisations économiques interétatiques créées par les pays membres du Conseil, les Consultations sur les Problèmes Juridiques du C.A.E.M. ont exprimé l'opinion qu'il est nécessaire d'élaborer un nouveau document réglant ces problèmes qui aurait remplacé dans l'avenir l'Accord de Varsovie.

En prenant note des remarques adressées par les pays membres, le Secrétariat du C.A.E.M. a préparé le projet préliminaire d'une nouvelle Convention. Dans les années 1978—1979, ce projet fut l'objet des travaux des sessions consécutives des Consultations sur les Problèmes Juridiques du C.A.E.M. et des commissions de travail fonctionnant dans le cadre de ces consultations. Les dernières questions contradictoires ont été tranchées lors de la session extraordinaire des Consultations au mois de février 1980. Le projet de la Convention sur le statut juridique, les privilèges et les immunités des organisations économiques interétatiques fonctionnant dans certains domaines de la coopération a été approuvé par le Comité Exécutif du Conseil (95-ème session). Par la même occasion, le Comité Exécutif a pris connaissance du fait que la Bulgarie, la Hongrie, le Viêt-nam, la R.D.A., le Cuba, la Mongolie, la Pologne, l'U.R.S.S. et la Tchécoslovaquie ont exprimé leur consentement pour signer la Convention jusqu'à la fin de l'année 1980 et pour procéder dans les plus brefs délais à sa ratification. Le Comité a été aussi informé que ces pays ont exprimé leur vœu d'appliquer la Convention, dès qu'elle sera entrée en vigueur pour eux, aux organisations économiques interétatiques citées dans la résolution du Comité Exécutif. Celles-ci sont:

1. Organisation de Coopération de l'Industrie des Métaux Ferreux «Inter-metal»,

³ L'Accord de Varsovie s'applique également à l'Organisation pour la Collaboration dans l'Industrie des Roulements à Bille. Ceci résulte du courrier du Ministère des Affaires Étrangères au Secrétariat de l'OCIRB attestant sur ce fait. Dès le 1er avril 1968, l'OCIRB jouit sur le territoire de la République Populaire de Pologne des privilèges et immunités garantis dans l'Accord de Varsovie.

2. Institut International Scientifique et de Recherche sur les problèmes de Gestion,
3. Système International de Liaison Spatiale (Satellitaire) «Intersputnik»,
4. Organisation Internationale pour la Coopération en matière de Production Chimique à Petit Tonnage «Interchim»,
5. Organisation Internationale pour la Coopération Economique, Scientifique et Technique dans l'Industrie Electrotechnique «Interelektro»,
6. Centre International de l'Information Scientifique et Technique,
7. Organisation pour la Collaboration dans l'Industrie des Roulements à Bille,
8. Parc Collectif des Wagons de Marchandise,
9. Conseil de l'Utilisation Collective des Conteneurs dans le Transport International,
10. Direction Centrale de Disposition de Systèmes Energetique Connexés.

La liste des organisations auxquelles serait applicable la Convention n'a pas été close. Les Etats ont obtenu la possibilité d'analyser et de décider sur l'applicabilité éventuelle de la Convention également à l'égard d'autres organisations économiques interétatiques, créées par les pays membres du Conseil. En faisant usage de cette possibilité, on a agréé que la Convention sera aussi applicable à l'Association Internationale en matière de Machines pour le Maraîchage, l'Arboriculture Fruitière et la Culture de la Vigne «Agromasz» et la Commission Internationale pour la Coopération des Pays Socialistes en matière de Technique de Calcul.

Sur demande de la délégation de la R.D.A., on a néanmoins décidé que la liste mentionnée des organisations devra être élaborée avant le moment de la signature de la Convention.

Avant que le Comité Exécutif n'ait pris connaissance de la décision des pays définissant les organisations auxquelles la Convention élaborée serait applicable, il procéda à un examen de leur statut juridique visant surtout à établir, en vertu des documents à base desquels elles ont été créées, si l'organisation donnée est une organisation créée par des Etats, si le fondement de son activité est une convention internationale et enfin, si son but d'activité est la coordination de l'activité des pays membres en matière de collaboration et coopération dans les domaines précis de l'économie, de la science et de la technique.

Les résultats de cette analyse ont permis de constater que les organisations internationales mentionnées sur la liste sont des sujets auxquels la Convention élaborée peut être applicable. Il peut être cependant nécessaire d'expliquer la nature juridique de cette liste et en particulier d'établir si la localisation de l'organisation sur la liste détermine son caractère juridique dans le sens du droit international. A la question formulée d'une telle façon il faut donner une réponse négative. Cette liste n'est qu'une preuve d'une certaine situation

juridique. Le caractère juridique d'une organisation est décidé par la volonté des pays qui en sont membres, exprimée dans une convention internationale adéquate constituant le statut de l'organisation. En considérant pourtant le déroulement des travaux consacrés à l'élaboration de cette liste, on peut admettre qu'elle exprime le point de vue des pays qui, après avoir soigneusement analysé les documents à base desquels les organisations ont été créées, ont constaté que les organisations qui y figurent répondent aux conditions requises pour les organisations économiques interétatiques auxquelles la Convention sera applicable.

La date dès laquelle la Convention sera applicable à l'organisation donnée sera fixée par ses pays membres par voie de consentement. Le Comité Exécutif a recommandé aux pays membres du C.A.E.M., parties à la Convention, d'entreprendre des mesures tendant à l'abrogation ou à l'accommodation aux dispositions de la Convention des documents réglant à ce jour le statut juridique, les privilèges et les immunités des organisations dont ils sont les membres. Il s'agit ici surtout de l'Accord sur le statut juridique et les facilités des organisations internationales de branche pour la coopération économique du 9 septembre 1966. Etats parties à cet accord ont accepté de le dénoncer au moment où la Convention de Budapest sera applicable à toutes les organisations auxquelles s'applique actuellement l'Accord de Varsovie.

En passant à l'analyse du texte de la Convention de Budapest, on peut apercevoir qu'elle comprend un préambule et six chapitres (introduction, organisation, représentants des pays, fonctionnaires, dispositions générales, dispositions finales). Comme il en résulte du préambule, le but de la conclusion de la Convention était le désir de participer au développement de l'activité des organisations économiques interétatiques fonctionnant dans certains domaines de la coopération et de cette façon de collaborer au renforcement des relations amicales entre les pays membres de ces organisations.

L'introduction comprend deux articles. L'article I donne un aperçu, des notions utilisées dans la Convention. Aux fins de la Convention, on a défini les notions suivantes : « l'organisation économique interétatique fonctionnant dans certains domaines de la coopération », « l'Etat du siège », « les bâtiments de l'Organisation », « l'organe représentatif », « les représentants des pays », « les fonctionnaires », « le fonctionnaire principal de l'organisation » et « les observateurs ». Par rapport à l'Accord de Varsovie, le catalogue des notions définies est beaucoup plus riche⁴. Le sens attribué à ces notions est également différent.

⁴ A l'article I de l'Accord de Varsovie on a défini seulement trois notions : « l'organisation internationale de branche », « les fonctionnaires » et « les représentants ».

Comme la pratique a fait naître des doutes quelles sont les organisations auxquelles la Convention devrait être applicable, il serait utile de rappeler que, conformément à l'article I lettre a, la notion « organisation économique interétatique fonctionnant dans certains domaines de la coopération » caractérise une organisation internationale dont les membres sont des pays et qui a été créée en résultat d'une convention internationale dans le but de coordonner l'activité de ses membres en matière de collaboration et coopération dans certains domaines de l'économie, de la science et de la technique.

La définition présentée détermine d'une manière générale le type d'organisations auxquelles la Convention peut être applicable. L'article II précise que la Convention s'applique aux organisations dont tous les membres sont parties à la Convention, aux organisations dont tous les membres se prononcent en faveur de l'application de la Convention à l'égard de leur organisation et enfin aux organisations dont les documents de base prévoient l'applicabilité de la Convention.

On peut remarquer que l'application de la Convention sera automatique uniquement au premier cas. Dans les autres cas, elle nécessitera une décision adéquate des pays membres ou des pays fondateurs d'une nouvelle organisation internationale.

En formulant la disposition analysée, on se rendait compte du fait que les membres de certaines organisations auxquelles pourrait s'appliquer la Convention sont aussi des pays n'étant pas parties à la Convention. En rapport à cela, les délégations de certains pays ont remarqué que les représentants des pays n'étant pas parties à la Convention vont également jouir des privilèges et immunités garantis par la Convention.

Une situation curieuse est survenue à l'occasion de refus de la Roumanie d'accéder à la Convention de Budapest. Lors de la phase finale des négociations, la Roumanie a retiré toutes les réserves qu'elle avait jusque là faites à l'égard des dispositions proposées de la Convention et son représentant a déclaré que la Roumanie n'est pas intéressée dans l'adoption de la Convention et qu'elle ne va pas la signer. La décision de la Roumanie était animée par le désir de ne pas rendre les négociations difficiles. Vu le fait que la Roumanie est membre d'une grosse majorité d'organisations mentionnées dans la résolution 95 de la session du Comité Exécutif, l'article II lettre a de la Convention peut avoir en pratique une application très restreinte⁵.

En marge, on peut indiquer que la Yougoslavie qui n'est pas partie à la Convention de Budapest a déclaré qu'elle consentait à appliquer les

⁵ La disposition citée peut s'appliquer uniquement à deux organisations — « Intermetal » et « Agromasz ». La Roumanie n'est pas le membre de l'Institut International Scientifique et de Recherche, mais le membre de cette organisation est le Cuba qui n'est pas partie à la Convention de Budapest.

dispositions de la Convention aux organisations dont elle est le membre.

Le Chapitre II de la Convention comprend huit articles et est intitulé « Organisation ». Les articles III et IV règlent la matière de la personnalité juridique de l'organisation : l'article III — sur le plan international, l'article IV sur le plan national.

Le problème de la personnalité juridique de l'organisation sur le plan international était l'un des plus controverses. Il provoqua une discussion animée et un échange des points de vue entre les représentants des pays participant aux négociations. L'interprétation de l'article III a également une influence considérable sur le processus de l'implémentation de toute la Convention. Il semble donc utile de prêter à cette règle une attention particulière et d'essayer de l'interpréter.

L'article III prévoit que « lors de la réalisation des dispositions de l'article II, les pays membres seront conscients du fait qu'en vertu de la présente Convention, les privilèges et les immunités qui y sont prévus, sont accordés aux organisations ayant la personnalité juridique sur le plan international, entièrement fondée sur les dispositions de leurs documents de base et qui, en agissant en telle qualité, conformément aux documents mentionnés et aux décisions de leurs organes représentatifs autorisés peuvent conclure des conventions internationales et agir dans les rapports internationaux dans le cadre indispensable à la réalisation de leurs objectifs et fonctions ».

Le seul fait de l'incorporation dans la Convention d'une disposition statuant *expressis verbis* sur la personnalité juridique sur le plan international des organisations internationales mérite déjà une attention particulière. En général il n'y a pas des dispositions analogues ni dans les statuts des organisations internationales ni dans d'autres conventions internationales réglant leur activité⁶. Il n'y en a pas non plus dans les statuts des organisations auxquelles pourrait s'appliquer la Convention. De là, on peut se demander quelle est la signification de la disposition analysée. Ainsi donc, en vertu de cette règle, les organisations auxquelles s'appliquera la Convention vont-elles acquérir le statut des sujets du droit international?

L'analyse des dispositions de l'article III doit débiter par les directives adoptées par les pays membres du Conseil à la 95-ème session du Comité Exécutif. L'élaboration de la liste des organisations auxquelles la Convention pourrait s'appliquer fut une tentative de réponse destinée aux experts roumains et ayant pour but de les convaincre que la Convention ne crée

⁶ La question de la personnalité juridique de l'organisation sur le plan international est par exemple réglée dans le statut de la Banque Africaine de Développement. De la Convention de Droit de Mer, signée en 1982 à Montego Bay, il résulte également que l'Organisation des Fonds de Mer va jouir de la personnalité juridique sur le plan international (voir art. 170, point 2).

pas en soi-même de nouveaux faits juridiques mais accorde seulement certains droits aux organisations dont les documents de base permettent d'adopter qu'elles sont sujets du droit international.

Tel est aussi l'objectif de l'article III de la Convention. Ainsi donc, cet article, qui doit être considéré et appliqué en liaison avec l'article II, a pour but d'attirer l'attention des pays membres de l'organisation donnée sur son caractère juridique et en particulier sur la disposition que les privilèges et les immunités prévus par la Convention sont accordés aux organisations jouissant de la personnalité juridique sur le plan international fondée sur leurs documents de base et qui peuvent, conformément à la teneur de ces documents et aux décisions de leurs organes représentatifs, conclure des conventions internationales et agir dans les rapports internationaux dans le cadre indispensable à la réalisation de leurs objectifs et fonctions.

L'accent posé sur les mots : « les privilèges et immunités prévus par la Convention » a une importance considérable. Le but de l'article III ne consiste pas à l'attribution aux organisations internationales de la personnalité juridique, mais à la constatation que la possibilité de jouir des privilèges et immunités par l'organisation est réservée uniquement aux organisations qui, en vertu de leurs status et leur pratique, sont munies d'un tel attribut.

De tout cela, il résulte que la disposition considérée ne crée pas de nouveaux faits juridiques pour les organisations auxquelles elle pourrait s'appliquer, mais cependant impose une analyse détaillée du caractère juridique de l'organisation avant que ses pays membres ne décident sur l'application de la Convention de Budapest à l'égard de l'organisation.

Ainsi donc, est-ce que cette disposition, qui a fait naître lors des travaux sur la Convention et lors des travaux liés à son application tant de controverses, est vraiment nécessaire ? Il faut constater que oui. Les organisations internationales auxquelles la Convention peut s'appliquer étaient créées surtout dans les années 1960. Leurs documents de base ne sont pas parfaits quant aux questions de règlement de leur statut juridique et des privilèges et des immunités. Il n'y a cependant pas de doute qu'elles peuvent conclure des conventions internationales et agir dans les rapports internationaux. La Convention voulait exprimer ceci d'une façon directe, notamment dans le but d'élever leur prestige dans les rapports internationaux.

L'analyse des dispositions de l'article III prouve donc que ces organisations sont déjà des sujets du droit international et que leurs pays membres l'admettent. De toute façon on ne peut plus dire qu'il n'y a pas de règle de droit international qui aurait défini la personnalité juridique de ces organisations⁷.

⁷ Voir A. KŁAFKOWSKI, *Prawo międzynarodowe publiczne [Droit international public]*, Warszawa 1979, pp. 186-190.

L'article IV, traitant de la personnalité juridique de l'organisation sur le plan national ne cause pas de tels problèmes. Il statue que l'organisation est une personne morale jouissant de la capacité juridique nécessaire à l'exécution de ses fonctions et qu'en particulier elle peut conclure des contrats ainsi qu'acquérir, louer et vendre le patrimoine possédé et paraître en justice.

On peut constater que la solution adoptée par la Convention est analogue à celles qui ont été adoptées par d'autres organisations internationales. Des dispositions semblables sont contenues à l'article I de la Convention sur les privilèges et les immunités des Nations Unies⁸ et à l'article I de la Convention sur la capacité juridique, les privilèges et les immunités du C.A.E.M.⁹.

L'Accord de Varsovie, dans ses dispositions traitant des droits de l'organisation fait référence à la législation nationale. L'article II prévoit entre autres que : « l'organisation est une personne morale, conformément à la législation de l'Etat où elle a son siège »¹⁰. En justifiant la nécessité de l'élaboration de la Convention de Budapest, on remarquait que cette disposition détermine le statut juridique des organisations économiques interétatiques d'une manière plutôt caractéristique pour les organisations dont les membres sont non des pays mais des entreprises d'Etat. De cette façon, l'article IV de la Convention ne fait donc pas référence à la législation de l'Etat où l'organisation a son siège. Il semble néanmoins qu'en analysant le statut juridique d'une organisation particulière, cette législation ne peut pas être négligée. Chaque organisation doit jouir des droits garantis par la Convention, mais rien ne s'oppose à ce qu'elle ne puisse pas jouir d'autres droits résultant de la législation nationale. Cette possibilité n'est pas éliminée par le fait que les organisations sont sujets du droit national des pays membres en vertu des dispositions de la Convention donc en vertu du droit international.

En considérant le problème de la capacité juridique de l'organisation sur le plan national, il faut aussi rappeler que leurs statuts déterminent les limites de leur capacité juridique en prévoyant par exemple que l'organisation en tant que personne morale peut acquérir des droits et entreprendre des engagements nécessaires à l'exécution de leurs tâches¹¹ ou que l'organisation peut acquérir des droits à caractère patrimonial

⁸ Journal des Lois 1948, n° 39, texte 286.

⁹ Journal des Lois 1960, n° 35, texte 199.

¹⁰ *Podstawowe dokumenty RWPG i organizacji wyspecjalizowanych* [Les documents fondamentaux du C.A.E.M. et des organisations spécialisées], choix et commentaire B. W. Reutt, Warszawa 1972, p. 340.

¹¹ Voir art. I al. 3 des Statuts. d' «Intermetal», Z. M. KLEPACKI, *Organizacje międzynarodowe państw socjalistycznych* [Les organisations internationales des pays socialistes], Warszawa 1981, p. 586.

et entreprendre des engagements « nécessaires à la réalisation des tâches résultant de sa compétence »¹².

En analysant la position juridique des organisations sur le territoire des pays membres, il faut se rendre compte qu'elles doivent être considérées non seulement dans le contexte de l'article IV de la Convention de Budapest mais aussi dans le contexte de leurs statuts et des dispositions de la législation des pays de leurs sièges. On ne peut pas également exclure que dans l'avenir des accords seront conclus entre ces organisations et les Etats de leurs sièges. Un exemple adéquat peut constituer l'accord du 7 décembre 1961 conclu entre le C.A.E.M. et le gouvernement de l'U.R.S.S. sur les règlements des modalités liées au siège en U.R.S.S. des institutions du Conseil¹³.

Les autres dispositions de chapitre II de la Convention (les articles V—X) définissent les privilèges et les immunités de l'organisation. L'article V prévoit que les bâtiments de l'organisation ainsi que ses archives et documents, y compris la correspondance courante, sont inviolables indépendamment du lieu où ils se trouvent. L'inclusion dans la Convention d'une telle disposition signifie un accroissement considérable de la protection accordé aux bâtiments de l'organisation. Conformément à l'article II pt 5 de l'Accord de Varsovie sont inviolables uniquement les archives et les documents de l'organisation ainsi que les pièces servant à leur dépôt.

La question d'inviolabilité des bâtiments de l'organisation était l'une des matières controverses. Certains délégations et particulièrement la délégation tchécoslovaque étaient lors des négociations sur la Convention de Budapest d'avis qu'il ne serait pas utile d'accorder une inviolabilité aux bâtiments de l'organisation dans une telle envergure.

L'immunité juridictionnelle de l'organisation a été également étendue. L'article VI de la Convention statue que le patrimoine et les biens actifs de l'organisation jouissent de l'immunité contre toute forme d'ingérence administrative judiciaire. L'organisation peut toutefois renoncer à l'immunité.

Les conditions adéquates pour le déploiement de son activité sont assurées à l'organisation grâce à la dispense des impôts et des taxes (art. VII), dispense du contrôle financier (art. VIII) et l'accord des facilités en matière de communication non moins favorables que celles dont jouissent les représentations diplomatiques dans les pays membres de la Convention (art. IX).

A la fin du Chapitre II de la Convention se trouve une disposition déterminant les règles de l'édition et de diffusion des publications de presse

¹² Voir art. I al. 4 des Statuts de l'Organisation pour la Collaboration dans l'Industrie des Roulements à Bille, Z. M. KLEPACKI, *op. cit.*, p. 574.

¹³ *Osnovnye dokumenty SEV*, vol. 2, Moskva 1983, pp. 483—488.

par les organisations. En poursuivant une activité d'édition l'organisation est tenue à respecter la loi de l'Etat où elle a son siège.

Le Chapitre III de la Convention, intitulé «Les représentants des pays», comporte deux articles. Le premier d'eux — l'article XI définit les privilèges et immunités dont jouissent les représentants des pays. Conformément à l'article I lettre e de la Convention, cette notion est applicable aux :

1. représentants des pays membres dans les organes représentatifs de l'organisation,
2. membres des délégations représentant les pays membres aux sessions des organes représentatifs,
3. observateurs.

L'analyse des dispositions de la Convention permet de distinguer encore une catégorie des représentants des pays qui sont : « les représentants des pays à l'organe représentatif principal de l'organisation ».

Les représentants des pays ne peuvent être ni arrêtés ni détenus. Ils jouissent de l'immunité judiciaire et administrative à l'égard de toutes les activités qu'ils entreprennent en tant que représentants. Ils jouissent aussi de l'inviolabilité de correspondance et de documents, des dispenses en matière de douane et des taxes à l'égard des objets destinés à l'usage personnel et professionnel, de la dispense du contrôle douanier du bagage personnel, de la dispense des impôts directs et des impôts sur le salaire qui leur est versé par l'Etat qu'ils représentent ainsi que de la dispense des servitudes personnelles¹⁴.

Les représentants des pays à l'organe représentatif central de l'organisation jouissent en plus des privilèges et immunités diplomatiques.

Les dispositions réglant le statut juridique des représentants des pays à l'organisation comportent à la fin une disposition prévoyant la possibilité pour l'Etat de renoncer à l'immunité de son représentant. Cette disposition statue d'une façon expresse que les privilèges et les immunités dont jouissent les représentants des pays leur sont accordés uniquement dans l'intérêt du service.

On peut remarquer qu'en comparaison à l'Accord de Varsovie, la Convention a d'une manière considérable élargi l'étendue des privilèges et immunités dont jouissent les représentants des pays. L'ensemble des destinataires de la notion « représentants des pays » a été également significativement élargi, car conformément à l'article I lettre e de la Convention il comprend aussi les observateurs. Le problème du statut juridique des

¹⁴ La dispense des impôts directs et des taxes sur le revenu ainsi que la dispense des servitudes personnelles est accordée aussi aux membres de la famille accompagnant le représentant du pays s'ils ne sont pas citoyens de l'Etat du siège de l'organisation et ne résident pas dans cet Etat d'une façon permanente.

observateurs a été d'ailleurs l'un des plus discutés. Le consentement pour que la Convention soit applicable aux représentants des pays n'étant ni parties à elle ni membres des organisations de branche ne fut pas exprimé par toutes les délégations. La prédominante fut cependant l'opinion que le problème des observateurs ne peut pas être négligé par la Convention.

L'analyse des dispositions contenues au Chapitre III de la Convention mène à la conclusion que les privilèges et les immunités qui y sont accordés sont analogues à ceux qui sont garantis par la Convention sur la capacité juridique, les privilèges et les immunités du C.A.E.M. Il n'y a également aucun doute que la formulation de ces dispositions a été faite à la base des dispositions de la Convention sur la représentation des pays dans leurs relations avec les organisations internationales à caractère universel, signée à Vienne en 1975.

La Convention de Budapest ne fait cependant pas de distinction entre les représentants permanents et les autres représentants des pays aux organisations. Il faut noter que lors des travaux liés à l'application de la Convention les experts roumains ont communiqué aux experts d'autres pays, qu'en rapport à l'article I lettre a de la Convention, la partie roumaine traitera la notion « les représentants des pays » comme adressée aux représentants permanents des pays à l'organisation. La Roumanie bien que n'étant pas partie à la Convention est cependant membre de la plupart d'organisations auxquelles pourrait s'appliquer la Convention, ainsi donc son point de vue influence fortement le processus d'application de la Convention.

Le Chapitre IV traite des « fonctionnaires ». Conformément à l'article I lettre f, cette catégorie comprend les employés de l'organisation qui en vertu de la décision de son organe représentatif y ont été attribués et cités dans la liste des fonctionnaires portée par l'organisation à la connaissance des pays membres. La Convention introduit aussi la notion de « fonctionnaire principal de l'organisation », c'est-à-dire de chef de l'organe administratif et exécutif, désigné à ce poste par un organe représentatif compétent.

Les fonctionnaires de l'organisation jouissent de l'immunité juridictionnelle sur le plan judiciaire et administratif. Cette immunité s'applique à toutes les activités qu'ils entreprennent en tant que fonctionnaires. Ils sont également dispensés de servitudes personnelles, d'impôts directs et taxes sur le salaire et autre rémunération versée par l'organisation ainsi que dispensés de taxes de douane et taxes relatives aux objets à usage personnel. Le fonctionnaire principal de l'organisation jouit également des privilèges et immunités diplomatiques.

Une attention particulière mérite l'alinéa 4 de l'article mentionné, déterminant les principes des rapports mutuels entre les fonctionnaires et les organes des Etats dont ils sont les citoyens ou sur le territoire desquels

ils résident d'une façon permanente. Il en résulte que le fonctionnaire principal de l'organisation jouit des privilèges et immunités qui lui sont garantis en vertu de la Convention également dans l'Etat dont il est le citoyen ou sur le territoire duquel il réside d'une façon permanente. Les autres fonctionnaires jouissent dans ces rapports uniquement de l'immunité juridictionnelle sur le plan judiciaire et administratif à l'égard des activités entreprises en tant que fonctionnaires.

La Convention prévoit aussi la possibilité de renonciation par le fonctionnaire principal de l'organisation à l'immunité accordée à un autre fonctionnaire quelconque. Le droit de renoncer à l'immunité du fonctionnaire principal appartient à l'organe qui l'a désigné à ce poste.

En comparant les dispositions de la Convention en matière de la position juridique des fonctionnaires de l'organisation aux dispositions respectives de l'Accord de Varsovie, on peut admettre que les immunités accordées aux fonctionnaires ont été considérablement élargies, car ceux-ci ont été dispensés de responsabilité judiciaire et administrative même à l'égard de l'Etat dont ils sont les citoyens. L'Accord de Varsovie ne prévoyait pas en plus aucuns privilèges et immunités supplémentaires pour les fonctionnaires principaux de l'organisation.

Les dispositions concernant les fonctionnaires ont fait également l'objet des controverses importantes. Certaines délégations ont surtout critiqué la proposition d'accorder des privilèges et immunités diplomatiques aux fonctionnaires principaux de l'organisation. On a remarqué qu'un tel règlement aurait trop extensivement augmenté le nombre des personnes jouissant du statut diplomatique. On a également indiqué que les fonctionnaires principaux de l'organisation ne devraient pas jouir d'un tel statut à l'égard de leur propre pays (des directeurs ou des vice-directeurs des organisations de branche sont en plupart les citoyens des pays sur le territoire desquels ces organisations ont leurs sièges permanents). Enfin, on a agréé que l'étendue des privilèges et immunités des fonctionnaires devrait être considérablement élargie tout en conservant leur caractère de connexion aux fonctions réalisées.

Les dispositions générales contenues au Chapitre V engagent l'Etat du siège à créer des conditions adéquates pour l'exercice par les représentants des pays et les fonctionnaires de l'organisation de leurs fonctions (art. XV) et les organisations et personnes jouissant des privilèges et immunités — à respecter la loi de l'Etat partie à la Convention sur le territoire duquel ils siègent ou résident (art. XVI).

Le Chapitre VI comprend les dispositions finales réglant les questions liées à la signature, l'accès, la ratification et l'entrée en vigueur de la Convention ainsi qu'aux modifications qui peuvent y être portées et le temps de sa validité (pour une période indéfinie). Il prévoit aussi la possibilité

de la dénonciation de la Convention et confie au Secrétariat du C.A.E.M. les fonctions de son dépositaire.

L'analyse des dispositions les plus importantes de la Convention nous permet de formuler quelques conclusions générales. Premièrement, on peut constater que l'implémentation des dispositions de la Convention signifiera non seulement l'uniformisation du statut juridique des organisations de branche fonctionnant dans certains domaines de la coopération mais aussi un élargissement considérable de leurs privilèges et immunités. Une comparaison avec les dispositions de l'Accord de Varsovie démontre que le nombre des sujets jouissant de la protection (par exemple : les observateurs) a été considérablement accru et que les organisations, leurs fonctionnaires et les représentants des pays ont été munis de privilèges supplémentaires.

En second lieu, l'adoption de la Convention signifie en pratique que le statut juridique des organisations de branche a été rendu égal au statut juridique du C.A.E.M. — organisation de base dans le système des organisations économiques internationales des pays socialistes. Là, il faut ajouter une troisième remarque que lors de l'élaboration de la Convention de Budapest on prenait largement en considération les dispositions de la Convention sur la capacité juridique, les privilèges et les immunités du Conseil d'Assistance Economique Mutuelle. On peut aussi mentionner qu'on s'appuyait aussi sur la Convention sur les privilèges et les immunités des Nations Unies, la Convention sur les privilèges et immunités des organisations spécialisées de l'O.N.U. et, en matière de définition du statut juridique des représentants des pays, aussi sur la Convention en matière de la représentation des Etats dans leurs rapports avec les organisations internationales à caractère universel.

Quatrièmement, l'adoption du texte de la Convention fut le résultat des négociations acharnées durant lesquelles des divergeances d'opinion considérables sont apparues. Malgré un compromis réalisé, ces divergeances influencent d'une manière importante le processus d'application de la Convention.

Cinquièmement, enfin, le point de vue de la délégation roumaine a eu une importance significative aussi bien pour les négociations que pour le processus de d'application de la Convention. Bien que la Roumanie s'est retirée des négociations en ne voulant pas perturber les travaux sur la Convention, elle est toutefois membre de la plupart des organisations auxquelles pourrait s'appliquer la Convention. L'attitude de la Roumanie doit ainsi être prise en considération lors de l'application de la Convention.

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Comme on l'a déjà mentionné au début, la première organisation qui a entrepris des actions en vue de l'application à son égard de la Convention

de Budapest fut l'Organisation pour la Collaboration dans l'Industrie des Roulements à Bille. Déjà en juin 1984, la Direction de cette organisation, à sa 46-ème session a été informée qu'en principe tous les pays membres consentent à signer un protocole spécial à l'accord sur la création de l'O.C.I.R.B. Ce protocole, dont le projet a été élaboré par le Secrétariat du C.A.E.M., devait être le document de base pour appliquer à l'O.C.I.R.B. la Convention du Budapest. Un protocole semblable a été élaboré en 1985 par le Bureau du Parc Collectif des Wagons de Marchandise.

Les protocoles mentionnés n'ont pas cependant été signés par les pays membres de l'OCIRB et de PCWM, car la délégation tchécoslovaque avait proposé que certaines réserves et remarques qu'elle avait formulées soient considérées dans le cadre des Consultations sur les Problèmes Juridiques du C.A.E.M. Les Consultations ont confié la préparation des documents adéquats à un groupe d'experts composé des délégations de la Bulgarie, Hongrie, R.D.A., Roumanie, Pologne, U.R.S.S. et Tchécoslovaquie.

En considérant le fait que la grosse majorité des organisations citées à la résolution 95 de la session du Comité Exécutif n'appartient pas à la catégorie des organisations dont tous les membres sont parties à la Convention et aucune d'elles n'est pas une organisation, dont les documents de base auraient prévu l'application de la Convention à son égard, les travaux du groupe d'experts ont dû se concentrer sur la forme de consentement par les pays membres d'une organisation donnée à l'application de la Convention de Budapest à son égard. Il s'agissait donc de la situation prévue à l'article II lettre b de la Convention. On a adopté que la forme la plus adéquate d'un tel consentement des pays membres serait un protocole au document à base duquel l'organisation donnée a été créée. Ainsi, l'effet de travail de ce groupe d'experts fut l'élaboration de projet d'un tel document. Il faut encore mentionner que vu la composition différente des organisations on a élaboré deux projets de protocole — l'un pour les organisations dont les membres sont uniquement les Etats parties à la Convention et l'autre pour les organisations dont les membres sont également des Etats tiers. Les protocoles élaborés ont, bien sûr le caractère d'un modèle type et leur texte peut varier selon les dispositions du document de base et du statut de l'organisation particulière¹⁵.

L'élaboration des protocoles mentionnés est sans doute une étape importante dans le processus de d'application de la Convention de Budapest. Il

¹⁵ Le projet du protocole modèle au document de base de l'organisation, dont les membres sont non seulement des Etats parties à la Convention, a été agréé par les experts en février 1986. Jusqu'au mois de mai 1986 presque tous les pays qui ont pris part aux négociations, y compris la Roumanie, ont accepté ce protocole. Jusque-là, seulement la Bulgarie et la R.D.A. n'ont pas communiqué leur avis.

faut aussi se rendre compte que ce n'est que la première étape de ce processus. Les travaux liés à sa continuation devraient être actuellement transférées par les Consultations Juridiques du C.A.E.M. aux organisations intéressées.

Le déroulement des négociations sur la Convention et sur les protocoles aux documents de base permet de supposer que la question d'applicabilité de la Convention aux 10 organisations économiques interétatiques fonctionnant dans certains domaines de coopération, citées dans la résolution de la 95-ème session du Comité Exécutif ainsi qu'à « Agromasz » et la Commission Internationale pour la Coopération des Pays Socialistes en matière de Technique de Calcul sera bientôt. On peut aussi s'attendre que ceci arrivera après d'autres négociations, menées non dans le cadre des Consultations, mais dans le cadre de ces organisations.

Interpretation of the International Covenant on Civil and Political Rights in the Light of Reports of the Human Rights Committee

by ANNA MICHALSKA

Introduction

In 1986, there are three important anniversaries to celebrate in the fields of human rights protection. 20 years ago, the UN General Assembly unanimously voted the two International Covenants on human rights. It is now ten years since these international instruments have entered into force. Similarly, ten years ago the Human Rights Committee was instituted with the charge of implementation of the International Covenant on Civil and Political Rights [further — the Covenant]. By now, the Covenant has achieved 80 instruments of ratification, thus more than a half of United Nations Member-States have undertaken the international obligations provided for in this treaty.

The object of this Article is to present a kind of outcome, to try to assess some aspects of the Human Rights Committee's activities. The Committee submits annual reports on its work to the UN General Assembly, and these reports will constitute a basis for our considerations.¹ In reports the Committee pronounces on methods and scope of implementation of obligations binding on States under the Covenant. In the course of performing control duties, the Committee interpretes in fact the provisions of the Covenant. It is not, to be true, a kind of interpretation legally binding on States-Parties to it. However, its role in uniforming measures of interpretation the human rights policy is not negligible. A standpoint of the Committee has its effect, in a bigger or lesser degree, onto States' activities. We should try to present some tendencies and directions in interpretation of

¹ *Report of the Committee on Human Rights. General Assembly Official Records: Thirty-Second Session, Supplement No. 40/A/32/44.* This is the first report, published in 1977. The following reports were published as Supplement No. 40, and will be quoted below as *Report....* with indication of a year.

the Covenant provisions, particularly those which in the Author's view have the stable character.

Before embarking on the task as defined in the foregoing, it seems necessary to present briefly the competence and the principles of functioning of the Human Rights Committee, both having their place in the Covenant and in the Optional Protocol annexed to it. So far, the question has not been touched upon in Polish literature and would serve as a kind of introduction to the main subject.

I. Competence of the Human Rights Committee

1. Election and Composition of the Committee

The Human Rights Committee (called further "the Committee" consists of 18 Members who are nationals of States-Parties to the Covenant. They should be of "high moral character and recognized competence in the field of human rights". The Covenant provides for the participation in the Committee of some persons having legal experience.

Members of the Committee are elected and serve in their personal capacity, not as representatives of States, which nationals they are. Every Member before taking up his duties makes a solemn declaration that he will perform his functions impartially and conscientiously.

There are two categories of organs in charge of supervising implementation of human rights policy by States. They can act at universal or regional level. Members of the organs of former category act as representatives of States, members of the organs belonging to the latter perform their duties in their personal capacity. For example, the control over observance of the International Covenant on Economic, Social and Cultural Rights is performed by the UN Economic and Social Council, members of which are States. The control over carrying out regional treaties belongs, in principle, to the organs, which members act independently of States; in certain circumstances however, an organ consisting of representatives of States takes part in this control. As candidates for the Members of the Committee, are proposed by the States-Parties only their nationals. Each State Party may nominate not more than two persons. Such person can be eligible for renomination. The election is held at the meeting of the States-Parties convened by the UN Secretary General, at the headquarters of the United Nations. For quorum, the majority of two-thirds of States-Parties is needed, and the voting is secret. The persons elected to the Committee are those nominees who obtained the largest number of votes and an absolute majority of the votes of the representatives of States-Parties present and voting. The Committee may not include more than one national of the same

State. The Members are elected for a term of four years. They are eligible for reelection.²

The Committee meets normally at the Headquarters of the UN, or at the UN Office in Geneva. It elects its officers for a term of two years and establishes its own rules of procedure. Two provisions of the rules are contained in the very Covenant, that is: quorum that consists of 12 Members, and the rule of making decisions by a majority vote of the members present and voting. According to the Covenant, first elections have taken place 6 months after its entry into force. The Committee started its work in 1977.

2. Measures of International Control

The Committee has the competence to study reports submitted by States-Parties, to receive and consider communications from States, and to receive and consider communications from individuals, subject to States' jurisdiction.

The Reports are the obligatory measures of control. Appropriate provisions begin to be binding on States the following day after the Covenant has entered into force in respect of that State. The other two measures (communications) are of optional character. The State-Parties to the Covenant

"undertake to submit reports on the measures they have adopted, which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights" (Art. 40, para. 1).

The reports should indicate the factors and difficulties affecting the implementation of the Covenant. They are submitted within one year following the entry into force of the Covenant for the State Party concerned, and after there, whenever the Committee so requests.

In 1977, during its first session, the Committee adopted the General Guidelines, in which requirements as to substance and form of reports were defined.³ They should contain informations on the following questions: a) whether any of the rights referred to in the Covenant are protected either in the Constitution or by separate "bill of rights"; b) whether the provisions of the Covenant can be invoked and directly enforced before courts, other tribunals or administrative authorities or whether they have to be transformed into municipal laws or administrative regulations; c) what judicial, administrative or other competent authorities have jurisdiction in the field of human rights; d) what remedies are available to an individual

² It is worthy to add that in 1985 the President of the High Administrative Court, Adam Zieliński, was elected to the Committee. He is the first Pole to be a Member of the Committee.

³ General Guidelines regarding the Form and Contents of Reports from States-Parties under Article 40 of the Covenant. *Report.... 1977. Annex.*

who claims that some of his rights have been violated; e) what other measures have been taken to ensure implementation of the provisions of the Covenant.

Apart from these general rules, the Committee has formulated further requirements addressed to States. Accordingly, the Committee's reports should indicate: a) the legislative, administrative or other measures in force in regard to every right; b) any restrictions or limitations even of a temporary nature imposed by law and practice or in any other way on the enjoyment of the right; c) any other factors affecting the enjoyment of the rights by persons within the jurisdiction of the State; d) any other information on the progress made in safeguarding the enjoyment of the right. A State-Party to Covenant may at any time declare that it

"recognized the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the Covenant" (Art. 41, para. 1).

The system of such communications is binding only among States, that have recognized the competence of the Committee. The provisions, mentioned above, entered into force in 1979. By the end of 1984, the declarations have been made by 17 States.⁴ So far, States have not avail themselves of the possibility of submitting to the Committee communications on violations of human rights by other States. To be strict, we did not find any mention of such communications in the annual reports of the Committee.

A system of communications from individuals is regulated in the Optional Protocol to the Covenant.⁵ It provides that a State-Party

"recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction, who claim to be victims of a violation by that State-Party of any of the rights set forth in the Covenant" (Art. 1).

The Protocol is open for signature and accession by any State which has signed the Covenant, and enters into force after the depositary has received 10 instruments of ratifications. It entered into force in 1976; by the end of 1984 it has been ratified by 34 States.⁶

It is characteristic that States much more willingly accept the system of

⁴ There are: Austria, Canada, Denmark, Ecuador, Finland, Federal Republic of Germany, Iceland, Italy, Luxembourg, Netherlands, New Zealand, Norway, Peru, Senegal, Sri Lanka, Sweden, United Kingdom.

⁵ The Optional Protocol, likewise both Covenants, entered into force in 1976.

⁶ There are: Barbados, Bolivia, Cameroun, Canada, Republic of Central Africa, Columbia, Congo, Costa Rica, Denmark, Dominicana, Ecuador, Finland, France, Iceland, Italy, Jamaica, Luxembourg, Madagascar, Mauritius, The Netherlands, Nicaragua, Norway, Panama, Peru, Portugal, Grenada, and Islands of Saint Vincent, Senegal, Surinam, Sweden, Trinidad and Tobago, Uruguay, Venezuela, Zaire, Zambia.

communications from individuals than international control based on communications from individuals, that will be discussed below.

3. Procedure and Conclusion of the Control Proceedings

Apart from the above mentioned decisions on time limits of the reports being submitted to the Committee, the Covenant does not regulate in details mode of its consideration, it provides only that the reports are submitted to the UN Secretary General, who transmits them to the Committee. The Secretary General can also, after consultations with the Committee, transmit to the specialized agencies concerned copies of such parts of the reports as may fall within their competence. The General Guidelines mentioned above, voted by the Committee, provide that copies of principal legislative and other texts referred to in the reports should be enclosed thereto. The texts should be made available to Members of the Committee.

Nevertheless, the reports should be prepared in detail and clearly enough in order to prevent the Committee from requesting additional materials when deciding on the scope of the compliance with the provisions of the Covenant. The Committee reserves itself to turn to a State with a request for additional report. In the last part of Regulation under consideration here, the opinion has been expressed, that it would be possible to

“develop a constructive dialogue with each State-Party in regard to the implementation of the Covenant and thereby contribute to mutual understanding and peaceful relations between nations, in accordance with the UN Charter.”

The Committee studies the reports and submits to States “its reports and much general comments as it may consider appropriate”. The Committee can also transmit the comments to the UN Economic and Social Council. The States-Parties may, for their part, submit to the Committee their own observations on any comments (Art. 40, paras 4 and 5). Mode of proceeding with communications on violations of human rights is regulated in a very detailed way by the Covenant; thus we will present basic informations only...

If a State-Party to the Covenant considers that another State-Party is not giving effect to the provisions of the Covenant, it may, by written communication, bring the matter to the attention of that State-Party. Within three months the receiving State should afford the State which sent the communication

“an explanation or any other statement in writing, clarifying the matter which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending, or available in the matter” (Art. 41).

If the matter is not adjusted to the satisfaction of both Parties concerned, either State has the right to refer the matter to the Committee.

The Committee deals with a matter referred to it only after it has ascertained that "all available domestic remedies have been invoked and exhausted" provided that the application of the remedies is unreasonably prolonged. The Committee examines communications at closed meetings.

The Committee can offer its good offices to the States with a view to "a friendly solution of the matter on the basis of respect for human rights and fundamental freedoms are recognized in the Covenant".

If this solution is reached, the Committee confines its report to a brief statement of the facts and of the solution reached. If the solution is not reached, the Committee prepares a summary of the facts and includes the written and oral submissions made by the States-Parties. In every matter, the report shall be communicated to the States-Parties concerned. If a matter referred to the Committee is not resolved to the satisfaction of the States-Parties concerned, the Committee may, with the prior consent of the States-Parties, appoint an *ad hoc* conciliation commission. The good offices of the commission are made available to the States-Parties with a view to an amicable solution of the matter, on the basis of respect for the human rights embraced by the Covenant. The Commission consists of five persons acceptable to the States-Parties concerned, and they serve in their personal capacity. If a solution is reached, the Commission confines its report to a statement of the facts and the solution. If not, the report of the Commission embodies

"its findings on all questions of facts relevant to the issues [...] and its views on the possibilities of an amicable solution of the matter" (Art. 42).

The report contains also the submissions made by the States-Parties concerned. Finally, within three months after the receipt of the report, they can notify the Commission whether or not they accept the contents of the report.

The Secretary General has prepared a draft of detailed rules of procedure relating to communications submitted to the Committee by States.⁷ So far however, no final decision had been adopted.

The Optional Protocol provides for a right of every individual to submit communications. Groups and social organizations are deprived of this right, unlike in some regional treaties on human rights. Any anonymous communication cannot be admitted, nor can the communication be incompatible with the provisions of the Covenant, or made in abuse of the said right (Article 3 of the Covenant). Mode of the examination of communications is, in a detailed way regulated in the Provisional Rules of Procedure, adopted by the Committee in the course of its first sessions.⁸

⁷ CCPR/C/L.2/Add. 1.

⁸ Provisional Rules of Procedure as adopted at the first and second session of the Human Rights Committee, Chapter VII; Procedure for the Consideration of Communication received under Optional Protocol, *Report*.... 1977.

Communications are collected and prepared for further proceedings by the UN Secretary General. He may request clarification from the author of a communication concerning his wish to have his communication submitted to the Committee for consideration. This is a very important clause of the Rules of Procedure; it has to be stressed that communications directed to the Secretary General can be thus analysed under other procedures of control within the UN System.⁹ The Secretary General may request clarifications from the author of a communication, regarding in particular: a) the name, address, age and occupation of the author and the verification of his identity; b) the name of the State-Party, against which the communication is directed; c) the object of the communication; d) the provision of the Covenant which has been allegedly violated; e) the statement of the facts; f) steps taken by the author to exhaust domestic remedies; g) the extent to which the same matter is being examined under another procedure of international investigation or settlement. The Secretary General prepares lists of communications with a brief summary of their contents, and is bound to circulate such a list to Members of the Committee at regular intervals. The full text of any communication shall be made available to any member of the Committee upon his request.

The first stage of control procedure concerns examining the admissibility of the communications. The Rules of Procedure precise the detailed way of the proceedings, formulated in the Optional Protocol (*vide supra*). The Committee examines communications at closed meetings. The Rules indicate circumstances in which a Member of the Committee should not take part in the examination. After the Committee has agreed that the communication fulfills the conditions required, it transmits the communication to the attention of a Party concerned, through the intermediation of the UN Secretary General. The author of the communication is informed on that transmission. In the time limit of three months, a receiving State should submit to the Committee written explanations, clarifying the matter and including reference to domestic procedures and remedies. These records are transmitted to the author of the communication, who has a right to submit additional informations and remarks in the time limit set up by the Committee.

Before making a verdict, the Committee takes into consideration all statements: both from the State and the individual. There is a possibility to create within the Committee a working group to deal with a concrete case. The proceedings may come to an end by issuing a statement which the Committee transmits to both parties to a dispute. Each Member of the

⁹ Cf. A. MICHALSKA, "Kompetencja kontrolna organów ONZ w związku z zawiadomieniem o naruszaniu praw człowieka" [Control Competences of the UN Organs in Connection with Communications on Violations of Human Rights], *Studia Prawnicze*, 1984, No. 1—2, pp. 3—40.

Committee can submit its dissenting opinion and demand that the opinion be joined to the Committee's report. On its part, the Committee includes summary of the activity based on the Optional Protocol.

While the subject of this Article is not a detailed analysis of international control system, of implementation of the Covenant's provisions, nor the assessment of efficacy of that implementation, the above notes might be sufficient to undertake an analysis of some opinions of the Committee on the merits.¹⁰ We should try to present statement on a basis of reports submitted to the Committee by States.

II. Forms of Pronouncements by the Committee

1. General Comments

Provisions of the Covenant cited in the foregoing provide, that the Committee

"transmits its reports and such general comments as it may consider appropriate [...]" (Art. 40, para. 4).

The comments constitute a kind of glossary to the provisions of the Covenant and, at the same time, their interpretation. Some rules applied when formulating general comments has been precised by the Committee. According to them, the comments should: a) foster cooperation among States in implementing the Covenant properly; b) call attention of States-Parties to circumstances and conditions, which should improve the mechanism of submitting reports and implementing the Covenant's provisions; c) stimulate activity of States and international organizations in the field of supporting and safeguarding human rights.

The Committee has admitted a principle, that its comments would relate to following questions: a) monitoring States' duty to submit reports, b) scope and methods of implementation of rights set up in the Covenant, c) interpretation and application of the Covenant's provisions, d) methods of cooperation among States aimed at guaranteeing full implementation of the Covenant's provisions.

Originally, the Committee's general comments concerned chiefly mode

¹⁰ The author discusses the matter in the following articles: "Sprawozdanie jako forma międzynarodowej kontroli nad realizacją prawa człowieka" [Reports as a Form of International Control over Implementation of Human Rights], *Państwo i Prawo*, 1980, No. 5, pp. 58—71; "Skargi państw jako środek międzynarodowej kontroli nad realizacją praw człowieka" [The Interstate Complaints as a Measure of International Control over Implementation of Human Rights], *Państwo i Prawo*, 1982, No. 5—6, pp. 37—47; "Petycje jako środek międzynarodowej kontroli nad realizacją praw człowieka" [Individual Petitions as a Measure of International Control over Implementation of Human Rights], *Państwo i Prawo*, 1983, No. 5, pp. 50—61.

and principles of submitting reports by States. It should be noted, that the Committee has kept confirming its desire to help States as far as needed in discharging of this duty. Consequently, in 1981, general observations were formulated relating to Articles 2—4 of the Covenant.¹¹

The Committee pointed out expressly, that its intention was only to turn the States' attention to some aspects of rights under consideration, any intention aimed at their complete analysis or setting up of any priorities in their implementation was disclaimed. The main purpose was to render experiences of the Committee gathered in examining reports to all the States-Parties. The Committee was going this way to call attention of States on lacks and imperfections of the reports submitted to it. It also suggested some systematization of procedure when submitting reports.¹² The elements described in the above have appeared in the Committee's observations later on.

In 1982 the Committee voted general observations relating to Articles 6, 7, 9, 10, and 20, of the Covenant. Similar observations were made in 1984, in respect of Articles 1 and 14. When preparing its observations the Committee established a working group composed of its Members. Nevertheless, all other members are invited to advance their proposals and comments. The draft prepared by the working group is discussed at a plenary session of the Committee. Final decisions are made by consensus.

The Committee strives to vest its observations with a practical significance, so as to incite the desired reaction and activities of States. As a formal reaction, it is desired, that the States refer in their reports to problems touched upon by the Committee.

According to Article 40, paragraph 5, of the Covenant, States-Parties can submit comments to general observations made by the Committee. So far, however, no State has availed itself of this right. On the other hand, in the course of debates on reports of the Committee in the UN Third Committee, representatives of States referred to the observations many times.¹³ It is noteworthy that the provisions of the Covenant do not impose obligation on States to observe general observations of the Committee. But there should be no doubt, that their aim is to direct activities of States. The Committee, when examining reports by States, refers to its observations and treats them as standards to be followed in States' practice. Although those observations may be not complied with in fact, States take care of referring to them in their reports.

¹¹ *Report...*, 1980, para. 370—383; *Report...*, 1981, paras 380—389; *Report...*, 1982, para. 336—346.

¹² *Report...*, 1981, Annex VII.

¹³ *Report...*, 1984, p. 117.

2. The Committee's Debates on States' Reports

Reports of the States-Parties to the Covenant are discussed by the Committee and debates are summarized in the Committee's reports. In the latter one can read, that "a Member of the Committee asked", "some Members called attention on", or "Members asked for clarification[...]". The opinion formulated during the discussions do not indicate the official stand of the Committee, they constitute the views of its particular Members. However, the role of this kind cannot be neglected as far as the whole process of international application of the Covenant is concerned. In the course of many years the same problems have been raised, the same questions have been asked. In consequence, States were frequently bound to submit answers, clarifications or supplements to their reports. It should be pointed out that in their consecutive reports, submitted every 3 years, States have referred to problems which were previously discussed by the Committee. Observations of the Committee are of a general character. However, during the discussions on reports, Members of the Committee have the opportunity to call States' attention to the particular questions of specific human rights. Unlike general observations, opinions expressed in the course of discussions referred to States identified *ex nomine*. In these circumstances, the Committee may take into account particular social, economic, political, civilisational and cultural conditions, as well as concrete juridical system, in which the Covenant is being implemented. The discussions seem to be an effective measure to influence the practical methods of implementing rights instituted in the Covenant. When seeking the Committee's holdings on interpretation and application of the Covenant, the analysis shouldn't be limited only to the Committee's general observations. It is indispensable to take into account discussions on reports, as well.

III. Interpretation of the Covenant

In describing the Committee's views on the matter, the present writer intends to refer to all general observations made by the Committee. As regards discussions however, only opinions and tendencies of a durable character, capable of being elicited from the majority of reports would be pointed out.

General Principles

Self-determination of Peoples

For the first time, this principle was discussed in 1950, in a particular context of the human rights protection. The UN Economic and Social

Council presented to the General Assembly the first draft of Covenants of human rights, at that time. The following year, the UN General Assembly decided to include right to self-determination to both Covenants, and to place it among general principles, not in a chapter containing a catalogue of human rights.¹⁴

The Political Covenant states, that

"All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development" (Art. 1, para. 1).

The regulation is not univocal enough so as to dispel any possible doubts concerning the holder and content of that right. Going back to the *travaux préparatoires* of the Covenant, it can be clearly seen, that "self determination" has had different meanings and contexts. Hence, the discussions in the Human Rights Commission and the Third Committee do not allow to ascertain the univocal meaning of the expression. Given the fact of an abusive use or even misuse of the notion of "self-determination" in the doctrine, the resort to it cannot bring a satisfying clarification.

In the doctrine, the right to self-determination is defined chiefly by reference to its subject. Generally speaking, two tendencies in the interpretation can be discerned: on the one side — a conception stressing the external aspect of self-determination, on the other — an internal one. Defenders of the first conception argue that only peoples of colonial or dependent territories can be subject to this right. Thus, this is tantamount to right to gain independence and to set up a new State. With the establishment of a new State, the full implementation, or in the words of some writers a "consumption" of the right to self-determination take place. At the same time, the prevailing view holds that this right cannot be interpreted as granting to national and ethnic minorities a right to a secession. It should be pointed out that there is a difference between the right to self-determination by peoples of colonial and trusteeship territories and a right to secession, because in the first case these territories do not form an integral part of States-administrators.¹⁵

Supporters of the right to self-determination in its internal aspect take the position, that the holder of that right is the community of every State, not only the community of colonial or dependent territories. They argue that no international instrument relates the right to self-determination exclusively to colonial peoples. A self-determination in its internal aspect

¹⁴ Resolution 545 (VI). General Assembly Official Records, Sixth Session.

¹⁵ More on this subject: cf J. TYRANOWSKI, "Prawo do samostanowienia a zasada integralności terytorialnej i nienaruszalności granic" [Rights to Self-determination and the Principle of Territorial Integrity and Inviolability of Frontiers], *Państwo i Prawo*, 1978, No. 12, pp. 30—42.

is implemented in a totally different way than in the external one. The former shapes principles regulating reciprocal relations between people of the State concerned and its authorities. A scope of implementation of the right so understood is measured by the extent of guaranteeing the civil and political rights to individuals.¹⁶

The two conceptions should not be opposed, because each of them relates to a different sphere of social relations.

Gradually, a new conception of this right emerges. In a way, it is a sum of the two views having been under consideration in the foregoing. According to it, international norms guarantee the right to self-determination to all peoples and nations, without any difference. Then, the right is capable of being implemented in both internal and external aspect.¹⁷

International instruments adopted within the UNO prior to 1966 and subsequently, linked expressly the right to self-determination with the decolonization process. By and large, the international practice has followed the same direction.¹⁸ Thus, the interpretation of Article 1 of the Covenant by the Committee has made discernible some new tendencies in the matter.¹⁹

The Committee has recognized that the fulfillment of the right to self-determination is the fundamental condition to guarantee and effectively respect individual human rights. In the Committee's view, it is also a condition of promotion and strengthening of these rights. In connection with Article 1, paragraph 1, of the Covenant, which reads, that people

"freely determine their political status and their economic, social and cultural development",

it is demanded by the Committee that States show in their reports what constitutional and political procedure make that right capable of being

¹⁶ Cf. A. CASSESE, "Political Self-determination — Old Concepts and New Developments", in: *United Nations Law and Fundamental Rights*, Alphen aan den Rijn, 1979, Sijthoff and Noordhoff, p. 137 ff. Review of this conception from the Marxist's point of view. B. GRAEFRAETH, "A Necessary Dispute on the Contents of the People's Right to Self-determination", *GDR Committee on Human Rights, Bulletin*, 1981, No. 1, p. 11 and seq.

¹⁷ *The Right to Self-determination. Implementation of United Nations Resolutions*. Study prepared by H. GROSS ESPIELL, E/CN.4/Sub.2/405/Rev.1.

¹⁸ Cf. esp.: The Declaration on the Granting Independence to Colonial Countries and Peoples, adopted by the General Assembly in 1960 (Res. 1514/XV). L. DEMBIŃSKI writes, that since World War II: "The problem of self-determination has been closely linked with the question of colonies, and in such an extent, that those separate consideration was impossible". *Samostanowienie w prawie i praktyce ONZ [Self-determination in the UN Law and Practice]*, Warszawa 1969, p. 38; cf. also L. ANTONOWICZ, "Deklaracja ONZ w sprawie przyznania niepodległości krajom i narodom kolonialnym" [The UN Declaration on the Granting Independence to Colonial Countries and People], *Sprawy Międzynarodowe*, 1961, No. 6, pp. 21—32.

¹⁹ *Report....* 1983, pp. 152—153.

executed. This requirement seems to indicate a tendency to understand the right to self-determination in its internal aspect, as well. This inclination can be seen in discussions concerning reports submitted by States. They were asked, how this right is carried out in the federal structure of Mexico, in what extent Australia grants that right to aborigines. Another theme of vivid discussions was the legal status of peoples in the French territories *d'outre-mer* (in the light of the right to self-determination) and provisions of the French Constitution providing for the indivisibility of the Republic and its territorial integrity.²⁰

The Committee has underlined, that the provision of Article 1, paragraph — 3, imposes the obligation to promote realization of the right to self-determination on all the States-Parties and not only on those, responsible for the administration of non self-governing and trusteeship territories. In the opinion of the Committee, all States should take positive steps to facilitate implementation and observance of that right. These activities must be consistent with the UN Charter and the general international law. In particular, States should abstain from any interference in the internal affairs of other States. It should be underlined, that the standpoint of the Committee on methods and extent of realization of the said provision, has many times been specified in the course of discussions. For example, Members of the Committee have asked a representative of Venezuela for clarification concerning scope of supporting the right to self-determination in other Latin American countries, in South Africa, in the Middle East and in Asia. Representative of Italy has been asked about Italian standpoint as to recognition of right to self-determination of the Palestinians. The Committee was interested in whether Jamaica gave aid to peoples fighting for self-determination, and whether Portugal recognized that right of the Namibians and the Palestinians.²¹ The Committee was also interested in Mexican position concerning the right to self-determination of African and Middle East peoples, and Island position towards the Namibia and the Palestine nations.²² Similar examples can be easily multiplied, it may be added, however, that rights of Palestinians and Namibians were most frequently discussed.

The prevailing view represented within the Committee is, that the subjects of that right to self-determination are dependent nations or nations deprived of statehood. Responsibilities in respect of safeguarding the implementation of the right to self-determination lie on all States-Parties to the Covenant. At the same time, a tendency to treat this right in its internal aspect can be seen mainly in respect of federalist and multinational States.

²⁰ *Report...*, 1983, pp. 13, 29, 74.

²¹ *Report...*, 1981, pp. 10, 25, 59, 68.

²² *Report...*, 1983, pp. 13, 23.

Another interesting drift in the interpretation of Article 1 by the Committee concerns the recognition of a policy of apartheid as incompatible with the right to self-determination. Thus, Italy has been asked what measures it had taken to speed up the elimination of apartheid in South Africa. Sometimes, requirements addressed to States go very far. States are asked, whether formal prohibition has been set up to render impossible financial and economic aid to South Africa, together with a prohibition of private investment and private loans to all economic entities of that country. Many States were asked about their actions in similar matters: Australia — about legislative and administrative measures taken for preventing companies, firms and banks from bringing aid to apartheid régime. France—about making impossible cooperation of its nationals and societies with South Africa, Portugal — about its position towards apartheid, in general.²³

The right to self-determination is linked very closely with a right of free disposal of natural wealth and resources. The Committee pointed out that reports submitted by States should show whether this free latter right was regarded as an element of the former. On account of that, the representative of Nicaragua was requested to make clear whether foreign companies were still exploiting natural resources of this country and the impact of nationalization, land reform and introduction of mixed economy on guaranteeing the right to self-determination. The problems of exploitation of natural resources by foreign societies was put under considerations while Peruvian report was examined. Particular attention was paid to the role of multinational enterprises, in particular whether; and to what extent that cooperation could have negative consequences for the self-determination of Jamaica's nation. Finally, the Committee indicated links between right to free disposal of natural resources and obligation to protect and develop the resources by the same State. This question was raised in connection with nuclear tests.

Another problem has arisen concerning the New International Economic Order in the context of the right to self-determination. Requests on this point were directed to Tanzania and Jamaica, as to consequences would have the institution of the NIEO on implementation of civil and political rights in these countries.

Methods of Implementation of the Covenant (Art. 2)

The Committee recognized that this Article left to the States-Parties freedom of choice of methods to guarantee the observance of rights set up in the Covenant. Similarly, it expressed the conviction that the establishment

²³ *Report...*, 1981, pp. 25, 68; *Report...*, 1983, pp. 29, 42, 74.

of respective constitutional norms and legislation cannot be treated as sufficient for the ensurance of these rights. In the Committee's opinion, obligations on States are not limited only to *respecting* human rights. States are obliged to ensure that all individuals under their jurisdiction have a possibility of undertaking of all appropriate steps, not only in the normative sphere. This view refers to all rights formulated in the Covenant. It has been expressed many times, during the discussions on State's reports.²⁴

In connection with the above conception, the necessity of every individual to be aware of his rights was recognized by the Committee as one of primary importance. The same refers to administrative and judicial organs to which obligations of safeguarding of these rights should be made know. To attain this aim, the text of the Covenant should be published in all official languages used in every State. It should be widely propagated and easily available. It would be desirable that informations on the course and results of cooperation between respective States and the Committee would, at least to some extent, be made know to the public opinion.²⁵

In the course of discussions, the attention of Members was focused on the question of the place of the Covenant in the internal law system and consequences for the methods and the scope of guarantees that the human rights be respected. The question of the place of the Covenant in the internal law system has arisen many times. A tendency to give priority to norms of international law can be gathered from views expressed by Members of the Committee. This inclination is apparent in questions directed to States' representatives. Here are some of them: what is the place of the Covenant in the system of sources of internal law, whether the Covenant has been ratified in form of a special law; whether it has priority over other laws which entered into force prior to the ratification, as well as over those adopted subsequently; what is the relation between the Covenant and the Constitution; whether the internal legal system contains any norms providing for priority of international over internal law in case of conflict; what measures were taken in order to include the provisions of the Covenant in internal law; whether there are any guaranties, that the Parliament does not pass a law contrary to the Covenant; whether the Supreme Court is competent to defer the application of internal law if it is not compatible with the Covenant; whether the Constitutional Tribunal is enabled with the competence to verify internal law from the point of view of its conformity with the Covenant, whether the norms of the Covenant can be invoked before judicial and administrative organs, and whether these organs

²⁴ *Report...*, 1981, pp. 50, 59; *Report...*, 1983, pp. 13, 52, 64, 75.

²⁵ *Report...*, 1981, pp. 118—119.

can apply them directly; whether an individual can initiate a judicial or administrative procedure if — in its opinion — internal norm are contrary to the Covenant or if his rights resulting from the Covenant have been violated. Finally, the kind and form of compensation that an individual is entitled to receive in case of the violation of his rights.

Another subject of interest was the methods of guaranteeing human rights in countries in which the Covenant was not incorporated into the internal law system, or in which the place of the Covenant in the system of sources of law had not been normatively specified. A tendency is discernible that the Covenant be directly applied by Courts and administration independently of the methods adopted by the State concerned to transform international law into internal law. Members of the Committee asked, what measures were granted to individuals in case of contradiction between internal law and the Covenant. Another point of interest was the guaranties of observance of the Covenant by State authorities, including security authorities.

As concerns the interdiction of dissemination, the interest of the Committee was focused on the legal status of aliens and naturalized persons. Measures undertaken to prevent the discrimination of emigrants, refugees, in particular political, foreign season workers. Measures adopted in order to prevent discrimination in the field of employment and residence, were the object of special attention. Less attention was paid to factual and legal situations of ethnic minorities. The Members of the Committee were also interested in economic conditions which enable all persons subject to jurisdiction of a given State to enjoy the rights provided for by the Covenant. One of the most frequent questions was that of publication and of dissemination of the provisions of the Covenant.²⁶

Equality of Rights of Women and Men (Art. 3)

The implementation of this principle cannot, according to the Committee, consist in introducing appropriate norms into the internal legal order. It is necessary that each of States undertakes "constructive" measures to guarantee practical possibilities of enjoying rights flowing from the principle of equality of women and men. The Committee decided to lay stress on information about factual position of women in the different fields of social life. The Committee takes into consideration that legislative and administrative measures in matters not covered by the Covenant may have unfavourable impact on the implementation of this principle.²⁷ For that reason, the

²⁶ *Report...*, 1981, pp. 10, 35, 41, 46, 53, 59, 69; *Report...*, 1983..., pp. 13, 23, 30, 53, 64—65, 74—75.

²⁷ As an example, immigration law frequently differentiating rights of women and men has been given. As a rule, it has the influence on limitations, for example, women's right to get married with aliens.

Committee points out the necessity of special control over norms of internal law, introducing any kind of differentiation on account of the sex. The Committee has called on States to set up methods of safeguarding equality of rights in and, for that purpose, to strengthen international cooperation in exchange of information and experiences.²⁸

In the course of considering reports submitted by States, the attention of the Committee concerned mainly on material guaranties of the principle of equality of rights. Many times, an opinion has been expressed that a constitutional norm providing for this principle is not in itself a sufficient tool to set up the equality in practice. Members of the Committee have asked for information on proportions between men and women in the administrative organs of States, in diplomacy, education and free professions. They have been interested in whether service in armies and policies in some countries is accessible for women. The discussions concentrated on measures set up to allow women indetical access to all kinds of education, professions, and finally — what kind of economic and social aid to mothers and pregnant women is available. Particular attention has been paid to the functioning of a right to equal pay for working women and men.²⁹

Limitations to Human Rights (Art. 4)

In its general observations, the Committee lay stress on a necessity of fulfilling by States all obligations relating to the establishment of state of emergency. Meanwhile, it is very difficult to ascertain in some cases, whether the state of emergency has been proclaimed in conformity with the Covenant's provisions. There are cases when reports leave out the question whether other States-Parties have been informed on that matter.

The Committee points out that the measures provided in Article 4 are of exceptional and temporary character. They may be applied only when existence of a nation has been threatened. At the same time there is a special duty to ensure the enjoyment of the rights which have not been limited or suspended in the aftermath of the law of emergency.³⁰ The Committee expressed its concern that constitutions of some countries admit a suspension or other restriction of human rights in much broader extent than the Covenant allows. The most vigorous criticism has been directed towards States which perceived in restriction of human rights the most efficient instrument of protection of public order and national security. The States were asked which organs of States are authorized to appraise, whether a given situation "threatens the existence of the nation". Many times it has been underlined

²⁸ Report..., 1981, p. 119.

²⁹ Report..., 1981, pp. 10, 26, 36, 41, 47, 53, 60, 70; Report..., 1983, pp. 14, 23, 43, 53, 63, 75, 87.

³⁰ Report..., 1981, p. 120.

that the obligation to let other States know about the proclamation of state of emergency cannot be treated only as a mere formality.

Members of the Committee have pointed out that emergency measures should be applied with the utmost caution so that limitations to human rights be of the least extent. States were asked about measures to ensure those rights that had not been banned in the course of a state of emergency, as well as about the competence of military tribunals. Many doubts have been raised in relations to limitations to human rights in case of natural disasters.

States were inquired about a relation between provisions concerned with a fight against terrorism and the establishment of a state of emergency. Another question related to the very character of a state of emergency, which in some cases resemble to an armed conflict and, consequently, the Geneva Conventions on humanitarian law should be applied to full extent.

A Catalogue of Human Rights

Rights to Life (Art. 6)

Special attention ought to be paid to the interpretation of this right made by the Committee for two reasons. First, in this case the interpretation of the Covenant by the Committee does not conform with the literal meaning of the said provision. Second, general observations on this subject have met with the opposition of two Members of the Committee, who called for a lack of its law-making competence. The last question will be referred to at the end of the present article.

In its general observations adopted in 1982, the Committee emphasized that the right to life is the paramount and most fundamental right of human beings. It cannot be therefore subject to any restrictions. This right is understood both as a "right to life" and as a "right to living".³¹ When considering "right to life" i.e. right to psycho-physical existence, the Committee has been interested in problems of death penalty and protection of an individual from arbitral deprivation of life. According to the Committee's opinion, the death penalty can be resorted to only in case of "most serious crimes", and this expression should be strictly interpreted. All steps taken by States to restrict the death penalties will be welcomed by the Committee as a progress in the enjoyment of the right to life.³²

Internal laws should univocally describe circumstances in which an

³¹ *Report...*, 1981, pp. 11, 26, 42, 47, 52, 60, 70; *Report...*, 1983..., pp. 63, 65, 87; *Report...*, 1984, p. 14, 22.

³² Cf. on the subject: A. MICHALSKA, "Prawo do życia w traktatach międzynarodowych" [Right of Life in International Conventions], *RPE i S*, 1984, No. 3, pp. 73—94.

individual could be deprived of his life as a result of activities of State organs. Independently from normative regulations, the State should undertake any other necessary measures to eliminate acts of arbitral deprivation of individual's life by its organs. Such measures are closely linked with activities aimed at preventing disappearances of individuals, which most frequently finish by arbitral deprivation of life, without any judicial procedure.³³

The Committee noted that the Article 6 of the Covenant was frequently interpreted in a too restrictive manner. The Article provides not only for the obligation to *respect* the right to life, but also an obligation to *ensure* it. It means that States should undertake all positive steps to, generally speaking, enlarge a life expectancy. In the view of the Committee, this question relates to a death rate of new-born babies, the elimination of malnutrition and epidemic diseases.³⁴

The discussion concerning reports submitted by States has concentrated on three questions: death penalty, arbitral deprivation of life and scope of positive obligations of States. While more and more banned, the death penalty recede into the background. The attention of the Committee was fixed on perspectives and expectancies of furthering its elimination from internal laws. In the discussions on arbitral deprivation of life, the necessity of univocal legal regulations providing for conditions and scope of use of arms by the police and the army was underlined. The Committee indicated that the rule of proportionality of means and ends should be observed.

As to the creation of adequate living conditions, the following questions drew the attention of the Members of the Committee: measures undertaken by State to lower a death ratio of new-born, fighting of epidemic diseases and an improvement of health conditions, in protection, fighting drug abuses, eliminating illiteracy and unemployment and, finally, acting in favour of general improvement of standards of living.³⁵

Prohibition of Tortures and Other Inhuman Treatment (Art. 7)

In the general observations the Committee has made it clear that the purpose of that provision is the protection of integrity and dignity of the individual. This Article should be interpreted in the light of general provisions of Article 2, providing that a State is obliged to ensure effective protection against torture and other inhumane treatment. An appropriate system of

³³ The matter is of a situation, while an individual is arrested — is a rule legally — and subsequently there is any further mention about his fate.

³⁴ *Report...*, 1982, pp. 93—94.

³⁵ *Report...*, 1981, pp. 11, 27, 36, 42, 47, 54; *Report...*, 1983..., pp. 14, 43, 54, 66, 76; *Report...*, 1984, pp. 15, 22, 36.

control over organs applying law ought to be instituted. Moreover, the victims of torture should have access to juridical protection, enabling them to get satisfaction and damages. A great deal of attention is paid to prisoners, who are specially exposed to torture and other inhumane treatment.

Protection of individuals deprived of liberty should go beyond a scope of torture understood in a traditional way. Categorizing different forms of treatment under the notion of "torture" depends also on a degree of security and goals. Persons deprived of liberty should be treated with humanity and with respect for the inherent dignity of human person.

The Committee points out that it is completely prohibited to apply any corporal punishment, as well as flogging, being sometimes part of pedagogical processes. It seems interesting that the Committee univocally expressed the opinion on obligation of States to guarantee legal protection from inhuman treatment by all persons, not only those who acted as representatives of States organs. Prohibitions set up in Article 7 relates also to medical or scientific experiments that cannot be carried on without consent of a person concerned. Those who are not able to express their will freely are under special protection.³⁶

As for as the legal situation of prisoners is concerned, States were asked whether they apply "Standard Minimum Rules for the Treatment of Prisoners", adopted by the UN General Assembly. The main point of interest were forms of supervision over performing of penalties, principles of classification of prisoners, their rights, living and social conditions when in prison, scope and principles of post-penitentiary help. The Committee discussed thoroughly legal regulation of medical experiments and psychiatric care, both being not appropriately regulated in many internal laws.³⁷

Liberty and Security of Person (Art. 9)

General observations indicate that States pay to little attention to this question. According to Committee's view, provision stating that

"no one shall be deprived of his liberty except on such grounds and in accordance with such provisions as are established by law",

relates to all forms of coercive isolation of an individual. Among other cases, the matter is of coercive treatment of drug addicts, restriction of liberty by assigning to closed educational institutions or psychiatric hospitals, detentions of tramps, some kinds of an immigration control.

Guaranties provided for in Article 9 should not be limited to the criminal procedure; they ought to be available to all detainees. In Article 9, notions of "reasonable time", "short time", "promptly" are used several times. The

³⁶ *Report...*, 1982, pp. 94—95.

³⁷ *Report...*, 1981, pp. 11, 27, 37, 42, 48, 54, 61; *Report...*, 1983, pp. 14, 24, 41, 44.

intention of the Committee is that they should be, if possible, interpreted as "several days".³⁸ Members of the Committee indicate that a suspected must not be deprived of contact with his advocate—the action to the contrary is incompatible with Article 9. States' representatives were asked whether a judicial system provides for a coercive expulsion from a country and whether it is applied in practice.³⁹ Another question touched upon concerned control over security organs, legal remedies guaranteeing the protection from different forms of detention, time limits concerning the detention, legal bases and conditions of arrest, possibility of release on bail, redress and compensation in case of unlawful arrest, functioning of "habeas corpus" principle.

Treatment of Persons Deprived of Liberty (Art. 10)

The Committee holds that the provision relation to humanitarian treatment and respect for human dignity concerns all persons irrespective of the practical way of having been put into custody. Humanitarian treatment is an universal norm, it cannot be subjected to economic conditions of a person. The same rule, according to the Committee's opinion, applies to prohibition of discrimination or differentiation either in different countries, or in different parts of the same country. This principle relates in the same way to hospitals and reformatories.

A strict separation of juvenile persons from adults is a norm unconditionally binding on all States-Parties; no circumstances can justify its infringement. The same opinion was expressed by the Committee as to the obligation to separate accused from convicted persons.

Methods of rehabilitation recommended by the Committee are: education, professional preparation, ensuring possibility of carrying out useful work.⁴⁰

It must be added that considerations of the States' reports by the Committee were based on Article 7 as read together with Article 10. As a rule, questions raised during the discussions related to both articles simultaneously.

Functioning of Judiciary (Art. 14)

Because of very detailed and clear redaction of Article 14 the Committee limited its interpretation only to enumerating guaranties mentioned in the said Article which ought to be referred to by the States Parties in their reports⁴¹. The central point of the discussions was the question of securing

³⁸ Report..., 1982, pp. 95—96.

³⁹ Report..., 1981, pp. 11, 27, 37, 43, 48, 61; Report..., 1982, pp. 27, 32, 39, 45, 57; Report..., 1984, pp. 15, 23, 28, 37.

⁴⁰ Report..., 1982, p. 97.

⁴¹ Report..., 1984, pp. 153—156.

the principle of independence and impartiality of Courts. Asking the States Parties for clarifications on methods of appointment, recalling suspension and removal of judges, the Committee emphasized the importance of independence of courts from administrative and political organs which should be one of fundamental guaranties of human rights. Other kinds of courts (military, for juveniles, special courts) drew the Committee's attention as well.

The second stream of the discussions related to specific entitlements granted to an accused as the corollaries of the right to defence.⁴²

Right to Hold and Express Opinions (Art. 19)

The Committee has accentuated that this provision aims at guaranteeing to an individual freedom from any kind of harassment on account of his opinions. The right to hold opinions is not subjected to any restrictions and exceptions in any circumstances.

The Committee underlines that the right to express opinions freely (para. 2) embraces the right to seek and receive all information and ideas, regardless of frontiers and by way of all media of one's choice. The Committee requires that detailed information should be submitted on the scope of freedom and its limitations established by the authorities. States are bound to show factual restrictions in the realization of that right.

Freedom of speech can be subjected to restrictions inherent in respect of rights and reputation of other individuals and in the protection of national security, public order, public wealth and morals (para. 3). The following rules have been directed to States-Parties by the Committee: restrictions can be imposed only through a law, their scope must be subjected to limits set up in the provision referred to above, and solely on account of reasons enumerated therein.⁴³

Discussions on reports on these questions focused on the scope of those restrictions. States were asked what kind of restrictions had been applied in view of the "sovereignty and integrity of a State". Other subjects of interest were: the interdiction of defamation of the national flag and emblem, the scope of freedom of speech in political questions, availability of mass media to political opponents, judicial protection of the press from undesirable influence, subordination of mass media to State organs.⁴⁴

Interdiction of Propaganda for War and Dissemination of Hated (Art. 20)

In its general comments the Committee recognized that States are not only obliged to pass a law on the prohibition of propaganda for war but

⁴² Cf. esp. *Report...*, 1981, pp. 12, 37, 43, 48, 71.

⁴³ *Report...*, 1983, p. 116.

⁴⁴ *Report...*, 1981, pp. 29, 38, 43, 49, 55, 72; *Report...*, 1984, pp. 37, 49, 54.

also to undertake all necessary practical steps in order to enable the dissemination of such propaganda. The interdiction in question also concerns any kind of propaganda aiming at the disturbance of peaceful relations between States. In the Committee's opinion it is indispensable that internal legislation explicitly indicate that propaganda for war is contrary to public order and that it falls under the penal sanctions.

It is interesting to note that some States forwarded reservations to this Article arguing that it is in contradiction to the principle of freedom of speech. The Committee, on its turn, expressed an opinion that the interdiction of propaganda for war was in conformity with the principle of freedom of speech and did not constitute a limitation of it. In the course of discussions the respective States were encouraged to withdraw their reservations.⁴⁵

IV. The Scope and Main Directions of Interpretation

1. The Scope of Competence

The Political Covenant does not specify the character and scope of the general comments of the Committee. Nor is there any mention of their binding force on States. From the provisions of Article 40 it results only that the general comments are, on the merits, connected with the reports of States. It is undisputed that the Committee is entitled to indicate to States those problems which, in its opinion, should be taken into account in the reports, it can press for additional explanations and supplements. These rights are directly connected with the controlling function it has been charged with. Doubts arise, however, as to whether the said Article entitles the Committee to interpret the Covenant. This competence is not formulated *expressis verbis* and it can be implied only by way of functional interpretation. When appraising the degree of fulfilment of their obligations by States, the Committee must at the same time interpret the respective provisions. Internal law of States is also subject to interpretation in the course of international control. However, the question remains how far the Committee may move when interpreting the Covenant.

Difficulties of an unequivocal delimitation of the boundaries between interpretation of legal rules and introduction of new rules are commonly known. There is no doubt that the Committee is not equipped with legislative powers, but at the same time there are no rules introducing frameworks for its general comments. Thus, a possibility exists that when interpreting provisions the Committee shall make rules not expressed in the Covenant. For, the Covenant does not contain any rule which would

⁴⁵ Report..., 1983, p. 117; cf. e.g. Report..., 1984, p. 37.

constitute an effective barrier to such practice. The phenomenon of extensive interpretation occurs in the case of the right to life.

The interpretation of the right to life presented above clearly exceeds the literal meaning of the provisions. But the Committee went even further in its general comments of 1984. They deal with the right to life in view of the threat of war. Here are some of the thesis.

The Committee states that it is the supreme duty of States to prevent wars. War and other acts of mass violence continue to be a scourge of humanity and take the lives of thousands of innocent human beings every year. The development and proliferation of weapons of mass destruction not only threaten human life but also absorb resources that could otherwise be used for vital economic and social purposes, particularly for the benefit of developing countries.

In the Committee's opinion the designing, testing, manufacture, possession and deployment of nuclear weapons are among the greatest threats to the right to life which confront mankind today.

In the Committee's opinion

"the production, testing, possession, deployment and use of nuclear weapons should be prohibited and recognized as crimes against humanity".

The Committee accordingly, in the interest of mankind,

"calls upon all States, whether Parties to the Covenant or not, to take urgent steps, unilaterally and by agreement, to rid the world of this menace".⁴⁶

The above text was adopted by consensus. Two members of the Committee formulated reservations. And so, F. Ermacona said that the main ideas contained in the general comment were acceptable to him as a private person and as a citizen of Austria, a country which possessed no atomic weapons. But he could not as a Member of the Committee endorse this opinion. If a formal vote had been taken, he would have voted against. From the standpoint of international law he could not agree with the request that

"the production, testing, possession, deployment and use of nuclear weapons should be recognized as crimes against humanity".

The evaluation of this kind should be made by law-making bodies of the United Nations, such as the General Assembly, and the Security Council. The Human Rights Committee is not a law-making body. The last sentence — in which obligations of States not parties to the Covenant are dealt with — goes beyond the nature of a general comment. Both these parts, according to Ermacora — lay outside the competence of the Committee and would create prejudice against the drafting of general comments.

⁴⁶ U.N. Doc. E/1985/56, p. 10.

The other member of the Committee, Errera, said that the reasons why a new text on Article 6 had been adopted two years after the adoption of a general comment in 1982 were not made clear. In his opinion questions relating to disarmament did not fall within the competence of the Committee. The move to create a new category of crimes against humanity did not appear to have been preceded by a thorough study of the concept in the context of national and international criminal law and in the light in particular of the pertinent treaties that had been concluded — on the establishment of the International Military Tribunal, on genocide, on imprescriptibility and on apartheid. In his opinion a distinction ought to be made between the use of nuclear weapons and their manufacture, testing and deployment. Where application is concerned it is necessary to have in mind the principle of self-defence as expressed in Article 51 of the Charter of the United Nations.

Errera, like F. Ermacora, is of the opinion that the Committee is not competent to address States other than States-Parties to the Covenant, as the Covenant itself makes clear in several of its provisions. He considers the

“general comment on Article 6 of the Covenant to be a regrettable and dangerous precedent”.⁴⁷

These powerful words give rise to reflexions. If in its subsequent general comments the Committee will aim at interpreting the Covenant in an extensive manner, it will be necessary, it seems, to determine by way of norms the character, scope and functions of the comments. For, there is the danger that objections similar to those above-mentioned will be raised by States. This could weaken the authority of the Committee and the effectiveness of its activity. It should, however, be borne in mind that in general, States reluctantly accept international control over their acts.

2. Directions of Interpretation

In a number of fragments of the general comments the Committee does not confine itself to indicating issues which should be taken into consideration in the reports of States. Some general comments mention only the most important, according to the Committee, aspects of particular human rights and the optimum methods of guaranteeing them.

The Committee has not so far adopted general comments on the human rights which realization and guarantee cause, as a rule, lively discussions and political, ideological and doctrinal controversies. This concerns, i.a., freedom of public meetings, freedom to form associations, freedom of religion, political rights.

⁴⁷ Summary Record of the 563rd meeting, Summary Record of the 571st meeting of the Human Rights Committee, CCPR/C/SR 563 and 571.

Some comments related to more detailed issues and their function is to specify the provisions of the Covenant. This consists in enumerating those specific rights which are components of the human right in question. This method was applied, above all, when the general comments connected with the functioning of judicature, were formulated.

Special attention should be paid, in my opinion, to the frequently repeated thesis that civic and political rights can be guaranteed in a situation when the State not only adopts a position of non-interference but undertakes positive measures as well. This is an evident departure from the classical position on these matters.

The Committee also points out that in certain circumstances the State is responsible not only for acts of its organs but should protect the individual against attempts at his rights by other persons as well. Thus we can gradually formulate a general positive obligation of a State to guarantee such internal order that human rights are respected, that an individual can effectively enjoy them and that, finally, their violation will fall under appropriate sanctions.

It has to be emphasized that the Committee is aware of the new dangers which at present threaten the realization of human rights. For example, attention was paid to the role of multinational enterprises. Thus human rights acquire dimensions which exceed the traditional relations between States and individuals. The Human Rights Committee can play a significant role in the promotion of new human rights as well as the new methods of their international and national protection.

Legal Regime of the International Organization

by WOJCIECH MORAWIECKI

1. Introductory Remarks

The international organization¹ is a special type of relations among States, significantly different from other forms of these relations, of bilateral or multilateral character, which do not acquire — unlike an international organization — a comparatively autonomous shape and personality with regard to participating States.

The distinct personality of the international organization is expressed in its acts of will — decisions arrived at by their supreme representative organs. These decisions are, above all, the result of processes of reciprocal interactions and mutual adjustments of States members of such organs. Their content cannot, therefore, be mechanically reduced to a simple sum of previous standpoints or to a common denominator of the States members of the organs or, more than so, the members of the whole organisation. They are, however, issued on behalf of the organization as a whole. They also have a certain effect and are a determined instrument of pressure on the behaviour of participants — Member-States in the first place — of the relations which they attempt to regulate and to correct. In this sense the organization demonstrates a certain degree of power over such participants, in particular with regard to its own members.

In examining such a complex and dynamic social phenomenon as an international organization, a methodology based on the General Systems Theory proves extremely useful. It is especially suitable in revealing those original features of an organization which necessitate and justify applying to it rules and legal solutions different from those applied to other forms of international relations.

In accordance with the systemic approach, an international organization (like any other organization) is a so-called open system.

¹ This article concerns international organizations whose members are States represented by their governments, that is Inter-Governmental Organizations. But many of the following remarks relate respectively also to other organizations.

In most general terms, a system is a set of units — its components — which are in a process of interaction and which constitute a relatively cohesive whole. Apart from this an open system interacts with its environment through processes of inputs at the entrances and outputs at the exits of the system consisting of transfer of support and information. Interactions within the system occur in an orderly manner according to determined rules which constitute its structure.

The notions of the system and its environment are of relative value serving as tools of research; they are related to a determined functional cross-section, aspect or level of relations and interactions between their components as, on one side, constituent parts of the system and, on the other side, parts of its environment. As a matter of fact, it is not whole elements as such, e.g. individuals and their groups in a social system, or States in an international system, that are components of such determined systems and their environments, but the *roles* played in them by these elements. Therefore, within the conceptual framework of systems analysis, when speaking about social systems, the proper components of which are various roles of individuals or of their groups, it is not unjustified to refer to them as actors in situations, events and games played on a determined scene.

In a systemic approach an international organisation can be generally described as a set of States performing the roles of members participating in a process of cooperation, based on sufficiently high and stable concurrence of their interest within a determined scope of affairs, whose most distinctive feature is that on their behalf as a whole according to established rules permanent representative organs make decisions concerning common tasks and their implementation.

The determination of boundaries separating the system from its environment is of primary importance for the whole systemic approach. As it concerns international organizations the basic observations to be made is the twofold role of States. On the one hand, they appear as fundamental components of the system of the organization in the role of its members participating in the process of interactions within its internal structure. On the other hand, the same States, but this time outside the boundaries of the organization, constitute the main components of its environment from where come inputs: supports and information, then processed within the system of the organization and to where the system finally directs its output, mainly in form of decisions of the organization aiming at exerting influence on the behaviour of States. As the matter concerns the delimitation of two different roles of the same States the boundaries between the system and the environment of an international organization are very relative. In this case, however, their determination is simplified because the roles of the members within the system are formalized by appropriate statutory and procedural rules.

The notion of the structure of the system is also of relative character. In the concept of the General System Theory it is understood as the system's goals, devices, rules and deep layers of memory which are relatively more stable and rigid and consequently, it is more difficult for them to undergo processes of adjustment to changes occurring in the environment, and, therefore, they remain relatively independent of it. By their very nature structural features of a system determine the system's personality and identity. From a simplified, legal point of view it is permitted to accept that the structure of the organization's system is determined by its statute from whose nature it follows that it is to constitute a comparatively invariable and inflexible legal basis of the organization's arrangement and functioning. This is shown, i.e., by deliberately stipulating a higher degree of difficulty as regards its amendment.

Such a broad approach allows the inclusion of all statutory rules in the structure of the organization relating not only to its arrangement and rules of internal and external functioning, but also to the fundamental aims of the organization and to general rules of inter-state relations favoring the attainment of those aims. For the reason that the functions of an international organization consist mainly in making decisions, the base of the system, that is its structure, is composed of statutory rules which form the parameters of the decision-making process, that is, they specify chief representative organs, their competence and composition, and define procedural requirements of decision validity and legal significance. The notion of the structure of an organization, in its narrower sense is frequently limited to those matters.

Processes of interactions among the components and interactions between the system and its environment occur within the stable structure of the system. They take the shape of functions which should be understood as ways of acting of the system as a whole both in its internal sphere and — what is of great significance — in relation to its environment. These processes and functions of the system account for its dynamic and vital character. In the system of an international organization processes and functions are of political nature both in the broad sense — as their content is expressed in making decisions — and in the narrow sense, due to the role played by governments guided by the national interests of the States they represent.

In the internal sphere of the organization's functioning its decisions aim at ensuring conditions indispensable for its very survival: its existence and the efficient functioning of its mechanism. This is the elementary and minimum goal of every system. Here the decisions are addressed to other organs and to members as components of the organization.

In the external sphere of the organization's functioning what matters is to influence its environment. Here the goals of the system are more ambitious; nevertheless, the impact of the organization on its environment,

it is on the behaviour of participants of international relations within its scope of competence has to be considered as the organization's *raison d'être*. This is what it is created for and maintained by its members. The external functioning of the international organization determines its effective role. In this sphere its decisions consist in determining common tasks and in allocating the resources — material and other values — available to it and at its disposal in order to realize its tasks mainly by rewarding or punishing the behaviour of States assessed by the organization as positive or negative.

A distinction between these two spheres of an international organization's functioning seems to be of crucial importance as the activities concerned have fundamentally different goals and dimensions especially in terms of national interests which may be involved. For that reason, as will be shown, the application of quite different legal regimes to each of the spheres, is justified.

This paper is aimed at the presenting the author's concepts resulting from his own research, experience and reflections. He deliberately desisted from quoting other authors and referring to various sources of information. The hardship of finding these sources which may be significantly facilitated by modern computerized information systems, is left to the interested reader.

2. The Theory of Implied Powers and the Differentiation of Legal Regimes in Internal and External Spheres of Functioning of an International Organization

As a matter of fact, in the practice of international organizations a need for a certain degree of discretion in settling, above all, more detailed and current matters concerning their functioning could be acknowledged from the very beginning. Supreme inter-governmental organs could not, in practice, have powers limited to those provided for by explicit provisions of constituent instruments. This was particularly relevant to such matters as adopting rules of procedure and establishing subsidiary organs. Gradually, however, these organs, followed later by administrative organs, became bolder, broadening the scope of matters, to which could apply their implied competences.

D. Anzilotti was first to take notice of this new and important phenomenon. While observing that it covered, i.a., the law created by an international organization concerning its internal matters, he maintained that it constituted some kind of a right to self-determination, that is the capability to determine

the ways in which the organization was to realize its own goals.² This outstanding Italian lawyer can thus be considered as the forerunner of the theory of implied powers of international organizations. This theory was then developed in the science of international law as well as in the jurisprudence of the International Court of Justice,³ especially after World War II, putting in general terms the abundant practice of international organizations but also encouraging them to a more resolute and broad use of implied powers.

While the general soundness of the theory of implied powers cannot be disputed there are, however, important and complicated questions and doubts as regards their scope. In other words, a paramount, as usual, issue of the boundaries of implied powers arises. How far can one advance in granting the organization inherent — residual — powers, flowing from its very nature and therefore not requiring a special authorization by statutory rules, is a matter of fundamental theoretical and political importance as it is linked with problems of autonomy and power of an organization in relation to Member-States and, the resulting risk for their interests.⁴

In order to clarify such complex issues and problems accompanying the theory of implied powers, the systemic approach to an international organization might prove useful.

It has been already indicated that the functioning of an international organization's system consists in processes of transforming impulses coming from its internal components and its environment into decisions of its organs, directed either inside, to the system itself, or outside, to its environment. Assuming the above, two fundamentally different spheres of the organization's functioning can be distinguished: one internal and the other one external.

The internal sphere of functioning covers activities which aim at ensuring indispensable, in a way "a minimum" of, conditions of survival and the very existence of the system and the efficient functioning of the mechanisms of an international organization.

The external sphere of functioning covers activities which aim at exerting a direct influence by an international organization on its environment, that is, in the first place, on Member-States and their conduct in mutual relations.

Bearing in mind the dissimilar nature of these aims it would be justified to apply different legal principles, especially as far as the application of

² D. ANZILOTTI, *Cours de Droit International*, Paris 1929, p. 295.

³ See below on functional interpretation.

⁴ See W. MORAWIECKI, "L'Etat dans le système de l'organisation internationale", *Polish Yearbook of International Law*, vol. 13, 1984, pp. 47—68.

implied powers is concerned to the sphere of the organization's internal functioning, as distinct from the sphere of its external functioning.

In relation to the sphere of the organization's internal functioning it is to be assumed that the ensurance of indispensable conditions of its mere existence and the realization of its decision making processes, which it is, in its substance, expected to achieve, constitutes the indispensable *minimum* of obligations of States, which logically follow from their assuming the roles of members of the organization and by the mere fact of participating in it. This presupposition is necessary for the organization itself. At the same time, the presupposition can be accepted by Member-States, because the scope and dimensions of resulting obligations and burdens are relatively limited and foreseeable and can be calculated at the time when a decision on the acceptance of the role of a member of the organization is made.

The ensurance of indispensable conditions for an organization's functioning requires, first of all, deciding upon the composition and completing of inter-governmental organs of limited membership as well as administrative organs. Necessary facilities for decision making processes taking place in the organs of the organization should next be provided, especially by determining appropriate rules of procedure and setting up a variety of subsidiary organs with suitable mandates and structural parameters. Appropriate administrative services for organizational and substantial preparation of decision-making processes of all organs and for facilitating their performance should be ensured. Finally, indispensable for the realization of these processes facilities and material and technical means as well as financial resources that will cover the costs of these facilities and means and the costs of staff, should be secured.

It appears that the assumption presented above allows and even obligates to draw the following important conclusions concerning the legal regime to be applied to the internal sphere of functioning of an international organization.

In the first place, as regards the full scope of matters included in this sphere, it can be assumed that organs of an organization do have implied powers. This means that they have the capacity to settle these issues, no matter whether statutory rules formally confirm it or not.

Secondly, these matters require operational decisions, that is — univocal and capable of being carried out directly. It should, therefore, also be assumed that in these matters decisions will, as a rule, have binding effect on all members of an organization. This results, i.a., from the necessity to ensure the organization's integrity. For example, no discretion can be allowed for a Member-State to acknowledge or not that another State is or is not an elected member of an organ, where and when an organ is to call a session or a meeting, whether a decision was arrived at pursuant to procedural requirements and thus is valid, what is the extent of the ordinary budget

indispensable for financing costs of internal functioning and how it is distributed among the Member-States, etc.

In case of a hierarchy of organs it is to be assumed that, as a rule, decisions of superior organs are binding on subordinate organs. This is especially pertinent to relations between subsidiary organs and those which they were created by, as well as to relations between inter-governmental organs and administrative organs.

Thirdly, for the same reasons as in the former case, in matters of internal functioning it should be implied that decisions are arrived at in the simplified procedure of a simple majority. For, they require operative solutions and as such should not be rendered difficult to make, delayed or paralysed due to extreme requirements of voting procedure, e.g. such which would enable to block (veto) them by an individual State or by a small group of States. Naturally, such far-reaching consequences of implied powers of international organizations, although limited only to their internal sphere of functioning, may turn out, as often happens in practice, to be impossible to accept by Member-State if the matters in question concern their major interests. In such situations, however, there is a possibility to provide for an *explicite* exception to the principles listed above and settle the matters in a different way on the basis of statutory rules — as frequently happens in practice. It especially concerns applying a more strict voting procedure in such matters as, e.g., the composition and procedure of establishing supreme organs, determining the extent of the ordinary budget as well as other matters considered as particularly important by the founders of an organization.

As a result of the principles governing the internal sphere of functioning of an organization presented above, its regulatory functions consisting in setting patterns and rules of conduct assume a very advanced degree in form, of the rules of the internal law of the organization.⁵ This is also true of its control functions consisting in verifying and assuring the compliance with established rules of conduct, e.g. administrative jurisdiction. In particular, the development of various internal operational functions exercised by administrative organs, is characteristic.

The situation is different in relation to the sphere of interactions between the system of the international organization and its environment, especially as to the organization's own active outside influence and exerting pressure on the behaviour of sovereign States. For, what matters here is not, like in the sphere of internal functioning, an indispensable minimum of obligations and burdens of membership, the scope and dimensions of which can be foreseen by a State at the moment of its accession to the

⁵ On this subject see below.

organization. A high degree of incertitude as to the possible range and consequences of its decisions depend here on two independent variables: changes in the environment leading to new challenges, and changes in the relationship of forces within the organization. The possibility of politically biased orientation of these decisions involves a significant risk for the interests of Member-States, the influence of which on the activities of the organization may prove inadequate. It involves a serious risk as well for the organization itself which faces the danger of desintegration as the result of withdrawal of States deeply dissatisfied with the activity of the organization when it exceeds tolerable limits of deviation from an equilibrium when it should be of some benefit for all its members.⁶

In order to maintain this risk within acceptable boundaries States joining an international organization rather cannot be expected to agree to grant it larger implied powers and an inherent capacity to act in its external sphere of functioning.

To this extent one can, without doubt, presume only its general implied capacity to receive inputs from its environment and exercise limited active impact upon it. Without such general capacity the organization would be deprived of its nature of an open system and the reason for its establishment and very existence would be forfeited.

In order to render possible interactions between an international organization and its environment it can be assumed that the organization has an implied capacity to conduct indispensable external relations with Member-States, the host State, States possessing the status of associated members or observers and with other international organizations. The capacity is at present widely accomplished in a passive form: by receiving special missions of States and organizations in order to participate in sessions of organs or conferences convened by the international organization and in the form of their permanent representations to the international organization at its headquarters. The capacity can also assume an active form: of special missions sent by the international organization and even permanent representations set up by it in States, where it realizes more serious external operational functions and at other international organizations, with which it is developing cooperation of considerable importance. The external relations of the organization can, finally, be settled in bilateral and multilateral agreements concluded by the international organization with States and with other international organizations. The contents of such agreements usually include granting or confirming rights of the international organization by the States concerned with the purpose of enabling it or facilitating the accomplishment of its recognized internal and external functions, as well as its obligations

⁶ See W. MORAWIECKI, *op. cit.*

to States, for instance of respecting their internal legal order or rendering appropriate services. Contractual obligations of the organization, from which could follow direct obligations or financial burdens for Member-States not being parties to those treaties, require, however, their explicit consent on the basis of statutory provisions or other legal acts.

In the present state of the international system it should be assumed that in the external sphere of functioning the residual capacity of the organization to exert an influence and respective implied powers should not, in general, exceed a relatively gentle moral and political pressure on the behaviour of States, that is, consist to the utmost in arriving at decisions of a recommendatory character. Exceeding such an indispensable minimum of implied capacity to act in this sphere of functioning of the organization is only possible as an exception to the rule, and must be based on its statutory explicit provisions. This applies, e.g., to such powers of organs as admitting or expelling States to or from an organization or suspending their rights as members; establishing new rules of conduct binding on States; exercising control functions on their territory; issuing binding assessments of their behaviour which would have the nature of judgments; assuming external operational functions, especially of technical, financial or military assistance and burdening Member-States with their costs.

It is, however, purposeful to point out that in the case of statutory authorization of the organization to perform definite external functions, especially more advanced control and operational functions, it is possible by means of functional interpretation⁷ to derive more concrete implied powers as necessary for the realization of such functions. This applies to a great extent to specific functions of special missions and permanent representations of an international organization and to the contents of agreements concluded by it. In this connection a general warning should be laid down that if further implied powers are deduced from previously derived implied powers, an infinitive process of liberal interpretation may be originated.

So, while in the internal sphere of functioning, the implied nature of its powers to the full extent of matters included in this sphere can be in a general manner assumed, in the external sphere of its functioning it should rather be regarded as an exceptional situation. This conclusion should, however, be supplemented with two reservations.

Firstly, the international system is not static but is in a process of evolution. Quantitative changes occurring in it consist, i.a., in introducing exceptions to its features recognized as fundamental at a given stage. When the number of such exceptions increases, it may approach a limit

⁷ On this subject see below.

beyond which the range of their application becomes wider than the range of application of what previously was regarded as a rule. Then the quality of the situation changes: what previously was a rule becomes an exception and the other way round. This can be, for instance, ascertained as regards voting procedures at multilateral conferences and in international organizations. From the principle of sovereignty of States an implication used to be derived that all their resolutions should be unanimous unless participating States agreed otherwise. It seems that as a result of the evolution of practice concerning the external sphere of functioning the implication has shifted from the requirement of unanimity to its attenuated form of consensus of all participants of the decision making process as the optimum expression of agreement and a premise of cooperation and, when that turns out impossible, to the qualified majority of two-thirds.⁸

Secondly, the fact that within the scope of external functions the decisions of organs maintain, in principle, the nature of non-binding recommendations does not mean that they have no significance whatsoever as a means of exerting influence on the behaviour of States and that therefore they can be disregarded. However, there can be noted — so it seems — a general tendency to increase their importance in this respect as a so-called collective legitimization. Decisions of international bodies although short of binding legal force tend to exert a growing influence on the behaviour of States as the regional and global interdependence of States deepens. Processes of cooperation, becoming more and more indispensable in these conditions, tend to increase the real role and power of international organizations.

3. Statutory Rules and Rules of Internal Law of International Organizations

The indispensable legal basis for the establishment, existence and functioning of an international organization is an international treaty. It plays the role of a statute and States parties to such a treaty become members of the organization which it calls into being. If the justified view that an organization should be composed of at least three members is accepted, it follows that its statute takes the shape of a multilateral convention.⁹ Such conventions are called statutes (e.g. IAEA), constitutions

⁸ This is confirmed, i.a., by the Vienna Convention on the Law of Treaties of 1969 which stipulates in Art. 9 that "the adoption of the text of a treaty at an international conference takes place by the vote of two-thirds of the States present and voting, unless by the same majority they shall decide to apply a different rule".

⁹ However, some features of international organizations can be traced in institutions of permanent bilateral cooperation. These are, e.g., joint inter-governmental commissions which meet in definite time intervals in order to assess the implementation of bilateral

(e.g. ILO, UNIDO) or charters (e.g. UNO, OAS) as well as treaties (e.g. NATO, EEC). It may, however, happen that a convention will cover a wider range of matters and only part of it will constitute the proper statute of the international organization to be established. A characteristic example is provided by the statute of the International Sea Bed Authority which is only one of the many parts of the Convention on the Law of the Sea of 1982, covering a wide range of issues and tending to regulate the full scope of international relations in this sphere.

The main and indispensable object of a statute of an organization is the determination of the basic elements of the structure of its system in a broad sense. They are then such elements which, as a matter of fact, should be of a sufficiently stable and unchanging nature. This is watched over by specific, relatively difficult terms of modifications of the statute.¹⁰ All rules contained in the statute formally deserve to be classified as statutory rules.

However, it sometimes happens that in a constituent instrument having the form of a statute of an organization, States insert, as its component part, rules aiming at regulating in an extensive and detailed manner matters not lined directly with the functioning of the mere system of the organization but concerning inter-state relations occurring outside the system, in its environment. This regards especially constituent instruments of international organizations of a technical nature, for instance, in the field of postal service (UPU) or telecommunication (ITU). They contain such provisions of regulatory and technical nature which require relatively frequent changes and modernization due to technical progress and other rapid developments in the environment. Out of consideration for the role and nature of the statute such rules cannot be substantially treated as statutory rules and should in effect be established separately, e.g., in an annex to the statute, which is not subject to strict rigours of revision, or in other legal acts, issued and amended on the basis of decisions of organs of the organization, falling within their advanced functions of external regulation, as in the case of ICAO and WHO.

Among statutory rules relating to the functioning of the system of the organization two groups can be distinguished; those which concern funda-

agreements on cooperation in the economic, scientific and technical fields and to lay out future aims and objects of such cooperation. They are fairly wide-spread in the practice of socialist States. However, it should be noted that their structure is not fully developed, e.g., usually they have no permanent secretariats. What is, however, more important is the decision-making process taking place within their framework which has a character of mutual consent and is of a different type from the decision-making process of multilateral consultations and negotiations typical of international organizations. This deprives bilateral institutions of autonomous personality.

¹⁰ On this subject see below.

mental structural elements and constitute the *indispensable* hard core of the statute and those which, in effect, would not have to be included in the statute. In the latter case, the rules concerned are of such character that their appearance in the statute means nothing more than a confirmation of implied powers already granted or whose determination could be left to the supreme organs of the organization within the scope of their implied powers to create rules of internal law.

With regard to the high rank of the first kind of statutory rules they deserve to be classified as constitutional rules. They include rules determining basic goals and aims of an organization as well as principles which are to be observed. They are rules setting up supreme organs: determining the scope of their powers and structural parameters of decision making in the sphere of external functioning and thus fixing the degree of power exercised by the organization. They are rules laying down conditions of membership of States and their fundamental rights and duties. They are also rules defining the conditions for the entry into force of the statute of the organization and its revision. Finally, also those rules should be included which derogate generally assumed implied powers both in the internal and the external sphere of functioning or provide respective exceptions. These rules, of a constitutional rank, should absolutely be inserted in constituent instruments as their provisions.

On the other hand, it must be pointed out that statutory rules of different rank can be laid down not only in constituent instruments but complemented also in other sources of law. They can be created by means of separate agreements between Member-States, concerning, e.g., the geographical distribution of places in organs of limited membership; as a result of custom, e.g., by an interpretation established in practice; on the basis of decisions of organs or conferences accepted by States in some way or another.¹¹

Sometimes nearly the whole set of statutory rules can have such an extra-constitutional basis. Such was the case with GATT which was gradually transformed from a rather ordinary multilateral convention into a fully shaped international organization on the basis of resolutions of the conference of the contracting parties.

If the statute of an organization is limited only to an absolutely indispensable hard core of rules of constitutional rank, its actual text

¹¹ The independence of the rank of legal rules of international organizations of their source is recognized, e.g., by the Vienna Convention of 1975 on the Representation of States in Their Relations with International Organizations of a Universal Character which explains in Art. 1, p. 34, that "rules of the Organization" mean, in particular, the constituent instruments, relevant decisions and resolutions, and established practice of the organization".

can be very brief. The shortest statute was the *communiqué* of 25 January, 1949, on the agreement of six socialist East European States to create CMEA, composed of only a few sentences. It was limited to enumerating the basic aims and setting up the supreme organ of the organization — the Session of the Council. The further structural development of the organization was left to the decisions of this organ. In the given circumstances and with foreseen safeguards, especially the requirement of unanimity, this was a quite rational solution.

On the opposite end in this respect we find statutes of organizations composing the European Community the texts of which are very extensive and detailed. For example, the text of the statute of the EEC enclosed in the Treaty of Rome of 1957 is comprised of several hundred pages. The statutory rules of ISBA contained in the Convention on the Law of the Sea are conceived in a similar way. That is justified when striving for a subtle balance of decision-making parameters of organs, for the exclusion or limitation of many of their implied powers, as well as for the limitation of their discretion in interpreting statutory rules. This, without doubt, makes the system of the organization more rigid and limits the role of the decisions of its organs in the process of its adaptation to the needs of the changing environment. This, however, can prove purposeful in case the organization is appointed a high degree of formal power in matters of high economic importance and political sensitivity regarding vital national interests.

As has already been explained above, in the sphere of the internal functioning of the organization the decisions of its organs are, as a rule, of a binding character. Many of them have the nature of executive decisions as they consist in specific solutions for non-recurrent situations. They can also take the form of normative decisions stipulating regulations which are general, impersonal and applicable to an unlimited number of recurrent situations. Such rules relating to the sphere of the internal functioning of the organization which are created by the decisions of its organs on the basis of implied powers, make up the internal law of the international organization. It follows from this definition that the rules of internal law of an international organization must at the same time comply with two criteria: have as their source decisions of their organs and apply in point of its contents to matters within the sphere of the internal functioning of the organization.

When the kind of subjects of and relations regulated by the internal law of an international organization are taken as a basis for its analysis, it should be pointed out that its rules vary in character. Only some of them are rules of international law — when they regulate relations between Member-States, e.g., in rules of procedure of inter-governmental organs or

when they regulate relations between those States and an international organization, e.g., in financial and budgetary rules. Such nature, however, cannot be attributed to rules regulating relations between an international organization, represented by its supreme administrative organ, and its staff. For, these are relations of subordination and the rules they are regulated by are of administrative law character. In the internal law of an international organization civil law rules can also be distinguished, e.g., in provisions concerning conclusion of various kinds of contracts by the organization.

The analysis of the rules of this law with regard to their contents allows to single out the following categories: a) internal rules of procedure of supreme inter-governmental organs; b) financial and budgetary rules; c) rules concerning the staff of the organization; d) rules relating to other administrative matters, as for example, security and order on the premises of the headquarters of the organization, use of its flag and emblem, postal and telecommunication services, the structure of the secretariat and management of its units at the headquarters and in other fields; e) rules concerning the performance by the organization of external operational functions of economic or social character and — in the case of UN — of military character; f) legal acts establishing subsidiary organs and their mandates. The analysis of the contents of the internal law of an international organization can also, what is of utmost importance, disclose their significance in relation to the interests of Member-States, revealing political implications of their appropriate types.

From this point of view it can be stated that rules of procedure of organs, financial and budgetary rules, rules concerning the staff of the organization and other administrative rules do not generally involve the more important interests of States and can be treated as matters of lower political rank. Legislative functions of administrative organs can, however, be the cause of more concern. Namely, it is possible that they may escape the influence of Member-States and not take their interests sufficiently into consideration. That is why they are, as a rule, subject to control of supervisory inter-governmental organs which lay down basic guidelines for administrative organs, receive their reports and adopt a position towards them. But special attention should be given to rules of international character dealing with the execution of external operational functions by administrative organs. These are the functions which administrative organs are, in fact, predestined to perform. Because such functions can be undertaken and performed in situations of conflict and cause political disputes, they should be subject to more strict control of appropriate inter-governmental organs.

The problem of creating subsidiary organs and determining their statutes deserves special consideration. Such organs present a great variety from the point of view of tasks entrusted to them and especially as concerns the

nature of their functions. This matter would be of little concern if it was related only to subsidiary organs with tasks limited to the sphere of the internal functioning of the organization, such as committees or working groups. They are established to pre-examine, negotiate or prepare proposals as to matters on the agenda of organs which have created them in order to render more efficient their decision making processes.

However, with regard to the UN and other organizations of the UN system, a pronounced tendency can be noted to entrust institutions, formally set up as subsidiary organs, with much more responsible and independent tasks, not limited only to the sphere of internal functioning. The UN system provides examples of special agencies created by the General Assembly as its subsidiary organs, like UNICEF, UNHCR or UNDP.

Detailed statutes of the agencies, having the form of General Assembly resolutions, provide them with their own managerial, inter-governmental and administrative organs and define the principles of social and technical assistance rendered by them on a large scale. It is sufficient to take notice of the fact that the exercise of external operational functions of this kind is not provided for by the Charter of the United Nations in order to realize how far the process of "self-determination" of an international organization can lead. Although activities of the special agencies are subject to general political control by the Economic and Social Council and the General Assembly as well as to the administrative control of the Secretary General, they display a significant degree of autonomy in decision making and a great financial independence while having at their disposal separate funds supplied by voluntary contribution of States.

The tendency in question has, finally, been expressed — to the greatest extent — in creating in the same simplified manner as subsidiary organs of the General Assembly of the United Nations, in 1964 — UNCTAD and in 1966 — UNIDO which were, as a matter of fact, regarded as substitutes for important specialised organizations in the field of trade and development and in the field of industrial development. They were equipped with broad powers and entrusted with extensive external functions.

The substantial importance and political implications of such special agencies and organizations result in the fact that they considerably exceed the normal concept of subsidiary organs. That is why it is hard to accept that their creation and the determination of their statutes fall within the internal law of an international organization.

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The purpose of statutory rules comprised in a convention possessing

the character of a constitution of an international organization is different from that of rules found in an ordinary multilateral convention. The first serve the creation of structural framework for the continual and dynamic political process of arriving at common decisions, while the latter — aim at a stable and possibly final solution or a regulation of inter-state relations.

That is why, when compared to ordinary multilateral conventions, solutions of pertinent legal issues, shaped in the process of development and applied to statutes of international organizations, are in many respects different and sometimes vary substantially from those adopted in traditional law of treaties.

To begin with, the terms of entry into force of conventions serving as constituent instruments of international organizations are generally more rigorous. Conditions of participation of States in such conventions require different solutions, consisting, above all, in the attribution of a significant role to the decisions of supreme organs of the organization. Other special solutions are required for such issues as reservations to and revision of statutes of international organizations. There also exist, without doubt, differences as to general rules of interpretation of the statutes in connection with the role of organs and their implied powers in the system of an international organization.

Specific solutions are justified by the specific role of statutory rules dealing with the structure of the system of international organizations. Thus, if a constituent instrument includes, as it happens, not only constitutional rules *sensu stricto* but also other rules, different solutions could be applied respectively regarding such issues as reservations, revision or interpretation. Such a differentiation of appropriate solutions and rules is, however, neither easy nor done in practice.

The following parts of this paper deal with some problems of the legal regime of international organizations arising out of the different character of their constituent instruments (statutes) as compared with other multilateral conventions.

4. Conditions of Entry into Force of a Statute

Statutes of international organizations provide for various conditions of entry into force.

They may require the ratification of all signatory States. This method is applied in organizations grouping a small number of members, but equipped with serious powers, such as organizations of military and political nature, e.g., NATO and OWP, as well as in economic organizations, e.g., CMEA, European Communities, WTO. Such high requirements for ratification are necessary and possible only when a group of States is consolidated

and united by strong common interests and solidarity. Apart from that, they result from the conviction of signatory States that the organization shall be created only if all these States participate.

Statutes of organizations which are to be composed of a larger number of States, especially organizations of universal character, also provide, as a condition of entry into force, relatively high requirements regarding ratification: quantitative, qualitative or both.

The first category comprises statutes which come into force when ratified or otherwise accepted by a given number of States. The quantitative requirements ensure that the organization has enough members, otherwise the realization of goals and aims provided for in the statute would be rendered difficult or even impossible. The appropriate minimum of members is subject to assessment and decision of the negotiators of the statute. Certainly, it should not, however, be smaller than the precise number of members of any principal organ of the organization as stipulated in the statute.¹² This category includes statutes of, e.g., such universal organizations as: FAO (20 States), ICAO (26 States), WHO (26), WMO (30), UNESCO (20), thus requiring ratification by approximately half of the participants of constituent conferences and of the expected number of 50 original members. To this category belongs also the statute of a group organization OECD requiring for its entry into force ratification by 15 from among 18 negotiating States.

The second category embraces statutes of financial and economic organizations whose entry into force depends on the ratification by States which will supply an appropriate percentage of the basic capital or which have an appropriate share in world trade, or, finally, which generally play a leading role in the field of relations covered by the scope of activities of the organization.

Qualitative requirements ensure the participation in the works of the organization of the main and the most concerned States from the very beginning. This, as a matter of course, determines the possibility of its effective functioning. It also prevents the establishment of an organization not having at its disposal indispensable means for the realization of its tasks. The introduction of these requirements of entry into force of the statute is possible when the material contribution or the actual roles of States are measurable in one way or another. Apart from that, it is significant as regards organizations which perform operational functions and

¹² This mistake was made by the authors of the Statute of the IAEA which requires for its entry into force the ratification by 18 States, while the number of members of the Board of Governors was to be 23. If the Organization was comprised of only 18 members it would be impossible to set up the Board.

have more serious powers concerning substantial interests of States. It is usually combined with the application of the weighted voting procedures.

The organizations in question were, e.g., IMF and the World Bank (ratification by States providing 65% of its initial capital) and GATT (accession by States whose shares in the global trade of the contracting States totalled 80%). High qualitative requirements can be found in international commodity agreements, creating organizations for regulating the market. So, for instance, the International Wheat Agreement of 1962 had to be ratified by States at the disposal of which were two-thirds of the votes in the group of exporters and importers; the International Sugar Agreement of 1958 — by States having — altogether — 60% of votes in the group of importers and 70% of votes in the group of exporters, with the distribution of the number of votes between States according to their shares in the total exports or imports of the commodity in question.

The third category is composed of statutes of international organizations which come into force when both qualitative and quantitative requirements are met. This, i.e., aims at preventing the establishment of an organization composed of only a few share-holders or main powers with one-sided and narrow interests to be observed by the organization.¹³ This group embraces, e.g., such organizations as the United Nations — ratification by five great powers and the majority of the remaining signatory States; IMO — 21 States, among which 7 having a merchant fleet of at least 1 mln tons; IAEA — 18 States, among them three of the then main atomic powers — USA, USSR, Great Britain, France and Canada; CERN — 7 of 12 signatory States on condition that one of them will be Switzerland, where the seat of the laboratory is, and that these States will provide 75% of the capital necessary for the laboratory construction; International Tin Agreement of 1960 — 9 importing States having 500 votes (on 1,000 possible) and 6 exporting countries with as much as 950 votes (on 1,000); International Coffee Agreement of 1962 — 20 exporting countries with 80% of votes and 10 importing countries with 80% of votes, in weighted voting, the votes distributed according to the share of the States in the export or import of the commodity in question.

Recently, some new solutions dealing with the establishment of new universal international organizations have appeared which could lead to a new tendency in this regard. Since the mid-1960s a new balance of forces

¹³ Theoretically, it would be possible, e.g., for GATT to enter into force only between the following States: the United States, the United Kingdom, France, the Benelux countries, Canada and Australia which jointly shared 81–86% of the world trade. Such was also the case with IMF and IBRD. Of course, it would be impossible to achieve the purposes of those organizations if their composition was so narrow.

has been shaping and the group of non-aligned States has begun to play a more organized and active role and to take advantage of its numerical preponderance to support at international conferences resolutions suiting the interest of less developed countries. This tendency was expressed, i.a., in simplifying the procedure of setting up new specialized agencies in the United Nations system. For instance, when it turned out that because of the opposition of Western States it would take a long and arduous process to agree on the text of statutes of such organizations and, in consequence, to comply with formal requirements of their entry into force, the General Assembly, yielding to pressure of the mentioned group, passed in 1964 and in 1966 resolutions on the establishment of UNCTAD and UNIDO respectively. From the legal point of view these bodies were subsidiary organs of the General Assembly while in fact they were playing the role of serious international organizations.

Both UNIDO and UNCTAD soon displayed a tendency to a formal transformation into fully independent international organizations. This proved easier in the case of UNIDO. By virtue of a recommendation of Second Conference of UNIDO convened in Lima in spring 1975 the General Assembly of the United Nations passed on 16 September, 1975, a resolution on taking preparatory measures in order to formally transform UNIDO into a specialized agency of the United Nations and on the establishment of an inter-governmental committee composed of representatives of States concerned in order to elaborate the text of its Constitution. As a result of negotiations and on the basis of consensus, the final text of the Constitution of UNIDO was adopted on 8 April, 1979. It was signed by 138 States. The entry into force of the Constitution of UNIDO required, according to Article 25, not only ratification, approval or acceptance by at least 80 States but — what is a new element — notification by those States to the Secretary General of the United Nations, him being the depositary, that as a result of mutual consultations they had agreed on the entry into force of the constituent convention. Although it was not precisely stated what was to be the subject of the consultations, it followed from discussions at the conference that it would be the ensurance of the participation of members on whose support the capacity of the organization to act and to reach its objectives depended and, above all, the ensurance of indispensable budgetary financial means. Thus, as a matter of fact, the question was to satisfy the conditions of effectiveness of the organization due to the participation of main powers.

The initial quantitative requirement was met on 9 August, 1982 when 80 States ratified the Constitution of UNIDO. However, such leading States as USA, USSR, FRG, Great Britain, Japan were not yet among them. In May 1983 a formal meeting of States which had ratified the Constitution and which were concerned with transforming UNIDO into an

independent organization, asked the Secretary General of the United Nations to determine when the financial basis of the new organization would be ensured. The decision on the entry into force of the Constitution of UNIDO was not, however, solely dependent on this factor.

The entry into force of the Constitution of UNIDO and the establishment of the independent organization was seriously delayed. In autumn 1984 the list of over 100 States which had ratified the Constitution included all leading States with the exception of USSR. In spring 1985 the number of States reached 120, among them three European socialist States: Romania, Hungary and Poland. The first session of the General Conference of UNIDO, planned for April 1985 was, however, further adjourned because of doubts as to the purposefulness of transforming UNIDO into an independent organization in the existing situation. The situation changed when, on 22 May 1985, USSR deposited both documents of ratification and notification stipulated in Article 25 of UNIDO's Constitution. Then the additional requirement of entry into force of the Constitution was complied with very soon and already on 21 June, 1985, the 80th State which had ratified the Constitution notified the depositary that the Constitution is to be carried into effect.¹⁴ The first session of the General Conference of UNIDO was then convened in Vienna on 12 - 16 August, 1985. During the session the organs of the organization were elected and completed: the Director-General, 53 members of the Industrial Development Board and 27 members of the Programme and Budget Committee.

Another organization expected to become a serious universal organization is the International Sea Bed Authority (ISBA). The idea of the organization emerged on the Third Conference on the Law of the Sea which began in 1973 and resulted in the adoption of the Convention on the Law of the Sea, signed at Montego Bay, Jamaica, on 10 December 1982.

It contains fully innovative regulations dealing with the area of the sea bed beyond the limits of national jurisdiction of coastal States which extends to the external boundaries of the so-called continental shelf. This area was proclaimed to be the common heritage of mankind and all activities within its boundaries are to be subject to administration and control of ISBA. Part XI of the Convention and detailed annexes contain statutory rules of this organization. Being an integral part of the Convention, they can be accepted or not by States only together with the whole Convention. Thus, the statute of the organization comes into force on the

¹⁴ According to Art. 25 p. 1 of UNIDO's Constitution it "shall enter into force when at least eighty States that had deposited instruments of ratification, acceptance or approval notify the Depositary that they have agreed, after consultations among themselves, that this Constitution shall enter into force".

same condition as is provided for the Convention as a whole. Pursuant to Article 308 the Convention will become effective 12 months after 60 documents of ratification or accession have been presented. Thus, a relatively low quantitative requirement has been stipulated. This seems, to some extent, to be light-minded. Moreover, the establishment of the organization is to take place automatically: The Assembly, composed of all States-parties to the Convention is to be convened on the day the Convention comes into force.

In the period preceding the entry into force of the Convention draft solutions of several organizational and legal problems related to putting the ISBA into operation had to be elaborated by a Preparatory Commission composed of States signatories of the Convention. Its main task was to prepare — in all aspects — the functioning of the new organization.

As has been mentioned above, a good start and the effective functioning of every international organization is dependent on the participation in it of leading actors — States playing substantial roles in its environment — i.e. in the spheres of its activities. Formally, this fact has been disregarded by the authors of the Convention. In practice, this problem cannot, however, be disregarded during the discussions in the Preparatory Commission.

The Convention was adopted by 130 positive votes. 4 States voted against, including the United States, the new administration of which was strongly opposed to the principles on which the functioning of ISBA was to be based. There were 17 abstentions, among them all leading capitalist States and almost all socialist States, including USSR and Poland. Despite that, until 10 December 1984 the Convention was signed by 159 States, territories and organizations, including all socialist States (with the exception of Albania). However, the Convention was not signed by some very important States — USA, Great Britain, FRG, which are to have a 40% share in the budget of ISBA. Up to that date it had been ratified by only 15 developing countries of no greater importance in maritime affairs (of socialist States only Cuba). This did not augur well for the establishment and the future of the organization in question.

5. Reservations to Statutes of International Organizations

A reservation to an international treaty consists in the exclusion (or modification) of certain provisions in their application to the State formulating the reservation. A State may formulate it when signing or ratifying (accepting) a treaty. Under traditional international law the reservation had to be accepted by all other parties to the treaty in order to be valid.

After World War II a new rule of international law emerged, according

to which reservations to multilateral treaties were possible by unilateral notification.¹⁵ This rule has, however, a few exceptions of formal and substantial nature. Reservations cannot be formulated if they are explicitly prohibited by the treaty. Neither can they exclude provisions constituting the essential contents of a treaty, i.e., be incompatible with the object and purpose of the treaty.¹⁶ For a reservation to be effective its acceptance by remaining parties to the convention is not, in principle, required. If, however, a party clearly objects to a reservation, then the whole convention will not be binding in relations between the objecting and reserving States.¹⁷

It is, however, justified to maintain that because of their specific nature statutes of international organizations do not permit reservations of acceding States as this would be incompatible with their object and purpose. Thus, the evolution of international law, having led to the acceptance as a rule of law of the right of States-parties to multilateral treaties to formulate reservations, with appropriate exceptions and under certain conditions, could not be applied to statutes of international organizations. Thus, as concerns this problem,¹⁸ what can be an exception to this

¹⁵ In this case a major role was played by the Advisory Opinion of the International Court of Justice, of 28 May, 1951. *ICJ Reports*, 1951, p. 15 ff.

¹⁶ Cf. Vienna Convention on the Law of Treaties of 1969, Article 19.

¹⁷ The Vienna Convention on the Law of Treaties of 1969 unfortunately made more confusion than cleared the problem of reservations to international treaties. For example, instead of formulating a more precise definition of objections to reservations and ignoring declarations of States which are of no legal effect, it complicates the issue in Art. 21, p. 3 by stipulating that "when a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation".

¹⁸ Unfortunately, the provisions of the Vienna Convention of 1969 relating to this issue can hardly be acknowledged as well-considered. Art. 20, p. 2 provides: "When it appears from the limited number of negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires the acceptance by all the parties". At the same time, however, Art. 20, p. 3 stipulates otherwise: "When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization". This solution would be of great risk for the international organization and its Member-States and it is difficult to justify it in practice.

Unfortunately, these strange provisions were repeated in the draft Convention on the Law of Treaties between States and International Organizations or between International Organizations worked out by the International Law Commission of the United Nations. See the document of the 37th Session of the General Assembly UN — A/37/10, Supplement No. 10.

new rule of general international law remains a rule without exceptions¹⁹ as regards the legal regime of international organizations.

The inadmissibility of reservations results, without doubt, from the necessity of ensuring an integral character of statutory constitutional rules, i.e., the stability of principal structural elements of the system of an international organization. It could therefore be argued that reservations are not completely excluded as regards statutory rules of a different and lower rank. For example, an attempt can be imagined to claim that a contingent statutory obligations of judicial settlement of disputes concerning the implementation or interpretation of a statute cannot be classified as a constitutional rule.

But even in relation to this kind of statutory provisions international organizations have not in practice permitted reservations.

For instance, in November 1953 the Government of USSR notified the Director-General of ILO about its joining the organization with a reservation excluding those provisions of the Constitution of ILO which provided for obligatory jurisdiction of the ICJ for the members of ILO in matters concerning the interpretation and application of the Constitution of ILO or of international labour conventions. The Director-General replied that he was unable to accept the notification of USSR as the Constitution of ILO does not provide for acceding to it with reservations. Some time later, in April 1954 the Government of USSR notified about its accession to ILO without any reservations to the Constitution. Other examples demonstrate a sufficiently uniform practice.

In February 1954 Yugoslavia presented a document of accession to ICAO with a reservation to Article 5 of the Chicago Convention of 1944. The depositary of the Convention, the Government of USA, notified members of ICAO about it. Some of them (e.g. Brazil) did not consent to the reservation. Thus, the accession of Yugoslavia to ICAO with this reservation was not recognized as effective. Yugoslavia decided to accede to the Chicago Convention without any reservations in 1960. Similar was the case of Cuba's accession. A reservation to Article 5 of the Chicago Convention was also formulated by the Government of Poland in the document of accession presented on 8 June, 1948. The document was not, however, accepted by the depositary of the Convention — the Government of USA —

¹⁹ Reservations to the statute of an international organization formulated by a State desiring to become its member would, of course, be possible and legally effective on condition that all the remaining Member-States of the organization would assent. The special legal status of the particular Member-State established in this way would, as a matter of fact, constitute a kind of associate membership. Associate membership is also a suitable solution of problem of membership in an international organization for a State unable or not desiring to assume all rights and obligations of an ordinary member of the organization.

for other reasons. The dispute concerned the prior accession to the Convention by the Polish Government in exile in London which was at that time recognized by the Government of the United States. Later, when the legal misunderstandings had been overcome, Poland announced its accession to ICAO without any reservations in a notification of 9 May, 1957.²⁰

An analysis of the problems which occurred in 1948 and concerned reservations of the United States to the Constitution of WHO and in 1958—1960 — which concerned reservations of Turkey and India to the Convention constituting IMO (IMCO)²¹ also confirm the hypothesis formulated above.

The practice of international organizations thus indicates rather univocally the inadmissibility of reservations to their statutes. The Constitution of UNIDO eliminates any doubts by stipulating in Article 27 that reservations are prohibited. In a similar manner the Convention on the Law of the Sea of 1982, including the statute of ISBA, explicitly states in Article

6. Revision of a Statute

According to a general rule of international law every modification of the provisions of an international treaty requires explicit consent of all parties unless the treaty itself provides for a different procedure. Apart from that the Vienna Convention on the Law of Treaties of 1969 requires in relation to multilateral treaties that all parties have an opportunity to give their view on the proposed changes and have the right to participate in negotiations and conclusion of the modified treaty. The Convention stipulates that the modified provisions bind only those States which have given their assent (Art. 41). This last provision ensuing from the above formulated general rule of international treaty law cannot apply to statutes of international organizations, their essential requirement being integrity, i.e. — they have to bind all members in an equal measure.

From the mere character of statutory rules which are related to the

²⁰ I wrote about it in the article: "Some Particular Aspects of Poland's Membership in International Organizations (UN, ICAO, GATT)", in the *Polish Yearbook of International Law*, vol. 2, 1969—1969, pp. 11—16.

²¹ These cases did not, as a matter of fact, relate to genuine reservations but to political declarations of no legal effects. I wrote about it in: "Charakter prawny statutu organizacji wyspecjalizowanych Narodów Zjednoczonych" [The Legal Status of Specialized Agencies of the United Nations], in: *Zbiór statutów i regulaminów organizacji międzynarodowych* [Collection of Statutes and Regulations of International Organizations], vol. 2, Part I, Warszawa, 1966, PISM, pp. 36—41.

structure of the system of an international organization, it appears that their alteration should not be a too easy matter. However, even they cannot be made rigid to the extent that the structural adjustment of the organization's system to changes occurring in its environment is rendered impossible. Thus, the problem consists in finding for the organization an appropriate degree of structural stability.

Very seldom, when statutes of international organizations do not provide for a procedure of revision and amendment, in conformity with the general rule of treaty law a requirement of unanimity and consent of all members should be met. Such is the case, e.g., of OECD. The statutes of the European Communities as well as the statutes of other important economic organizations with restricted membership, such as CMEA, or such military organizations as NATO and Warsaw Treaty Organization — confirm the necessity of consent of all members when revision or amendment is concerned.

However, the procedures of revision of statutes of such organizations depart substantially from the requirement of consent of all Member-States.

The procedure of revision of statutes of such organizations can be divided into two stages:

- 1) adoption by the plenary organ (sometimes also by an organ of limited membership) of a resolution concerning the alteration;
- 2) ratification (acceptance) of this alteration by a sufficient number of members.

In universal organizations the requirement of unanimity has been nearly completely abandoned, not only in relation to the first stage but to the second as well.

Resolutions dealing with revision of statutes are usually adopted by the plenary organ by a vote of a qualified majority of two-thirds. In some organizations a resolution of the supreme organ of a limited membership is additionally required, e.g., in UN — by two-thirds of its members including the five permanent members of the Security Council; in ILO, WHO, IMO — by two-thirds of their members.

Some organizations apply to the procedure of statutory alterations a gradation of requirements according to the importance of matters in question. For example, in IMF and IBRD alterations of the statute, not requiring unanimity, have to be accepted by three-fifths of members with shares totalling four-fifths of the initial capital. Depending on the significance of the alteration, the plenary organ of ICAO can itself determine the indispensable number of acceptances, not less, however, than two-thirds of the Member-States (Art. 94). Alterations of the Constitution of UNIDO require the acceptance of two-thirds of the Member-States but when they concern matters of greater importance, such as the right to withdraw or the

programme and budgetary powers of the Council, a majority of three-fourths is required.

It happens, however, that alterations of the statute adopted by a majority of votes take effect without subsequent additional ratification. For example, in FAO (Art. XIX) and WMO (Art. 28) alterations not involving, in principle, new obligations for Member States, take effect without ratification after a resolution of the plenary organ is adopted by a majority of two-thirds. In the remaining cases when new obligations may arise such decisions take effect after they are accepted by two-thirds of the Member-States.

The procedure of revision of the statute of ISBA is the most exacting. Article 314 of the Convention on the Law of the Sea of 1982 stipulates particularly that alterations to Part XI, which deals with ISBA, require the approval of the Assembly and of the Board of ISBA. Decisions dealing with this matter are arrived at in the Assembly by a majority of two-thirds (Art. 159, p. 8) and in the Board — by consensus (Art. 161, p. 5 d). They become effective for all participating States after one year from the date of presenting documents of ratification or acceptance by three-fourths of all participating States (Art. 316, p. 5).²²

Alterations introduced in a statute of an organization in one way or another are binding on all Member-States. This principle corresponds to the basic requirement of the integral character of the statute. A situation when new statutory provisions would be binding only on some members would bring chaos and destabilize the system of the international organization. On the other hand, this principle entails some risk for the Member-States. It can put some members under the necessity to choose: accept the alterations of the statute imposed by a majority against the standpoint of the minority of Member-States or withdraw from the organization. This latter alternative only theoretically meets the principle that sovereign States may only voluntarily accept new legal rules. In such situations States are under pressure and have only the choice between "the lesser of the two evils": submit to alterations which are taking no account of their interests or lose benefits flowing from membership in an international organization.

In practice the benefits of membership must have been significant enough and alterations introduced to the statutes against the standpoint of the minority so rare and not of greater importance that so far no

²² Provisions on amendments to the remaining parts of the Convention on the Law of the Sea stipulate that they take effect after being adopted by a majority of two-thirds on a conference convened for this purpose and after their ratification by three-fourths of participating States and only between those States which have ratified them.

case of withdrawal from an international organization has occurred as a consequence of such alterations.

7. Interpretation of Statutes

Legal rules are interpreted, first of all, in the process of their application in practice. Every application of law inevitably involves its interpretation.

International treaties are in the first place interpreted by States — parties to it applying it in practice. Because statutes of international organizations are applied also by their organs they too, as a matter of course, have the right to interpret statutory rules.²³

The interpretation of particular Member-States is not binding on other States. A situation when every State interprets its statutory rights and obligations by itself may lead to differing, even contradicting interpretation by individual States reflecting their more or less permanent or immediate, distinct or opposite, interests. Disputes between States as to the meaning of statutory provisions bring a threat of weakening or even undermining the principle that a statute is binding on all Member-States in equal measure.²⁴

Resolutions of organs of an international organization adopted by a certain majority of votes cannot be considered as an authoritative interpretation of the statute for Member-States, unless it is explicitly stated in the provisions of the statute or, as regards the internal sphere of functioning of the organization, it may be implied. If such resolutions are controversial they will not contribute to settling the dispute on interpretation between Member-States, but, on the contrary, they can aggravate the conflict. In extreme cases, like for instance, the problem of financing the UN

²³ This is confirmed, e.g., by the declaration adopted by the United Nations Conference on International Organization in San Francisco which expounds the lack of provisions on interpretation in the Charter of the United Nations. UNCIO, vol. 13, pp. 709—710.

²⁴ Statutes of many organizations of the United Nations system point to the possibility of judicial settling of disputes on interpretation (e.g. IMF, World Bank, FAO, WHO, IAEA, UNIDO) by being submitted to arbitration or to the ICJ. They do not, however, as a rule, introduce obligatory jurisdiction. The most rigorous in this respect is the Constitution of ILO which provides for a quasi-judicial jurisdiction in the form of a Commission of Inquiry (Art. 26) and the right to unilaterally bring a case before the ICJ by Member-States disagreeing with its recommendations (Art. 29).

In the United Nations system there is generally a possibility for supreme inter-governmental organs of the organizations to request from the ICJ advisory opinions in legal matters arising in the process of application and interpretation of their statutes.

Obligatory jurisdiction by specially established tribunals is imposed on a large scale only by statutory rules of the European Community and the future ISBA.

military operations in the Congo in the 1960s, such disputes can even lead to the danger of disintegration of the organization.

It should be borne in mind that the character and consequence of interpretation of a statute by particular States approximates reservations, while the interpretation done by organs of the organization is a process which may be brought to the verge of contradicting the statute. A daring politically oriented interpretation may even lead to a substantial modification of the meaning of its provisions.

The risk of interpretation reaching too far can be constrained by, i.a., the determination of its appropriate general rules. An attempt to codify such rules, concerning treaties, was made by the Vienna Convention of 1969 (Art. 31).

However, where rules of interpretation of statutes of international organizations are concerned, it must be noted that they cannot be identical to those applied to ordinary international treaties. For, in the interpretation of statutes the greatest practical and theoretical significance is attributed to problems which do not occur in an ordinary treaty, namely, concerning powers of organs. The wider their scope, the greater the power of the organization in relation to Member-States, and this is an issue politically very sensitive for them.

In conformity with traditional international law obligations and limitations imposed by the rules of this law on a State have been considered as an exception to the principle of State sovereignty. It follows from it that in case of doubt and controversial issues a presumption should be applied in favour of the principle of sovereignty and not in favour of the exception — its limitation. In other words, the obligations and limitations of freedom of action of sovereign States should be interpreted restrictively.

If a statute of an organization were regarded as an ordinary international treaty it would ensue from this general principle that when its text is silent on some matters it means that the organization lacks any powers in these matters and that its organs should refrain here from any action; on the other hand, when the text of the statute is not sufficiently clear and precise on some matters — its provisions regarding the powers of the organs in such matters should be interpreted restrictively.

This general rule of interpretation can be recognized as justified but only as regards such activity of the organization which, within the scope of its external functions, would impose new legal reciprocal rights and obligations on Member-States. It cannot, however, as has been explained above, be in any way applied to the sphere of the internal functioning of the system of the organization. To some extent, especially in relation to making decisions of recommendatory character it cannot even be applied to the sphere of its external functioning. Some adequate minimum of ability

to act has to be implied from the very character, object and purpose of an international organization.

For, international organizations are live and open political systems set up in order to satisfy continuously increasing needs of cooperation of their members; by disclosing concurrence of their interests, by defining corresponding common tasks and aiding in their realization. They must demonstrate an indispensable capacity to adapt to but also to influence actively its environment. The autonomous dynamics and continual changes in this environment require formulating new tasks, dealing with new challenges and issues. An international organization is expected to be able to face and try to resolve new problems which it is impossible for the statute of an organization to foresee completely and in advance. The appropriate modifications of basic elements of the structure of the system of the organization being left to the more rigid procedures of 'revision of the statute,' the organs of the organization cannot be deprived of the capacity to interpret their powers in a more flexible manner in the above presented limited scope.

A method of interpretation which acknowledges the possibility of making such decisions and undertaking such activities as may prove indispensable for the realization of its fundamental aims by the organs of an international organization can be defined as functional interpretation. Functional interpretation has been approved by provisions of statutes of many international organizations. In particular, when enumerating various kinds of activities and powers of the organization as a whole and of particular organs it is rather systematically pointed out that the enumeration is not exhaustive and a provision is frequently added that apart from the mentioned activities and powers a competent organ "undertakes other activities indispensable for the realization of the aims" of the organization. Such was, for instance, the case with the statute of CMEA of 1959 (Art. III) as well as with the Constitution of UNIDO (Art. 8, p. 3f in relation to the General Conference and Art. 9, p. 4h in relation to the Council).²⁵

As can easily be seen the method of functional interpretation is very closely and logically linked with the theory of implied powers. In general terms, it can be observed that appropriate implications are introduced by means of functional interpretation by indicating that they are indispensable for the realization of essential aims of the system of the organization in the sphere of its internal and external functioning. In narrower terms, the concept of functional interpretation is, however, applied rather to the organization's powers in the sphere of its external functions.

²⁵ But detailed statutes of organizations with a high degree of power over their Member-States such as the EEC and ISBA do not contain analogous provisions.

A significant role in the development of this concept was played by the International Court of Justice. The method of functional interpretation has been applied by the Court in some cases regarding international organizations already in the time of the League of Nations but it found its fullest expression in its Advisory Opinion of 11 April, 1949, on Reparation of Injuries Suffered in the Service of the United Nations. Since then it has been applied in practice in an increasingly broad and bold manner and more and more largely approved in theory of international law and organization. Today it is hardly possible to question its rationality.

It should, however, be noted that there exist certain limits of its justified application. Such limits are not easy to determine, but once exceeded,—what could be considered as functional interpretation gets transformed into an illegal revision of the statute. In particular, there is a risk that excessive functional interpretation can lead to or even be consciously abused for transforming an international organization by a group of Member-States which control decision making processes in its organs into a tool of their policies and interests employed against other Member-States belonging to the so-called “embattled minority”. One should be aware that if a group of States disposing of an appropriate majority of votes is politically strongly interested and motivated to impose on an organ a certain decision, they will naturally be inclined to have recourse to such an interpretation which would allow to recognize a given organ as authorized and its decision as in conformity with the statute of the organization.

This risk will not be reduced in a satisfactory way to an acceptable level neither by the fact that the interpretation of the statute and the decision arrived at may not be legally binding on the members of the organization nor by the fact that discontented members may (and they usually do so) raise objections of illegality of such decisions claiming excess or abuse of powers of the respective organs or intervention in their domestic matters.

Of course, political restraints preventing the trespassing of a certain threshold of tolerance by the injured minority of Member-States and of resistance of the organization’s system itself should be taken into account.²⁶

In a political atmosphere favouring cooperation, which should prevail in an international organization, its members can be expected to consciously strive for basing a more liberal interpretation of statutory rules on general consensus.

Under less normal conditions, taking into account that interpretation is contiguous to revision as regards its character and legal consequences,

²⁶ See W. MORAWIECKI, *L'Etat dans le système de l'organisation internationale*.

it should be required of resolutions constituting a controversial interpretation of statutes of international organizations that they fulfill at least some essential conditions similar to those required for a revision of the statute. If, for instance, an amendment of the Charter of the United Nations takes effect when recommended by a majority of two-thirds and then ratified by the same majority of Member-States, including all five permanent members of the Security Council, then it seems to be suitable to recognize as quite authoritative an interpretation which would be supported by two-thirds of all the members of the United Nations, including all the permanent members of the Security Council.

A rather effective way of decreasing the risk considered can be a precise, detailed and exhaustive formulation of statutory rules of an organization, dealing with powers of organs, which would produce a strict delimitation of the scope of functional interpretation. However, that is not always possible because of the difficulty to reach the necessary agreement between the States negotiating the constitutional convention. Also, it is not always purposeful, in particular, as regards the scope of powers of the organization and its organs in order not to excessively hamper the indispensable ability of the system of the organization to adjust to changes and development of its environment.

However, this is the direction that constituent instruments of organizations equipped with considerable power in relation to Member-States seem to consciously head for. The higher is the power delegated by Member-States to international organs, the greater are the risks of abusing it that these States have to fear. Therefore, special precautions had to be provided for to reduce such risks to levels acceptable by Member-States in such organizations as, e.g., the European Communities.

In those organizations explicit statutory limitations or even an exclusion of any possibility to apply functional interpretation can be justified. This is done, e.g., by the statute of the EEC in Article 235 of the Treaty of Rome:

"If action by the Community should prove necessary to attain in the course of the operation of the common market one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the [Parliamentary — *W. M.*] Assembly take the appropriate measures".

On Codification of International Law

by STANISŁAW E. NAHLIK

I

For many centuries, international law seemed not to need any codification. Its rules were growing gradually, in an empirical way, according to need, from case to case. As long as the theocratic order of the Middle Ages dominated in Europe, such cases were often solved by applying, by analogy, partly the rules derived from Roman and Canon Law, partly the principles of Christian morality, and thereafter, when the free-thinking rationalism gained upper hand — by recourse to the principles of common sense. Not seldom were these principles referred to as the Law of Nature. With the growing number of cases solved in a similar way, a certain practice was born — the most essential factor for the creation of customary rules.

Treaties were concluded rather rarely, on solemn occasions, only for the purpose of a specific situation. It was not until the 19th century that international agreements were concluded whose aim was to regulate not one specific situation, but to establish rules to be followed in all future situations of a certain kind. At the beginning, the significance of such compacts, usually pertaining to matters of minor importance, was hardly realized.

Their origin may be rightly found in a few acts of the Vienna Congress of 1815. However, they came into being rather in the background to what was mostly attracting the attention of the prominent statesmen and diplomats participating in the Congress. The preparation of the respective drafts was usually the task of the junior members of particular delegations. The documents of the Congress clearly show, however, that the three achievements of the Congress which might be regarded as the rudiments of the codification of international law were due to the initiative of Talleyrand, head of the French delegation. It is characteristic that each of those achievements had an entirely different legal nature: a) the regulations on the rank of diplomatic agents were alone a self-contained set of rules

suitable for a direct application, and thus something we would call today "a self-executing agreement"; b) the principles of navigation on the international rivers, embodied in the Final Act of the Congress, constituted a broad outline requiring further elaboration in agreements concerning particular rivers, which was first done in respect of the Rhine, and thereafter — the Danube, and finally c) the declaration on the slave trade, at the time only an expression of intentions, was only to anticipate the future legally binding acts.¹

As at the Vienna Congress of 1815, also later, e.g. during the Paris Peace Conference of 1856, rules of a general character were created only on the margin of meetings pursuing different aims, mainly political, which at the moment seemed more important. It was not until the second half of the century that conferences were convened purely for the purpose of preparing multilateral conventions aimed at codifying a particular branch of international law. They were mostly convened by a government particularly interested, sometimes on the initiative of a social organization. This was, for instance, the case of the Geneva Conference of 1864 on protection of the wounded and sick in land warfare. Assistance was sometimes given by groups of jurists organized in international associations, especially the Institut de Droit International, or even by drafts of individual eminent jurists such as, for instance, Johann Caspar Bluntschli *n.b.* the first president of that Institute. Their textbooks of international law, sometimes were divided into articles, chapters and parts, resembling (national) codes embracing extensive legal domains of particular States.

The very first codificatory conferences, of which the most important dealt with the problems of pacific settlement of disputes and with the law of war, were convoked only casually. Not till the IInd Hague Conference of 1907 the idea had been conceived that an organ should be formally established to prepare the next. IIIrd Conference which, however, did not take place in view of the outbreak, in 1914, of World War I.

It seemed that the codification of international law would be advanced by the League of Nations created after World War I and, as an international organization, the first to be assumably universal and pursuing aims assumably general. It turned out, however, that — although the League's Council had called into being a Committee of Jurists — the Hague Codification Conference that had been called in 1930 (the only one to be convened

¹ The above is a summary of the respective part of my *Wstęp do nauki prawa międzynarodowego* [Introduction to Study of International Law], Warszawa 1967 (further quoted: S. E. NAHLIK, *Introduction*), p. 103 ff. See also S. E. NAHLIK, "A l'aube de la codification du droit international", in: *Essays in International Law in Honour of Judge Manfred Lachs*, M. Nijhoff, 1984. p. 201 ff.

in the interwar period) dealt only with three topics proposed by the Committee out of which a single one concerning selected problems of the nationality conflicts resulted in adopting a Convention which, however, till the outbreak of World War II, had been ratified by only 10 States (including Poland). In the interwar period, a greater vigour was shown by a regional organization: the Pan-American Union. Within its activities — particularly at the Pan-American Conferences in 1928 (Havana) and in 1933 (Montevideo) — about a dozen conventions on several problems of international law were adopted, but not all came into force even in that limited regional scale. Within its restricted material competence, it was the International Labour Organization that could boast of serious achievements by bringing about the conclusion of a whole range of conventions on various social problems.²

With the creation after World War II of the United Nations codification activities were undertaken within a much wider scope. In its Article 13 (1a), the UN Charter entrusted the General Assembly with the task of initiating and encouraging “the progressive development of international law and its codification”, and that body, in turn, established for that purpose a permanent auxiliary organ: the International Law Commission.³

The tasks of that Commission have been formulated in Article 15 of its Statute which keeps to the wording of the Charter. In principle, the Statute defined “codification” as endowing the already existing rules, mostly customary, with a written form, and “development” as the formulation of new rules. In practice, these tasks intertwine one with another, since draft conventions are likely to meet the approval of most States only when they correspond to their current practice but, at the same time, there is always the need of a “cosmetic” work, resulting in creating anew some additional rules whenever that practice is to be reflected in a written form. Thus, the very term “codification” gradually acquired a wider meaning, encompassing whole process of formulating treaty rules of a general character.

However, the question which according to various sources of inspiration seem to be pressing for codification by way of multilateral conventions are so numerous and complex that the International Law Commission alone would hardly be able to cope with all of them. Hence, the codification processes follow today several parallel tracks.⁴

² More on this question: S. E. NAHLIK, *Wstęp...*, [Introduction...], p. 418 ff.

³ The Statute of the ILC is an annex to the UN General Assembly Resolution 174/II of 21 November, 1947.

⁴ More on this question: S. E. NAHLIK, “The Role of the United Nations in the Codification and Development of International Law”, *Sprawy Międzynarodowe*, special issue, Warszawa 1971, p. 133 ff.

First, on universal scale, when the question to be resolved is relatively simple and, in many cases, does not require a more comprehensive text, the UN General Assembly alone shortens the codification process by adopting a given act and including it in its resolution, usually as an annex. Second, also on universal scale, quite a number of the so-called specialized agencies, partially following the example of the interwar activities of the ILO, either draft and adopt at their periodical sessions conventions concerning problems pertaining to their material competence, or sponsor codification conferences convened for such purpose. Third, still on universal scale, a codification conference is sometimes convoked by a State on the inspiration of a social organization functioning on its territory, for instance, the Federal Government of Switzerland on the inspiration of the International Committee of the Red Cross convened several diplomatic conferences on the development of the so-called humanitarian law.⁵ Moreover, also the regional organizations much more numerous today than in the interwar period, do not waste their time. Many of them draft and adopt various normative acts which, to a certain degree, contribute to the codification of particular questions and domains of international law, though of course only within the territorial range of the organization concerned.⁶

However, the most important forum of codification processes is still that which, under the auspices of the UN General Assembly, is based upon the activities of the ILC. It is, as it were, a very useful but somewhat complicated device,⁷ since the Commission first appoints for each chosen topic a "special rapporteur" who formulates preliminary draft articles, first submitted to the Commission for a sometimes very long discussion and then, with amendments resulting therefrom, returned to the rapporteur for a new elaboration. It is only when the draft has been adopted by the Commission as mature enough that it is submitted to the UN General Assembly which passes it through the filter of its subsidiary organs (in most cases, the VI Committee) and then either returns it to the Commission for a redrafting, or transmits it to the UN Secretary General with a recommendation to convene a special diplomatic conference. Its goal would consist in examining article after article, paragraph after paragraph the ILC draft and in bringing about the adoption first of each particular provision, then of the Convention as a whole, and subsequently in opening it to signature and ratification or accession by individual States. Although

⁵ See S. E. NAHLIK, "A Brief Outline of International Humanitarian Law", *International Review of the International Red Cross*, July—August 1984.

⁶ See i.a. S. E. NAHLIK, "La codification du droit international dans les pays du Comecon", in: *Régionalisme et Universalisme dans le droit international contemporain, Colloque de Bordeaux 20—22 mai, 1976*, éd. Pedone 1977, p. 243 ff.

⁷ See S. E. NAHLIK, *The Role...* (note 4), Chapter II.

it is a long and complicated way, it has led to the adoption of a number of conventions concerning important and extensive sections of international law such as, for instance, various aspects of diplomatic law, consular law, treaty law, succession of States, the law of the sea (the latter in two, entirely different stages: first, in four conventions of 1958 and, second, in a gigantic code of a "new" law of the sea contained in the 1982 Convention).⁸ There are also further differently advanced sections of international law expecting codification.⁹ Approaching its final shape is the Convention on the responsibility of States. Moreover, there are being prepared conventions on such problems as international liability for injurious consequences arising out of acts not prohibited by international law, jurisdictional immunities of States and their property, status of the diplomatic courier and the diplomatic bag, the use of international waterways for purposes other than the navigational and, finally, the abandoned in the 1950s draft of a code of crimes against peace and security of mankind. Some of these topics are linked with the question of the protection of environment, which gives rise to an increasing anxiety also within the International Law Commission.

Thus it may be said that the trend towards a progressive codification of international law has established itself in several international organizations — both regional and universal with the United Nations at the head — as well as in several different domains of international law.

In view of this, a number of general reflections call for attention.

II

First of all, the question should be asked of how international law, which had been for so many centuries, if not exclusively then nearly so, a customary law based on practice, succumbed after World War II as though overcome by a hurricane, to the codification trend.

It seems that mainly two factors contributed to it: one objective, another subjective.

The objective factor is related to the stupendous development of science and technology, leading mankind to the conquest of outer space and heretofore unknown energies, to mention only the nuclear energy. But also

⁸ In view of its specific character, the Convention was prepared outside the UN International Law Commission, for its text, see UN Doc. A/CONF.62/122.

⁹ The progress in the Commission's work in those domains is reflected in its successive yearbooks — see, for example, *The Yearbook of the International Law Commission*, vol. 2, 1982, Part II, *passim*.

such spaces and energies as had already been known before can be only now exploited in a previously unattainable manner. This can especially be said of the air and even of the sea space which, conquered only partially in the past, offer at present new and increasingly growing exploitation possibilities covering the continental shelf, as well as the seabed and ocean floor. Apart from those conquests in scientific and technological fields, the scope of official cooperation between States, regulated by international law, has been also extended to such realms of interhuman relations as were previously left mainly to individuals and private institutions. This concerns international economic as well as cultural, scientific and technological relations. Hence, next to the new possibilities offered by the progress in science and technology there emerged a great many situations for which it would be difficult to find a satisfactory solution in traditional customary law.

The subjective factor has also played and is still playing a no less important role in bringing about the pressure of the codification trend. It consists in an unprecedented development and, at the same time, in a tremendous diversification of the international community. Once, only the European Christian States, and thereafter only the "civilized" States were considered to constitute the "international community", while it seemed nearly self-evident that only European States, or those ruled by people of European origin (first and foremost, American States) deserved to be considered as "civilized". The admittance to this community from beyond that group was granted only — if at all — to a few States (some Asian, with Japan at the top) unreservedly accepting certain European standards. All in all, the "international community" hardly ever extended beyond half a hundred of States, being the exact number of States belonging to the interwar League of Nations even at the peak of its membership. But after World War II the international community began, like a bank-bursting river, to expand by including new and new States, mainly those just liberated from under various forms of colonial or semicolonial dependence (protectorates, mandated or trusteeship territories). So, in comparison with the interwar period, membership in the international community eventually increased threefold. As a matter of fact, membership in the United Nations has transgressed 160, while a dozen or so States remain — for different reasons — outside the organization (for instance, Switzerland, the so-called dwarf European States, or both Korean States) taking otherwise an active part in international relations.

What seriously hampers international cooperation, also the one consisting in a gradual codification of international law, is not the very increase of the membership of the international community, but something quite different. Formerly, this community comprised States recognizing, even when in dispute or at war, the same legal standards. When they sat down —

rarely enough — to the codification table, they could without much difficulty come to an agreement — as it had been convincingly demonstrated at the Hague Conference of 1907, which prior to World War II constituted the peak of the codification trend. 44 States participated therein and one session was sufficient to work out and agree upon the texts of no less than 13 conventions, not counting various “declarations” and “recommendations”. And today? The codification work over a single convention requires several years and the all-time record is held by the Convention on the Law of the Sea whose working out, not counting the preparatory stages, took about 12 years. The divergencies among particular groups of States are too great to be resolved in a short time. Nevertheless, the codification trend goes on though the divergencies begin already with the very approach to the store of rules of traditional customary law. Even the European socialist States could not accept some, few perhaps, but some rather essential rules of customary law created on the basis of mutual relations among the capitalist, and sometimes still feudal, States. Also a considerable part of Third World States perceive even more accentuated difficulties in adapting themselves to traditional customary rules, since, from their point of view, these rules derived from the colonial era had been created at a time when they had been refused the status of equality within the international community.

And, apart from that, also the Third World is not a monolith, as it encompasses groups of States differing greatly in views and traditions. Hence, it is sometimes a difficult task to come to an agreement with some of them. I have experienced it many a time while participating in the work of the Drafting Committee¹⁰ of the Conference on the Law of Treaties (1968—1969)¹¹ and on Succession of States (1983).¹² Quite frequently, what had been self-evident to an European jurist, both from the West (sometimes with the exception of Anglo-Saxons) and the East, had proved to be questionable to some of the African or Asian delegates. Thus, the advantage of treaty codification consists i.a. in the fact that what to an European jurist is an unquestionable rule of customary law is questionable to a Third World jurist till it becomes a treaty rule formulated with his participation.

These circumstances enhance largely the driving force of the codification trend.

¹⁰ The meetings of the Drafting Committee are not recorded; thus any information about their course may only be drawn from the recollections (or personal notes) of those who participated in them.

¹¹ *United Nations Conference on the Law of Treaties, Official Documents*, vol. 1—3, UN, New York 1969—1971.

¹² *United Nations Conference on Succession of States in Respect of State Property, Archives and Debts, Official Documents*. UN, New York 1984.

III

In discussing the proceedings of the International Law Commission we have already mentioned how long and complex they are. And all of them have only a preliminary character! What to say when the draft, preliminarily agreed upon, enters into the stage of being formally concluded and coming into force?

The principle of sovereignty traditionally required that any text binding upon the States be adopted unanimously. The requirement of unanimity was thus obligatory at the earlier conferences, both before World War I and still in the interwar period, also within the League of Nations (in any case, for resolutions of a substantial character, while in certain procedural matters this requirement was sometimes restricted by disregarding the votes of States parties to a dispute).¹³ After World War II, the postulate of unanimity has been recognized as not realistic, and thus the UN Charter has introduced a majority vote which, in the UN General Assembly, envisages a simple majority on less important decisions and a qualified majority of two-thirds on questions recognized as "important".¹⁴ This solution has begun to be applied more and more frequently also beyond the UN General Assembly, i.e. to rules of procedure of codification conferences. It has become so frequently applied that the Vienna Convention on the Law of Treaties (Article 9/2) introduced a presumption in its favour unless it has been otherwise decided by the rules of procedure of a given conference, adopted by a similar majority.¹⁵

Also worthy of attention is the specific wording of Article 18 of the UN Charter according to which decisions shall be made by a majority of the members "present and voting". The same wording is embodied in the rules of procedure of the UN General Assembly and has been thereafter adopted by the rules of procedure of all other UN organs as well as conferences *ad hoc*, not excluding those convened for codification purposes.¹⁶ Thus, as "voting" are regarded only those (otherwise than provided for in the statutes of many bodies in national law) voting "for" or "against". Those abstaining are considered as not voting. Their role is thus identical with those absent. It is hard to disregard what paradoxical situations may ensue therefrom. It may, for instance, happen that — with 100 delegations attending — 20 delegates have voted for a resolution, 10 against, and the remaining

¹³ See Covenant of the League of Nations, Art. 15, para. 6 and 10.

¹⁴ Charter of the United Nations, Art. 18, para. 2 and 3.

¹⁵ Vienna Convention on the Law of Treaties signed on 23 May, 1969, Art. 9, para. 2.

¹⁶ For instance, Rules of Procedure of the Vienna Conference on the Law of Treaties (UN Doc. A/CONF.39/10), Rule 37.

70 have abstained from vote. Such a resolution is formally adopted, but what is its political and psychological value? Those abstaining or ignoring the voting at all will frequently find themselves in — talking frankly — an embarrassing situation, since it will become obvious enough that they have no opinion at all on the subject-matter in question, or try not to expose themselves to any risk, or even do not know what it is all about. At codification conferences, in cases of a highly sophisticated legal argumentation, this may as a rule, concern a considerable part of Third World delegates.

It was such embarrassing situation that highly contributed to establishing the practice of the so-called consensus. It consists in that the chairman of a particular meeting — when the discussion seems to have been exhausted and there seems to be agreement as to the essentials — instead of ordering a formal vote, after having asked whether there are no objections, states that the point in question has been adopted by consensus, that is, by a presumed general consent (thereafter, the matter is usually transmitted to the drafting committee for further polishing).

This practice, established mainly in an extrastatutory way, has been to my knowledge formally expressed only in a few regulations (but, for instance, the Rules of Procedure of the III Conference on the Law of the Sea did envisage, as a rule, the common consent and only the absence thereof constituted a sufficient reason for formal voting.¹⁷ It constitutes an interesting reversion to the traditional unanimity rule. This procedure has its advantages and disadvantages.

The most important advantage is that the obtained (though often apparent) consent is in principle general, the incidental one being that the hesitant or misinformed remain undisclosed. Both these advantages have their deep sense. But on the other side... To overcome the differences of views and interests and to obtain such a consent, the eventual wording must become, more often than not, vague or even ambiguous. Sometimes this is accomplished more or less in this way: a certain general principle is established to satisfy some (probably the most numerous or most influential) group of delegates. However, to satisfy some other group, exceptions to the rule are introduced from the very beginning. And moreover, to satisfy a third group, exceptions to exceptions are added.

In order not to be empty-worded, I would like to quote at least one typical example: Article 62 of the Vienna Convention on the Law of Treaties of 1969 concerns the well-known controversial doctrine *rebus sic stantibus*. The general principle, whose Latin denomination has been

¹⁷ Rules of Procedure of the III UN Conference on the Law of the Sea (UN Doc. A/CONF.62/30/Rev.2), Art. 37.

characteristically omitted in the heading of that Article, says that, to terminate a treaty, a fundamental change of circumstances may not be invoked. But soon the reader is faced with the word "unless" and the establishment of two situations in which such a change may be invoked. Then the next paragraph supplies the information that, even if such situations should arise, there are two instances in which a fundamental change may not be invoked.

Other similar examples remaining in the world of conferences and treaties of which I have some personal experience are to be found in the equally dialectic provisions of two other treaties: the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, laying down the conditions under which certain buildings may enjoy "special protection",¹⁸ and the 1st Geneva Protocol of 1977 relating to the Protection of Victims of International Armed Conflicts, defining the conditions under which certain persons or groups of persons may enjoy the combatant status.¹⁹

The price of unanimity, whether obtained through formal voting or through consensus, consists — not always but sometimes — in clumsy, complex and vague wording of the provisions concerned which may thereafter produce serious differences of interpretation. But that worries little the participants in a conference. They have achieved their fragile success and let the problems left behind worry their successors.

However, it is sometimes impossible to reach consensus as to the very basis of a required solution, and a formal voting becomes necessary. We have encountered frequently — a highly remarkable and, at the same time, highly distressing phenomenon. The Third World countries, confident of their voting power — it is mainly they that demand a considerable majority of votes, sometimes reaching the ceiling of two-thirds required to adopt an important resolution — arrive through voting at formulas which turn out to be unacceptable to a considerable group of other States — mainly those of the West. These States, having found themselves in minority, will sometimes not only refuse to accept the controversial resolution, but will also assume a negative attitude to the general results of a given conference and will either abstain from voting or even vote against the draft convention as a whole. What then? The convention which was intended to be universal or nearly universal, will be binding only upon the Third World States, or possibly also the socialist

¹⁸ Convention for the Protection of Cultural Property in the Event of Armed Conflict signed at The Hague on 14 May, 1954, Art. 8.

¹⁹ Protocol additional to the Geneva Conventions of 12 August, 1949, and relating to the Protection of the Victims of International Armed Conflicts, adopted at Geneva on 10 June, 1977, Art. 44, especially para. 3.

States. Without the participation of the Western States or, in any case, of a considerable part of them, the convention may prove to be a failure. And sometimes this is exactly the outcome.

I had an experience of this kind in 1983 during the Vienna Conference on Succession of States in respect of State Property, Archives and Debts: the Third World States forced the Conference through voting to adopt a number of solutions which had not been agreed upon by a considerable part of Western States,²⁰ and thus the triumph of the Third World should be regarded as rather illusory. That is why hasty voting should be avoided and the negotiating process rather prolonged, even at the expense of time and effort, until compromise solutions are found, since it is only they that could, when there is a conflict of interests, lead to a—if not ideal then bearable—result allowing of a more or less effective international cooperation in a given field.

IV

A text, whether adopted in formal voting by a considerable majority or unanimously, or through consensus, is not yet binding upon the States. According to the sovereignty principle, each State should also express its individual approval either through signature and ratification or, as the case may be, through accession. However, States sometimes delay in carrying out any of such acts whereby the text of a treaty or convention would become formally binding upon them. There may be various reasons for the delay: a change of government, uneasiness about the parliament (in the States whose constitutions require the consent of parliament previous to the ratification by the head of State), or resistance on the part of some ministry whose consent is indispensable to carry out the ratification.

Objections on the part of a State against a convention may concern it as a whole or only a few of its provisions. France, the only State which in 1969 voted against adopting the Vienna Convention on the Law of Treaties as a whole, had been—according to the French delegate's pronouncement—adverse only to a few of its provisions.²¹ In 1977, in connection with the Ist Geneva Protocol relating to the Protection of Victims of International Armed Conflicts, the State of Israel pronounced

²⁰ Convention on the Succession of States in Respect of State Property, Archives and Debts signed at Vienna on 8 April, 1983 (UN Doc. A/CONF.117/14), especially Arts 15, 28 and 38.

²¹ He repeated later the same reasoning in *Annuaire français de droit international*, 1969, p. 7 ff. (O. DELEAU, "Les positions françaises...").

itself against the Protocol as a whole mainly on account of only one article concerning the combatant status.²²

Apart from that, the views and interests of particular States are so divergent that it would be difficult to assert that some States would be inclined to associate themselves with the whole of an act which is sometimes very extensive and differentiated as to its content. Here the institution of reservations is of great help.²³ Initially, it was mistrusted, especially by Western States. The important advisory opinion of the International Court of Justice issued in view of the reservations, which some States had formulated in respect of the Paris Convention of 1948 on Genocide, and which contained a truly Salomonic verdict admitting of reservations to a treaty, embodying no specific provisions in respect of reservations, inasmuch as they were not "incompatible with the object and purpose of the treaty",²⁴ was adopted in the early 1950s by a majority of one vote only. But several years later, when the Draft Convention on the Law of Treaties was submitted containing an almost identical formula, no basic objection was raised against it.²⁵ It has become habitual in view of its great importance for the progress of international cooperation. The requirement that reservations should be compatible with the "object and purpose" of the treaty means undoubtedly that reservations may not be submitted to substantial provisions, but nothing should stand in the way of submitting them to those less essential such as, for instance, those of a procedural character. It seems preferable that a State which has difficulties in accepting one or two articles from among 50 or 100 be allowed to submit reservations, and thus tie itself the more closely to the 48 or 49 articles, rather than such State not to become a party to the treaty concerned as a whole. It should be also added that the State which submits such reservations strengthens thereby — *a contrario* — its approval of all remaining articles.

As a rule, reservations have legal value only when they accompany acts expressing the consent of the State to be bound by a treaty, that is, the instruments of ratification or accession.²⁶ However, a certain foreboding

²² R. LAPIDOTH (who had represented Israel at the Geneva Conference) attempted to defend this point of view also in *Revue générale de droit international public*, 1978, p. 170 ff ("Qui a droit au statut de prisonnier de guerre?").

²³ The Problem of reservations is thoroughly discussed by R. SZAFARZ in her book *Zastrzeżenia do traktatów wielostronnych* [Reservations to Multilateral Treaties], Warszawa 1974, *passim* as well as in her article "Reservations to Multilateral Treaties", *Polish Yearbook of International Law*, vol. 3, 1970, p. 293 ff.

²⁴ *ICJ Reports*, 1951, especially p. 21 ff.

²⁵ It has been expressed in Art. 19, subpara. c. of the final text of the 1969 Convention.

²⁶ Cf. the definition of reservation in Art. 2, para. 1, subpara. d of the 1969 Convention.

of such future reservations, or at least interpretative declarations indicating how a State perceives one or another treaty provision and intends to apply it, may be now and then detected already in the pronouncements of the delegates of States to international conferences, especially when their attitude towards the voting becomes known, either immediately before or immediately after the voting, sometimes through a written and sometimes through an oral statement to be found in the records of the session. Many a time the records of a conference clearly show that such attitude constitutes the seed of future reservations or interpretative declarations, and thus a preview of the difficulties in respect of the possible application of a treaty even if it is expected to become operative. I shall limit myself to only one example here, namely to one of the most controversial provisions of the I Protocol of 1977 relating to the Protection of Victims of International Armed Conflicts, embodied in Article 44 and concerning the combatant status. When after a long work of a special working group the whole matter had entered the forum of the respective commission, as many as 41 delegates deemed it necessary to explain the way in which they had voted and thereafter, when the voting took place at the plenary session — as many as 62.²⁷

However, the same principle of sovereignty, which underlies the institution of reservations, permits simultaneously the contracting parties to lodge objections to reservations giving to their objections such legal effect as they determine themselves.²⁸ In practice, as Renata Szafarz has aptly demonstrated in her doctoral thesis, the State lodging an objection to the reservation has very rarely recourse to the extreme effect of fully excluding any treaty realations between itself and the State which had formulated the reservation. Thus it seems that the institution of reservations has many a time played and is still playing a positive role in enriching treaty relations, also in respect of conventions codifying international law.

Doubts may be raised as to the status of a multilateral treaty which has been adopted either unanimously, or by an overwhelming majority of votes, but which is being ratified or acceded to only very slowly. Is it without any legal value?

A barrier against such activities as would defeat the very object and purpose of the treaty prior to its entering into force has been very aptly erected in Article 18 of the Vienna Convention on the Law of Treaties, by obliging each State to desist from such activities already from the

²⁷ For more detail on this subject, see S. E. NAHLIK, "L'extension du statut de combattant...", in: *Recueil des cours de l'Académie de droit international de La Haye*, vol. 164 (1979), p. 223 ff.

²⁸ Convention 1969, Art. 20, para. 4, especially subpara. b.

moment of its having been signed and before either its having been ratified by the State, or its entry into force in general.

Apart from that, however, it may be assumed that the position taken at a conference by the delegates of a State endowed with full powers and instructions and learned in matters concerning the treaty in question, may be indicative of the intentions of that State.

Finally, great importance may be ascribed to the relation between the provisions of the treaty and the preexisting customary law. If the treaty corresponds with it to a high degree, one or another treaty provision may be regarded as a handy formulation of a given customary rule. That is in any case my opinion as to the Vienna Convention on the Law of Treaties in which I see a much stronger reflection of the rules of customary law than my learned colleague K. Wolfke is inclined to admit.²⁹ Of a similar opinion is — *toute proportion gardée* — the International Court of Justice which has repeatedly expounded it even in respect of such treaty provisions as had been most vigorously discussed at the Vienna Conference (for instance, as to the consequences of the breach of a treaty by one of the parties concerned, the conditions of invoking a fundamental change of circumstances, or the invalidity of the treaty concluded under coercion or the threat or use of force).³⁰

V

In view of not infrequent disillusion, there appear sometimes doubts, voiced by such eminent jurists as Roberto Ago or Richard Baxter, whether it is useful to undertake codification initiatives in cases when universal acceptance of a convention is uncertain.³¹ A codification initiative which either comes to nothing or results in only partial acceptance of the drafted text may — as Roberto Ago indicated at one time when acting as chairman of the International Law Commission — create a greater uncertainty of law than that existing at the time of a customary rule being applied without any attempt at a treaty codification of the given part of international

²⁹ K. WOLFKE, *Rozwój i kodyfikacja prawa międzynarodowego* [The Development and Codification of International Law], Wrocław 1972, p. 37.

³⁰ The respective opinions of the International Court of Justice have been quoted by S. E. NAHLIK, *Kodeks prawa traktatów* [Code of the Law of Treaties], Warszawa 1976, pp. 493—494.

³¹ R. AGO, *La phase finale de l'oeuvre de codification du droit international*, UN Doc. A/CN.4/Rév. 1 of 29 July, 1968, paragraph 7; R. R. BAXTER, *The Effects of Ill-Conceived Codification*, in: *Recueil d'études de droit international en hommage à Paul Guggenheim*, Genève 1968, p. 146 ff.

law. There is undoubtedly something worth attention in this reasoning. However, should we unreservedly accept this point of view, no codification initiative would make any sense, since it is hardly ever certain whether a specific convention is likely to gain universal acceptance. Not all the States have become parties to such an uncontroversial treaty as the Vienna Convention of 1961 on Diplomatic Relations which codifies preexisting customary law and never encountered any serious objections.

The trend towards a gradual codification of international law undoubtedly corresponds — at least in view of the above-mentioned objective and subjective reasons — to the contemporary stage in the development of international relations. However, when drafting a convention, one should always remember the relation between it and customary law. This relation may be sometimes defined as *sui generis* feedback since, on the one hand, conventions usually attempt to take into account as much as possible the already existing customary rules and, on the other, they themselves frequently inspire development of such rules.

As for that, a valuable interpretative indication can be found in preambles to almost all codification conventions, which remind the parties that “the rules of customary international law will continue to govern questions not regulated by the provisions of the present convention”. Highly characteristic is also, for instance, the stipulation of Article 43 of the Vienna Convention on the Law of Treaties that the extinction of a treaty obligation in view of such treaty’s invalidity or termination

“shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the treaty”.

Guided by such principles, or simply by the principle of good faith, which constitutes one of the main pillars of the whole edifice of international law, we should realize that both treaty and customary rules, as well as those frequently and unjustly ignored “general principles of law” (cf. Article 38, paragraph 1c of the ICJ Statute), are intermingled and complementary to one another. Treaty codification does not eliminate those different kinds of sources, but frequently offers the States and their representatives a handy textbook facilitating the task of finding and understanding them.

A text once drafted lives frequently a life of its own. If it is easily accessible both to students and those having to apply them in practice, they become accustomed to it, whether it is formally binding or not. I venture to assert that an institution, which is today rather rarely mentioned in the textbooks of international law, comes thereby back to life, namely “adhesion”, application in practice of provisions of a given treaty without formally acceding to it. It has occurred many a time and will continue to occur, constituting one more factor in the development of international

law. Thus the effort invested in drafting a treaty text will not be wasted even if individual States should, for reasons of their own, postpone its formal acceptance.

Consular Immunity from Jurisdiction in Internal Law and Consular Conventions binding on Poland

by STEFAN SAWICKI

1. Grounds of the Jurisdictional Immunity

In order to ensure the members of consulate the possibility to execute tasks entrusted them by their country, with the purpose of maintaining international relations, it is essential to create such a legal situation which would enable to proceed with their work without any obstacles and with a conviction of full personal security and independence of action. Thus the primary aim and a justification of the privileged position of members of consulate is ensuring them an unconstrained fulfilment of their tasks.¹ According to V. Namysłowski's words

"It is essential to create for consuls abroad such a legal background which would enable them to fulfil their duties freely with a conviction of full personal security".²

Also W. Durdieniewski and S. Krylow state that consuls are entitled to a series of privileges "in order to have a free hand to attend to their duties".³ According to Z. Sarna the foundation of the jurisdictional immunity lies in "the desire to gain independence for consuls from authorities of the receiving state".⁴ In the opinion of W. Michalski the aim of the jurisdictional immunity is to ensure a group of persons to which it was granted, conditions to perform their official functions.⁵

Members of consulate are also entitled to immunity from jurisdiction not on the account of their persons but only in the interest of the sending

¹ C. BEREZOWSKI, W. GÓRALCZYK, K. LIBERA, *Prawo międzynarodowe publiczne* [Public International Law], Warszawa 1970, pp. 280, 311—312; L. GELBERG, *Zarys prawa międzynarodowego* [Outline of International Law], Warszawa 1977, p. 219.

² W. NAMYSŁOWSKI, *Zarys systemu współczesnego prawa konsularnego* [Outline of System of Contemporary Consular Law], Warszawa 1931, p. 23.

³ V. DURDENEVSKIJ, S. KRYLOV, *Meždunarodnoe pravo*, Moskva 1947, p. 369.

⁴ Z. SARNA, *Prawo konsularne* [Consular Law], Kraków 1936, p. 13.

⁵ W. MICHALSKI, *Immunitety w polskim procesie karnym* [Immunities in Polish Penal Procedure], Warszawa 1970, p. 38.

State in order to allow them to freely perform their duties. This immunity is not related to their persons but to the representation status of the sending State or to the fulfilment of respective functions on behalf of that country.⁶

So, as a theoretical foundation for the jurisdictional immunity serves the theory of function. According to this theory the substance of the special status lies in the necessity to guarantee conditions indispensable for an uninterrupted execution of their functions to the members of consulate.⁷ On this concept, are also based, among other things, such conventions as the 1961 Vienna Convention on diplomatic relations,⁸ the 1963 Vienna Convention on consular relations⁹ and numerous bilateral consular conventions.

2. The Substance of the Jurisdictional Immunity

Unlike a diplomatic agent, who is granted full immunity from jurisdiction in the receiving state, members of consulate enjoy the immunity only in relation to official acts considered as expression of activities of a sovereign State (however — as we shall later evidence — there exists a possibility to conventionally broaden the objective scope of the immunity).

The functioning of the jurisdictional immunity causes a situation in which no administrative body and no court of law of receiving state is competent to consider whatever a matter related to official activities conducted by members of consulate. The exclusion of competence of courts of receiving state is unquestionable and concerns jurisdiction in criminal, civil and administrative cases. This relates to both the assessment of acts (also official acts) of members of consulate and to their personal liability for legal or material consequences of the acts.¹⁰ If a consul alludes to he

⁶ J. OSIECKI, "Służba dyplomatyczna i konsularna w świetle kodyfikacji prawa konsularnego" [Diplomatic and Consular Service in the Light of Codification of Consular Law], *Państwo i Prawo*, 1964, No. 5—6, p. 800; C. BEREZOWSKI, *Prawo międzynarodowe publiczne* [Public International Law], Warszawa 1969, vol. 2, p. 195; W. MICHALSKI, *op. cit.*, p. 38; J. SUTOR, *Prawo dyplomatyczne i konsularne* [Diplomatic and Consular Law], Warszawa 1982, p. 345.

⁷ D. LEWIN, *Diplomatičeskij immunitet*, Moskva 1949, p. 257; K. STEFKO, *Dyplomatyczne zwolnienie od jurysdykcji w sprawach cywilnych* [Diplomatic Release from Jurisdiction in Civil Cases], Lwów 1938, p. 80; I. BLIŠČENKO, V. DURDENEVSKIJ, *Diplomatičeskoe i konsularnoe pravo*, Moskva 1962, p. 347; C. CAHIER, *Le droit diplomatique contemporain*, Geneve 1964, p. 190; M. LACHS, "Prace kodyfikacyjne ONZ" [Codification Works of the UN], *Państwo i Prawo*, 1960, No. 1, p. 7; L. GELBERG, *op. cit.*, p. 219.

⁸ Dz. U. [Dziennik Ustaw — Journal of Laws, further as Dz. U.], 1965, No. 37, item 232.

⁹ Dz. U., 1982, No. 13, item 98.

¹⁰ C. BEREZOWSKI, W. GÓRALCZYK, K. LIBERA, *op. cit.*, p. 315.

vested immunity, the court of the receiving State should confine itself to examining whether the alluded act had an official character and whether it lied within the competence of the consul or if the consul executed duties of official character. In case of a positive result the court should not judge the merits of the case¹¹ that is it should not give answers to the main question of a proceeding if the defendant or the accused committed the act on which he was charged. In case of any doubts the court, through the mediation of its supreme authorities, should ask the minister of foreign affairs for an explanation whether the act under investigation lies within the scope of duties of the consular office.¹²

Does the jurisdictional immunity in criminal cases cover only judicial proceedings or is it a broader topic concerning also preparatory proceedings? C. Berezowski holds that the jurisdictional immunity signifies an independence of the individual from the law of the receiving State.¹³ According to Z. Cybichowski, persons entitled to immunity from jurisdiction are not liable to either State authorities or state law.¹⁴ The same opinion is shared by K. Libera.¹⁵

Such attitudes and practices of States allow to conclude that jurisdictional immunity in criminal cases covers not only judicial but also preparatory proceedings (investigation).¹⁶ This view is also substantiated by the essence of the immunity itself which has to ensure a consul unrestricted execution of his duties. The exclusion of preparatory proceedings from the immunity would lead to substantial restrictions on the liberties of performing consular duties.

Thus a public prosecutor, who after instituting preparatory proceedings in a criminal case, states that the suspect enjoys immunity from jurisdiction, has to discontinue the preparatory proceedings without the right of issuing an order to inform the suspect of the charges against him and at the same time should inform the ministry of foreign affairs about the matter in order to conduct further relevant steps. If, on the other hand, it is known from

¹¹ F. PRZETACZNIK, "Kodeks postępowania cywilnego a prawo międzynarodowe" [Code of Civil Procedure and International Law], *Nowe Prawo*, 1965, No. 9, p. 1002.

¹² According to Art. 1116 of the Code of Civil Procedure, the competent body to consider problems of exempting persons from internal jurisdiction, is the Minister of Justice.

¹³ C. BEREZOWSKI, *op. cit.*, p. 188.

¹⁴ Z. CYBICHOWSKI, *System prawa międzynarodowego* [System of International Law], Warszawa 1932, p. 148.

¹⁵ K. LIBERA, "Konsularny immunitet jurysdykcyjny" [Consular Immunity from Jurisdiction], *Państwo i Prawo*, 1960, No. 3, p. 473.

¹⁶ W. MICHAŁSKI, *op. cit.*, p. 62.

the beginning that the perpetrator of the offence is a member of the consular office enjoying immunity from jurisdiction, the public prosecutor may institute preparatory proceedings "of the case" in order to determine if there exist grounds to move for the withdrawal of this privilege in circumstances when this is permissible. It is forbidden, however, to present the decision to inform a suspect of charges against him until the prosecutor obtains an adequate permission.¹⁷

Criminal immunity from jurisdiction does not abrogate the criminal character of the act, it merely causes its exemption from punishment in the receiving State.¹⁸ That is why, for example, according to the 1969 Polish penal code the liability of an inciter or accessory to a crime committed by a person enjoying immunity from jurisdiction cannot be abrogated and at the same time he will be held responsible for his deeds independently, according to his intent (Art. 19). This also refers to liability for criminal support, incitement or praising of a crime by a member of a consular office enjoying immunity from jurisdiction.¹⁹

Everything that relates to the jurisdictional immunity in criminal cases has, to a great degree, an application to this immunity in civil cases. A court of law or any other administrative body of a receiving state which receives a claim against a member of a consular office enjoying immunity from jurisdiction has to reject it after establishing, that the charged act was committed during execution of official business.

Consular jurisdictional immunity has a formal character.²⁰ This means that it does not cancel the penalty for the act, but only eliminates the possibility of conducting proceedings before a court for the act committed during execution of official duties.²¹ It is a partial immunity because it deals primarily with acts related to official functions of a consular members. It is also a permanent immunity because it assures permanent legal protection of a deed committed during its upholding. In practice, this signifies that a person enjoying the privilege cannot be prosecuted for acts committed during its upholding, also after the extinction of the mission substantiating the grant of the jurisdictional immunity.²²

¹⁷ J. BAFIA, J. BEDNARZAK, M. FLEMMING, S. KALINOWSKI, H. KEMPISTY, M. SIEWIERSKI, *Kodeks postępowania karnego. Komentarz* [Code of Penal Procedure. Commentary], Warszawa 1976, p. 29.

¹⁸ J. ANDREJEW, *Polskie prawo karne w zarysie* [Polish Penal Law in Outline], Warszawa 1970, p. 63.

¹⁹ W. MICHALSKI, *op. cit.*, p. 66.

²⁰ W. MICHALSKI, *op. cit.*, pp. 73—74; S. KALINOWSKI, *Polski proces karny* [Polish Penal Procedure], Warszawa 1979, p. 106.

²¹ J. ANDREJEW, W. SWIDA, W. WOLTER, *Kodeks karny z komentarzem* [Penal Code with Commentary], Warszawa 1973, pp. 35, 116.

²² C. BEREZOWSKI, W. GÓRALCZYK, K. LIBERA, *op. cit.*, pp. 282—283.

The functioning of both kinds of the immunity is different because the material immunity relates to the mere existence of proceedings at law as it is based on the annulation of punishability for acts considered as offences. The formal immunity, on the other hand, has nothing in common with the problem of punishability of the deed but instead acts as a bar against proceedings at law, thus making impossible the institution of such proceedings. However, the functioning of both the material and formal immunity in the procedure stage is the same as it leads to the discontinuance of the proceedings.²³

3. The Scope *Ratione Personae* of the Jurisdictional Immunity

a) In Internal Law

The 1964 Code of Civil Law Procedure (CCLP)²⁴ being now in force in Poland states precisely which of the consular office members are released from the jurisdiction of Polish courts. According to Article 1112, paragraph 1 of the above mentioned code which deals with persons enjoying immunity from jurisdiction on a limited scale, the privilege is granted to the following:

1. Officials executing consular functions on behalf of foreign states independently of their citizenship.
2. Foreigners employed as administrative and technical workers in consular offices of other nations in Poland.

In Article 1112, paragraph 1, of the CCLP a solution, consistent with Article 43 of the 1963 Vienna Convention on consular relations, was adopted. This solution grants immunity from jurisdiction to consular officials and consular employees. There exists, however, a minor difference based on terminology. The Vienna Convention uses a term "consular officials" while the CCLP describes those persons as "officials executing consular functions". The latter term signifies heads of consulate (general consuls, vice-consuls and consular agents) and persons executing consular functions on behalf of the sending state. The Code of Civil Law Procedure grants immunity from jurisdiction to officials performing consular duties independently of their citizenship. This solved the problem of foreigners who are citizens of a different State than they represent. However, it seems impossible to include into this category, persons possessing the citizenship of the receiving state, in this case Polish, as consular conventions signed by Poland in the

²³ S. KALINOWSKI, *Postępowanie karne. Zarys części ogólnej* [Penal Procedure. Outline of General Part], Warszawa 1963, pp. 137—138; W. MICHAŁSKI, *op. cit.*, pp. 20—21.

²⁴ Dz. U., 1964, No. 43, item 296.

past state that only a citizen of the sending State can become a consular official. Agreements with Great Britain in 1967 (Art. 7),²⁵ the Soviet Union in 1971 (Art. 4)²⁶ and East Germany in 1972 (Art. 6)²⁷ may serve as examples.

The second group of persons mentioned in item 2, paragraph 1, Article 1112 of the CCLP concerns foreign administrative and technical personnel of consular offices in Poland. They have been included into the group privileged by jurisdictional immunity as a consequence of taking into consideration of the solution adopted by the 1963 Vienna Convention (Art. 43, para. 1). The convention describes the term "consular employee" as every person employed in the administrative or technical service of a consular office. Article 43, paragraph 1 refers to consular employees who are citizens of the sending State. As regards consular employees, citizens of the receiving State or living there permanently, their situation is regulated by Article 71, paragraph 2, of the Vienna Convention which states that these persons enjoy the merits of the immunities and thus also immunity from jurisdiction, in such degree which is granted to them by the receiving state. In other words the concession of the jurisdictional immunity depends on the assent of that States' authorities.

According to Article 513, paragraph 1, of the 1969 Code of Penal administrative and technical personnel is granted immunity from civil jurisdiction. The general term "foreigners" which has no limits, indicates that they enjoy this immunity regardless of their permanent residence which may also be in Poland.²⁸ Thus foreigners — citizens of the sending State or a third country, employed in foreign consular offices and permanently residing in Poland have a right to immunity from jurisdiction.

To sum it up, according to the CCLP, immunity from jurisdiction is granted to consular officials and administrative and technical employees, who are citizens of the sending State or a third country and at the same time they can be foreigners permanently residing in Poland.

According to Article 513, paragraph 1, of the 1969 Code of Penal Procedure (CPP) in force in Poland, the following persons do not fall under the jurisdiction of Polish courts in criminal cases, while performing official duties:

1. Heads of consulates and other consulate officials of foreign countries,
2. Other persons put on equal footing as the above by way of agreements or commonly recognized international customs.²⁹

²⁵ Dz. U., 1971, No. 20, item 192.

²⁶ Dz. U., 1972, No. 15, item 106.

²⁷ Dz. U., 1972, No. 55, item. 360.

²⁸ F. PRZETACZNIK, *op. cit.*, p. 1003.

²⁹ Dz. U., 1969, No. 13, item '96.

The contents of the article indicate, that the definition of persons to whom the immunity may be granted has a general character. The provision is very flexible as it refers to agreements or commonly recognized international customs and it commands the state to take them into consideration treating them as internal law. International law is thus a source of law in cases determining which other persons, apart from the mentioned above, should be granted immunity from jurisdiction in Poland. Article 513, paragraph 1, item 1, of the CCP gives a general name for the heads of consular offices and other consular officials. The first term indicates general consuls, consuls, vice-consuls and consular agents. The second, which according to the 1963 Vienna Convention, concerns "consular officials", means officials performing consular functions.

Under the category of persons enjoying immunity from jurisdiction, according to Article 513, paragraph 1, item 2, of the CPP, should also fall the administrative and technical personnel of the consular offices, as they have been awarded this immunity by consular conventions signed by Poland in the post-war period. According to the commonly recognized customs and, unlike the CCLP, Article 517 of the CPP states that provisions of Article 513, paragraph 1, do not refer to persons who possess Polish citizenship or permanently reside in Poland. Thus in practice this regulation refers only to citizens of the sending State.

Provisions of Article 513, paragraph 1, of the CPP have a limited application, as according to Article 541, paragraph 1 they cannot be utilized if the international agreement of which Poland is a Party provides differently.

The Code of Penal Procedure subjects the grant of the jurisdictional immunity to conditions of reciprocity of the sending state. It is essential to stress, that this subjection does not have an obligatory character, as according to Article 541, paragraph 2 provisions on the jurisdictional immunity do not have to be introduced in respect of a foreign State with which there exists no agreement in that field and that State does not ensure reciprocity. Thus Poland can decline immunity from jurisdiction to a member of a foreign consular office if two conditions are met: nonexistence of an agreement on immunity between Poland and the sending State and the lack of reciprocity from the other State. The condition concerning the agreement refers to both bilateral and multilateral agreements of which Poland is a Party.

The same personal scope of the jurisdictional immunity is described in the 1971 Code of Procedure in Petty Offences (Art. 10, para. 1, letter f).³⁰

³⁰ Dz. U., 1971, No. 12, item 116.

b) In Consular Conventions

Unlike the CCLP and the CPP where the scope *ratione personae* of the jurisdictional immunity is similar, in consular conventions signed by Poland and currently in force, the range of privileged persons is more differentiated. After an analysis of the conventional provisions a certain regularity can be observed. This regularity is based on the tendency to award the immunity from jurisdiction to a larger circle of consular office members even including members of their families.

Consular conventions signed by Poland with Italy in 1973 (Art. 43)³¹ and Yugoslavia in 1982 (Art. 20)³² grant immunity from jurisdiction only to a certain group of persons employed in consular offices, that is, to consular officials and administrative and technical employees.³³ Both conventions, in Article 1, explain that a consular official is every person, including the head of the consulate, appointed to perform consular functions. Thus it may be a consul general, consul, vice-consul, consular agent and consular attache. An administrative-technical employee can be a person performing administrative or technical duties in a consular office—for example chancellery personnel, interpreters, cryptographers, radiotelegraphic operators, etc.

It is worth to underline, for the sake of comparison, that consular conventions signed by other countries adopted the same scope for the jurisdictional immunity. As example may serve conventions signed by the United States with Ireland in 1950 (Art. 11),³⁴ with Great Britain in 1951 (Art. 11)³⁵ and with the Soviet Union in 1964 (Art. 19),³⁶ by Great Britain with Greece in 1953 (Art. 13)³⁷ and with Yugoslavia in 1965 (Art. 15).³⁸ Such solutions were also adopted in agreements between socialist countries: the Soviet Union with Albania in 1957 (Art. 6),³⁹

³¹ Dz. U., 1977, No. 9, item 35.

³² Dz. U., 1984, No. 11, item 48.

³³ It is important to remind, that numerous consular conventions signed by Poland but not in force today, granted the jurisdictional immunity only to the heads of consular offices and consular officials. Such solutions were adopted, among others, in conventions with the Soviet Union in 1924 (Dz. U., 1926, No. 35, item 210) or with France (Dz. U., 1928, No. 56, item 528).

³⁴ *United Nations Treaty Series* [UNTS], vol. 222, p. 108.

³⁵ UNTS, vol. 165, p. 122.

³⁶ UNTS, vol. 665, p. 215.

³⁷ UNTS, vol. 191, p. 180.

³⁸ UNTS, vol. 595, p. 190.

³⁹ UNTS, vol. 307, p. 265.

Hungary with Bulgaria in 1958 (Art. 5)⁴⁰ and Romania with East Germany in 1958 (Art. 8).⁴¹

Some consular conventions binding Poland granted immunity from jurisdiction not only to consular officials and administrative and technical personnel but also to members of the service staff of consulate. For example the 1967 agreement with Great Britain⁴² in Article 22, paragraph 1 states that consular officials and employees do not fall under the jurisdiction of receiving State. Further in Article 2, it is explained that a consular official is every person, including the head of consulate, appointed to perform consular functions. A consular employee on the other hand—is every person employed by the sending State in a consular office to conduct technical or administrative operations or any other functions connected with the functioning of the consular office. Undoubtedly, to the privileged group described generally as “consular employees” performing other duties, have to be included members of the service staff (drivers, porters, gardeners, messenger-boys, etc.).

The 1974 Polish-Austrian convention⁴³ treats this problem more precisely. Article 19 clearly provides that apart from consular officials and employees, the privilege of immunity is also awarded to members of the service staff which comprise the domestic staff of the consulate.

The scope of the jurisdictional immunity is treated similarly in conventions signed by Poland with Finland in 1971 (Art. 12),⁴⁴ with Belgium in 1972 (Art. 17),⁴⁵ with France in 1976 (Art. 19),⁴⁶ with Greece in 1977 (Art. 19),⁴⁷ with Vietnam in 1979 (Art. 19),⁴⁸ with Cyprus in 1980 (Art. 17)⁴⁹ and with People's Democratic Republic of Korea in 1982 (Art. 19).⁵⁰

For comparison reasons, it is worth adding that the same solution was adopted in consular conventions signed by the Soviet Union with Austria in 1959 (Art. 7),⁵¹ with France in 1966 (Art. 11),⁵² and with Romania in 1972 (Art. 26).⁵³ It was also adopted in conventions signed between

⁴⁰ UNTS, vol. 438, p. 252.

⁴¹ UNTS, vol. 387, p. 150.

⁴² Dz. U., 1971, No. 20, item 192.

⁴³ Dz. U., 1975, No. 24, item 131.

⁴⁴ Dz. U., 1973, No. 2, item 11.

⁴⁵ Dz. U., 1974, No. 3, item 18.

⁴⁶ Dz. U., 1977, No. 19, item 76.

⁴⁷ Dz. U., 1979, No. 12, item 82.

⁴⁸ Dz. U., 1980, No. 21, item 76.

⁴⁹ Dz. U., 1984, No. 48, item 249.

⁵⁰ Dz. U., 1983, No. 54, item 239.

⁵¹ UNTS, vol. 356, p. 162.

⁵² UNTS, vol. 699, p. 272.

⁵³ UNTS, vol. 881, p. 183.

Belgium and Yugoslavia in 1969 (Art. 9),⁵⁴ Finland and Hungary in 1971 (Art. 13)⁵⁵ and Greece and Bulgaria in 1973 (Art. 14).⁵⁶

The outcome of the above analysis shows that the expansion of the jurisdictional immunity onto the members of the service staff of consulate is discernible primarily in agreements between socialist countries and between the latter and western nations. On the other hand, western countries basically employ solutions adopted by the 1963 Vienna Convention on consular relations⁵⁷ which — it is worth to remind — granted immunity from jurisdiction only to consular officials and administrative and technical employees.

The provision of the jurisdictional immunity to the heads of consulate, consulate officials, administrative and technical employees and members of the service staff of consulate, creates a situation where every member of the consular office enjoys the same privileges. One could assume, that further possibilities of expanding the scope *ratione personae* of the immunity from jurisdiction do not exist any more. That is however a false judgement. More and more often we are beginning to witness the expansion of the privilege onto family members of persons employed in consular offices. For example the 1971 convention between Poland and the Soviet Union provides for immunity from jurisdiction not only for officials and employees of the consulate but for “members of their families residing with them in home community” (Art. 15).⁵⁸ The convention did not clearly define the term of family. Diverging views and differentiated practices of nations in this field caused that the state of facts of cohabitation of members of the family “in domestic commune”, “under the same roof” and not kinship, was adopted as a criterion.⁵⁹ On this basis for example, immunity from jurisdiction will not be awarded to a spouse living in separation or to selfsupporting children living outside of the house. An adopted child, or even a relative or akin may, on the other hand, be members of the family on condition that they live together with the privileged member of a consular office, thus belonging to his “domestic commune”.

The same solution was adopted by numerous other consular conventions signed by Poland with East Germany in 1971 (Art. 15),⁶⁰ with Mongolia in 1972 (Art. 19),⁶¹ with Cuba in 1972 (Art. 17),⁶² with Bulgaria in 1972

⁵⁴ UNTS, vol. 943, p. 83.

⁵⁵ UNTS, vol. 859, p. 26.

⁵⁶ UNTS, vol. 965, p. 256.

⁵⁷ J. SUTOR, “Niektóre problemy współczesnego prawa konsularnego” [Selected Problems of Contemporary Consular Law], *Przegląd Stosunków Międzynarodowych*, 1978, No. 4, p. 83.

⁵⁸ Dz. U., 1972, No. 15, item 106.

⁵⁹ J. SUTOR, *op. cit.*, p. 158.

⁶⁰ Dz. U., 1972, No. 55, item 360.

⁶¹ Dz. U., 1974, No. 3, item 22.

⁶² Dz. U., 1975, No. 21, item 111.

(Art. 19),⁶³ with Czechoslovakia in 1972 (Art. 17),⁶⁴ with Hungary in 1973 (Art. 16),⁶⁵ with Romania in 1974 (Art. 34, 37),⁶⁶ with Iraq in 1980 (Art. 35)⁶⁷ and with China in 1984 (Art. 42 and 48).⁶⁸

The 1972 convention with the United States limits the functioning of the jurisdictional immunity only to family members of consular officials (Art. 13).⁶⁹ At the same time, however, it grants this privilege to consular officials, administrative and technical employees and members of the service staff.

It is worth stressing that the tendency to award immunity from jurisdiction to family members of persons employed in consular offices is growing stronger. Solutions of a similar nature were adopted by numerous consular conventions signed by other countries e.g. by the Soviet Union with Finland in 1966 (Art. 7),⁷⁰ with Japan in 1966 (Art. 18),⁷¹ with Somalia in 1971 (Art. 16)⁷² and with Czechoslovakia in 1972 (Art. 15)⁷³ and further by Hungary with Czechoslovakia in 1973 (Art. 17)⁷⁴ and with Mongolia in 1974 (Art. 16).⁷⁵

It is necessary to underline, that the described scope of the jurisdictional immunity greatly exceeds the solutions of the 1963 Vienna Convention on consular relations. Also worth mentioning is the big contribution of Poland and other socialist countries into the broadening of the scope of this privilege. The analysed consular conventions signed after the adoption of the Vienna Convention in 1963, prove that the socialist countries consequently aim at a further expansion of the scope of privileged persons enjoying immunity from jurisdiction. One should judge, that this process is linked with a tendency to erase differences in legal regulations between the consular and diplomatic services.⁷⁶ Again, for comparison reasons, it is necessary to add that according to the 1961 Vienna Convention on diplomatic relations the following persons are awarded immunity from jurisdiction:

— diplomatic agents (heads of diplomatic missions and members of diplomatic staff),

⁶³ Dz. U., 1973, No. 24, item 138.

⁶⁴ Dz. U., 1973, No. 19, item 108.

⁶⁵ Dz. U., 1974, No. 5, item 28.

⁶⁶ Dz. U., 1974, No. 15, item 87.

⁶⁷ Dz. U., 1982, No. 27, item 194.

⁶⁸ Dz. U., 1985, No. 8, item 24.

⁶⁹ Dz. U., 1973, No. 30, item 173.

⁷⁰ UNTS, vol. 576, p. 60.

⁷¹ UNTS, vol. 608, p. 158.

⁷² UNTS, vol. 897, p. 221.

⁷³ UNTS, vol. 897, p. 276.

⁷⁴ UNTS, vol. 986, p. 141.

⁷⁵ UNTS, vol. 986, p. 204.

⁷⁶ J. SUTOR, *op. cit.*, p. 76.

- members of the administrative and technical staff,
- members of the service staff of the diplomatic mission,
- family members of diplomatic representatives and of members of the administrative and technical staff who reside together in domestic commune.

4. The Scope *ratione materiae* of the Jurisdictional Immunity

a) In Internal Law

The 1964 Code of Civil Procedure (CCP) in Article 1112, paragraph 1 states generally that consular officials and employees of foreign states in Poland "cannot be brought to Polish courts in respect of acts committed in their official capacity". In analogy to Article 43, paragraph 2, letter b, of the 1963 Vienna Convention on consular conventions, the CCP in paragraph 2 states that the provisions of Article 1112, paragraph 1 shall not apply to consular officials and employees

"in case civil action is brought against them in respect of damage caused in Poland by vehicle, vessel or aircraft".

This undoubtedly constitutes an limitation *ratione materiae* of the jurisdictional immunity.

Basically, the matter of counter-claims, directly connected with the main claim, does not constitute an exemption from the jurisdictional immunity. However, when persons mentioned in Article 1112, paragraph 1, of the CCP are plaintiffs in a civil court, they fall under its jurisdiction also in respect of all counter-claims directly related to the main claim. This rule is commonly recognized in the international law doctrine⁷⁷ and also expressed in Article 32, paragraph 3, of the 1961 Vienna Convention on diplomatic relations.

Also the 1969 Code of Penal Procedure in Article 513, paragraph 1 provides that heads of consulates and other consular officials of foreign countries

"do not fall under the judicial decisions of Polish penal courts in respect of acts performed during an execution of official functions".

The same solution is included in the 1971 Code of Petty Offences Procedure (Art. 10, para. 2, part. 1).

A characteristic feature of the analysed legal acts is the broad treatment of official functions covered by the jurisdictional immunity, however none

⁷⁷ I. BLIŠČENKO, V. DURDENEVSKIJ, wers. 8, *op. cit.*, p. 360; L. EHRLICH, *Prawo międzynarodowe [International Law]*, Warszawa 1958, p. 200; P. GUGGENHEIM, *Traité de droit international public*, Genève 1953, vol. 1, p. 508; P. CAHIER, *op. cit.*, p. 261.

of those acts explains their essence. Thus, it is reasonable to assume, that all acts of official character performed by a member of a consular office, arising from consular conventions, consular regulations of the sending State and international customary law — are covered by the jurisdictional immunity.

b) In Consular Conventions

The scope *ratione materiae* of the jurisdictional immunity in consular conventions binding Poland is diversified. Some conventions state that members of the consular office do not fall under the jurisdiction of the receiving State (criminal, civil and administrative) “in respect of an act performed in his official capacity”. One should assume that this refers to acts which have been determined in the convention itself, in instruments of internal law of sending state and in international customary law. Thus the immunity has a functional character and does not cover private actions of the privileged person. Such solutions are included in conventions with Great Britain in 1967 (Art. 22), Finland in 1971 (Art. 12), Belgium in 1972 (Art. 17), Italy in 1973 (Art. 43), France in 1976 (Art. 19), Iraq in 1980 (Art. 35) and with Yugoslavia in 1982 (Art. 20). The conventions limit the immunity from jurisdiction in civil cases because it does not apply to civil action:

- arising out of a contract concluded by a consular official in which he did not clearly or presumptively act on behalf of the sending State,
- brought by a third party in respect of damage caused by vehicle or vessel,
- relating to succession in which the consular official acts not in the name of the sending State, but in a character of a private person (conventions with Great Britain, Finland, Italy and Yugoslavia),
- relating to any professional or commercial activity performed by a consular official in receiving State, outside his official duties (convention with Yugoslavia).

It has to be stressed that this kind of description of the scope of the jurisdictional immunity has been adopted by conventions signed by Poland with western States (with the exception of Yugoslavia). This serves as a proof that these nations are devoted to a relatively narrow scope of this privilege limited to official duties.

For comparison, it is worth adding, that the same solution was adopted by numerous other consular conventions as for example conventions between Great Britain and Mexico in 1954 (Art. 13),⁷⁸ Hungary and Bulgaria

⁷⁸ UNTS, vol. 331, p. 22.

in 1958 (Art. 5),⁷⁹ Romania and Yugoslavia in 1962 (Art. 9)⁸⁰ and between the Soviet Union and France in 1966 (Art. 11).⁸¹ It was also adopted in conventions signed by the United States with Iran in 1955 (Art. 18)⁸² and with France in 1966 (Art. 19).⁸³

The remaining consular conventions binding on Poland gave some members of the consular offices a full immunity from jurisdiction in criminal, civil and administrative cases, which is analogical to the jurisdictional immunity of a diplomatic agent. Thus these conventions reversed the hitherto existing practice of countries in this field and yielded the consular office members — instead of a functional immunity — a full jurisdictional immunity. This, in practice, means that a privileged person does not fall under the jurisdiction of the receiving state not only during performance of the official duties but also when acting as a private person.⁸⁴ In this situation the competence of the receiving state's authorities could only arise in case the sending State, in specific circumstances waives the jurisdictional immunity granted to the consul.⁸⁵

It should be stressed, however, that not all members of the consular office have been granted full immunity from jurisdiction. Among conventions which granted this privilege to heads of consulate only (general consul, consuls, vice-consuls and consular agents) are agreements signed by Poland with Austria in 1974 (Art. 19) and with Greece in 1977 (Art. 19). Such solutions were also adopted by the 1963 Czechoslovakia-Mongolia convention (Art. 7)⁸⁶ and by the 1968 Romania-Great Britain convention (Art. 37).⁸⁷

Some conventions binding on Poland grant full jurisdiction immunity also to consular officials and to consular employees who have been awarded this privilege but only during the performance of official duties. These solutions were also adopted in agreements with the United States in 1972 (Art. 13), Cuba in 1972 (Art. 17), Vietnam in 1979 (Art. 19), Cyprus in 1980 (Art. 17) and with China in 1984 (Art. 42).

⁷⁹ UNTS, vol. 438, p. 252.

⁸⁰ UNTS, vol. 472, p. 324.

⁸¹ UNTS, vol. 699, p. 272.

⁸² UNTS, vol. 284, p. 132.

⁸³ UNTS, vol. 700, p. 258.

⁸⁴ K. LIBERA, *Zasady międzynarodowego prawa konsularnego* [*The Principles of International Consular Law*], Warszawa 1960, p. 312.

⁸⁵ S. SAWICKI, "Zrzeczenie się immunitetu jurysdykcyjnego członka urzędu konsularnego" [Waiver of Immunity from Jurisdiction by Member of Consulate], *Nowe Prawo*, 1975, No. 6, p. 825.

⁸⁶ UNTS, vol. 503, p. 150.

⁸⁷ UNTS, vol. 789, p. 4.

Another solution is based on granting full jurisdictional immunity to all members of a consular office together with members of their families. The convention with the Soviet Union of 1971 states for example that consular officials and employees together with members of their families enjoy immunity from jurisdiction of receiving State (Art. 15). Further, the agreement adds, that the jurisdictional immunity does not refer to civil claims:

- relating to private immovable property, situated on the territory of the receiving State, unless the consular official or consular employee holds it on behalf of the sending State for purposes of the consulate,
- relating to succession in which a consular official or employee is involved as executor, administrator, heir or legatee and as a private person and not on behalf of the sending State,
- relating to any professional or commercial activity performed by a consular official or consular employee in receiving State outside of his official functions,
- arising out of a contract concluded by a consular official or employee in which they did not clearly or presumptively act on behalf of the sending State,
- brought by a third party in respect of damage caused by vehicle or vessel.

Similar solutions (some differences concern the scope of exemptions of the immunity from jurisdiction in civil cases) have also been adopted in agreements signed by Poland with Bulgaria in 1972 (Art. 17), East Germany in 1972 (Art. 15), Mongolia in 1973 (Art. 19) and with Hungary in 1973 (Art. 16).

The grant of full jurisdictional immunity to members of the consular office undoubtedly confirms a development of the tendency to level out their legal situation with members of diplomatic missions. It is characteristic that a significant role in the formation and development of this tendency play Poland and other socialist countries, which in a decisive manner steer towards securing a consul a legal status which would be adequate to the character of a consular representation of a nation. Such a solution is a practical affirmation of views represented by F. Liszt, who even at the beginning of our century wrote that

"the general tendency guiding the ever increasing significance of economic relations, aims at creating a legal position of consuls which would bring them near the status of an envoy".⁸⁸

⁸⁸ F. LISZT, *System prawa międzynarodowego* [System of International Law], Kraków 1907, p. 128.

Although cases of granting members of consulates full jurisdictional immunity occur rather rarely, many nations having remained faithful to traditional views, a beginning of a clearly defined direction of progress has been marked and will undoubtedly force its way forward. Even more so — as writes K. Libera — this process may be hastened by the existence of the most favoured nation clause and the adoption and spread of the commonly used in the field of consular relations rule of reciprocity, which may relatively soon lead to generalizing and consolidation of such practice and consequently give shape to a norm of customary law, which would grant consuls a legal status adequate to their role in international relations.⁸⁹

⁸⁹ K. LIBERA, *Consular Immunity*, p. 483.

Non-Binding Resolutions and the Law-Making Process

by KRZYSZTOF SKUBISZEWSKI

The present paper considers the multifarious roles which non-binding resolutions adopted by international organizations or conferences play in the law-making process. The paper concentrates on resolutions which lay down general and abstract rules of conduct for States. Some writers classify such resolutions as a new source of international law. While the correctness of this view will be explored at some further point, the reader may be reminded at the outset that a rule is general when both its addressees and the circumstances in which they must behave as required, are defined in a generic, and not individualized way. The rule is abstract when it deals with a conduct that can or does recur and not with one that is specific. For instance, the Final Act of the Conference on Security and Cooperation in Europe (Helsinki, 1975) fits into this category,¹ while the UN General Assembly Resolution 2799 (XXVI) on the Middle East does not. However, an individualized and specific act, like the latter, may assume, expressly or impliedly, a general and abstract rule of conduct for States or it may have been adopted on the premise that the rule of conduct required of the State specifically named would be required of any State in a similar situation.² An international body often assumes the existence of a generally relevant rule when it condemns certain acts or calls upon particular States to follow a line of conduct.

I

The instruments considered in the present paper are normative in nature. Some writers identify normativity with binding force or even with

¹ As a whole the Final Act is non-binding, though several principles and other rules it recites are part of law.

² D. W. BOWETT, in: *Institut de Droit International, Annuaire (IDI Annuaire)*, vol. 61, 1985, Part I, p. 335.

the law³ and, consequently, deny that non-binding acts should have any normative effect. The question is a semantic one: the term "norm" and its derivatives do not cover legal rules and obligations alone. International life knows of both mandatory and non-mandatory norms. In inter-State relations purely political norms play an important part. They obviously have a normative effect, though not on the legal plane.⁴ In other words, normativity is a notion that is broader than legal regulatory effect. Rules of one category can be transformed into another, non-legal norms may become legal: the principle of self-determination of peoples is one of the many examples. A resolution adopted by an international organization or conference may, as such, have no law-creating effect, but its merely recommendatory nature does not mean that it is deprived of other consequences which are relevant in the realm of law.

Among themselves States observe or demand the implementation of different norms, not only legal ones. We are faced with moral, ethical or exclusively political rules. The latter, in particular, acquire increasing importance at present, for they are often adopted in areas where legal regulation is still premature and yet States agree that some standards of conduct should be laid down and followed. The instruments which incorporate those standards are not treaties. Nonetheless, there is an expectation that States would respect them.

Non-binding rules are linked and related to law-making in a variety of ways.⁵ This does not mean that they could be called "soft law". The adjectives "soft" and "hard", or similar expressions, cannot apply to law. In the context of law they are meaningless: there is but one law and not two kinds of it, one soft and the other hard. The description of any instrument or rule as "soft law" can be highly confusing.

II

The basic criterion to be applied is the existence of binding force: some international acts are mandatory, others are not. However, Governments

³ P. WEIL, "Towards Relative Normativity in International Law", *American Journal of International Law* (AJIL), 1983, vol. 77, p. 413, at pp. 415—417.

⁴ The status of this type of rules has been thoroughly analyzed by M. VIRALLY, "La distinction entre textes internationaux de portée juridique et textes internationaux dépourvus de portée juridique", *IDI Annuaire*, 1983, Part I, vol. 60, p. 166.

⁵ G. I. TUNKIN, "International Law in the International System", *Académie de Droit International, Recueil des Cours (Hague Recueil)*, vol. 147, 1975-IV, p. 1, at p. 60, speaks of the close interrelation between legal and "semi-legal" norms which form one "international juridical system".

and writers tend to differ in defining the status of a specific resolution or a whole category, and the divergencies persist, even if the constitutional provisions are clear enough to exclude any legislative competence on the part of the international organ or conference. On various occasions, the developing States read into some recommendations the legal duty to conform to them: a case in point is the Charter of Economic Rights and Duties of States (1974). There is a whole gamut of arguments to justify this attitude. Some writers treat the non-binding resolutions as a modern source of law.⁶ Others give an extensive interpretation of the powers of the resolution-making body,⁷ so extensive that it obviously contravenes its constitutional position. Still others question the appropriateness of rigid criteria when the status of declaratory resolutions is explored. They contend that here a clear distinction between what is binding and what is not would amount to an "exaggerated juridical formalism".⁸ These and similar views run into the danger of eroding the concept of legal obligation.

This approach, though now characteristic primarily of the Third World, has had its Western pre-history. In the late 1940s and early 1950s the Western majority in the United Nations supported the broadening of regulative powers of such organs of parliamentary diplomacy as the General Assembly. Its resolutions were to develop international law, especially the law of the UN Charter. Numerous Western commentators supported this interpretation, and various doctrines on the law-making effect of non-binding instruments and on their being a new source of law have their Western roots. As one jurist ironically noted:

"Although it is the Third World that advocates these new doctrines, and which chiefly benefits from them, they were conceived and born, I suspect, in Western universities".⁹

In their policy-oriented concept of international law Harold D. Lasswell, Myres S. McDougal and their followers emphasize the dynamic function of law in bringing about social change. They view international law as a process of promoting the values of human dignity.¹⁰ Professor McDougal says that a policy-oriented conception of international law,

⁶ M. BEDJAOUI, *Pour un nouvel ordre économique international*, Paris 1979, pp. 140 and 142.

⁷ See, in particular, T. O. ELIAS, *Africa and the Development of International Law*, Leiden 1972, pp. 74—75.

⁸ J. CASTAÑEDA, "Valeur juridique des résolutions des Nations Unies", *Hague Recueil*, vol. 129, 1970-I, p. 205, at p. 321.

⁹ O. M. GARIBALDI, "The Legal Status of General Assembly Resolutions: Some Conceptual Observations", *American Society of International Law, Proceedings (ASIL Proceedings)*, 1979, p. 324, at p. 325.

¹⁰ M. S. McDUGAL and H. D. LASSWELL, "The Identification and Appraisal of Diverse Systems of Public Order", *AJIL*, vol. 53, 1959, p. 1.

"though it must be concerned with rules, as authoritative prescriptions of fundamental community policy, it must extend its concern, if it would consider effects, beyond rules to the decisions which in fact formulate and apply rules and include within its compass all such decisions, whosoever the decision-maker, which importantly affect community values".

He conceives international law

"as a *flow of decisions* in which community prescriptions are formulated, invoked, and in fact applied in the promotion of community policies".

He goes beyond the traditional doctrine of sources of law by stating that a policy-oriented international law

"will rather emphasize that decision-making is a dynamic process in which decision-makers, located in many different institutional positions and contexts, are continually creating, interpreting and reinterpreting rules and continually formulating and reformulating, applying and terminating, policies".¹¹

Recently, Professor McDougal has succinctly put down his position on international law-making:

"Law-making in any community, by whatever modality, is a process of communication by which certain expectations are created in the community members. For effective law-making, these expectations must include at least a triple reference: to policy content (the projected shaping and sharing of community values); authority (the appropriateness of the decision-making process); and control (the probabilities that the projected policies will be put into actual operation). In the global arena, communications about these three different components of law are made through many different procedures and modalities, ranging through a broad continuum, from the most deliberate and formal (international agreements) to the least deliberate and formal (inferences from habitual behaviour and relatively uniform decision). In any particular case in any particular context, all procedures and modalities, from the most deliberate to the least deliberate, must be reviewed for a realistic determination of whether law has, or has not, been created".

Thus, logically, the law-making impact of any resolution considered in the present paper "is a function of two different factual contexts". One is the resolution itself:

"precisely who was communicating, what policy, to whom, in what setting, by what modalities, with what outcomes in expectations about policy, authority, and control".

The second context

"is that of the most comprehensive global process of law-making. The outcomes of the particular 'resolution' context may be affected by the outcomes of the other communications by which the expectations we call law are created".¹²

¹¹ M. S. McDUGAL, "International Law, Power and Policy: A Contemporary Conception", *Hague Recueil*, vol. 82, 1953-I, p. 137, at pp. 181 and 182. See also id., "Some Basic Theoretical Concepts about International Law: A Policy-Oriented Framework of Inquiry", *Journal of Conflict Resolution*, vol. 4, 1960, p. 337.

¹² In: *IDI Annuaire*, vol. 61, 1985, Part I, p. 337.

It is no wonder that in this theory of law and law-making the problem of the binding force of the rule loses its relevance. Professor McDougal is explicit about it:

"a policy-oriented international law will not seek in an infinite regress of verbalisms to discover some mystical 'binding force', independent of particular decision-makers in particular contexts, for its prescriptions".¹³

Referring to the "UN machinery", he observed that

"the concept of 'binding obligation' became little more than meaningless noise if it omitted expectations of the community concerning authority (i.e., who is competent to make decisions) and control (i.e., what sanctions are in fact available to carry out decisions)".¹⁴

Expectations, as understood by Professor McDougal, involve necessarily a certain amount of practice.¹⁵ Professors Richard A. Falk and Saul H. Mendlovitz, who are not far from McDougal's views on law, think that one

"must look [...] at what is expected and *what happens* when resolutions of the General Assembly call upon states to act or refrain from acting in a certain way".¹⁶

This seems to be a reference to law-creating practice and not any rejection of the notion of a binding or obligatory force.

III

It may of course be, as Professor Oscar Schachter points out, that "the distinction between 'binding' and 'non-binding' is not easily determinable" when one looks at the activity of political bodies and at the diplomatic arena.¹⁷ In discussing international decisions, Mr Elihu Lauterpacht referred to

"the understandable tendency for us not to become too concerned with the definition of what is legally binding and what is not legally binding".¹⁸

The position will depend on the angle of approach. If the actual

¹³ *Hague Recueil*, *op. cit.*, note 11, p. 185.

¹⁴ In: *ASIL Proceedings*, 1979, at p. 328.

¹⁵ McDougal gives the example of mine laying operations.

¹⁶ R. A. FALK and S. H. MENDLOVITZ (eds), *The Strategy of World Order*, vol. 3: The United Nations, New York 1966, p. 248.

¹⁷ O. SCHACHTER, "Towards a Theory of International Obligation", in: S. M. SCHWEBEL (ed.), *The Effectiveness of International Decisions*, Leyden and Dobbs Ferry, N.J. 1971, p. 9, at p. 13.

¹⁸ In: SCHWEBEL (ed.), *op. cit.* note 17, p. 394. Cf. also E. W. McWHINNEY, in: *IDI Annuaire*, vol. 61, 1985, Part I, p. 260, answer to question 1.

impact of the decision on State conduct is considered, the legal nature of the instrument need not be of primary importance. Sir James Fawcett refers to some resolutions which are "formal recommendations only" and notes that this fact

"does not prevent a few resolutions from embodying directive principles or agreed standards, which may, by reason of their content, purpose and form of adoption secure as great international observance as a treaty. That the provisions of such resolutions do not rank as legal obligations, is then immaterial".¹⁹

Hence another category may be, or even should be, introduced: the "Authority" of the instrument.²⁰

However, all these considerations, persuasive as they are, do not deprive the criterion of binding force of its relevance. The test of legal obligation must be maintained, because there is no other way to discipline our thinking on the sources of law. Legal rules should be separated from postulates, demands or wishes, no matter how justified or how widely supported. Another reason for not dropping the distinction is the absence of law-making powers on the part of the conference or organization that adopts the resolution. Of course, its recommendatory nature may change, but that will be due to the interplay of factors which are external to the competence of the adopting body.

Normally, the non-binding nature of the instrument extends to the rules it embodies. Yet it may happen that the resolution recites rules that are already part of international law; they come from a different source, and the fact that they have now been repeated in a non-binding instrument does not detract from the State's duty to comply with them. In other words, some resolutions which are non-binding *qua* acts of the conference or organization, are declaratory of law. It is the rule incorporated in the resolution which is obligatory, not the resolution itself.

IV

Non-binding normative resolutions are acts which are primarily attributed to the organization as an international person, and not to Member States

¹⁹ J. E. S. FAWCETT, "The Development of International Law", *International Affairs*, A Special Issue to Mark the Fiftieth Anniversary of Chatham House, 1970, p. 127, at p. 131.

²⁰ The point is elaborated upon by H. MIEHSLER, "Zur Autorität von Beschlüssen internationaler Institutionen", in: Ch. SCHREUER (ed.), *Autorität und internationale Ordnung. Aufsätze zum Völkerrecht*, Berlin 1979, p. 35. See also H. MOSLER, in: *IDI Annuaire*, vol. 61, 1985, Part I, p. 267, answer to question 1.

taken individually or collectively.²¹ It is true that an international conference lacks international personality, nonetheless its resolutions constitute collective acts of the participating States.

However, each non-binding resolution has another side to it. By taking part in its adoption the State does not only contribute to the creation of the act of the organization or conference but it also expresses its individual attitude. In that capacity the State may go beyond the limits imposed by the powers of the voting body. Resolutions, it should be remembered, result from negotiations conducted by States, usually through the procedures of conference or parliamentary diplomacy. Negotiations lead to arrangements or agreements,²² and it cannot be excluded that States will consent to accept a rule or rules contained in the resolution as binding.²³

State acceptance or recognition of a resolution as obligatory does not turn the instrument into a tool of international legislation or, as it were, law-creating consensus.²⁴ Nor is such a resolution a new source of international law. But acceptance, no doubt, leads to incurring a legal obligation. The Sole Arbitrator in the *Texaco* case seems to have admitted this possibility;²⁵ one may assume that in his opinion the UN resolution

²¹ Cf. K. ZEMANEK, in: *Berichte der Deutschen Gesellschaft für Völkerrecht*, 41. Tagung, 1969, Heft 10, Karlsruhe 1971, p. 232 and E. YEMIN, *Legislative Powers in the United Nations and Specialized Agencies*, Leyden 1969, pp. 8 and 12—13.

²² Cf. M. VIRALLY, in: *IDI Annuaire*, 1985, vol. 61, Part I, p. 298.

²³ This possibility is admitted, among others, by G. I. TUNKIN, *Das Völkerrecht der Gegenwart. Theorie und Praxis*, Berlin 1963, p. 105; A. C. CASTLES, "Legal Status of UN Resolutions", *Adelaide Law Review*, vol. 3, 1967, p. 68, at p. 70; L. GROSS, "The International Court of Justice and the United Nations", *Hague Recueil*, vol. 120, 1967-I, p. 313, at p. 375; E. McWHINNEY, *The World Court and the Contemporary International Law-Making Process*, Alphen aan den Rijn 1979, p. 3; E. HAMBRO, "Some Notes on the Development of the Sources of International Law", *Scandinavian Studies in Law*, 1973, p. 75, at p. 87; I. McGIBBON, "Means for the Identification of International Law. General Assembly Resolutions: Custom, Practice and Mistaken Identity", in: B. CHENG (ed.), *International Law: Teaching and Practice*, London 1982, p. 10, at p. 26; E. SUY, in: *IDI Annuaire*, vol. 61, 1985, Part I, pp. 290—291, answer to question 28.

²⁴ See especially A. VERDROSS's concept of informal consensus, *Die Quellen des universellen Völkerrechts. Eine Einführung*, Freiburg 1973, pp. 20, 37, 119 and 139—140; id. and B. SIMMA, *Universelles Völkerrecht. Theorie und Praxis*, Berlin 1976, p. 258. This concept has been elaborated upon by B. SIMMA, "Methodik und Bedeutung der Arbeit der Vereinten Nationen für die Fortentwicklung des Völkerrechts", in: W. A. KEWENIG (ed.), *Die Vereinten Nationen im Wandel. Referate und Diskussionen eines Symposiums Kiel 1974*, Berlin 1975, p. 79, at pp. 97—110 and id., "Zur völkerrechtlichen Bedeutung von Resolutionen der UN-Generalversammlung", in: *Fünftes deutsch-polnisches Juristen-Kolloquium*, Baden-Baden 1981, vol. 2, p. 45, at pp. 57—67.

²⁵ *Texaco Overseas Petroleum Company and California Asiatic Oil Company v. The Government of The Libyan Arab Republic* (Award on the Merits), *International Law Reports* (ILR), vol. 53, p. 422, at p. 491, para. 86. One should say "seems" because it is not quite

on permanent sovereignty over natural resources is a case in point.²⁶ In his Dissenting Opinion in the *Fisheries Jurisdiction Case (United Kingdom v. Iceland)*, *Merits*, Judge Petrén clearly (and rightly) distinguished between mere voting for the resolution and the fact that the State "envisaged and accepted the possibility of its immediately acquiring binding force".²⁷ The acceptance or recognition of the resolution as obligatory is extraneous to the procedure that has led to its adoption.

If the resolution declares that the rule it enunciates is binding, such a statement can constitute evidence of existing law, but that evidence is rebuttable. The organization or conference cannot make new law by adopting a normative instrument unless specifically empowered to do so; yet State acceptance or recognition can turn a non-binding instrument into an obligatory one.

To procedure this result, the State's position must be unequivocal. The State has to say, or clearly prove by its conduct, that it considers itself to be bound by the resolution. Voting in favour of it, or another form of approval within the deciding body (e.g. consensus), is not enough. One should distinguish between the State's consent to the adoption of the resolution and its consent to be bound by it.²⁸ Acceptance is an act different from voting²⁹ or other forms of participation in the adoption of the resolution. Occasionally, Governments use imprecise language which blurs this basic distinction.

To accept, or recognize, the binding force of a resolution States may

clear whether the Arbitrator referred to the adoption of the resolution by the relevant body and the approval of States making that adoption possible, or whether he spoke of the acceptance by States in the foregoing sense.

²⁶ GA Resolution 1803 (XVII). Two recent arbitral awards have followed Texaco on the significance of that resolution, the *Framatome case* and *Kuwait v. Aminoil*, *Journal du Droit International*, 1984, p. 58 and ILR, vol. 66, p. 518, at pp. 587—588, para. 90 (2), respectively. S. M. SCHWEBEL, "The Legal Effects of Resolutions and Codes of Conduct of the United Nations", *Forum Internationale*, October 1985, No. 7, pp. 10—11.

²⁷ *International Court of Justice Reports (ICJ Reports)*, 1974, p. 150, at p. 162. H. STEINBERGER, "Bemühungen zur Kodifizierung und Weiterbildung des Völkerrechts im Rahmen der Organisation der Vereinten Nationen", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)*, 1968, vol. 28, p. 617, at p. 641, distinguishes between the act of the international organ and the taking over of this act by the individual States which alone constitutes the basis of the act's binding force.

²⁸ There are contrary views, cf. ELIAS, *op. cit.*, note 7. P. K. MENON, "United Nations Special Committee and Decolonization", *Indian Journal of International Law*, vol. 9, 1969, p. 19, at p. 27. R. HIGGINS, in: SCHWEBEL (ed.), *op. cit.*, note 17, pp. 398—399.

²⁹ G. I. TUNKIN, *Völkerrechtstheorie*, Berlin 1972, p. 196, emphasizes the limited effect of voting which cannot reach beyond the recommendatory nature of the instrument. Cf. *ibid.*, p. 203.

incorporate its provisions in a treaty. It is also possible that without repeating the norms of the resolution, a treaty will refer to them as obligatory for the contracting parties. Acceptance or recognition may equally take the form of a unilateral act.³⁰ If the purpose of the resolutions is to shape internal relationships within States, its adoption by municipal law results in its acquiring binding force in the relevant national system.³¹ For instance, various recommendations of the International Labour Organization have found their way into the law of a number of Member States. Finally, implicit acceptance is not excluded, but it cannot be lightly admitted. In particular, implementation of the instrument is by itself no proof of its recognition as binding. As it is, implementation of recommendations is always voluntary and does not express any sense of obligation. Nor does the setting up of implementing machinery or the convening of follow-up meetings, turn the resolution into a binding text.

In most instances, however, non-binding resolutions do not undergo a transformation into law in the manner described above. In fact, acceptance of resolutions as binding is rather exceptional.

V

The crux of the matter lies elsewhere: it is the impact which some resolutions have on the operation of the traditional sources. The intensity of that impact varies. Indeed, it covers a whole gamut, from the more static role to the more dynamic.

Thus a resolution can simply state what the existing law is. Such a declaratory statement is, no doubt, useful when it is not quite clear what the *lex lata* on a particular subject is. The resolution thus facilitates the determination of law and, in some circumstances, it may even become evidence of it or of one of its ingredients, i.e. practice or the *opinio juris*. Until now the Hague Court and arbitral tribunals have rarely corroborated this role of the resolutions; but the decisions in the cases of

³⁰ R. BINDSCHEDLER, "La délimitation des compétences des Nations Unies", *Hague Recueil*, vol. 108, 1963-I, pp. 305, 344 ff.; id., in: *IDI Annuaire*, vol. 61, 1985, Part I, pp. 250—251, answer to question 9; O. SCHACHTER, *ibid.*, pp. 282—284, answer to question 20. Cf., id., "Alf Ross Memorial Lecture: The Crisis of Legitimation in the United Nations", *Acta Scandinavica Juris Gentium*, 1981, vol. 50, p. 3, at pp. 7 and 9.

³¹ See, e.g., I. SEIDL-HOHENVELDERN, "International Economic 'Soft Law'", *Hague Recueil*, vol. 163, 1979-II, p. 165, at pp. 198—205 and especially Ch. SCHREUER, *Decisions of International Institutions before Domestic Courts*, London—Rome—New York 1981.

Namibia,³² *Western Sahara*,³³ *Texaco*,³⁴ *LIAMCO*,³⁵ *Framatome*³⁶ and *Aminoil*³⁷ seem to be relevant. The UN General Assembly has recognized that its non-binding declarations and other resolutions may reflect "the development of international law".³⁸ However, during the debate in the Sixth Committee that statement was subject to many reservations and it was in fact rejected by several delegations. In the South West Africa Cases, Second Phase, the Applicants contended that with "the growth of an organized international community" it was

"increasingly reasonable to regard the collective acts of the competent international institutions as evidence of general practice accepted as law".³⁹

In the *Nuclear Tests Case* Australia invoked several non-binding resolutions as evidence for the

maturing of national and international attitudes towards atmospheric testing of nuclear devices".⁴⁰

Various factors and their interplay contribute to the evidentiary nature of a resolution. They are the intention of Governments that participate in the organ or conference; the nature of the procedure which has led to the elaboration of the resolution — the procedure should be such as to offer certain guarantees that the text correctly reflects the law; finally, the extent of support behind the resolution. Apart from the universal or near-universal support of States and their intent of declaring law, Judge Schwebel mentions State practice that sustains the rule or rules so declared.⁴¹ Though the latter is indispensable, it need not be specifically referred to, because it is the necessary ingredient of law which the resolution declares to exist. Its absence would deprive the resolution of its material basis and would turn it into a futile exercise. The same is true if there is an absence of *opinio juris*. By definition, the contents and effect of the

³² *ICJ Reports*, 1971, pp. 16 and 31, para. 53.

³³ *Ibid.*, 1975, p. 16, at pp. 31—34, paras 54—60.

³⁴ *Op. cit.*, note 15, pp. 484, 487, 491 and 492, paras 80, 83 and 86—87.

³⁵ *International Legal Materials*, 1981, vol. 20, p. 1, at p. 53.

³⁶ *Loc. cit.*, note 26.

³⁷ *Ibid.*

³⁸ Resolution 3232 (XXIX), eighth preambular paragraph. SCHWEBEL, *op. cit.*, note 26, p. 8, quotes the latest draft of the Foreign Relations Law of the United States and takes a very cautious view of the evidentiary significance of G. A. resolutions.

³⁹ *International Court of Justice, Pleadings, Oral Arguments Documents (ICJ Pleadings)*, vol. 9, p. 347.

⁴⁰ *ICJ Pleadings*, vol. 1, p. 12, para. 41 of the Application. Cf. also *ibid.*, pp. 478; 486, 506—509, 514 and 519.

⁴¹ *Op. cit.*, note 26, p. 12.

type of resolution now considered is strictly declaratory: in contradistinction to the categories discussed in paragraph VII below, a declaratory resolution creates neither practice nor the *opinio juris*.

Correspondingly, there are also some indicators which clearly negate the evidentiary value of the text. Thus political compromise that has led to the adoption of the resolution is not favourable to the exact formulation of law. Faulty drafting and other inaccuracies deprive a resolution of its potential law-declaring effect, and so do various clauses or qualifications which show that in approving the instrument States did not move on the plane of international law. Explanations of votes by States or the reservations they make can equally manifest the absence of any evidentiary effect.

Repetition or re-citation of a rule in two or more consecutive resolutions is not, by itself, conclusive in any sense. All depends on the circumstances in which reiteration took place. In one situation repetition will reflect the conviction of Governments that the rule is one of law, in another it will merely expose noncompliance with the rule and the impotence of the voting body.

Some resolutions state that a treaty or one or more of its provisions are or have become general international law. A case in point is Resolution 2603 (XXIV) of the UN General Assembly relating to chemical and bacteriological weapons, i.e. the Geneva Protocol of 17 June, 1925. This category raises several issues, first of all that of competence, viz. whether a body whose composition is not identical with the collectivity of the contracting parties is a proper forum for interpreting the treaty. In any case, a statement by an organ or conference on the customary nature of a treaty provision must be assessed in the same manner as any other resolution declaratory of the law.

VI

It is a fact of contemporary international life that numerous resolutions of intergovernmental conferences and organizations reflect the trends in the growth of modern law. Suffice it to recall various non-binding instruments on decolonisation and self-determination, sovereignty over natural resources, economic development and the new international economic order, the concept of common heritage of mankind, law of the sea, law of outer space, or human rights and fundamental freedoms. The resolutions express and formulate broad lines and main ideas of legal policies, while the traditional sources translate them into the language of legal norms.

VII

Some resolutions can contribute to the emergence of international custom.

By encouraging and recommending a standard of conduct a resolution can influence State practice. In particular, it can become one of the factors which determine the shaping of that practice according to the custom-creating pattern: claims and responses thereto, and making practice constant, uniform and general. When practice is already in progress a resolution can help to bring about its consolidation.

However, a resolution that aims at breaking new ground may touch off a reaction and produce an opposite effect. If some States fear that future law, as envisaged by the resolution, might jeopardize their interests, they may be prompted to take a course of action which, to some extent, will be contrary to the basic idea and purpose of the resolution. It has been noted that the UN declaration on sea-bed, which inaugurated a revision of the law of the sea in the spirit of the concept of the common heritage of mankind, has led several States to extend the limits of their jurisdiction over what until now constituted the open sea.⁴² What these States did flew in the face of the UN declaration by restricting the territorial extent of the application of the new concept.

By themselves, resolutions do not constitute State practice.⁴³ This applies also to repetition of resolutions, though reiteration may in some circumstances become a contributing factor. Nor are resolutions a substitute for State practice in the custom-creating process.⁴⁴ Were they such a substitute, the whole meaning of custom would be changed, the resolution assuming the function of practice and the latter becoming redundant. That view must be rejected.

Turning to the second ingredient of custom, i.e. the *opinio juris*, it cannot be denied that in a non-binding resolution States can declare

⁴² UN General Assembly Resolution 2749 (XXV). J. CHARPENTIER, "Tendances de l'élaboration du droit international public coutumier", in: *Société française pour le droit international. Colloque de Toulouse. L'Élaboration du droit international public*, Paris 1975, p. 105, at p. 116.

⁴³ For a contrary view, see O. Y. ASAMOAH, *The Legal Significance of the Declarations of the General Assembly of the United Nations*, The Hague 1966, pp. 42, 52 ff., 159 and 242. Cf. also Judge Tanaka's Dissenting Opinion, South West Africa Cases, Second Phase, *ICJ Reports*, 1966, p. 250, at p. 292.

⁴⁴ The substitution concept is present in the doctrine of custom as explained by the Applicants in the cases referred to in note 43 above. In that doctrine, which is contrasted with the "traditional" position, custom results from "the formal standard and norm-setting processes of the organized international community, acting through its competent organs", *ICJ Pleadings*, vol. 9, pp. 350—352, quotation at p. 350.

that a certain conduct is dictated by law. The expression of such a position can have various shadings: a resolution can corroborate, confirm, or crystallize the conviction that a particular practice is obligatory. It will then help to remove doubts as to the existence of the *opinio juris*. However, this does not mean that the resolution can simply be identified with the *opinio juris*. In the final stage of the birth of custom the *opinio juris* cannot be divorced from practice: that *opinio* is articulated by way of practice.⁴⁵ The transformation of practice into a customary rule of law does not operate through any declaration of State "will" formulated in a text. That transformation remains part and parcel of State conduct consisting in claiming a right and submitting to it as a matter of obligation.⁴⁶

More often than not a resolution that falls under the present heading lays down certain norms or standards prior to the emergence of State practice. This does not mean that what the resolution says has already acquired the rank of *opinio juris* and is, in fact, a particular category of it, viz. an *opinio juris* which precedes custom-creating practice. It is difficult to agree with the proposition that normative resolutions reverse the sequence in which customary law is born, i.e. the *opinio juris* appears first, and it is subsequently confirmed by practice.⁴⁷

In the *Namibia*⁴⁸ and *Western Sahara*⁴⁹ cases the Hague Court recognized the influence of the UN recommendations on the generation of customary law. The Court was rather cautious, and it did not elaborate on how the rules embodied in a resolution would pass into international law. It cannot be excluded that normative resolutions would accelerate the process of law-making. De-colonisation, economic development, law of outer space, changes in the law of the sea are but some examples. However, the element of time is never so compressed as to permit the

⁴⁵ Cf. A. VERDROSS, "Les principes généraux de droit dans le système des sources du droit international public", in: *Recueil d'études de droit international en hommage à Paul Guggenheim*, Genève 1968, p. 521, at p. 526.

⁴⁶ Cf. I. C. MacGIBBON, "Customary International Law and Acquiescence", *British Year Book of International Law* (BYBIL), 1957, vol. 33, p. 115, at p. 117.

⁴⁷ E. GIRAUD, "Le droit international public et la politique", *Hague Recueil*, vol. 110, 1963-III, p. 419, at p. 737; VERDROSS, *op. cit.*, note 24, p. 116. See also A. A. D'AMATO, *The Concept of Custom in International Law*, Ithaca and London 1971, pp. 76, 79 and 86; P. De VISSCHER, "Cours général de droit international public", *Hague Recueil*, vol. 136, 1972-II, p. 1, at p. 132; HAMBRO, *op. cit.*, note 23, p. 88.

⁴⁸ *ICJ Reports*, 1971, p. 16, at p. 31, paras 52 and 53. E. JIMÉNEZ DE ARÉCHAGA, "International Law in the Past Third of a Century", *Hague Recueil*, vol. 159, 1978-I, p. 1, at p. 33; H. THIERRY, "Les Résolutions des organes internationaux dans la jurisprudence de la Cour Internationale de Justice", *ibid.*, vol. 167, 1980-II, p. 385, at p. 442.

⁴⁹ *ICJ Reports*, 1975, p. 12, at p. 34, para. 60. THIERRY, *op. cit.*, note 48, p. 444.

creation of an "instant" custom, by way of a single resolution.⁵⁰ Repetition of resolutions can prove helpful in transforming a non-binding rule into one of law, yet no generalized opinion on the role of reiteration is possible: all depends on the relevant circumstances which usually differ from case to case. In particular, there are situations where repetition simply reveals the inertia of States⁵¹ and has practically no effect at all.

VIII

Turning to the varied relationships between normative resolutions and treaties, it will be convenient first to say a few words about interpretation.

Several resolutions interpret treaties. They are frequent in international organizations, where they elucidate the meaning of various provisions in the constitutional instruments. The competence of the organization to interpret its constitution cannot be questioned. Nor are there any significant problems of competence or appropriateness when the organization interprets treaties to which it is a party, or treaties which confer a function, or functions, on the organization. But interpretation of other treaties may lead to controversy and, therefore, can be of problematical value. The point is illustrated by some resolutions of the UN General Assembly.

Resolution 2603 (XXIV), already referred to in paragraph V above, interprets the prohibition stipulated in the Geneva Protocol of 1925 on the use of gases and bacteriological methods of warfare. During the debate various arguments have been adduced against the interpretation of treaties by the Assembly. Interpretation was said to be a matter for the contracting parties alone, whereas here non-parties were given a chance to say what the treaty meant.⁵² At the same time a contracting party which was not

⁵⁰ B. CHENG, "United Nations Resolutions on Outer Space: 'Instant' International Customary Law?", *Indian Journal on International Law*, 1965, vol. 5, p. 23.

⁵¹ Cf. S. ROSENNE, in: *IDI Annuaire*, 1985, vol. 61, Part I, p. 276, answer to Question 15.

⁵² *General Assembly Official Records (GAOR)*, 24th Session, 1969, 1st Committee, 1704th Meeting, para. 70; 1716th Meeting, para. 202; 1717th Meeting, paras 12, 37, 39, 52, 56, 60, 64, 66, 70, 81, 120, 152, 158 and 177. R. HIGGINS, *The Development of International Law through the Political Organs of the United Nations*, London — New York — Toronto 1963, p. 308, n. 3, cites the question of South Tyrol, including Resolution 1497 (XV) by the UN General Assembly, as an example where "the Assembly rejected the role of interpreter".

represented in the United Nations had no opportunity to influence the interpretation by the Assembly.⁵³ In the opinion of one delegate

"international conventions cannot be [...] interpreted simply by the passage of resolutions by the General Assembly".⁵⁴

That organ cannot and should not "assume the role of the Parties".⁵⁵ One Government explained that though it agreed with the substance of the resolution, it abstained from voting because it questioned the Assembly's power to interpret treaties.⁵⁶ Other Governments had doubts on both the competence to interpret and the correctness of the interpretation itself.⁵⁷ It was also maintained that the interpretation adopted by the Assembly could have a negative influence on the attitude of potential contracting parties as they might decide not to accede to the Protocol.⁵⁸ The interpretation by the Assembly might weaken the treaty.⁵⁹ There was even talk of "a dangerous precedent".⁶⁰ These arguments must have sounded convincing to some proponents of the resolution, for they tried to show that it did not "interpret the Protocol *per se*"⁶¹ or legislate for the contracting parties.⁶²

Other interpretative statements by the Assembly also met with official censure. Paragraph 4 of Resolution 2674 (XXV) on the respect for human rights in armed conflict was criticized for passing over in silence the requirements which had to be met before the provisions of the Hague Convention No. IV of 1907 and the Geneva Conventions of 1949 could be applied to participants in resistance movements and freedom fighters: "the General

⁵³ GAOR, 24th Session, 1969, 1st Committee, 1716th Meeting, paragraph 146 (Canada). Though the reference did not mention the "major Power" involved, it obviously concerned the People's Republic of China.

⁵⁴ *Ibid.*, para. 179 (Australia).

⁵⁵ *Ibid.*, 1717th Meeting, para. 81.

⁵⁶ *Ibid.*, 1716th Meeting, para. 202 (France).

⁵⁷ *Ibid.*, paras 174—176 (Australia); 1717th Meeting, paras 12—13 (Netherlands); paras 40—41 and 45—46 (United States); paras 61—76 (El Salvador).

⁵⁸ *Ibid.*, 1716th Meeting, para. 146 (Canada); 1717th Meeting, para. 98 (New Zealand).

⁵⁹ *Ibid.*, para. 161 (Greece).

⁶⁰ *Ibid.*, para 165 (Venezuela). If one agrees with HIGGINS, *op. cit.*, note 52, p. 306, that General Assembly Resolution 272 (III) contained the interpretation of the treaties therein mentioned, the "precedent" was established much earlier than Resolution 2603 (XXIV).

⁶¹ GAOR, 24th Session, 1969, 1st Committee, 1716th Meeting, para. 188 (Sweden). R. HIGGINS, "The United Nations and Law-Making: The Political Organs", *ASIL Proceedings*, 1970, p. 37, at pp. 54—55, thinks that here the Assembly engaged in treaty interpretation: "its concern with this matter [...] was authorized". She adds, however, that in giving its interpretation "the General Assembly was actually speaking to the point of customary international law".

⁶² GAOR, 24th Session, 1969, 1st Committee, 1717th Meeting, paras 134 and 135. (Ghana).

Assembly should not adopt a resolution which disregarded the provisions of those Conventions". In paragraph 5 the Assembly "considers that air bombardments of civilian populations [...] constitute a flagrant violation of [...] the Geneva Conventions of 1949".

The comment was that "there was no reference to them in the Conventions".⁶³ It may be added that paragraph 4 of Resolution 2674 (XXV) uses the word "should"⁶⁴ which implies a recommended, not a mandatory, course of action. On the other hand, paragraph 5 is not a recommendation but a statement on the contents of the Conventions. So are paragraph 3 and the first part of paragraph 4 in Resolution 3103 (XXVIII) relating to the legal status of some categories of combatants.

IX

While non-binding resolutions often cite principles and other rules of general international law (paragraph VII), they rarely do so with regard to treaty provisions. An example of the repetition of treaty norms is the UN General Assembly Resolution 2018 (XX) reiterating three principles of the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages of 10 December, 1962, annexed to G. A. Resolution 1763 (XVII). Essentially, the resolution contains the same principles and expresses them in the same language, and the changes it introduces do not detract from the substance of the principles laid down in the Convention.⁶⁵ Part B of Resolution 1763 (XVII) provided for the consideration of the recommendation subsequently embodied in Resolution 2018 (XX), yet the latter does not invoke the earlier Resolution, nor does it cite the Convention.

Resolution 2018 (XX) recommends that Member States "should take the necessary steps [...] to adopt such legislative and other measures as may be appropriate to give effect" to the three principles. At the moment this recommendation was adopted the contracting parties consisted mostly of States whose legislation conformed to the three principles long before

⁶³ GAOR, 25th Session, 1970, 3rd Committee, 17798th Meeting, p. 366, para. 46 (New Zealand).

⁶⁴ The Assembly reaffirmed its position in Resolution 2852 (XXVI), para. 2. Other debatable examples are Resolutions 3005 (XXVII) and 3175 (XXVIII). See comment by H. REINHARD, *Rechtsgleichheit und Selbstbestimmung der Völker in wirtschaftlicher Hinsicht. Die Praxis der Vereinten Nationen*, Berlin — Heidelberg — New York 1980, pp. 239—240.

⁶⁵ The resolution revises the formulation relating to marriage by proxy. In particular, it requires the presence of witnesses. It also specifies the minimum age for marriage (not less than fifteen years). The Convention did not prescribe a precise age limit leaving the matter to national legislation.

the conclusion of the Convention. Consequently, their ratifications did not actually result in any broadening of the application of the principles. On the other hand, the Convention has not been ratified by some States whose law and practice did not comply with these principles and should, therefore, be modified. Thus the Recommendation aimed at achieving what had not been attained by way of treaty. As one Government representative noted, the Recommendation was

"an important addition which should help certain countries to reach the stage where they could accept the binding provisions of the Convention".⁶⁶

A more dynamic category is that of resolutions which supplement or develop treaty provisions. Several recommendations of the International Labour Organization contain the details concerning implementation of the ILO conventions.⁶⁷ The general principles adopted at the first session (1964) of the United Nations Conference on Trade and Development might be regarded as supplementing the General Agreement on Tariffs and Trade.⁶⁸

A number of international organizations have been empowered by their constituent instruments to amend some provisions of them. Amendments which become *eo ipso* obligatory for Member States are still rather exceptional. More often international organizations have the authority to make proposals for review or amendment of treaties. As a result, they adopt appropriate non binding resolutions, while the actual decision rests with the contracting parties which have drawn up a protocol of amendment, set into motion the ratification procedure, etc. A resolution may also record the assent of the contracting parties to the revision of a treaty. A case in point is Resolution 1903 (XVIII) of the UN General Assembly.⁶⁹ On the other hand, Resolution 2603 (XXIV) of that body, discussed in paragraphs V and VIII above, could not be dealt with under the head of treaty modification, in spite of a certain discrepancy between its wording and the treaty concerned. Both the sponsors of Resolution 2603 (XXIV) and the States which voted in its favour denied any intent to modify the Geneva Protocol. The representative of Ghana reduced the effect of the resolution to persuading the parties to revise the Protocol.

⁶⁶ GOAR, 20th Session, 1965, 3rd Committee, 1295th Meeting, p. 35, para. 3 (New Zealand).

⁶⁷ This is one of the purposes of the ILO recommendations, cf. J. F. McMAHON, "The Legislative Techniques of the International Labour Organization", BYBIL, vol. 41, 1965-66, p. 1, at p. 24.

⁶⁸ S. EL-NAGGAR, "The Recommendations of the United Nations Conference on Trade and Development as a Means of Creating International Norms", in: *Les Résolutions dans la formation du droit international du développement*, Genève 1971, pp. 165 and 166.

⁶⁹ For details, see *IDI Annuaire*, vol. 61, 1985, Part I, pp. 133-135.

"Even if we cannot legislate for the world we can make declarations which can be taken note of by those parties to a treaty which in turn can make the necessary changes in the treaty".⁷⁰

Nor did the opponents of the resolution subsume it under modification of treaties; they discussed it mainly in terms of interpretation which, in their view, the Assembly was not authorized to give.⁷¹ Modification, however, was invoked in regard to certain reservations to the Protocol. According to some Governments, the resolution was incompatible with the reservations they made when signing or ratifying the Protocol. In the opinion of Canada

"changes in or nullification of reservations should not be attempted through a General Assembly resolution [...]".⁷²

The representative of Australia raised the "constitutional objection": the resolution (or rather its draft as it then was)

"takes no account of the reservations of many parties which were recorded at the time of their accession to the Protocol. [...] The draft [...] by ignoring such reservations attempts to interpret the Protocol in a different sense".⁷³

X

Some resolutions are linked, in one way or another, to future treaty-making.

They may facilitate the acceptance, at a later date, of a convention on the same subject, while for the time-being only a non-binding act is feasible. Several recommendations of the International Labour Organization played that part.⁷⁴ Another example is the resolution on preferential fishing rights adopted by the First UN Conference on the Law of the Sea (1958) referred to in paragraph XI below.

Other resolutions constitute the initial stage in the elaboration of a treaty. Numerous resolutions deal with procedural or organizational matters relating to future treaty-making such as surveying a chosen field of law, consultation with Governments, setting up special organs, fixing delays, preparation of

⁷⁰ GAOR, 24th Session, 1969, 1st Committee, 1717th Meeting, para. 135.

⁷¹ Cf. however, the observations by the representative of the Netherlands that the definitions which are different from those of the Protocol "cannot [...] simply be imposed on the parties to the Protocol by a decision of the General Assembly", *ibid.*, para. 17.

⁷² *Ibid.*, 1716th Meeting, para. 147.

⁷³ *Ibid.*, para. 178. Whether the explanation by Sweden meets "the objections which are based on the fact of reservations" is debatable, *ibid.*, para. 189.

⁷⁴ The same is true of some ILO resolutions. In the ILO, recommendations and resolutions are distinct acts. The latter are equally non-obligatory.

drafts, convocation of a conference, etc. These are administrative decisions which are mandatory in the internal sphere of the organization or conference. Important as they are to the process of law-making, they lie beyond the scope of the present paper. What is meant here by the first stage of treaty-making are non-obligatory resolutions that comprise substantive provisions *de lege ferenda*. The purpose of such resolutions is to influence the contents of future treaties.

This procedure, which is fairly recent in international practice, consists in the making of a treaty in two stages.⁷⁵ In the first stage States adopt a resolution which indicates the matters to be dealt with in the treaty, or expresses the policies to be followed by the treaty-makers, or lays down principles or other rules to be included in the treaty. The resolution can limit itself to one of these subjects or contain any combination of them. This can be done in one instrument or in a series of resolutions. Subsequently⁷⁶ States proceed to the second stage which is the work on the text of the treaty. The idea is that in its substantive provisions the treaty should take account of the resolution.

The latter point raises the issue of possible deviations from the resolution. The debate on the UN Declaration of Principles Governing the Sea-bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction is instructive in this respect. During the 25th Session of the General Assembly in 1970 there were Member States which thought that the future treaty on the law of the sea (now the Convention signed at Montego Bay, 1982) would have to follow the Declaration. On the other hand, several States referred to the Declaration in terms which implied a certain freedom for the negotiators, while still other delegations were emphatic in maintaining that the Declaration constituted a compromise, was not fully satisfactory to any States, and many of them had reservations

⁷⁵ The two-stage procedure has been occasionally mentioned in official statements, cf. M. Lachs in his capacity as representative of Poland, UN Document A/5549, p. 4. During the 1963 debate on the preparation of a declaration of principles on international law the Indonesian delegation "had reached the conclusion that a declaration was entirely suitable, not as a substitute for a convention, but as an instrument preliminary to one", GAOR, 18th Session, 1963, 6th Committee, p. 151, para. 3. The two-stage procedure is referred to in writings. For some recent opinions, see the replies to Question 10 in the questionnaire of the Thirteenth Commission of the Institute of International Law, *IDI Annuaire*, vol. 61, 1985, Part I, pp. 250 ff.

⁷⁶ Depending on circumstances it can take a lot of time. M. VIRALLY, "Rapport No. 1" (Rapport introductif), in: *Les Résolutions*, *op. cit.*, note 68, p. 49, at p. 57, observes, *inter alia*: "Une résolution n'est souvent que le point de départ d'une longue action diplomatique [...]".

and doubts about some of its provisions. Hence no rule of the future treaty could be taken for granted.

The problem became more acute, and some attitudes more rigid, during the Third UN Conference on the Law of the Sea. In particular, the Chairman of the Group of 77 argued that the Declaration of Principles had "the effect of creating the basis for the legal régime this Conference was entrusted to formulate". In his opinion international law had been authoritatively expressed by the Declaration. The Group referred to "an international régime in conformity with the Declaration of Principles within the framework of an International Convention".⁷⁷

A controversy of the foregoing type can deprive the resolution of much of its role with regard to the future treaty. But even in a non-controversial situation the impact of the resolution on the treaty cannot be stated in a general way because usually one instance will differ from another. However, two things can be said with some certainty. First, in the two-stage procedure the resolution is part of the preparatory work on the treaty and can be assessed within that framework. Second, while the resolution does not bind the hands of the negotiators, their freedom will be limited when the resolution has met with universal or near-universal approval among the States participating in the treaty-making process. The resolution is then to be regarded as having established some common ground among those States.

XI

Once the substantive provisions of the resolution have been incorporated into the treaty,⁷⁸ the two-stage procedure (as described in paragraph X above) has borne its fruit and the role of the resolution would then normally come to a close.

In some circumstances, however, there will be room for the parallel existence of the two instruments.

If there is a considerable time lag between the adoption of the resolution and the conclusion (and entry into force) of the treaty, the resolution can gain in significance and can actually have a regulatory effect of its own. For instance, it can be argued that in the long interval

⁷⁷ UN Conference on the Law of the Sea, Seventh Session, Plenary, 15 September 1978.

⁷⁸ UNTS, vol. 331, p. 22.

between the adoption of the Universal Declaration of Human Rights and the entry into force of the Covenants on Human Rights (1948—1976), the Declaration has become part of general international law or, in any case, United Nations law.⁷⁹ In other words, the Universal Declaration acquired an autonomous rôle which it still has, irrespective of the Covenants. When and whether such a development is possible cannot be generally stated. There were resolutions which totally failed to attain a similar status, e.g. UN General Assembly Resolution 1653 (XVI) on the prohibition of the use of nuclear and thermo-nuclear weapons.

Sir Robert Jennings discussed the statements by various Governments to the effect that the Declaration of Principles on sea-bed (referred to in paragraph X above) was not binding and the new law on the subject would emerge only when an appropriate treaty was made. He observed:

“But this very caveat could be thought to suggest that the Declaration will have a new legal status if and when it appears alongside an agreement and an ‘internationally accepted’ definition”.

Writing of the Draft Convention on the International Sea-bed Area submitted in 1970 by the United States he said:

“Certainly the Declaration is neither binding nor dispositive; but there are circumstances in which it might be said with some cogency to lend a more convincing colour of general law to a provision such as Article 2 of the US draft treaty, should it eventually become more than a mere draft”.⁸⁰

In connection with that line of reasoning it is perhaps useful to make a brief excursion and to refer to a dictum of the International Court of Justice, though that dictum envisaged a reverse position, viz. one in which a conference adopted a non-binding resolution because the proposal in question had not been incorporated into the treaty.⁸¹ In 1958 the Conference on the Law of the Sea adopted a resolution concerning the situation of

⁷⁹ C. H. M. WALDOCK, “General Course on Public International Law”, *Hague Recueil*, vol. 106, 1962-II, p. 1, at pp. 32—33. See also E. SUY, ‘A Peaceful Influence’, Letter to *The New York Times*, 1 April, 1977.

⁸⁰ R. Y. JENNINGS, “The United States Draft Treaty on the International Seabed Area — Basic Principles”, *International and Comparative Law Quarterly*, vol. 20, 1971, p. 443, at pp. 439—440. See also id., “Law-Making and Package Deal”, in: *Mélanges offerts à Paul Reuter. Le droit international: unité et diversité*, Paris 1981, p. 347, at pp. 354—355. H. GURADZE, “Are Human Rights Resolutions of the United Nations General Assembly Law-Making?”, *Revue des droits de l’homme — Human Rights Journal*, vol. 4, 1971, p. 453, at p. 462, is of a different opinion: “the very fact that the General Assembly adopts a draft convention, militates against the law-creating nature of the basic declaration or resolution, and this also applies as long as a convention is in the making”.

⁸¹ For the possible significance of those provisions of the resolution which were not incorporated into the treaty, see *IDI Annuaire*, vol. 61, 1985, Part I, pp. 142—144.

countries whose people were overwhelmingly dependent upon coastal fisheries for their livelihood or economic development. The resolution recommends that the measures on such fisheries agreed between the coastal State and other fishing States

"shall recognize any preferential requirements of the coastal State resulting from its dependence upon the fishery concerned while having regard to the interests of the other States".

The Court found that the said resolution and a joint amendment submitted to the Second Conference on the Law of the Sea (1960)

"were approved by a large majority of the Conferences, thus showing overwhelming support for the idea that in certain special situations it was fair to recognize that the coastal State had preferential fishing rights. After these Conferences, the preferential rights of the coastal State were recognized in various bilateral and multilateral international agreements".⁸²

XII

Some Governments and some writers have maintained that normative resolutions, though formally non-binding, can or do constitute a new source of international law.

The point was often made by the developing countries with regard to the resolutions of the UN General Assembly, despite the clear rejection by the San Francisco Conference of a proposal that would empower the Assembly to enact rules of international law, with the approval of the Security Council.⁸³ In 1949 the representative of Ecuador maintained that the draft declaration on the rights and duties of States

"was indeed a source of law which could serve as a basis for the further development of international law on the subject [...]".⁸⁴

In introducing its draft on the duties of States in the event of the outbreak of hostilities Yugoslavia referred to the provisions of the proposed resolution as "laying down" a "legal rule",⁸⁵ and its delegate used words which implied that the resolution would constitute a source of rights and

⁸² *Fisheries Jurisdiction Case (U. K. v. Iceland)*, *Merits*, ICJ Reports, 1974, p. 3, at p. 26, paragraph 58.

⁸³ *Documents of the UN Conference on International Organization*, vol. 9, pp. 70 and 316.

⁸⁴ GAOR, 4th Session, 1949, 6th Committee, 172nd Meeting, p. 201, para. 47. The draft declaration was later annexed to Resolution 375 (IV).

⁸⁵ GAOR, 5th Session, Annexes, Agenda Item 72, A/1399, para. 5 and 11. According to the first Yugoslav draft the Assembly was to proclaim the proposed rules by using the terms "consider" and "determine". Later the verb "recommend" appeared.

duties.⁸⁶ Speaking on the proposal to adopt a declaration of principles of international law the delegate of Ceylon (now Sri Lanka) maintained that

“the time had come to revise and supplement the Charter and to give full effect to its purposes by laying down more comprehensive principles and rules and by formulating more declarations like the Universal Declaration of Human Rights”.

In particular,

“he believed [...] that the General Assembly resolutions of a declaratory nature, giving fresh vitality to the Charter, were a source of international law”.⁸⁷

In an earlier statement by the same country the term “source” was not used, nonetheless a declaration was said to contain “the categorical imperative of our age”.⁸⁸ In the opinion of India

“the various General Assembly resolutions adopted by a very large majority could obviously be a source of international law. Indeed, that law was the expression of the will of the majority of States, and the progressive development of international law, prescribed in Article 13 of the Charter, could be nothing but the formulation of new rules of law”.⁸⁹

During the debate on the Declaration on the Inadmissibility of Intervention, Pakistan submitted an amendment which sought

“to register the fact that [...] the resolutions of the United Nations were as much a source of international law as the United Nations Charter”.⁹⁰

According to Cyprus,

“among the sources of the law the [Hague] Court would administer, it may be included the law making resolutions and declarations of the General Assembly and the Security Council”.⁹¹

⁸⁶ Cf. GAOR, 5th Session, 1950, 1st Committee, 384th Meeting, p. 248, para. 9 and 11, and p. 249, para. 17.

⁸⁷ GAOR, 17th Session, 1962, 6th Committee, 763rd Meeting, p. 150, para. 4. The declaration is embodied in resolution 2625 (XXV). See also the position of Ghana, UN Document A/AC.125/SR.72, p. 13.

⁸⁸ UN Security Council Official Records, 1961, 988th Meeting, p. 23, para. 102.

⁸⁹ GAOR, 17th Session, 1962, 6th Committee, 770th Meeting, p. 202, para. 9.

⁹⁰ GAOR, 20th Session, 1965, 1st Committee, 1404th Meeting, p. 305, para. 6.

⁹¹ UN Document A/8382, p. 23, para. 58. On the other hand, the sponsors of the statement recognizing that “the development of international law may be reflected, *inter alia*, by declarations and resolutions of the General Assembly” assured the Sixth Committee that they “were not trying to introduce any other source of law than was already covered by Article 38 of the Statute of the Court”, GAOR, 29th Session, 1974, 6th Committee, 1486th Meeting, p. 134, para. 11 (Mexico). The statement figures in the eighth preambular paragraph of G. A. Resolution 3232 (XXIX). It caused strong reservations on the part of various States, not exclusively Western, see the debate in the Sixth Committee in 1974, especially during the 1492nd Meeting.

A quarter of a century ago Jorge Castañeda foresaw a gradual

"shift in emphasis toward a strengthening of the quasi-legislative functions of international organizations [...], a shift for which the new states will provide the stimulus".⁹²

He himself, both as scholar and as official representative of Mexico, repeatedly defended a role for the resolutions which would place them among the sources of law; suffice it to recall his comments on the Charter of Economic Rights and Duties of States.⁹³ Judges Elias⁹⁴ and Bedjaoui⁹⁵ also expose the role of resolutions as a source of legal obligations and law.

The opinion is not limited to writers from the Third World. Judge Krylov was inclined to approach the resolutions in this way.⁹⁶ In Clive Parry's view "the United Nations has not revealed itself to be an international legislature" but "certain of its operations obviously constitute an important source of that law".⁹⁷ Professor McWhinney, who sees in some Assembly resolutions much more than mere recommendations, mentions

"as yet unresolved doctrinal issues of just how, in analytical jurisprudential terms, to classify or categorise such Relations, assuming that they are law in the first place".⁹⁸

According to Judge Alvarez, "the Assembly of the United Nations is tending to become an actual international legislative power", and the evolution of this organ "is characterized by a number of factors which transform the Assembly in an all-powerful legislative organ".⁹⁹

The Applicants in the *South Africa Cases, Second Phase*, did not go that far; they admitted that "international society [lacked] legislative

⁹² J. CASTAÑEDA, "The Underdeveloped Nations and the Development of International Law", *International Organization*, vol. 15, 1961, p. 38, at p. 44.

⁹³ GAOR, 29th Session, 1974, 2nd Committee, 1638th Meeting, p. 385, para. 14.

⁹⁴ T. O. ELIAS, "Modern Sources of International Law", in: *Transnational Law in a Changing Society: Essays in Honour of Philip C. Jessup*, New York 1972, p. 34, at p. 46; id., *op. cit.*, note 7, pp. 71 and 74—75. G. J. TUNKIN, *op. cit.*, note 5, p. 63, criticizes Elias's view.

⁹⁵ M. BEDJAOUI, *loc. cit.*, note 6.

⁹⁶ See, for instance, his lectures "Les notions principales du droit des gens (La doctrine soviétique du droit international)", *Hague Recueil*, vol. 70, 1947-I, p. 441, at pp. 433—444.

⁹⁷ C. PARRY, *The Sources and Evidences of International Law*, Manchester 1965, p. 111.

⁹⁸ *Op. cit.*, note 23, p. 12. See also his reply to Question 20, *IDI Annuaire*, vol. 61, 1985, Part I, p. 263.

⁹⁹ The first quotation is from his Dissenting Opinion *Reservations to the Convention on Genocide*, ICJ Reports, 1951, p. 49, at p. 52. The second comes from his Dissenting Opinion, *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, *ibid.*, 1954, p. 67, at p. 71.

organs" and they spoke approvingly of scholars who had "increasingly urged that suitable and, in appropriate cases, *quasi*-legislative effect be given to official acts of international institutions". They stated "the need in international society for at least *quasi*-legislative capacity in appropriate situations" and linked it to

"the ordering role played by the organs and specialized agencies in the great system of the United Nations itself [...]". "The world order attributes increasing importance to the normative functions of international institutions and acknowledges that actors other than States may evolve authoritative international standards as well as international legal norms".¹⁰⁰

While Judge Alvarez saw in the Assembly a residue of legislative powers and in its resolutions a source of law, Judge Jessup reminds us that the contention of the Applicants in the *South West Africa Cases, Second Phase*, would be open, *inter alia*, to the attack that since various international bodies "lack a true legislative character, their resolutions alone cannot create law".¹⁰¹

The great majority of States reject the purported legislative competence of the United Nations. By way of example one may cite the statements by the United Kingdom,¹⁰² Venezuela,¹⁰³ Italy,¹⁰⁴ or France.¹⁰⁵

XIII

In concluding, it must be admitted that there is a grain of truth in what the proponents of the new sources of law say. Yet their main contention goes too far: the existing structure of international law does not permit the assumption that non-binding resolutions are a source of that law. However, while not a source, the resolutions do influence the process of law-making. The fields where resolutions left their mark are both significant and numerous: human rights, decolonisation and self-determination, economic relations and development, outer space, sea-bed and ocean floor, different social problems, especially labour relations, protection of victims of armed conflicts, not to

¹⁰⁰ *ICJ Pleadings*, vol. 9, pp. 344 and 345.

¹⁰¹ *ICJ Reports*, 1966, p. 325, at p. 432.

¹⁰² GAOR, 4th Session, 1949, 6th Committee, 159th Meeting, p. 105, paras 21 and 25.

¹⁰³ GAOR, 17th Session, 1962, 6th Committee, 766th Meeting, p. 174, paras 33, 38 and 39.

¹⁰⁴ GAOR, 18th Session, 1963, 6th Committee, 802nd Meeting, p. 113, paras. 49 and 51.

¹⁰⁵ *Ibid.*, 810th Meeting, p. 157, para. 3.

mention several narrower subjects such as reservations to multilateral treaties.

Judge Jiménez de Aréchaga has elaborated on the interaction of two sources, *viz.* custom and treaty, in the evolution of the law of the sea.¹⁰⁶ In fact, the interaction is not limited to that branch of law, and today it is reinforced by other law-influencing agencies such as the non-obligatory resolutions.

Writing of the declarations Professor Schachter emphasizes the generality of their pronouncements and the fact that "they do not appear to circumscribe the activities of States as much as most detailed treaty provisions do". They "do not appear to imply the degree of permanent commitment characteristic of treaties".

Elasticity and suppleness "may be highly desirable in areas of rapid changes".¹⁰⁷ A resolution may prove a means which is better than a treaty for expressing and embodying community interests which transcend individual national interests.¹⁰⁸

Usually a resolution is more appropriate than a treaty if the aim is to formulate policies. Subsequently, legal rules will put these policies into effect.

The interplay between resolution and treaty can be useful in still another respect. It has been pointed out¹⁰⁹ that

"today for most multilateral treaties the formulation of the text begins before it is clear whether and about what consent can actually be attained".

And it happens frequently that

"some disagreement about the objective of the treaty continues throughout the whole treaty-making procedure and puts its stamp upon the final outcome".¹¹⁰

There seems to be a role for the non-binding resolution in the reduction

¹⁰⁶ E. JIMÉNEZ de ARÉCHAGA, "Customary International Law and the Conference on the Law of the Sea", in: J. MAKARCZYK (ed.), *Essays in International Law in Honour of Judge Manfred Lachs*, The Hague — Boston — Lancaster 1984, p. 575, at p. 577.

¹⁰⁷ O. SCHACHTER, "The Prospects for a Régime in Outer Space and International Organization", in: M. COHEN (ed.), *Law and Politics in Space*, Montreal 1964, p. 95, at p. 99.

¹⁰⁸ Cf. *ibid.*

¹⁰⁹ B. SIMMA, "Consent: Strains in the Treaty System", in: R. St. J. MacDONALD and D. M. JOHNSTON (eds), *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory*, The Hague — Boston — Lancaster 1983, p. 485, at p. 488.

¹¹⁰ *Ibid.*

or even elimination of those difficulties. A preliminary debate on the subject to be dealt with by a future treaty leading to the adoption — or rejection — of a resolution on that subject could supply some guidance and orientation on the chances of the subsequent law-making and codification process.

In the relationships between resolutions and custom there is one point which is worth stressing, especially in connection with what has been said in paragraph VII above. The *opinio juris*, as an ingredient of every customary norm of law, cannot be separated from practice because it finds its expression in State conduct. However, the birth of custom is not an operation of pure induction where one infers a norm from practice and from the accompanying conviction that the standard of behaviour formed in that practice is obligatory. Another important factor is the value judgment, the opinion that the transformation of a still non-binding standard into law is desirable for the States and lies in their interest. A reverse position is also possible: States may feel that the time has come when the modification of existing law is called for. A non-binding resolution adopted by an international conference or organization can serve the purpose of revealing the value judgment of Governments when they consider the need for making new law or revising the old.¹¹¹

¹¹¹ The different problems raised in the present paper have been analysed in detail by this writer with regard to one category of non-binding resolutions, namely those of the UN General Assembly, *IDI Annuaire*, vol. 61, 1985, Part I, pp. 29 ff. A short version of the present paper was published in Polish in *Państwo i Prawo*, 1986, vol. 41, No. 1, p. 34.

Prohibition of Torture and Other Inhuman Treatment (The Development of International Legal Regulation within the United Nations)

by JAN SKUPIŃSKI

1. Introductory Remarks

1.1. The experience of World War II left no doubts that although humanity had reached the "20th Century" stage of civilization development, human beings were not *per se* protected from cruel treatment invoked by others including the most degenerate form — torture. The need for ensuring special legal protection of humans against attempts against life, health, liberty, inviolability and dignity, became extremely clear. For, it was realized that these were rights which, the more they are valued, the stronger protection they deserve. As a result of recognizing that the terms "inhuman treatment", "cruelty" or "torture" were not to be seen only in historical categories, the problem of torture and other forms of inhuman treatment was introduced before the international community. A search began for such legal solutions which would ensure all human beings adequate protection against this kind of acts.

This search has its over forty-year-long history. Its last, but the most spectacular effect was the adoption by the General Assembly of the United Nations on December 10, 1984 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

An examination of the most important stages of the evolution of the international "law of protection against torture" (and other cruel, inhuman or degrading treatment), which were brought about on the forum of the United Nations will allow to display its complexity. However, before attempting to present this evolution it would be advisable to elucidate — in very general terms — the relation of law to this phenomenon.

Most generally, three periods of legal evaluation of the problem of torture in municipal law can be distinguished in the past.

In the first period torture was applied without being subject to any legal regulation. It was neither permitted nor prohibited by law. This period

of legal indifferenciation to torture can thus be called the period of informal toleration.¹

The second period brought legal regulation of torture. In some cases torture was prohibited by law, in others — torture was explicitly permitted and even the way of its application was legally settled. Thus, in the latter case torture had become a legalized method of investigation or a form of punishment. This second stage can be called the period of legalized torture.²

The next period, the beginnings of which reach back no further than two or three centuries, consisted in the abolition of torture as a means permitted by law. In this period torture became illegal in a way which arises no doubts. The prohibition of torture was formulated either *expressis verbis* (e.g. in a Constitution) or it was implied that it obviously flowed from general legal rules in a given country as well as other rules protecting human life, health, liberty and dignity, regularity of penal proceedings and the rights of persons deprived of liberty. However, at that time the legislator was not concerned about establishing special guaranties of observing this prohibition.

It turns out, however, that in the practice of various kinds of organs the interdiction in question is not always respected. Therefore, a need emerges to ensure appropriate guaranties.

The third period — of pure prohibition — is thus beginning to undergo a transformation into a fourth one — of an active combat against torture by means of legal instruments.³

It is the above-mentioned forty-years-long period of searching for means of adequate protection of human beings against torture which is the very stage of passing from the third to the fourth period. This latest stage of evolution of the “law against torture” is seriously advanced on the international plane. However, as concerns municipal law it seems not to have gone beyond the earliest stage in this regard.

2. The Evolution of International Legal Regulations

2.1. From the Universal Declaration of Human Rights to the Declaration on the Protection against Torture

2.1.1. The roots of the prohibition of torture should be sought in the

¹ Cf. D. SPINELLIS, *Torture. A Non-conventional Offence Criminalised Recently in Greece* A/Conf 121/G/GRECE/ 1, 29 July, 1985 — elaborated for the Seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders (Milan 1985, p. 1).

² Cf. *ibid.*, p. 2.

³ *Ibid.*

Charter of the United Nations. Already in the second sentence of the preamble of the Charter, the United Nations express their determination "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person". According to Article 1 point 3 the purpose of the United Nations is to

"achieve international cooperation in solving problems of [...] social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all [...]".

Article 55 letter c. declares that the United Nations shall promote

"universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion".

In the light of these provisions it is a matter of course that the legal protection of human beings against torture is fully supported by the provisions of the fundamental document of the United Nations.

The first United Nations document which prohibited torture *expressis verbis* was the Universal Declaration of Human Rights. Article 5 of the Declaration provides that:

"No one shall be held subjected to torture or to cruel, inhuman or degrading treatment or punishment".

Of a great significance for the protection of human beings against torture were also those provisions of the Declaration which concerned equality before the law and equal protection of the law (Art. 7), the right to an effective remedy by the competent national tribunals for acts violating fundamental rights (Art. 8), the right to the protection of privacy, honour and reputation (Art. 12) and the rights of a person against whom penal proceedings have been (or can be) instituted. The latter rights include the right of the accused to be heard by an independent and impartial tribunal (Art. 10), the right to be presumed innocent (Art. 11) and the prohibition of arbitrary arrest or detention (Art. 9).

The Declaration was not limited to prohibiting torture only. In addition to that it prohibited cruel, inhuman or degrading treatment and punishment. Such an approach to the substance of the protection of human against cruel or other inhuman treatment is indispensable and it is no accident that in later international legal instruments these elements appear together. For, all these notions, the notion of torture included, are exceptionally vague and subject to appraisal. For, in a necessary synthetic provision it is impossible to exactly define what kind of cruel (inhuman, etc.) treatment already torture *is* and what is something less than that. The above-mentioned provisions of the Charter of the United Nations appealed to the respect for human dignity and other values. The protection of those fundamental interests cannot, as a matter of fact, be confined to a combat against only the most drastic actions.

2.1.2. Not long after the adoption of the Universal Declaration the problem of protection against torture and other inhuman treatment⁴ emerged in various kinds of international instruments (treaties, declarations, resolutions). They concerned situations in which — and this was evident on the grounds of former experience — a person (or a group of people) were especially exposed to inhuman treatment. Thus the idea of general protection proclaimed in the Universal Declaration was becoming more concrete.

Actually, the idea was specified for the first time a day before the adoption of the Universal Declaration — in the Convention on the Prevention and Punishment of the Crime of Genocide.⁵ Its definition of the crime of genocide embraced not only acts committed with intent to destroy in whole groups of people but also, i.a., “causing serious bodily or mental harm to members of the group” (Art. II point (b)) and

“deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part” (Art. II point (c)).

Although the notions of torture or inhuman treatment are not used by the Convention (this would certainly be difficult due to the synthetically formulated provisions of the instrument as well as its construction), acting in such a way, of course with the intention to destroy a group, falls under the interdictions contained in the Convention.

A few months later, on 12 August, 1949, the four Geneva Conventions for the Protection of War Victims were signed. They concerned: the amelioration of the condition of the wounded and sick in armed forces in the field — known as the First Convention; the amelioration of the conditions of wounded, sick and shipwrecked members of armed forces at sea (The Second Convention); treatment of prisoners of war (Third Convention) and protection of civilian persons in time of war (Fourth Convention).⁶

All the conventions contained a common prohibition of (i.a.) mutilation, cruel treatment and torture and outrages upon personal dignity, in particular humiliating and degrading treatment.⁷

As regards wounded, sick and shipwrecked the Conventions provide that

⁴ For the purpose of this paper the term “inhuman treatment” will be understood as any kind of cruel, inhuman or degrading treatment, including punishment.

⁵ GA Res. 260 A(III) of December 9, 1948 (Polish text in: *Dziennik Ustaw — Journal of Laws*, 1952, No. 2, item 9).

⁶ Polish text in: *Dziennik Ustaw*, 1956, No. 38, item 171 (Supplement).

⁷ This prohibition is found in Art. 3 common to all Conventions, para. 1, letters a) to c).

they are to be treated humanely and prohibit (i.a.) violence to their persons, in particular subjecting them to torture or to biological experiments.⁸

The Third Convention stipulates in Article 13 that prisoners of war must be humanely treated as well as protected against acts of violence or intimidation and against insults and public curiosity. Acts causing death or seriously endangering the health, in particular mutilation or medical or scientific experiments not carried out in the prisoner's interest have been classified by this article as "a serious breach of the present Convention". The Convention also prohibits (Art. 99) exerting moral or physical coercion on a prisoner of war in order to induce him to admit himself guilty of the act of which he is accused.

Torture is dealt with *expressis verbis* in Articles 17 and 87 of the Third Convention. The first prohibits physical or mental torture inflicted on prisoners of war to secure from them information of any kind whatever. The second forbids collective punishment for individual acts, corporal punishments, imprisonment in premises without daylight and "in general, any form of torture or cruelty".

As regards civilian persons, protected by the Fourth Convention, the prohibition of exercising physical or moral coercion, in particular to obtain information from them or from third parties (Art. 31) should be mentioned. It is to be implied that this provision embraces the prohibition of torture, included in the much broader scope of interdicted behaviour. In a similarly broad manner was formulated — in relation to the other Conventions — the prohibition of taking any measures causing physical suffering or extermination (Art. 32).

Thus it can easily be noted that in the Geneva Conventions, just like in the Universal Declaration, the problem of torture and other forms of inhuman treatment was considered in a complex way.

In the same year (1949) the United Nations dealt with another issue connected with inhuman treatment. It concerned corporal punishment in trust territories. In the Report from its 4th and 5th sessions the Trusteeship Council recommended an immediate abolition of corporal punishment in Togo, Kamerun and New Guinea.⁹ In a resolution adopted in 1949¹⁰ the General Assembly supported this recommendation and itself recommended the abolition of the lash in Ruanda Urundi, followed a year later by a resolution¹¹

⁸ Art. 12 of the First Convention and the same article of the Second — its provisions are common to both Conventions.

⁹ A/933.

¹⁰ Resolution 323 (IV) of November 15, 1949.

¹¹ Resolution 440 (V) of December 2, 1950.

recommending the immediate application of adequate measures aiming at a complete abolition of corporal punishment in all trust territories.¹²

Another document in which inhuman treatment became subject to a more precise prohibition was the Supplementary Convention of 1956 on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery.¹³ Art. 5 of the Convention prohibited and obliged the States Parties to the Convention to recognize as a criminal offence the act of (or being accessory to) mutilating, branding or otherwise marking a slave or a person of servile status for any reason whatever.

The above examples of particularizing the prohibition of inhuman treatment concerned specific situations (war, genocide, remnants of colonialism, slavery). Their common denominator is the fact that in these situations human beings are exposed to cruel treatment to an exceptionally high degree. Moreover, due to their specific character there is a dangerously high possibility of the act of cruelty becoming exceptionally drastic. Another common feature is that these situations are not of universal character. For, they do not occur in all places and at all times. They can be referred to as specific (exceptional) situations.

This it is not surprising that at the beginning the attention of the international community was focused on the protection against inhuman treatment in special situations, where the need for legal protection is the greatest. Moreover, this was done on the occasion of complex regulations of problems requiring the most expeditious solution.

2.1.3. Cruel or other inhuman treatment is not, however, a phenomenon occurring exclusively in exceptional situations. Human beings need to be protected from such practices also in situations resulting from every day life of a society. These can be called general situations.

The construction of appropriate legal means of protection against inhuman treatment in general situations began quite early — it dates back to the mid-1950s. It was then that the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, adopted an extremely important document, namely, the Standard Minimum Rules for the Treatment of Prisoners. Two years later they were adopted and approved by the Economic and Social Council.¹⁴

The Standard Minimum Rules comprise an integrated body of rules concerning the treatment of persons deprived of liberty. They deal with

¹² For a broader look see: United Nations Action in the Field of Human Rights, UN 1980, p. 159.

¹³ Adopted on September 7, 1956 in Geneva by the Conference of Plenipotentiaries convened by the Economic and Social Council. Resolution 608 (XXI) of April 30, 1956.

¹⁴ Resolution 663 C (XXIV) of June 31, 1957.

prisoners under sentence, prisoners under arrest or awaiting trial, insane and mentally abnormal prisoners, persons imprisoned for debt (civil prisoners) and persons arrested or detained without charge.¹⁵

The document in question contains a set of rules rich in contents ensuring humane treatment of prisoners. They refer, i.a., to accommodation, personal hygiene, clothing and bedding, food, exercise and sport, medical services. Their basic principle prescribes impartial application of the rules and prohibits discrimination. As regards punishment for disciplinary offences the Rules completely prohibit corporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or degrading punishment (Rule 31). Any punishment that may be prejudicial to the physical or mental health of a prisoner may be inflicted only when the medical officer, having examined the prisoner, certifies in writing that he is fit to sustain it (Rule 32 points (1) and (2)). This applies especially (but not only) to close confinement or reduction of diet. The Rules prohibit the application of chains or irons as punishment or restraints and handcuffs or strait-jackets as punishment. The latter may be used as restraints only as a precaution against escape during a transfer, on medical grounds by direction of the medical officer and in order to prevent a prisoner from injuring himself or others or from damaging property (Rule 33).

Besides these interdictions aiming at protecting prisoners against torture the Rules also contain provisions with the purpose to protect them from other specific forms of inhuman or degrading treatment. Accordingly, Rule 45 provides that the transport of prisoners in conveyances with inadequate ventilation or light, or in any way which would subject them to unnecessary physical hardship, shall be prohibited (point 2) and prescribes that when prisoners are being removed to or from an institution they shall be exposed to public view as little as possible and protected from insult, curiosity and publicity in any form (Rule 1).

However, the Rules lacked a general prohibition of torture or cruel treatment of persons subjected to imprisonment (the notion "torture" was never used) and did not regulate the problem in a complex manner. In spite of this the mere adoption of the Standard Minimum Rules constituted a very important step in the search for effective means of protection of human against inhuman treatment. For, it was the first instrument which did not concern situations of an exceptional character.

2.1.4. Irrespective of the Standard Minimum Rules the development of protection from torture in legal international acts dealing with special situations was in process.

¹⁵ The Standard Minimum Rules became applicable to this last category of prisoners later, in 1977 when Rule 95 was added. This was done by virtue of Economic and Social Council Resolution No. 2076 (LXII) of May 13, 1977.

In 1963 the General Assembly adopted the Declaration on the Elimination of All Forms of Racial Discrimination.¹⁶ and two years later (1965) it adopted an international convention on the same subject.¹⁷ The Declaration proclaimed the right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual, group or institution (Art. 7 para. 1). The Convention (Art. 5) obliged the States Parties to respect this right which was formulated identically as the above-mentioned Article 7 of the Declaration. The Convention also obliged the States to declare an offence punishable by law, i.e., all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin (Art. 4). Thus neither the Declaration nor the Convention use the notion of torture.

2.1.5. In 1966 the General Assembly adopted the International Covenants on Human Rights. Article 7 of the International Covenant on Civil and Political Rights¹⁸ contains the following interdiction:

"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation".

Article 4 of the Covenant provides that the interdiction is of peremptory character and no derogation may be made from it.

If the interdiction determined by Article 7 of the Covenant is compared with that contained in Article 5 of the Universal Declaration it will be noted that 18 years later the interdiction of torture or cruel, inhuman or degrading treatment was formulated in a similar way. Only the exemplification of medical or scientific experimentations was introduced. The Covenant, like the Universal Declaration, did not define torture or other inhuman treatment. After all, that would not have corresponded to the character of these acts. However, unlike the Declaration, the Covenant contained a significantly richer set of basic rights granted to persons charged with a penal offence and persons deprived of liberty, that is persons especially exposed to cruel treatment. This automatically strengthened protection against torture.

Thus the provisions of the Covenant on the matter in question constituted a continuation of the course taken by the Universal Declaration while the prohibition of torture acquired a fuller expression. It would, however, be difficult to ascertain that the adoption of the Covenant was a turning point in the search for effective forms of the combat with torture and other inhuman treatment.

2.1.6. In the following years the meaning of prohibition of torture was

¹⁶ Resolution 1904 (XVIII) of November 20, 1963.

¹⁷ Resolution 2106A (XX) of December 21, 1965.

¹⁸ Resolution 2200A (XXI) of December 16, 1966.

further specified in two acts, both of which concerned special situations. Until 1973 the Standard Minimum Rules Still remained the sole act dealing with general situations.

In 1968 the General Assembly adopted the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.¹⁹ It excluded from statutory limitation i.a. the "grave breaches" enumerated in the Geneva Conventions of 1949 and the crime of genocide as defined in the Convention of 1948. The latter crimes could, i.a., consist in torture and other cruel treatment of human beings.

In 1973 the International Convention on the Suppression and Punishment of the Crime of Apartheid was adopted.²⁰ According to the definition formulated in Article II point (a) the crime of apartheid may include i.a.: denial to a member or members of a racial group or groups of the right to life and liberty of person by (i.a.) the infliction of serious bodily or mental harm, the infringement of their freedom or dignity or subjecting them to torture or to cruel, inhuman or degrading treatment or punishment. It can easily be noticed that the Convention accepted the terms introduced by the Covenant on Civil and Political Rights. The adoption of this Convention closed the first stage of the evolution of international legal rules concerning the combat with torture. It had lasted as many as 25 years. We shall now make an attempt to distinguish the most characteristic, in our opinion, features of this period.

2.1.7. The Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights proclaimed a general prohibition of torture and other inhuman treatment. The very notion of torture and other inhuman treatment was not defined. It was a general prohibition introduced without specifying all possible situations in which the human being was exposed to such treatment. In consequence of this generality the prohibition lacked appropriate guaranties which would ensure its effectiveness. This did not mean, however, that the prohibition was not at all precise. It was gradually (but never to the fullest extent) becoming more and more precise with respect to some special situations which had in the meantime come to be the subject of international legal regulation. The documents in question contained either an *expressis verbis* prohibition of torture and other inhuman treatment or a prohibition of various acts which evidently could be (or even had to be) recognized as torture, inhuman, cruel or degrading treatment. The sole instrument dealing with general situations were the Standard Minimum Rules for the Treatment of Prisoners. They constituted a complete set of rules of treatment of persons deprived of

¹⁹ Resolution 2391 (XXIII) of November 26, 1968.

²⁰ Resolution 3068 (XXVIII) of November 30, 1973.

liberty and prohibited a number of acts which corresponded to the general concept of torture and inhuman treatment. Although the Rules contained neither a general prohibition of torture of imprisoned persons nor even used this notion, they were of considerable importance for the actual specification of the prohibition in question.

So, the prohibition of torture which at the beginning, in 1948, had been declared only in most general terms, became, during the 25 years that intervened, more firmly established in international law. The right of human beings to be protected against torture and inhuman treatment doubtlessly found a permanent place among the fundamental human rights which the attention of the international community is focused upon. However, all this time there was no act concerning exclusively this protection.

2.1.8. Work on a separate special international legal regulation dates back to 1973 when the General Assembly of the United Nations adopted Resolution 3059 devoted to the problem of torture and other cruel, inhuman or degrading treatment or punishment²¹. In the discussed instrument the General Assembly rejected all forms of torture and other cruel, inhuman or degrading treatment or punishment and appealed to governments to declare such practices illegal.²²

In 1974 the General Assembly adopted another resolution²³ in which it ascertained i.a. that in view of the growing number of alarming reports on torture it is indispensable to undertake further continual efforts to protect, in all circumstances, the basic human right to freedom from torture and other inhuman treatment. For the first time the resolution took into consideration the problem of guaranties of protection against torture. It rightly acknowledged that legal instruments of protection against torture must above all concern those areas where the risk of torture is the greatest and the most common. Three such areas were distinguished: a) deprivation of liberty, b) activities of the police and other law enforcement personnel, c) activities of medical personnel.

The General Assembly addressed a request to prepare drafts of relative documents concerning the first two issues to the Fifth Congress of the United Nations on the Prevention of Crime and Treatment of Offenders which was to be held in 1975 in Geneva, while in the third issue — to WHO which was to present the prepared draft to the Fifth Congress.

²¹ Resolution 3059 (XXVIII) of November 2, 1973.

²² For more details cf. "United Nations Action in the Field of Human Rights", *United Nations*, 1980, p. 160 and N. S. RODLEY, "Defining International Norms Against Torture", p. 2 ff., in: *International Institute of Human Rights (founded by René Cassin) Sixteenth Study Session*, Strasbourg, July 1985.

²³ Resolution 3218 (XXIV) of November 6, 1974.

In the said resolution the General Assembly also approached Member-States to supply information to the Secretary General on adopted measures (legal, administrative and judicial), directed at ensuring protection against torture. The information was to be presented to the Fifth Congress.

Resolution 3218 is of historical value as the first United Nations document in which concrete measures were undertaken aiming at providing adequate guaranties of the right in question. The fact that most tasks arising therefrom were entrusted to the Fifth Congress was particularly advantageous. For, in these congresses participate delegates of state representing, in the first place, municipal systems of administration of justice and prosecution. Thus, it is an assembly of persons not only competent but also, in principle, directly responsible for protection against torture in their respective states.²⁴

However, the Congress took a slightly different course, for it focused its attention on the elaboration of a draft general act, namely, a declaration on the protection against torture and other inhuman treatment. The draft was to be presented to the General Assembly for adoption. The proposal for elaborating the draft declaration was made on the first day of the Congress by the Swedish and Dutch delegations which submitted the preliminary draft. The two States, Sweden in particular, have considerably contributed to the work on international legal protection against torture.

The draft declaration was elaborated by the Fifth Congress during the debates which followed. Only three months later, on 9 December 1975, the General Assembly adopted the Declaration unanimously²⁵ accepting the text presented by the Fifth Congress (with only one minor modification). The document's full name is: Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

2.2. The Declaration of 9 December, 1975 on the Protection Against Torture

The Declaration is composed of 12 articles. It contains, what is of utmost importance, a definition of torture formulated for the first time. It is found in Article 1 of the Declaration, according to which

"torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners" (para. 1).

²⁴ Cf. also N. S. RODLEY, *op. cit.*, p. 4.

²⁵ Resolution 3452 (XXX), For Polish text see: Zb. Dok. 1975, No. 11—12, item 106, p. 859 ff.

"Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment" (para. 2).

The legal formula of torture accepted by the Declaration has thus been quite explicitly determined. It seems that of utmost importance is the condition which limits the notion of torture solely to acts of public officials or persons acting on their incitement. Torture means thus an act of state authority. It must be an intentional, deliberate act aimed at either obtaining some kind of verbal information or punishing or intimidating. These are all conditions narrowing the definition. At the same time, however, the definition is broad enough for it does not limit the notion of torture to the treatment of persons deprived of liberty or those awaiting trial. The very act of torture has been defined in likewise broad terms. What suffices for it to be recognized as torture is that it causes any physical or mental pain or suffering under only one quantitative condition — severity.

The Declaration condemned and rejected torture and other inhuman treatment, qualifying them as an offence to human dignity (Art. 2). In this way the basic object of legal protection was indicated.

The Declaration appealed to states not to permit or tolerate torture or other cruel, inhuman or degrading treatment or punishment. It also pointed out that exceptional circumstances such as a state of war or threat of war, internal political instability or any other public emergency may not be invoked as a justification of such acts (Art. 3).

The first three articles constitute, in a way, the first part²⁶ of the Declaration which could be named a "definition and declaratory" part. The remaining provisions form a distinct part, containing guaranties. It indicates measures which — if adopted by states — surely would contribute to a considerable degree to ensuring the effectiveness of the general prohibitions formulated in Articles 2 and 3.

Article 4 appeals to all states to take effective measures to prevent torture and other inhuman treatment. The most important measures have been enumerated in the subsequent provisions. They constitute the first catalogue of guaranties protecting against torture formulated in an international legal act.

The Declaration provides:

- That each State shall ensure that all acts of torture (this time without other forms of inhuman treatment) as defined in Article 1 are offences under its criminal law (Art. 7);
- That in the training of law enforcement personnel and of other

²⁶ The Declaration is not formally divided into parts.

public officials who may be responsible for persons deprived of their liberty full account shall be taken of the prohibition against torture and other inhuman treatment (Art. 5);

— That each State shall keep under systematic review interrogation methods and practices as well as arrangements for the custody and treatment of persons deprived of their liberty (Art. 6);

— That any person who alleges that he has been subjected to torture or other cruel, inhuman or degrading treatment or punishment shall have the right to complain to, and to have his case impartially examined by the competent authorities of the State concerned (Art. 8);

— That whenever there is reasonable ground to believe that an act of torture has been committed, the competent authorities of the State concerned shall promptly proceed to an impartial investigation, even if there has been no formal complaint;

— That if an investigation under Article 8 or Article 9 establishes that an act of torture appears to have been committed, criminal proceedings shall be instituted; if an allegation of other forms of inhuman treatment is considered to be well founded, criminal, disciplinary or other appropriate proceedings shall be instituted (Art. 10);

— That any statement which is established to have been made as a result of torture or other inhuman treatment may not be invoked as evidence against any person in any proceedings (Art. 12);

— That the victim of torture or other inhuman treatment shall be afforded redress and compensation (Art. 11).

This set of guaranties deserves special attention not only because — like the definition — it appeared for the first time. Its significance results, above all, from the fact that owing to its formulation the provisions of the Declaration became the first and a highly spectacular expression of the active combat against torture with the help of legal instruments.

What kind of guaranties did the Declaration proclaim?

Firstly, there were guaranties aiming at the prevention of torture, i.e., those whose primary objective was not to allow the act of torture or inhuman treatment to take place at all.

Secondly, the Declaration contained guaranties directed at ensuring an easier disclosure of breaches already committed.

Thirdly, the guaranties were to contribute to the inevitable punishment of offenders.

Fourthly, the Declaration embraced a set of rights of the victim of torture.

Separate attention should be paid to Article 12 which deprives any statement which has been made as a result of torture or other inhuman treatment of any force of evidence. It is a provision of considerable importance, carrying great weight as a guaranty. For, it introduced the

obligation to exclude evidence obtained in a "contaminated" manner. This rule has various functions: firstly -- it protects the victim; secondly -- it discourages law enforcement organs from applying illegal methods of interrogation; thirdly -- it serves the broader interest of the protection of legality in a given state.

2.3. Subsequent Resolutions and the Work on the Convention

On the same day that the Declaration was adopted the General Assembly adopted another resolution concerning the problem of torture.²⁷

It had a twofold objective.

On the one hand it was aimed at inciting activities with the purpose of obtaining information if and to what extent the provisions of the Declaration were applied by states. In this connection the General Assembly approached the Human Rights Commission for taking necessary steps to ensure the observance of the Declaration.

On the other hand, the object was to carry out the provisions of Resolution 3218 of 1974 with the view of ensuring protection against torture in those areas where exposure to torture is the greatest (deprivation of liberty, the activities of the police, the activities of the medical personnel). The expectations connected with the Fifth Congress in this regard had not been fulfilled. Consequently, the General Assembly asked the Human Rights Commission to elaborate draft principles concerning the rights of detained and arrested persons, it approached the Committee on Crime Prevention and Control for elaborating a draft code of conduct for law enforcement officials and the World Health Organization for elaborating the principles of medical ethics relevant to the protection of persons deprived of liberty against torture and other inhuman treatment.

Resolution 3453 was of considerable importance, as it seems, in respect of the fact that it constituted an indispensable supplement of the Declaration. The Declaration was a collection of general rules. However, the need for more precisely determined detailed rules, concerning areas of greatest potential threat to the interest protected by law, was evident.

Resolution 31/85 of 16 December, 1976 was a continuation of Resolution 3453. This time the General Assembly addressed, i.e., governments, inter-governmental and non-governmental organizations concerned with the problem of human rights, appealing to them to give the provisions of the Declaration possibly strongest publicity.²⁸

²⁷ Resolution 3453 (XXX) of December 9, 1975.

²⁸ For more details on Resolution 31/85 and the work of the Human Rights Commission to carry out Resolution 3453 see: United Nations Action in the Field of Human Rights, *op. cit.*, p. 162 ff.

In the following year four more resolutions were adopted dealing with further activities against torture.

In the following year a package of four resolutions²⁹ dealing with further activities against torture, was adopted.

Resolution 32/63 obliged the Secretary General to collect information from Member States on measures adopted with the purpose of introducing the principles provided for in the Declaration and to submit a suitable report to the Human Rights Commission and the General Assembly.

In Resolution 32/65 torturing of opponents to apartheid by the South African regime was condemned.

Resolution 32/64 called on member-States to consolidate their support for the Declaration by issuing unilateral declarations condemning torture and other similar treatment.³⁰

Finally, Resolution 32/62 underlined the need for further efforts to ensure adequate protection against torture and stated that an important step in this direction should be the adoption of an international convention. The resolution charged the Human Rights Commission with the task of preparing a draft convention, based on the principles contained in the Declaration.

Work in the Human Rights Commission, which established a special working group, was carried on for 6 years (it was launched without delay, already in February 1978).

During the years 1978—1984 preparations of the draft convention were not the only work done. Documents proclaiming special rules, carrying out the provisions of Resolution 3453, were elaborated. Two of these acts were elaborated and adopted before the Convention. These were: the Code of Conduct for Law Enforcement Officials (the so-called Code of Police Ethics) and the Principles of Medical Ethics in the Protection of Prisoners and Detainees against Torture. The problem of protection of humans against arbitrary arrest and detention was also tackled.

It has to be noted that in the period before the adoption of the Convention the General Assembly established in 1981 a United Nations Voluntary Fund for Victims of Torture.³¹

2.4. Code of Police Ethics

The need for the preparation of a draft code of police ethics was brought up on several occasions. At first the General Assembly addressed the Fifth Congress (Resolution 3218 of 1974), then the Committee on Crime Prevention and Control (Resolution 3453 of 1975) and later, after the draft

²⁹ Resolutions 32/62, 32/63, 32/64 and 32/65 of December 8, 1977.

³⁰ By the middle of 1983 such declarations were submitted by 34 states.

³¹ Resolution 36/151 of December 16, 1981.

had been elaborated by the Committee — the Economic and Social Council requesting it to present the draft code to the General Assembly (Resolution 31/85 of 1976). The Council adopted the draft in 1977³² and submitted it to the Assembly.

The text of the code was accepted by the General Assembly on 17 December, 1979.³³

The document bears the name Code of Conduct for Law Enforcement Officials. It is composed of 8 articles with commentaries in which legal interpretation of the notions used can be found.

Article 5 deals directly with torture. It provides that no enforcement official may inflict, instigate or tolerate any act of torture or similar treatment. The official may not invoke superior orders or exceptional circumstances such as a state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification of such acts.

Nearly every remaining article of the code is of indirect significance to the protection against torture. Article 1 prescribes that law enforcement officials at all times fulfil the duty imposed upon them by law, by serving the community and by protecting all persons against illegal acts. Article 2 prescribes respect and protection of human dignity and the protection of human rights of all persons. Article 3 provides that law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty. Article 6 obliges law enforcement officials to ensure the full protection of the health of persons in their custody and to secure medical attention whenever required. Finally, Art. 8 obliges officials to respect the law and the rules of the Code and to prevent and rigorously oppose any violations of them. Law enforcement officials who have reason to believe that a violation of the Code has occurred or is about to occur should report the matter to their superior authorities and, where necessary, to other appropriate authorities or organs.

The Code of Police Ethics is considered one of the most significant international legal acts of protection of humans against torture. It is at the same time the first act addressed to a concrete group of subjects.

2.5. The Principles of Medical Ethics

As has already been mentioned, already in 1974 in Resolution 3218 the General Assembly called on the World Health Organization to prepare draft principles of medical ethics related to the protection of persons

³² Resolution 2073 (LXII) of May 13, 1977.

³³ Resolution 34/169.

deprived of liberty against torture. The request was repeated in Resolution 3453 of 1975 and Resolution 31/85 of 1976. The WHO entrusted this task to the Council for international organizations of Medical Sciences which prepared an appropriate draft.³⁴ In 1979 the WHO presented the draft to the Secretary General and nearly 4 years later (in 1982) the General Assembly adopted³⁵ the document entitled: Principles of Medical Ethics Relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. It is the first international legal act dealing exclusively with special protection against torture in general situations.

The "Principles" oblige health personnel to provide prisoners and detainees with medical care (protection of their physical and mental health and treatment of disease) "of the same quality and standard" as if afforded to those who are not deprived of liberty. (Principle 1).

The remaining principles contain interdictions referred to as "contraventions" or "gross contraventions" of medical ethics.

It is a gross contravention, as well as an offence under applicable international instruments, to engage (actively or passively) in acts which constitute participation in, complicity in, incitement to or attempts to commit torture or other inhuman treatment (Principle 2). Besides that, the "Principles" specify three contraventions of medical ethics.

The first consists in being involved in any professional relationship with prisoners or detainees the purpose of which is not solely to evaluate, protect or improve their physical and mental health (Principle 3). This principle was aimed at establishing—in the form of a rule of medical ethics—an intransgressible barrier to the participation of the medical personnel in any acts the purpose of which is not medical treatment. This would mean excluding medical personnel from participation in torture and other inhuman treatment.

³⁴ At the same time another organization was engaged in work on principles of medical ethics. Already in 1975 the World Medical Association on its 29th session in Tokyo (October 1973) adopted a declaration named: Comprising Guidelines for Physicians Concerning Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of Persons Imprisoned and Arrested. It should be noted that this document was adopted at an earlier date than the General Assembly Torture Declaration. The document, known as the Tokyo Declaration, was taken into consideration during the work on the Code of Medical Ethics. Cf. the text of Resolution 37/194 of the General Assembly of December 18, 1982. On the contents of the Tokyo Declaration see P. MAĆKOWIAK, "Prawa człowieka a zagadnienia tortur" [Human Rights and the Problem of Torture], in: *Problematyka przestępczości na VI Kongresie Narodów Zjednoczonych* [The Problem of Crime on the Sixth Congress of the United Nations], ed. by B. Hołyst, Warszawa 1983, pp. 185—6.

³⁵ Resolution 37/194 of December 18, 1982.

The second contravention consists in: a) applying one's knowledge and skills in order to assist in the interrogation of prisoners and detainees in a manner that may adversely affect their physical or mental health or condition and which is not in accordance with the relevant international instruments; b) certifying or participating in the certification of the fitness of prisoners or detainees for any form of treatment or punishment that may adversely affect their health and which is not in accordance with the relevant international instruments or participating in any way in the infliction of any such treatment or punishment.

The third contravention consists in participating in any procedure for restraining a prisoner or detainee unless such a procedure is determined in accordance with purely medical criteria as being necessary for the protection of the physical or mental health or the safety of the prisoner or detainee himself, of his fellow prisoners or detainees, or of his guardians; the action cannot, however, present any hazard to his physical or mental health (Principle 5).

The last Principle provides that there may be no derogation from the principles on any ground whatsoever, including public emergency.

The basic aim of the Principles of Medical Ethics is to prevent health personnel from participating in torture and other inhuman treatment. Approaching this problem from the point of view of professional ethics has a twofold prophylactic value. On the one hand, the creation of a system of prohibitions for health personnel should play a restraining role. On the other hand, it simplifies the situation of the personnel in relation to organs who have direct control over the prisoner or detainee. For, to adduce an *expressis verbis* prohibition of professional ethics, not being subject to appraisal, is a convenient reason for refusal to participate in inhuman treatment.

2.6. Protection of Persons Deprived of Liberty

When the human right to freedom from inhuman treatment is discussed, it is evident that the problem of the rights of persons deprived of liberty cannot be disregarded. Up till now only one act has been elaborated in this matter within the United Nations, namely — the Standard Minimum Rules. The adoption of the Rules in 1955 was a significant step towards the development of international legal protection against inhuman treatment. Today, however, they are becoming less and less adequate to the growing needs and expectations.

The work on a document which would regulate in a more detailed way the rights of arrested and imprisoned persons has been carried on for a long time. As early as 1961 the Human Rights Commission prepared

a draft of principles of freedom from arbitrary arrest or detention.³⁶ In Resolution 3218, the Fifth United Nations Congress on Crime Prevention and Treatment of Offenders was addressed in this matter. In the above-mentioned Resolution 3453, issued on the day the Declaration on Torture was adopted, the Human Rights Commission was approached for preparing a set of rules of protection of all persons detained or imprisoned in any way whatsoever. The Commission entrusted the task to the Sub-Commission on Prevention of Discrimination and Protection of Minorities. The Sub-Commission presented a draft of such principles in 1978 and the following year the text was submitted to the General Assembly. However, no document on the matter in question had been adopted by the end of 1985.³⁷

Thereby a very significant area of protection against torture which should become the subject of a detailed international legal instrument, still awaits complex regulation.

3. The Convention against Torture of 10 December, 1984

The text of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was adopted by consensus by the General Assembly on 10 December, 1984.³⁸

It is a broad act, divided into three parts and composed of 33, sometimes very long, articles. The provisions of the Convention can be classified into several categories.

The first includes provisions containing the definition of torture and other inhuman treatment.

In the second we find provisions concerning the legislation and internal practice of Member States. It deals with the prevention of torture and other forms of inhuman treatment, the prosecution and punishment of offenders and the protection of the rights of the victim. These provisions clearly refer to the Declaration and other acts dealing with the problem of protection against torture.

The third group embraces new provisions, concerning extradition, while the

³⁶ See: "Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile", *United Nations*, No. 65, XIV. 2, part VI.

³⁷ For more details on the work on this problem and on the project see: "United Nations Actions in the Field of Human Rights", p. 159, 160 and 164 ff.; N. S. RODLEY, *op. cit.*, p. 6 and 19 ff.

³⁸ Resolution 39/46 of December 10, 1984.

fourth constitutes a vast complex of rules relating to the control of the observance of the Convention by the States Parties.

The Convention, like the Declaration, does not regulate torture and other forms of cruel, inhuman or degrading treatment or punishment alike in every case. Therefore, provisions relating to torture, will be dealt with in the first place.

3.1. The Definition of Torture

In comparison with the Declaration the Convention has maintained in Article 1 the basic shape of the definition, binding the concept of torture with abuse of power for a definite purpose. The Convention has, however, formulated the definition in broader terms by, first of all, adding two more purposes of the offender's action: coercion and discrimination in the broad sense. Prerequisites for responsibility have been — considerably — broadened. Pursuant to the Declaration the group of subjects was limited to public officials or persons acting at their instigation. The Convention has introduced, besides officials, persons acting in an official capacity (even if deprived of the status of a public official). In accordance with the convention torture includes not only acts committed directly by these persons, but also — and these are successive new elements which broaden the legal concept of torture — with their consent or acquiescence.

It seems that the broader definition of torture as formulated by the Convention can better serve the protection of human beings against torture. For, it complies to a greater extent with the realities of life and aims at covering a widest possibly scope of cases where instrumental abuse of power manifests itself in drastic acts of brutality.

3.2. Preventive Rules

A general preventive rule is found in Article 2, paragraph 1 which obliges each State Party to take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction. It is the counterpart of Article 4 of the Declaration.

Articles 10 and 11 are modified versions of Articles 5 and 6 of the Declaration.

Article 10 provides that each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment. The prohibition of torture should be included

in the rules or instructions issued in regard to the duties and functions of any such persons.

Article 11 obliges the State Parties — with a view to preventing acts of torture — to keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment.

These rules are of exclusively preventive character. Their main, if not the sole, objective, is to prevent any cases of torture. This preventive role can, what is a matter of course, be attributed also to other provisions aimed at e.g. repression, facilitation of finding the offender or the protection of the victim. Therefore, when provisions having such objectives shall be discussed below, their preventive character will be underlined.

3.3. Repressive Rules

Article 4 (paragraph 1) of the Convention obliges the States Parties to ensure that all acts of torture are offences under their criminal law. The types of the offences should correspond to the Convention's definition of torture. Attempt and any act of participation (coperpetration, abetting, aiding) should also be made punishable.

The Convention also deals with exceptional circumstances barring responsibility which could be invoked as a justification of torture and provides that neither exceptional circumstances (state of war or threat of war, internal political instability or any "other public emergency") nor an order from a superior officer or a public authority (Art. 2, paras 2 and 3) cannot justify such acts.

Thus the grounds for criminal responsibility have been broadly circumscribed.

The Convention also obliges each State Party to make the offences in question punishable by appropriate penalties which take into account their grave nature (Art. 4, para. 2).

Articles 5, 6 and 7 contain principles of prosecution of the crimes of torture standardized in municipal law and the principles of the binding force of this legislature in relation to place and persons.

The States Parties should apply the principle of territoriality and establish its jurisdiction over all their nationals, no matter where the offence has been committed. However, it has been left to the State to establish its jurisdiction in cases when the victim is a national of that State (Art. 5, para. 1).

The fundamental principle adopted in the Convention is, however, the so-called principle of world-wide (universal) repression which prescribes that State Parties take legal measures against any person who has committed

an offence (in this case the offence of torture), no matter where the offence has been committed and what nationality the offender is.

The Convention also regulates (in Articles 8 and 9) the problem of extradition between States-Parties with the purpose of widening the possibility of extradition.

The Convention obliges (Art. 9) the States-Parties to afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of offences of torture.

The Convention also deals with the rights of persons alleged to have committed such an offence and provides that the standards of evidence required for prosecution and conviction shall not be less stringent; it imposes an obligation to guarantee them fair treatment at all stages of the proceedings (Art. 7, paras 2 and 3).

Repressive provisions are, or in any case should be, also of preventive value. These qualities should be attributed both to the obligation that acts consisting in torture (according to the definition contained in Article 1) be distinctly standardized and to the provisions with the purpose of ensuring inescapable repression.

3.4. Facilitating Detection

Like the Declaration, the Convention comprises provisions which are to give reality to the application of repression. The essential condition of such reality, in any case whatsoever, is the creation of adequate possibilities of detection of offences. This purpose can be accomplished owing to the solutions contained in Articles 11 - 13 of the Convention. The above-mentioned Article 11 obliges to a systematic review of interrogation rules, instructions, methods and practices and treatment of persons deprived of liberty. All this should facilitate disclosure of crimes by State organs. It is, however, generally known that one of the main sources of information not only on criminal abuse of power but also on any breaches of law are complaints of citizens. Whether the complaints are actually lodged depends on the existing situation, created both by the law itself and the practice of its application, which does not discourage citizens from lodging complaints, in particular against state officials. The provisions of Article 13 are expected to activate this basic source of information on a vast scale. They oblige States to ensure that any individual who alleges he has been subjected to torture has the right to complain to, and to have his case promptly and impartially examined by, competent authorities. This rule also obliges States to take steps to ensure that the complainant and witnesses are protected against all illtreatment or intimidation as a consequence of his complaint or any evidence given.

Information on torture, no matter what their source, should be examined. Therefore, a provision must be provided in order to enable ignoring such information. This role is played by Article 2 of the Convention which prescribes prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in the territory of the State. This indicates the introduction — in relation to the prosecution of torture — of the legality principle, sharpened by two additional conditions. One is the order to promptly institute an investigation and the other is its impartiality. The latter condition, which also appears in Article 13, is of special significance as concerns torture. For, it often happens that on the basis of general principles binding in a given state the organ competent to institute proceedings in the case in question is at the same time the very organ whose officials are alleged to have committed the offence of torture. Therefore, it is impossible for the organ to be impartial.

The preventive meaning of provisions facilitating detention leaves no doubt. For, they serve the fulfilment of the principle of inevitable responsibility.

3.5. The Rights of the Victim

The right of the victim to lodge an effective complaint is expressed in the above-mentioned Article 13. It is worth while to add that the additional guaranty that the complainant and witnesses are protected against all negative consequences of the complaint or evidence given had not been included in the Declaration and appeared for the first time in the Convention.

Article 14 concerns the right to redress which has been formulated in broader terms than in the Declaration. It obliges States Parties to ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation.

From this point of view also Article 3 of the Convention should be considered. It aims at protecting the human person against the threat of torture. For, this provision prohibits expulsion, return or extradition of a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

3.6. Exclusion of the Force of Evidence of a Statement Made as a Result of Torture

Like the Declaration, the Convention provides that any statement which is established (i.e. testimony, opinion, etc.) to have been made as a result of torture shall not be invoked as evidence. This prohibition is formulated in broader terms than in the Declaration as the Convention extends it on any proceedings and does not limit its application to "the person concerned" or "any other person in any proceedings". Thus, it absolutely

deprives such a statement of force of evidence in any proceedings of the legal system of a given State. The only exception are proceedings against a person accused of torture as evidence that the statement was made.

3.7. Other Cruel, Inhuman or Degrading Treatment or Punishment

As has already been mentioned, the Convention distinctly differentiates provisions concerning torture from those concerning other forms of inhuman treatment.

Article 16 prescribes that each State Party shall undertake to prevent in any territory under its jurisdiction

"other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1, when such acts are committed by or at the instigation or with the consent of acquiescence of a public official or other person acting in an official capacity".

It can easily be noted that the remaining conditions of torture, i.e. in particular, severe pain or suffering, as well as the purpose of the act consisting in obtaining from the person subjected to torture information or a confession, punishing, intimidating, coercing or discriminating him, are not included in the definition considered.

Article 16 extends some guaranties connected with torture or other forms of inhuman treatment. This concerns Articles 10, 11, 12, and 13 which have been dealt with above.

The remaining provisions which have already been discussed in relation to torture do not apply to other forms of inhuman treatment.

3.8. Means of Control

When considered in relation to such breaches of human rights as torture and other inhuman treatment the problem of laying down adequate rules of international control of the observance by States Parties of obligations following from a treaty is a very complex and complicated one. Within the meaning of the already established international legal definition torture constitutes, first of all, an abuse of power, secondly, an abuse consisting in a very drastic breach of human rights, thirdly, an abuse by that part of the state apparatus which should guard law and order and directly exercise functions of law enforcement. States are not interested in wide publicity of cases where such acts have been committed — neither in internal relations nor in the international plane. For, these are acts of pathology of State authority. Each state endeavours to fight them in its own capacity and in a discrete manner, frequently considering publicity in such cases detrimental to state interest, internal and external. In addition, there always exists a possibility that, if international control is brought into operation,

other participating States will use its mechanisms not only to promote the universal interest of protection of human rights but also to pursue their own exclusively political aims.

Therefore, it is not accidental that according to the Convention submission to international means of control depends on the approval of each State Party. The list of compulsory means of control for all States Parties is limited while the Convention provides as many as four variants of optional control procedures.

The whole part II of the Convention deals with means of control (Arts 17–24).

3.8.1. Compulsory Means of Control

The Convention has established a Committee against Torture composed of 10 experts elected from a list of persons nominated by the States Parties (one person from each State).

The Committee is the basic organ controlling the observance by the State Parties of the provisions of the Convention and the sole organ as regards the functioning of compulsory means of control. These means are as follows.

The States Parties are obliged to submit to the Committee reports on the measures they have taken to give effect to their undertakings under the Convention as well as other reports requested by the Committee.

Each report is considered by the Committee which may make general comments on the report and forward these to the State Party concerned. The State, in turn, may forward its observations to the Committee. The Committee may, at its discretion, decide to include any comments made by it together with the observations received from the States Parties, in its annual report. In this case the State concerned may request that the Committee include in its report a copy of the State's report which was the subject of the exchange of remarks.

It is the sole control procedure obligatory for all Parties to the Convention.

3.8.2. Optional (facultative) Means of Control

The Convention provides four procedures of control which are not obligatory but depend on the approval of each State Party.

The first procedure widens the rights of the Committee by the right to examine, on its own initiative, cases of systematical application of torture on the territory of one of the States Parties. If the Committee receives reliable information on such cases it has an obligation to examine it (Art. 20). In doing so, the Committee should invite the State Party

concerned to cooperate in this regard. As a result the State should submit observations with regard to the information concerned.

Taking into account any observations which may have been submitted by the State Party concerned as well as any other relevant information available to it, the Committee may designate one or more of its members to make a confidential enquiry.

The Convention requires (Art. 20, para. 3) all the proceedings to be confidential and that in all its stages the Committee seeks the cooperation with the State Party concerned.

After concluding all the proceedings the Committee may decide to include a summary account of the proceedings in its annual report. This decision may be arrived at only after consultations with the State Party concerned.

The States Parties may exclude the possibility of being submitted to this procedure by making a reservation (Art. 28, para. 1).

The second procedure is put in motion when a State Party claims that another State Party is not fulfilling its obligations under the Convention. The allegation is referred to in the Convention as a "communication". Within three months after the receipt of the communication the receiving State should afford an explanation in writing clarifying the matter. If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the initial communication was received, either State shall have the right to refer the matter to the Committee.

When dealing with the matter the Committee is under obligation to make available its good offices to the States concerned with a view to a friendly solution of the matter on the basis of respect for the obligations provided for in the Convention. The Committee may set up an *ad hoc* conciliation commission.

Within 12 months after the date of receipt of notice the Committee has to conclude it and submit a report which shall be communicated to the States Parties concerned.

This procedure is binding only on those States Parties who have declared that they submit to such means of control.

The third procedure can be initiated as a result of complaint of an individual against a State Party. Individuals subject to the jurisdiction of a State Party may communicate to the Committee claiming to be victims of a violation by this State of the provisions of the Convention. The claim may be made on behalf of the individual.

After receiving the communication the Committee brings it to the attention of the State which is alleged to be violating the Convention. The State is obliged to submit, within six months, written explanations or statements and inform on the remedy, if any, that may have been taken. The Committee considers the information received and then forwards its views to the State Party concerned and to the individual.

The procedure can be applied only in relation to a State Party which has issued an appropriate declaration.

The fourth procedure consists in settling disputes between States by means of arbitration or by the International Court of Justice. Article 30 provides that any dispute between two or more States Parties concerning the interpretation or application of the Convention which cannot be settled through negotiation shall, at the request of one of them, be submitted to arbitration. If, however, within six months from the date of such a request the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

In this solution notice should be taken of the relative obligation to submit the dispute to arbitration on demand of one of the parties. For, the condition to refer the case to arbitration is agreement on its organization. This means that practically any of the Parties can cause that this stage is omitted.

The procedure is binding only on those States Parties which have not declared that they do not consider themselves bound by Article 30 paragraph 1 which regulates this matter.

3.9. A General Characteristic of the Convention

The Convention was adopted not long ago and it is not yet possible to talk about experiences flowing from its application in practice. However, nothing hinders from making an attempt to characterize it as a legal act, and to appraise it from the point of view of the contents of legal rules.

It appears that the Convention constitutes a very important step on the road to legal prevention of and combat against torture. For, the instrument in question contains a rather detailed and broad definition of the very offence and its realistic approach to the problem deserves attention. For, the definition, which treats the legal notion of torture in terms of abuse of power, includes both situations where the very act of torture is inflicted directly by a public official and those where for factual abuse of power somebody else is used. This should, to a considerable degree, contribute to effective combat against torture. This broad approach fully corresponds with the general principles of responsibility according to which the prohibition of torture is peremptory and the offender can invoke neither exceptional circumstances nor an order from any authority whatsoever.

The realistic approach of the Convention manifests itself not definition. It also shows up in the system of guaranties, in particular those directed at the prevention and ensurance of inevitable repression.

The realistic approach is expressed in another, maybe the most important from this point of view, feature of the Convention. Namely, the fact that, with only one exception, the application of the measures of control depends on the former approval of the State Party. Owing to this States have a very wide scope of discretion when deciding if and to what extent the participation in one of the procedures of control will be in conformity with their political interests. It is also worth while to underline that the procedures of control are confidential and are directed at seeking solutions with as few conflicts as possible.

The catalogue of rights and obligations contained in the Convention can be compared to "minimum rules" of protection against torture and other inhuman treatment binding on the parties. The Convention underlines in several of its provisions that States are free to impose more stringent rules against torture in their municipal law, and that the Convention is without prejudice to the provisions of other international instruments which prohibit inhuman treatment (Art. 1, para. 1, Art. 16, para. 2)

4. Application of International Standards in Municipal Law

4.1. The Convention against torture obliges the States Parties to introduce quite considerable modifications or supplementation of municipal law. For, the result of this supplementation shall be nothing other than a transition — in municipal law — from the third to the fourth stage of legal assessment of torture and other inhuman treatment. The changes shall have to concern not only the contents but also the form of law. The form — because in several cases the Convention insists on the introduction of provisions expressing explicitly the prohibition of torture and other cruel, inhuman or degrading treatment or punishment.

The signatories of the Convention are, therefore, faced with the necessity to introduce these notions into their legal language. Moreover, the contents of the prohibitions must take into account all elements of the Convention's definitions and the principles of responsibility introduced by it. This concerns not only substantive criminal law. Appropriate modifications should also be introduced to penal procedure to the extent inevitable punishment, impartial investigation, evidence prohibition, extradition proceedings and legal aid are concerned. Civil law should, in turn, guarantee the protection of the victim's right redress and compensation. Provisions of implementation of penal sanctions and of administrative law shall also require modifications as regards programmes of training of appropriate personnel (law enforcement, civil or military, medical) as well as rules and instructions binding on such

persons. It follows that the changes in question will involve legal provisions enacted on different levels of the State's authority.

The entire fulfilment of the obligations arising from the Convention does not, therefore, seem to be an easy task.

There is no doubt that it will be a lengthy process as it is difficult to imagine a situation where a State quickly brings into effect so many modifications of various branches of law. Moreover, a problem will surely come up to what extent the changes should be made in order to claim that the obligations flowing from the Convention have been carried out. This will depend on an international, universally accepted standard of the conformity of municipal law with the provisions of the Convention which is yet to be shaped in future practice.

4.2. The above remarks are, naturally, also pertinent to Polish law. If our State ratified the Convention against torture, a necessity to make serious supplements to Polish law, would arise.

Like the law of other States (although with a few exceptions) Polish law is in the third of the four stages of legal appraisalment of the acts in question, enumerated in the introduction to this paper.

Polish law passed into the third stage relatively early for already in the eight decade of the 18th century when the Sejm Constitution of 23 October, 1776 entitled "Convictions in Criminal Matters" abolished torture and the death penalty for witchcraft.³⁹ The act abolished torture, at the same time prohibiting *expressis verbis* its application.⁴⁰ Subsequent Polish legal regulations (excluding the legislation of the three partitioning powers) did not repeat this prohibition.

It was also unknown to the legislation both of the Second Republic and of the Polish People's Republic. Laying down a special prohibition in this matter was not considered necessary for, it was thought, the complex of rules in force afforded sufficient protection to humans against torture. Nor did this necessity follow from international obligations.

As the rules actually binding in Poland are a rather typical — where protection against torture and other inhuman treatment is concerned — example of "the law of the third stage", neither torture nor other, within the meaning of the Convention, cruel, inhuman or degrading treatment or

³⁹ For more details see: S. WALTOŚ, "The Abolition of Torture in Poland", in: *Humanitarian Traditions of the Polish Criminal Procedure*, *Zeszyty Naukowe U.J., Prace Prawnicze*, No. 102, Kraków—Warszawa 1983, p. 53 ff.; M. KLEMENTOWSKI, E. SKRĘTOWICZ, "Z dziejów zniesienia tortur w Polsce" [Abolition of Torture in Poland], *Studia Kryminologiczne, Kryminalistyczne i Penitencjarne*, vol. 9, Warszawa 1979, p. 374 ff.

⁴⁰ Poland was the fourth state in Europe to completely abolish torture. It was preceded by England (1629), Scotland (1709) and Austria (January 1776).

punishment is *expressis verbis* prohibited. For, there are no provisions directly referring to these phenomena. At the same time, however, the rules in force prohibit any acts corresponding to those described by the definition in the Convention. This means that the law in force contains an appropriate set of prohibitions and enables prosecution of the offender, not only criminal but civil and administrative as well.

The International Court of Justice on the Competence and Function of the Security Council (Related to the Cases brought before It)

by JANUSZ STAŃCZYK

The above title presupposes limitations upon the examination of all possible links between the International Court of Justice and the Security Council. Consideration will be given only to decisions of the Court delivered in contentious proceedings, thus excluding all pronouncements on the Security Council in advisory proceedings.¹ Furthermore, all possible links between these organs relating to the post-adjudicative phase are left aside e.g. the power of the Council (if requested by a party to a case) to implement a Judgment of the Court (Art. 94, para. 2, of the UN Charter).²

The problem will be discussed in three parts. The first of them will be devoted to the question of cooperation of the Security Council in directing the parties to a dispute to the Court. In the second part the relation between Orders of the Court indicating provisional measures and resolutions of the Council will be discussed and finally, the competence and activity of the Security Council as the question of jurisdiction and admissibility before the Court will be dealt with.

I. The Role of the Security Council in Directing the Parties to a Dispute before the ICJ

When the Security Council recommends procedures or methods of ad-

¹ The Security Council may also request the Court to give an advisory opinion on any legal question (Art. 96, para. 1, of the Charter).

² A related problem is exemplified by the Council's dealing with the complaint lodged by the United Kingdom in September 1951 concerning Iran's failure to comply with provisional measures indicated by the Court in the *Anglo-Iranian Oil Co.* case. This recourse was made for the purposes of seeking an assistance in effectuating the Order of 5 July, 1951, and the British representative alluded to Art. 94, para. 2, of the Charter and Art. 41, para. 2, of the Statute; for more details, see — YUEN-LI LIANG, "The Question of Domestic Jurisdiction in the Anglo-Iranian Oil Dispute before the Security Council", *AJIL* vol. 46, 1952, No. 2, p. 272 ff.

justment of international disputes to the parties concerned, under the terms of Article 36, paragraph 3, of the Charter it is requested to take into consideration that legal disputes should, as a general rule, be referred by the parties to the International Court of Justice, in accordance with the provisions of the Statute of the Court.

The Corfu Channel case was the unique occasion on which the said provision was practically applied. Well known events which had led to the dispute between the United Kingdom and Albania are of no substantial importance for our purposes and need not be summarized here. Of importance, however, is the fact that these States did not enter into negotiations with the view to remove disparities in their opinions concerning causes and consequences of the events which had taken place in October and November 1946 in the Corfu Channel. As a result of the British complaint³ and the Albanian acceptance of the invitation addressed to it by the Security Council according to Article 32 of the Charter⁴ (Albania was not a Member-State of the United Nations at that time),⁵ both parties defended their positions on the forum of the Council. The debate did not, however, result in any arrangement in spite of protracted discussions and the appointment of a sub-committee with the mission to examine all available evidence concerning the above-mentioned incidents and to report to the Council. In this situation the Council adopted Resolution 22 (1974) in which it recommended

“that the United Kingdom and Albanian Governments should immediately refer the dispute to the International Court of Justice in accordance with the provisions of the Statute of the Court”.⁶

Pursuant to the terms of the SC Resolution the United Kingdom filed the Application with the Court. The basis of the Court’s jurisdiction was claimed to be found in the provision of Article 36, paragraph 1, of the Statute, the case brought to the Court being covered by the expression “all matters specially provided for in the Charter of the United Nations”. Recalling further the said Resolution and the Albanian

³ UN Doe. S/247 10 January, 1947.

⁴ The terms on which a State not a Member of the United Nations may be invited by the Security Council to participate in the discussion before it relating to a dispute (to which this State is a party) referred to in Art. 32 of the Charter, the Council interpreted, for the purposes of this case, as the acceptance of all the obligations which a Member of the UN would have to assume in a similar case — SC Decision of 20 January, 1947.

⁵ Neither was Albania entitled to appear before the ICJ according to Art. 35, para. 2, of the Statute of the Court.

⁶ SC Resolution 22 of 9 April, 1947.

acceptance of the invitation extended to it by the Council the Applicant contended that under Article 25 of the Charter all Members of the United Nations were bound to accept and carry out the decisions of the Security Council.⁷

The first reaction of the Respondent — and this proved to be a crucial point — was not totally negative to the summons. Albania declared that

“it is prepared, notwithstanding [...] irregularity in the action taken by the Government of the United Kingdom, to appear before the Court”.

The irregularity was claimed to be seen in the way the Applicant had instituted the proceedings before the Court. The case was brought by means of an unilateral Application and this Albania regarded as a failure to comply with the provisions of the Statute on the part of the United Kingdom. The proper way of instituting the proceedings should have been, in Albania's view, the conclusion of a Special Agreement and, consequently, joint or unilateral notification of it to the Court. This irregularity notwithstanding, the Respondent declared that it fully accepted the recommendation of the Security Council, indicating at the same time that Article 25 of the Charter vested with binding force only decisions of the Council adopted under Chapter VII of the Charter.⁸

These reservations were fully developed in the preliminary objection filed with the Court by Albania a few months later. In response to the British contentions, a central point of the Albanian objection was the question of the SC Resolution 22 in which the Council had explicitly employed the term “(SC) recommends”.

In its Judgment of 25 March, 1948 the Court refused to uphold the objection of the Respondent. It did not, however, address the British contentions substantiated at length in the written and oral proceedings.⁹ The Court instead recognized its jurisdiction as consolidated by the Albanian letter of July 1947. According to the Court this letter constituted a decisive and undisputable acceptance of its jurisdiction. The Court found further that seisin by Application is not exclusively reserved to the field of compulsory jurisdiction. When summoned to the Court, Albania was given an opportunity to accept jurisdiction of the Court and this acceptance was found in the said letter. Consequently, the Court saw no contradiction between the provisions

⁷ Corfu Channel case (Preliminary Objection), *ICJ Reports*, 1948. p. 17.

⁸ Letter of the Government of Albania addressed to the Court on 2 July, 1947. *ibid.* d. 19.

⁹ Corfu Channel case, *Pleadings*, vol. 2, p. 14 ff, vol. 3, p. 76 ff.

of the Statute and the way of grounding its jurisdiction by two separate and successive acts.¹⁰ It was ready to admit that the Resolution 22 required action by both parties for the case to be brought before it but refused to see any underlying intention on the part of the Security Council to request the parties to make it jointly.¹¹

These rulings of the Court may be open to various criticisms¹² but it is not relevant here. Of importance is that the Court did not allude to the British contentions. A clear position on the issue was taken, however, by seven Judges in their joint Separate Opinion. But at first let us come back to the British claims.

According to the Applicant its way of submitting the case to the Court constituted in effect a new — unknown to the Permanent Court of International Justice — title of its jurisdiction in contentious proceedings. A Counsel for the Government of the United Kingdom making an allusion to Article 40, paragraph 1, of the Statute pointed out that there were 5 instances in which a case may be submitted to the Court by means of an Application. Out of those instances two might involve the action of the Security Council.¹³ First, it is a situation when one of the parties to a dispute is not a Member of the United Nations and second, it is a case of two Members of this Organization. The latter situation is covered directly by the terms of Article 36, paragraph 1, of the Statute being a matter “provided for in the Charter of the United Nations”. In the former, the filing of an Application by one of the parties consolidates, according to the British views, jurisdiction of the Court.¹⁴

The British contentions were not upheld by the Court. Surprisingly

¹⁰ Professor Gross holds that the Court based its jurisdiction in this case on “a form of *forum prorogatum*” — L. GROSS, “Some Observations on the ICJ”, in: *Essays on International Law and Organization*, New York — The Hague/Boston/Lancaster 1984, vol. 2, p. 870.

¹¹ *ICJ Reports*, 1948, pp. 27—28.

¹² For pertinent criticism see, H. KELSEN, *The Law of the United Nations*, London 1951, p. 537. It is to be observed that the United Kingdom and Albania concluded the Special Agreement after the delivery of Judgement of 25 March, 1948, and the Court made it clear that this Agreement “now forms the basis of further proceedings before the Court” — Order of 26 March, 1948, *ICJ Reports*, 1948, p. 55.

¹³ Remaining instances concerned situations where both States had made declarations under Art. 36, para. 2, of the Statute, both States were parties to a treaty containing a compromissory clause and when filing of an Application was made with the view to obtain the consent of a Respondent to appear before the Court — Corfu Channel case, *Pleadings*, vol. 3, pp. 77—91.

¹⁴ *Ibid.*, pp. 95—96.

enough, a majority of the Judges¹⁵ did not find it necessary to take up the question at all. Some of the Judges¹⁶ chose, however, to be explicit on the issue. In the Separate Opinion referred to above the view was expressed that, contrary to British allegations, the case before the Court did not come within the Court's compulsory jurisdiction. The objections raised against the conclusions advanced by the United Kingdom were based on: first, the usual meaning of the word "recommendation", second, the general system of the Charter and the Statute according to which the Court's jurisdiction must be founded on the consent of States and third, the wording of Article 36, paragraph 3, of the Charter

"which is to remind the Security Council that legal disputes should normally be decided by judicial methods".¹⁷

The soundness of this opinion seems well founded. The fact remains, however, that one is left with the terms of Article 36, paragraph 1, of the Statute suggesting that there are some "matters specially provided for in the Charter". Furthermore, it is to be noted that this provision maintained its present form although the deletion of the above-mentioned expression contained therein had been proposed at San Francisco Conference.¹⁸ As a consequence, the only point of reference in this connection remains the provision of Article 36, paragraph 3, of the Charter.¹⁹

This provision cannot, however, extend by itself the scope of compulsory jurisdiction of the ICJ. It follows not only from the fact that the very wording of this provision describes the legal nature of the instrument put into the hands of the Council on such an occasion — it has to be a recommendation²⁰ — but also from another requirement contained therein —

¹⁵ A majority eight to seven, Judge *ad hoc* excluded. It follows that the decision not to find on this submission was taken by the casting vote of the President of the Court (Judge Guerrero).

¹⁶ Basdevant, Alvarez, Winiarski, Zoricić, de Visscher, Badawi, Krylov in the joint Separate Opinion and Albanian Judge *ad hoc* in the Dissenting Opinion.

¹⁷ *ICJ Reports*, 1948, p. 31—32. *ad hoc* Judge Daxner chose to stress the non-binding character of the SC resolutions — *ibid.*, p. 33 ff.

¹⁸ More on that — Sh. ROSENNE, *The Law and Practice of the International Court*, Leyden 1965, vol. 1, pp. 342—343; cf. also — H. Kelsen, *op. cit.*, p. 517.

¹⁹ Leaving aside Art. 96 of the Charter relating to the advisory competence of the Court because, as Rosenne points out, it has given no encouragement to the idea that Art. 36, para. 1, of its Statute has any direct relevance for its advisory competence — Sh. ROSENNE, *op. cit.*, p. 342.

²⁰ Even if the Security Council were to employ some other verb than "recommend" it could not change the legal nature of a SC resolution. Obviously, the Council is empowered to direct the parties to a dispute to the Court by adopting a decision within the meaning of Art. 25 of the Charter. However, it would be either the action under Charter VII of the Charter or an act *ultra vires* if undertaken in application of Art. 36, para. 3, of the Charter.

a dispute has to be submitted to the Court “in accordance with the provisions of the Statute of the Court”.²¹

A separate question is the possibility put at the Security Council’s disposal to use its authority in order to “persuade” the parties to a dispute to refer it to the Court. In other words, in implementing the provision of Article 36, paragraph 3, of the Charter the Council should not hesitate to influence the behaviour of the parties also by inducing them to resort to the Court.

The Council has not, however, been disposed to avail itself of this opportunity.²² That is why the compromise achieved at San Francisco Conference, according to which the Court’s jurisdiction was to be based on the consent of States but a special role was to be played by the Security Council in recommending reference of legal disputes to the Court, has not functioned as then envisaged.

This cannot be seen, however, in separation but rather as one of facets of the low effectiveness of the whole machinery for the pacific settlement

²¹ This requirement excludes practically any “new title of compulsory jurisdiction” of the Court other than that under Art. 36, para. 2, of the Statute. That is why one cannot deplore with Professor Gross an allegedly missed opportunity by the Court in the Corfu Channel case to accept this new title. According to his thesis the Court could have based its jurisdiction on the SC Resolution 22 and the consent of the parties to the Council’s recommendation. If this “new title” is, as Professor Gross openly admits, “subject, of course, to (States’) right to accept or reject the Council’s recommendation”, one may only wonder at the meaning of the term “compulsory” in this connection — L. GROSS, *op. cit.*, p. 871.

²² Another instance of the application of Art. 36, para. 3, of the Charter constitutes the SC Resolution 395 of 25 August, 1976. It is to be noted, however, that only one State out of four sponsors of this Resolution (France), referring to para. 4 thereof, mentioned specifically the said provision; three others referred to Art. 33 of the Charter.

When acting under Art. 36, para. 3, of the Charter the Security Council could be expected to encourage the parties to take legal disputes to the Court and, in any case, not to discourage them from doing so especially when a dispute has been already submitted to it. In the case of the Greco-Turkish dispute the Council actually invited the parties to such a submission but in preceding this invitation with an appeal for the resumption of negotiations it appeared to discourage them from resorting to the Court or, at least, to regard the Greek Application as premature and the Court’s seizure as inappropriate. In this respect the Council espoused the Turkish position (as presented before the Council — cf. UN Doc. S/PV.1950 13 August, 1975, p. 12). Although this cannot be viewed as an infringement on the litispendance rule it seems not satisfactory, however, to reduce it only to a transgression of a moral duty of loyalty *vis-à-vis* the Court. What is really at stake in similar circumstances is the proper functioning of the whole machinery set up in the Charter in order to provide States with different tools facilitating the peaceful settlement of their disputes. The Council in its Resolution 395 (1976) did not fact contradict the idea that the resort to the Court by means of an unilateral Application should not be regarded as an unfriendly act by a defendant.

of international disputes provided for in the Charter. The Security Council has not made a contribution which the terms of Article 36, paragraph 3, of the Charter enjoined it to make but, after all, this has been one of minor causes of the Court's unemployment in comparison with States' reluctance to be cited before it.

II. Orders of the ICJ Indicating Provisional Measures and Resolutions of the Security Council Relating to the Same Events

Another link between the Court and the Security Council is established in the provision of Article 41, paragraph 2, of the Court's Statute. This provision enjoins the Court to give notice of provisional measures suggested to the parties and to the Security Council pending the final decision in the case brought to it.²³ In this respect the Council has been granted the same position as the parties to a case.

The said notice has not been conceived of to be informative only — the Court reports on its work to the General Assembly.²⁴ At the same time the Statute contains no similar requirement to be met in respect of other orders and even judgements delivered by the Court. Seen in this light the provisions of Article 41, paragraph 2, of the Statute is indicative of a need to co-ordinate the activity of these organs relating to the same events.

The power to indicate provisional measures entrusted to the Court stems from the practical need to prevent *pendente lite* one or both parties to a dispute from infringing upon the rights (enjoyed or claimed) of the other party. In certain situations it would be impossible to reconstitute those rights or to compensate adequately an infringement of them. In such cases the Court is entitled to indicate provisional measures which ought to be taken in order to preserve the rights of either party at the request of one of them or on its own initiative.²⁵

Up till the end of 1985 the Court has been requested 12 times to give such a ruling, the requests having been filed by the Applicants.

²³ At least on one occasion a communication sent by a State which had filed the request for the indication of provisional measures with the Court was forwarded to the Security Council ahead of the respective communication by the Registrar of the Court. It was the case of the Provisional Measures Order of 10 May, 1984. Although a letter sent to the Secretary-General by the Registrar and a letter sent to the same address by the UN representative of Nicaragua (which contained the operative part of the Order) were dispatched the very day the Court issued the Order, the latter was distributed under a lower code — UN Doc. S/16556 11 May, 1984; the former — UN Doc. S/16564 16 May, 1984.

²⁴ This practice was initiated in 1968.

²⁵ See Art. 75, para. I, of the Rules of the Court (adopted on 14 April 1978).

Out of those instances three²⁶ concerned disputes which had been referred to the Security Council. Twice the discussions before the Council resulted in adopting a resolution on the issue²⁷ and in the third case the Council's initiatives were opposed by a veto of a Permanent Member.²⁸

It may be worth paying closer attention to certain differences concerning both the object of the relief sought and the way of seeking it when referring a dispute to the Security Council and to the Court respectively. Those differences as related to the above-mentioned three cases of a "parallel resort" will now be discussed.

1. Problem of Competence

The Security Council has been granted general powers in the field of peace and security. In Article 24, paragraph 1, of the Charter the Members of the United Nations conferred on it

"primary responsibility for the maintenance of international peace and security".

Under Chapter VI of the Charter the Council may exercise certain powers in pacific settlement of disputes. *Ratione materiae* those powers concern disputes

"the continuance of which is likely to endanger the maintenance of international peace and security";

they concern also

"any situation which might lead to international friction or give rise to a dispute" (Art. 33, para. 1 and Art. 34 of the Charter).

The Council may act on the initiative of any Member of the UN but also any State which is not a Member of this Organization (Art. 35). A dispute may be brought to the attention of this organ by the Secretary-General²⁹ (Art. 99) and finally, the Security Council has been authorized

²⁶ Aegean Sea Continental Shelf case, Interim Protection Order of 11 September, 1976, *ICJ Reports*, 1976, p. 3 ff; Case concerning US Diplomatic and Consular Staff in Tehran, Provisional Measures Order of 15 December, 1979, *ICJ Reports*, 1979, p. 7 ff; Case concerning Military and Paramilitary Activities in and against Nicaragua, Provisional Measures Order of 10 May, 1984, *ICJ Reports*, 1984, p. 169 ff.

²⁷ Resolution 395 (1976) of 25 August, 1976, (adopted by consensus) and Resolution 457 (1979) of 4 December, 1979, (adopted unanimously).

²⁸ At the same time the Council adopted on 19 May, 1983, the Resolution 530 (1983) but it related to more comprehensive issues and did not address the dispute between Nicaragua and the USA.

²⁹ The fact remains, however, that the Secretary-General has very rarely acted under this provision (both explicitly and implicitly).

to act on its own initiative (Art. 33, para. 2, Art. 34, Art. 36, para. 1).³⁰ “Access” to the Council is therefore easily available.

In 1976 Greece sought help of the Council under Article 35, paragraph 1, of the Charter in a communication to the President of the Security Council denouncing

“recent repeated flagrant violations by Turkey of the sovereign rights of Greece in the continental shelf in the Aegean”

and requesting a meeting of the Council on the ground that

“a dangerous situation has been created threatening international peace and security”.³¹

In the Iranian crisis it was the turn of the Secretary-General to bring the matter to the attention of the Council. It was done in a letter to the President of the Council referring to the seizure of the US Embassy and the detention of its diplomatic and consular staff and requesting an urgent meeting of this organ in an effort to seek “a peaceful solution to the problem”.³²

During the years of strained relations between the USA and Nicaragua a number of requests calling for urgent meetings have been submitted to the Council by Nicaragua. But virtually impressive quantity of communications was transmitted to the Council with the goal to keep it informed about ongoing acts of violence taking place in Nicaragua and its borders.³³ A filling of those communications was intended to apprise the Council of the situation without asking for a meeting to discuss it.³⁴

When a request for the indication of provisional measures is being filed with the Court the problem of its jurisdiction is of vital importance and at the same time highly controversial. As a matter of fact, in twelve

³⁰ The Council has been reluctant to exercise the initiatives authorized by the Charter — cf. Rule 6 and 7/2/ of the Provisional Rules of Procedure of the Security Council imposing the limitation in this respect. However, restricting its agenda practically to items submitted by States was criticized in the doctrine — L. B. SOHN, “The Security Council’s Role in the Settlement of International Disputes”, *AJIL*, vol. 78, 1984, No. 2, pp. 402—403.

³¹ UN Doc. S/12167 10 August, 1976.

³² UN Doc. S/13646 25 November, 1979.

³³ Those communications comprised above all Nicaraguan protests addressed to Honduras, Costa Rica and the USA and afterwards transmitted to the President of the Security Council (sometimes to the Secretary-General) with the aim of being distributed as the official documents of the Council — e.g. letters to the US Secretary of State — UN Doc. S/16037 12 October, 1983; S/16264 10 January, 1984; S/16528 3 May, 1984.

³⁴ It has been rightly deplored with respect to the general attitude of the Council that this sort of information does not prompt any action on the part of the President of the Council who is the addressee of such communications. The practical way of exploiting them in expanding the agenda of this organ is advocated by Professor Sohn — cf. L. B. SOHN, *op. cit.*, pp. 403—404.

instances of request all were filed in the situation of the Court's jurisdiction being questioned by the defendant. Thus the problem of jurisdiction -to proceed with a request was called for. The jurisprudence of the Court has undergone here an essential evolution³⁵ ending in the early 1970s by accepting the opinion of Judge Lauterpacht expressed in his Separate Opinion annexed to the Order of 24 October, 1957.³⁶ The test advocated therein by Judge Lauterpacht was applied in two out of three Orders discussed here.³⁷ According to the Court, before deciding whether or not to indicate provisional measures it need not finally satisfy itself that it has jurisdiction on the merits of a case. However, it ought not to indicate such measures

“unless the provisions invoked by the Applicant appear, *prima facie*, to afford a basis on which the jurisdiction of the Court might be founded”.³⁸

In order to file a request for the indication of provisional measures a State must at first institute the proceedings before the Court and, afterwards, it may file the request (practically it may be the very day on which an Application was brought to the Court). Then, the above-mentioned test should be applied by the Court to ascertain itself that it has jurisdiction on the merits or, in any case, that the lack of it is not manifest.³⁹ It is an important limitation set upon the Court but not the only one. There has to exist a dispute between the parties before the Court — even in so “manifest”⁴⁰ a case as the Tehran case the Court found it necessary to ensure itself on this point.⁴¹

Of equal importance is another requirement consequently applied by the Court in the provisional measures phase according to its settled jurisprudence

³⁵ For an interesting analysis of this evolution see, M. H. MENDELSON, “Interim Measures of Protection in Cases of Contested Jurisdiction”, BYIL, 1972—73, p. 269 ff.

³⁶ Interhandel case, Interim Protection Order of 24 October, 1957, *ICJ Reports*, 1957, pp. 118—119.

³⁷ In the third case (chronologically the first one) the question of the Court's jurisdiction was not dealt with at all, the Court having based its refusal on other grounds (the existence of appropriate means of reparation and the action taken by the Security Council — *vide infra*).

³⁸ *ICJ Reports*, 1984, p. 179.

³⁹ The Court has quoted here the title of its jurisdiction relied on by the Applicant — declarations under Art. 36, para. 2, of its Statute, compromissory clauses contained in treaties invoked — making sure that there is no reservation manifestly excluding its jurisdiction. Such an approach was advocated by Judge Lauterpacht (*vide supra*).

⁴⁰ It is to be noted that in the Order of 15 December, 1979 the Court used twice the term “manifest” in respect of the title relied on by the USA — *ICJ Reports*, 1979, p. 14 (para. 18 and 20).

⁴¹ For more details see, L. GROSS, “The Case concerning US Diplomatic and Consular Staff in Tehran: Phase of Provisional Measures”, in: *Essays...*, pp. 1067—1068.

in this respect.⁴² And so, provisional measures may be indicated when an infringement upon rights to be preserved could cause “irreparable prejudice”.⁴³

This requirement occupies a first-rate position among “circumstances” within the meaning of Article 41, paragraph 1, of the Court’s Statute. No wonder that it was raised in all the above-mentioned Orders — first, *in abstracto*⁴⁴ then, as related to the case before the Court.⁴⁵

2. Legal Remedy Sought by States when Referring a Dispute to the Security Council and the ICJ

It is generally agreed that resolutions of the Security Council under Chapter VI of the Charter are recommendatory as to their legal nature. This is made clear by the language of the respective provisions. Those recommendations are exactly what States seek in referring a dispute to the Council. However, even if not formally binding upon States, recommendations are bolstered by the authority of the Council and, in the last analysis, by the obligations of States under the UN Charter with respect to the peaceful settlement of disputes. It may be that expectations have been circumscribed narrowly from the legal point of view but a problem may consequently be put in the right perspective by the Security Council as it was the case in debates before this organ following the Greek letter of 10 August, 1976.⁴⁶ If broad enough, this perspective may leave the Court

⁴² This concerns also, from the first Interim Measures Order on, the Permanent Court of International Justice — Denunciation of the Treaty of November 2nd, 1865 between China and Belgium (1927), PCIJ Series A, No. 8, p. 7 ff.

⁴³ It suffices the possibility of such a prejudice. In Order of 1976 the Court spoke about “a risk of irreparable prejudice” and in Order of 1979 about “a serious possibility” — *ICJ Reports*, 1976, p. 11; 1979, p. 20.

⁴⁴ *ICJ Reports*, 1976, p. 9 and 11; 1979, p. 19. In Order of 1984 the Court did not spell out explicitly this requirement. However, it follows univocally from the part of the reasonings where “circumstances” are discussed — *ICJ Reports*, 1984, pp. 180—182. Cf. also C. RUCZ, “L’indication de mesures conservatoires par la CIJ dans l’affaire des activités militaires et paramilitaires au Nicaragua et contre celui-ci”, *RGDIP*, 1985/1, p. 103 ff.

⁴⁵ *ICJ Reports*, 1976, pp. 10—11; 1979, p. 20 (only in respect of the hostages); 1984, p. 182 para. 32 (by implication; the Court quoted rights for the protection of which Nicaragua had claimed provisional measures to be necessary and among them — *res ipsa loquitur* — the rights of Nicaraguan citizens to life and security, the right of sovereignty of Nicaragua).

⁴⁶ Foreign Minister of Greece explained the Greek recourse to the Council as an attempt to denounce Turkish activities threatening peace and security in the Mediterranean (August 12). After the Council had adopted Resolution 395 (1976) he declared that “it clears away the obstacles to a resumption of the dialogue and leads to the solution of the problem of the continental shelf by peaceful means”. This flagrant inconsistency was noted by Judge Lachs and the Greek Agent was asked for clarification. His response, however, did not go to the point. He insisted instead upon a recommendatory character of the Resolution and the allegedly binding force of the Court’s order implored. Aegean Sea Continental Shelf case, *Pleadings*, pp. 138, 578—579.

with no need to accede to a request for the indication of provisional measures.

The Court indicates provisional measures by issuing an Order. It is not a Judgment and does not fall under Article 59 of the Court's Statute. At the same time there is no provision therein describing a legal effect of such an Order.⁴⁷ Communications sent to the Security Council under Article 41, paragraph 2, of the Statute are not aimed at seeking help in case of a failure to comply with provisional measures because powers of the Council are based entirely on the Charter and not on the Court's Statute. In one instance when a link was claimed to exist between Article 41, paragraph 2, of the Statute and Article 94, paragraph 2, of the Charter, with a corollary that the Council had the power to deal with non-compliance with provisional measures if this could frustrate the future decision on the merits, the outcome of the debate in the Security Council proved to be negative on the issue.⁴⁸ Even if it is of no final probative value the fact remains, however, that this attempt was made on an assumption that the provisional measures Order had only recommendatory character.

Article 41 of the Statute contains no express reference to the author of a request for provisional measures. Consequently, the Court may indicate them *proprio motu*.⁴⁹ In the event of a request being filed by a party, the Court maintains its discretionary power; it may indicate measures that are in whole or in part other than those requested, it may also address them to the author of a request.⁵⁰ It means that the *non ultra petita* rule is excluded in this kind of incidental proceedings.⁵¹ This fact notwithstanding, the Respondents have shown little will for trying to blame the other party on substantial issues. They have preferred the battlefield

⁴⁷ Nor are the Rules explicit on this subject. Of some significance may be Art. 78 of the Rules (as amended on 14 April, 1978) authorizing the Court to request information from the parties on any matter connected with the implementation of any provisional measures it has indicated. Neither the Rules adopted in 1946 nor the Rules as amended in 1972 contained such a provision. It is noteworthy to observe that a leading scholar on the questions of the Court's procedure issued recently an opinion that an order indicating provisional measures is "probably not itself binding and only recommendatory" — Sh. ROSENNE, "The Changing Role of the International Court", 20 IsLR 1985, No. 2—3, p. 200.

⁴⁸ See note 2.

⁴⁹ Art. 75, para. 1, of the Rules.

⁵⁰ Art. 75, para. 2, of the Rules.

⁵¹ Sh. ROSENNE, *The Law...*, vol. 1, p. 427.

of the Court's jurisdiction⁵² and a *sui generis* admissibility of a request.⁵³ It has been made possible by the Court's consistent practice of taking into account all kinds of communications from the parties; the practice consecrated to the fullest extent in the latest revision of the Rules, of the Court.⁵⁴

* *

In the three cases under discussion here no objection has been raised by the defendant to the effect that the Court should not entertain a request on the ground that it would coincide with the role which the Security Council has played or has been supposed to play in the matter before the Court. Instead, the emphasis was preferred to be placed on the lack of jurisdiction of the Court.

Consequently, there is no surprise that the Court itself has been anxious to ponder the significance which should be attached to the SC resolutions. Questions to this effect were addressed to the Agents of Greece and the USA by the President of the Court at the hearings. The answer of the Greek Agent could hardly be satisfactory.⁵⁵ The Agent of the USA, however, provided the Court with detailed explanations⁵⁶ which visibly persuaded it. In the Order of 15 December, 1979 the Court referred to the SC Resolution 457 (1979) only incidentally in the context of one of the Iranian objections

⁵² In the latest of the cases quoted here the USA refused to enter a discussion on any substantive matters and limited itself to raise the lack of the Court's jurisdiction as a reason not to proceed on the Nicaraguan request.

⁵³The qualification of *sui generis* is to be explained by the fact that an objection to admissibility, put formally, may be raised only in respect of the Application — cf. Art. 79 of the Rules. The objections to such an effect may be exemplified by: the implication of passing a judgment on the merits of the case, the alleged exclusion of an unilateral request for the indication of provisional measures — cf. *ICJ Reports*, 1979, pp. 16—17.

⁵⁴Art. 74, para. 3. The fact remains, however, that only the United States appeared twice at the hearings before the Court (1957 and 1984). Other defendants chose to submit written observations.

⁵⁵The Greek Agent did not elaborate on the issue. He declared that in the opinion of his Government "*les deux procédures au Conseil de sécurité et à la Cour internationale de Justice, sont distinctes l'une de l'autre. La résolution du Conseil de sécurité, adoptée par consensus le 25 août 1976, n'empiète pas sur la mission de la Cour aux fins de la présente procédure*", Aegean Sea Continental Shelf case, *Pleadings*, p. 137.

⁵⁶The US Agent made a considerable effort to distinguish the case before the Court from the Aegean case. He enumerated — with good reason — five grounds justifying this distinction. Case concerning US Diplomatic and Consular Staff in Tehran, *Pleadings*, pp. 28—34.

to the Court's jurisdiction.⁵⁷ In the former case the Court took a different stand. It reviewed the proceedings in the Security Council and stressed the adoption of the SC Resolution 395 (1976). In view of the favourable attitude of both Greece and Turkey towards the Resolution the Court found it unnecessary

“to decide the question whether Article 41 of the Statute confers upon it the power to indicate interim measures of protection for the sole purpose of preventing the aggravation or extension of a dispute”.⁵⁸

The major premise of the Court's reasoning has always been the recognition of the separation existing between itself and the Security Council. The Court was established as “the principal judicial organ of the United Nations” which is entrusted with judicial responsibilities and, among them, with the power to indicate provisional measures “if it considers that circumstances so require”. Consequently, the position of the Court to consider the parallel activity of the Council as a “circumstance” must be firmly approved. At the same time it is to be emphasized that the Court's taking cognizance of this activity when dealing with requests for the indication of provisional measures attests to its concern not only for respecting the constitutional separation of powers and functions but also for coming up to States' expectations from the Court and from the United Nations as a whole.

In 1976 the Court declined to examine whether it had an independent power to indicate interim measures of protection in order to prevent the aggravation or extension of the dispute. Instead, it turned to the SC Resolution 395 (1976) and in the recitals it found that the Council had called on the parties to the dispute to avoid any incident which might lead to the worsening of the situation. The Court refused to presume that either party would fail to heed its obligations under the Charter or fail to heed the recommendation of the Security Council addressed to them.

In doing so the Court gave its own authority to the act passed by the Council and, even if it felt bound to deny the Greek request, this did not mean the refusal to indicate the obligations of the States concerned in the dispute referred to it.

In the next Provisional Measures Order the Court was not explicit that the Council in its Resolution of 4 December, 1979 had called on the Government of Iran to release the personnel of the US Embassy being held in Tehran and to allow them to leave the country. The Court stressed, instead, that the Council expressed itself as deeply concerned about the dangerous level of tensions between the USA and Iran which could have

⁵⁷ *ICJ Reports*, 1979, p.

⁵⁸ *ICJ Reports*, 1976, p.

grave consequences for international peace and security. And here, the heart of the Court's position is to be found. On ignoring one of the key provisions of the SC Resolution the Court seems to have acted on the premise that the Council was dealing with the Tehran crisis on a more comprehensive basis.

Another reason which prompted the Court to decline to give closer consideration to the duplication of recourses was the fact that it was the Secretary-General who had taken initiative to request a meeting of the Council. Of importance was also the reaction of Iran to the adoption of the Resolution 457 (1979) — this act was characterized as a part of an “American plot” and rejected. It cannot be surprising therefore, that the question of the Security Council action discussed at length by the US Agent at the hearings gave rise to one small notice in the Order. Thus the Court adequately supplemented the action of the Council.

In the latest of the cases under discussion here it was not the question of supplementing the activity of the Council but rather of acting as a substitute for it. As the Security Council had been in fact paralyzed in its possible action with respect to Nicaraguan claims, the Court chose judicial boldness and indicated provisional measures.

Of special interest is the way in which the Court dealt with the American contentions that it should deny the request of Nicaragua. Those contentions were presented by the Court under their original title of “compelling reasons” (put in quotation-marks).⁵⁹ Surprisingly enough, the Court limited itself to a simple presentation of those reasons⁶⁰ without being explicit as to grounds of this reticence. It proceeded further to give a summary of the Nicaraguan response to those objections.

It is submitted that the Court declined to dispose of them on the ground that they had in fact addressed the question of admissibility of the Application rather than *sui generis* admissibility of the request for the indication of provisional measures. In doing so the Court seems to have recognized the artificiality of those arguments in the provisional measures phase. And in this it was on the sound ground.

By indicating provisional measures the Court provided the Applicant with an act calling expressly on the USA to refrain from the actions complained of by the plaintiff and calling on both States to ensure that no action is taken which might aggravate or extend the dispute opposing

⁵⁹ *ICJ Reports*, 1984, p. 184—185.

⁶⁰ Those reasons concerned a possible impact which the indication of provisional measures would have on rights and interests of other States in Central America and on the Contadora process and, finally, the scope of the proceedings to indicate provisional measures — in the American view — likely to be strained beyond any reasonable bounds in the circumstances of the case, *ibid.*

them. An act of this kind could not be issued previously by the Security Council and Nicaragua was quick to appreciate it duly.⁶¹ In fact the Order has acquired a special importance due to the failure of the Security Council to take up its responsibilities under the Charter with respect to tensions between Nicaragua and the USA.⁶² In that way the judicial proceedings have become more politicized than usually. It must be underlined, however, that the Court chose not to allude to this specific situation and assumed its role with all discretion.

III. Competence and Activity of the Security Council as a Question of Jurisdiction and Admissibility before the ICJ

The problem of the competence and activity of the Council may arise in the jurisdiction and admissibility phase of the proceedings before the Court. It may be raised either by a defendant availing itself of the possibility laid down in Article 79 of the 1978 Rules of the Court or by the Court itself acting under Article 53, paragraph 2, of the Statute.⁶³

The question of the action undertaken by the Council, including a possible action (and thus related to the Council's competence) may be raised either under the head of jurisdiction of the Court or admissibility of the Application.⁶⁴ Neither the Statute nor the Rules provide a clear definition of these terms, the jurisprudence of the Court is also silent in this respect — on some occasions the Court eschewed a specific definition of them.⁶⁵ It is therefore submitted that, for the purposes of the present article.

⁶¹ See note 23.

⁶² On 26 November, 1984, the Court decreed that measures indicated in its interim ruling of 10 May should remain in force pending the final outcome of the case — Case concerning Military and Paramilitary Activities in and against Nicaragua (Preliminary Objections), *ICJ Reports*, 1984, p. 442.

⁶³ In the latter case it is not, properly speaking, the jurisdiction and admissibility phase — this expression being reserved only to the proceedings on the preliminary objections. In applying Art. 53 of the Statute, the Court has to satisfy itself that it has jurisdiction empowering it to decide on Applicant's claims and in this case any possible bar to the examination of the merits, whether of jurisdiction or of admissibility, may be called e.g. "a preliminary question" (cf. *ICJ Reports*, 1980, p. 18) or "a possible objection" (cf. *ICJ Reports*, 1978, p. 18).

⁶⁴ The equivalent term used by the Court is "the admissibility of the proceedings" — cf. *ICJ Reports*, 1980, pp. 16, 20.

⁶⁵ Nottebohm case, *ICJ Reports*, 1953, p. 121; Northern Cameroons case, *ICJ Reports*, 1963, p. 28.

we can adopt the distinction advocated by Judge Fitzmaurice in the early 1960s.⁶⁶

The first instance in which the ICJ considered the question of a possible impact of the Council's activity on the proceedings instituted before the Court was the Tehran case. In the Judgment the Court described at length the Council's action in the matter brought simultaneously before it. It recalled that in both resolutions issued by the Security Council in respect of the Tehran crisis (SC Resolution 457 (1979) and SC Resolution 461 (1979)) the Council had requested the Secretary-General to lend his good offices for the immediate implementation of the Resolution. Pursuant to this request the Secretary-General announced on 20 February, 1980, the establishment of a commission to undertake "a fact-finding" mission to Iran. The terms of reference of the Commission were, in the Secretary-General's words, "to hear Iran's grievances and to allow for an early solution of the crisis". Both Iran and the USA agreed to its establishment. Unfortunately, the Commission was unable to complete its mission, it suspended its activities in Tehran and returned to New York without any report.⁶⁷

The Court, in accordance with the requirements of Article 53, paragraph 2, of its Statute, proceeded to ensure itself that it could decide on the merits. One of the questions, referred to as a question of admissibility of the proceedings,⁶⁸ was the terms of reference of the above-mentioned Commission and the progress of its work.⁶⁹

For the purposes of the present article it is not necessary to enter into details of the Court's reasoning which led it to reject the objection formulated in substitution for the non-appearing Respondent.⁷⁰ The Court ruled that

"A given preliminary objection may on occasion be partly one of receivability [term equivalent to admissibility — cf. p. 102 and 128 — J. S.], but the real distinction and test would seem to be whether or not the objection is based on, or arises from, the jurisdictional clause or clauses under which the jurisdiction of the tribunal is said to exist. If so, the objection is basically one of jurisdiction. If it is founded on considerations lying outside the ambit of any jurisdictional clause, and not involving the interpretation or application of such a provision, then it will normally be an objection to the receivability of the claim". — *ICJ Reports*, 1963, pp. 102—103.

⁶⁷ *ICJ Reports*. 1980. p. 21.

⁶⁸ This head was, as it appears, used without a strong conviction. The problem in question was first referred to as a question of admissibility (*ibid.*, p. 16) but subsequently, when the Court reverted to that problem, its competence was also recalled, (*ibid.*, p. 20).

⁶⁹ *Ibid.*, p. 16.

⁷⁰ It suffices to mention that the Court found the justification for that decision in the attitudes of the parties to the dispute towards the Commission's task, the functions of that organ as explained by the Secretary-General and, finally, the settled jurisprudence of the Court not to see in negotiations any obstacle to a parallel recourse to judicial settlement, *ibid.* PP—23. For the details see, E. ZOLLER. "L'affaire du personnel diplomatique et consulaire des Etats-Unis a Téhéran", RGDIP 1980/IV, pp. 989—993.

“neither the mandate given by the Security Council to the Secretary-General in resolutions 457 and 461 of 1979, nor the setting up of the Commission by the Secretary-General, can be considered as constituting any obstacle to the Court’s jurisdiction in the present case”.⁷¹

As it appears, this approach can be explained best by the fact that the Court’s decision was based on the argument *a fortiori*. The Court regarded the Commission as a core of the action undertaken by the Secretary-General when fulfilling the mandate given to him by the Council.⁷²

The Commission was set up by the Secretary-General acting in accordance with the *ad hoc* mandate but it was the Security Council which had vested him with it and, in this way, had contributed to the setting up of the Commission. Furthermore, all the time the Council remained “actively seized of the matter”. And now, the question whether there was or could be anything irregular in the simultaneous exercise of their respective functions by the Council and itself, the Court answered in the negative. It then added reasons for that: first, neither the Charter nor the Statute contains a restriction on the functioning of the Court similar to that contained in Article 12 of the Charter whereby the General Assembly cannot make any recommendation with regard to a dispute or situation while the Security Council is exercising its functions in respect of that dispute or situation, second, the general position of the Court, the principal judicial organ of the UN with the task to decide disputes brought to it by States

“and the resolution of such legal questions [...] may be important, and sometimes decisive, factor in promoting the peaceful settlement of the dispute”.⁷³

The question remains, however, whether the recourse to this judicial body should, in peculiar circumstances of a case, deprive the parties of more “intimate” tools suitable for resolving their differences as, for instance, the above-mentioned Commission. This problem was not considered by the Court in an abstract manner but it gave a clarifying explanation in the reasonings of the Judgment. In analyzing the attitudes of the parties towards the Commission’s task the Court found no trace of any understanding on the part of either party that the setting up of this organ might involve a postponement of the proceedings until the conclusion of its work. The same readiness not to go ahead with the proceedings (when requested by the parties or one of them — in any case by the Applicant) was

⁷¹ *ICJ Reports*, 1980, pp. 23—24.

⁷² Hence, the Court stressed that it was the Secretary-General who had set up the Commission, controlled it and supplied it with instructions, *ibid.*, pp. 16. 21—23.

⁷³ *Ibid.*, p. 22.

declared by the Court in respect of the Security Council's consideration of the matter.⁷⁴ It follows from this that this kind of a flexibility can be expected from the Court but, as a rule, it must be requested to this effect in clear terms.

In the *Nicaragua v. USA* case the Court dealt with the question of admissibility of the Application when considering the American objections to this effect. In advancing five legal arguments the USA claimed that each of them was sufficient to establish the inadmissibility of the Nicaraguan Application. Three of those objections are of importance for the sake of the present article.⁷⁵

The first of those objections (dealt with by the Court as the second one) relied on by the USA was that the Nicaraguan Application should be held inadmissible because the claims contained therein related to an unlawful use of force, or breach of the peace, or acts of aggression. This matter having been entrusted to the competence of UN organs other than the Court both under the provisions of the Charter and by practice, complaints of the kind presented by Nicaragua are confided to the political organs of the UN for consideration. Provisions of the Charter — so did the American argument run — do not contain any recognition of the possibility of judicial settlement of the matter brought to the Court.^{76 77}

A little more diversified as to its legal content was the second ground of inadmissibility (classified by the Court as the third). The United States contended that the Court should declare the Application inadmissible in view of its subject-matter. This subject-matter, given the allegations made by the USA, was likely to involve a decision of the Court on the application of Article of 51 of the Charter concerning the right of self-defence. The Respondent asserted that under the terms of this Article the only role to play was for the Security Council. The second part of this objection concerned the position of the Court within the UN; the position not to be reconciled with the Nicaraguan claims being in effect an appeal to the Court from an adverse decision of the Council.⁷⁷

The above-described objections were intended to persuade the Court as to the inadmissibility of the Application filed by Nicaragua. Although they were made under the head of admissibility, they addressed not only this question. The United States was perfectly aware of it when it

⁷⁴ *Ibid.*, p. 23.

⁷⁵ Other objections raised by the defendant concerned a necessary implication of the Court's decision for the rights and obligations of third States (which Nicaragua had failed to bring before the Court) and the inability of the judicial function to pass a judgment in situations involving an ongoing armed conflict — *ICJ Reports*, 1984, pp. 430, 43.6—437.

⁷⁶ *Ibid.*, pp. 431—432.

⁷⁷ *Ibid.*, pp. 432—433.

contended — and this was subsequently repeated by the Court — that the objections advanced constituted either “a legal bar to adjudication” or “a matter requiring the exercise of prudential discretion in the interest of the integrity of the judicial function”. This distinction, however, was not the only one. It was followed by another one — the Court expressed its doubts whether the objections raised by the defendant related exclusively to the admissibility of the Application; the way in which they were presented suggested that at least some of the objections addressed the question of jurisdiction or competence.⁷⁸ Furthermore, in order to supply the Court with a legal justification for the decision implored, the defendant resorted not only to the normative language but added to it arguments designed to reinforce its persuasiveness (as the contentions advanced in respect of the alleged “appeal”).

Unlike in the Tehran case, the objections referring to a possible or actually played role of the Security Council and its impact on the proceedings instituted by Nicaragua did not address exclusively the question of litispendance. The defendant was questioning the Court’s jurisdiction⁷⁹ i.e. the ability to exercise its functions in the area which, according to the USA, was essentially one for the Security Council. The American thesis was designed to question the scope of matters susceptible of judicial settlement under the UN Charter. It was aimed not only at preventing the Court from hearing the present case but similar cases (i.e. involving an ongoing armed conflict) in the future as well. Thus, a far-reaching legal issue was raised that transcended the particular context in which it was taken up.

The Court, however, was unanimous in its refusal to uphold the contentions of the Respondent.⁸⁰ It chose not to discuss each of the

⁷⁸ *Ibid.*, p. 429.

⁷⁹ The term “competence” is being used here to denote “the tribunal’s jurisdictional field, whether *ratione materiae*, *personae* or *temporis*”, more on that see, G. FITZMAURICE, “The Law and Procedure of the International Court of Justice, 1951—4: Questions of Jurisdiction. Competence and Procedure”. BYIL, 1958. pp. 8—9.

⁸⁰ Similarly, it was unanimous on all issues raised by the United States under the head of admissibility. The Court ruled by 16 to none that the Nicaraguan Application was admissible, some Judges dissented, however, to other points of the dispositif of the Judgment. This fact notwithstanding, two Judges reserved for themselves a separate position on the admissibility question. Judge Jennings explained that his vote in favour of the admissibility of the Application was confined only to the dispute opposing the parties in respect of the Treaty of Friendship, Commerce and Navigation of 1956 (*ibid.*, p. 557). Judge Schwebel declared in his Dissenting Opinion: “While I do not agree with all of the Court’s holdings on admissibility, at the present stage I do not find the contentions of the United States concerning the inadmissibility of the case to be convincing. Accordingly, I have joined the Court in voting that the Application is admissible, by which I mean that, if the Court had jurisdiction — as in my view it does not — the case currently would appear to be

American arguments. Instead, it concentrated its attention on general and fundamental reasons defeating those contentions. First, the Court recalled a passage from its Judgment delivered on 24 May, 1980 (the Tehran case) in which it issued an opinion that the fact that a matter was before the Security Council did not bar the Court's dealing with it and that both proceedings could be pursued *pari passu*. Second, the Court emphasized that under the terms of Article 24 of the Charter, the Council is not conferred upon exclusive responsibility for the maintenance of international peace and security. The Court went on to note that the Charter did not contain any provision demarcating the functions with respect to the Council and the Court (while there was a provision with this effect in respect of the General Assembly and the Security Council). This prompted the Court's conclusion:

"The Council has functions of a political nature assigned to it, whereas the Court exercises purely judicial functions. Both organs can therefore perform their separate but complementary functions with respect to the same events".

Third, the Respondent's experience with the Court⁸¹ was used to question the American objections inconsistent, in the Court's view, with the previous position of the USA.⁸²

The arguments described in the foregoing are of uneven character and legal value. The first of them addresses the possible parallel action by the Security Council and the Court. The truth is that this parallelism is not open to any legal challenge under the UN Charter. But it is not entirely relevant to quote from the Judgment on the Tehran case the passage which may serve to support the legal admissibility of the simultaneous exercise of the functions of those organs when an answer is needed whether or not the Court can enter risky road of adjudicating upon the rights and obligations of States in the midst of ongoing hostilities.

admissible" (*ibid.*, p. 562). In the merits phase of the case Judge Schwebel amplified his views on the issue but remaining unconvinced by the American contentions concerning the admissibility of the Nicaraguan Application. The argument that judgment of the legality of a State's resort to the self-defence is essentially entrusted to the Security Council and exceptionally withheld from the Court Judge Schwebel admitted as "both theoretically tenable and politically plausible", but "insufficient". The contentions of the United States being ambivalent and inconclusive, he was not disposed to conclude that "so far-reaching a restriction on the competence of the Court can be held to be implied by such ambiguous indications" Case concerning Military and Paramilitary Activities in and against Nicaragua, Merits, Judgment of 27 June, 1986, Dissenting Opinion of Judge Schwebel, *ICJ Reports*, 1986, pp. 287—290.

⁸¹ *ICJ Reports*, 1984, pp. 433—435.

⁸² The Court recalled this refusal in the Judgment on the merits in the context of a preliminary question concerning justiciability of the dispute, *ICJ Reports*, 1986, pp. 26—27.

Even less convincing in point of law is the third argument advanced by the Court in order to repudiate the American pleas. The United States brought indeed several cases to the Court involving armed attacks by military aircraft of other States against US military aircraft in the 1950s. In noting this practice⁸³ the Court went on to observe that the USA had not contradicted a Nicaragua's argument that it had chosen the Court rather than the Security Council. There is no denying that this reminder was equivalent to an espousal of the Nicaraguan position on the part of the Court. However, the intention to amplify the Court's thesis by this argument could not materialize. First, the "consistent practice" argument overlooks the distinction insisted on by the United States, namely that in the present case the question is of ongoing armed conflict while in the Aerial Incident cases it was not (the conflicts took place in the past). Second, (and here the Court chose wisely to refrain from any comment, the position of States when bringing or not suits in the Court cannot be critical for establishing the limits to its competence, and doubly so, when their Applications vainly awaited the action by the Respondents.

Turning now to the crucial argument set forth by the Court one cannot but admire a bold self-reliance expressed by it when finding in the Charter no explicit bar to the exercise of its judicial function in matters conferred primarily on the Security Council, it recognized its own competence. Legally, the Court was no doubt on sound ground. All that is left behind is the integrity and propriety of judicial function,⁸⁴ the possibility of delivering a Judgment capable of execution, a decision on the scope of evidentiary materials needed to acquire an adequate image of facts, the relation of final outcome of a case to occurrences actually in progress between the parties; one can multiply other factors which are likely to play a role in such a context.⁸⁵

This firm ruling of the Court has no precedent in its jurisprudence. It seems therefore justified to conclude that if the expanded in arguments challenge to the Court's competence was ultimately met, this is likely to constitute a solid basis for any future decision on a similar issue. Any departure from the position taken recently by the Court is to be expected

⁸³ It proved to be completely unsuccessful because of the adamant opposition of the parties invited to accept jurisdiction of the Court either for the purposes of the given case or more generally. Consequently, those cases were discontinued.

⁸⁴ In his Separate Opinion appended to the Judgment on the merits of the case Judge Lachs was even inclined to admit that the question of parallel competence of other UN organs involves issues of judicial propriety rather than justiciability, *ibid.*. Separate Opinion of Judge Lachs. *ICJ Reports*, 1986, p. 166.

⁸⁵ It has to be observed that similar arguments prompted *a posteriori* Judge Oda to affirm that considerations of judicial propriety should have dissuaded the Court from pronouncing on the Nicaraguan Application on the basis of Art. 36, para. 2, of the Statute, see *ibid.*, Dissenting Opinion of Judge Oda, *ibid.*, pp. 237–246.

as an exception to the rule already established and, obviously, under special conditions.

The fact remains, however, that in the *Nicaragua v. USA* case the problem of safeguarding the propriety of judicial function was not given all possible consideration. Thus, at least one “gate” seems to remain open for the Court to decline to take cognizance of a dispute under the general head of admissibility when such a submission has been filed by the Respondent. It would be idle to speculate what legal or factual data of the action by the Security Council could lead the Court to exercise “the prudential discretion” when dealing with a case brought before it. In any case, it is submitted that an effective and ongoing action undertaken by the Council under Chapter VII of the Charter in respect of events involving a legal dispute pending before the Court would weight heavily against the Court’s discharge of its judicial functions in such a case.⁸⁶ A mere postponement of the proceedings might, seem here inadequate.⁸⁷

In the *Nicaragua v. USA* case the Court dealt once more with the competence and functions of the Council when finding on the fifth submission to the inadmissibility of the Application advanced by the USA.

In that submission⁸⁸ the defendant contended that the Court should declare the Application inadmissible on the ground that the plaintiff had failed to exhaust the established process for the resolution of the conflicts in Central America. The Contadora process has been recognized *inter alia* by the Security Council as an appropriate way likely to result in an overall settlement of the security problems of this region. In the defendant’s contention, this process constitutes a “regional arrangement” within the meaning of Article 52, paragraph 2, of the Charter. Hence, Nicaragua is under the obligation of having exhausted such regional processes before it can properly seize the Court. In view of the defendant, such an argument follows *a fortiori* from the fact that an exhaustion of regional arrangements was

⁸⁶ It is noteworthy that a number of States included in their declarations made under Art. 36, para. 2, of the Court’s Statute a reservations excluding from the Court’s jurisdiction disputes arising out of, or having reference to any hostilities, war, state of war, or military occupation in which this State is or has been involved (there are different formulae used in this context) — e.g. Sudan, Israel, India (France and South Africa in already terminated declarations).

⁸⁷ On the other hand, one should agree with Klein that even if the Security Council expressly called on the parties to a dispute to refrain from instituting the proceedings before the Court, such a request (made under Art. 39 or 40 of the UN Charter) “kann [...] allerdings nur vorübergehender Natur sein”, see E. KLEIN, *Paralleles Tätigwerden von Sicherheitsrat und Internationalem Gerichtshof bei friedens-bedrohenden Streitigkeiten*, *Festschrift für H. Moster*, Berlin—Heidelberg—New York 1983, pp. 480—481. See also Dissenting Opinion of Judge Schwebel annexed to the Judgment of 27 June, 1986, *ICJ Reports*, 1986, p. 289.

⁸⁸ *ICJ Reports*, 1984, p. 438.

set out in the said provision as a precondition to the reference of a dispute to the Security Council.⁸⁹

The reply delivered by the Court was in the negative. It denied the existence of any requirement of prior exhaustion of regional negotiating processes as a precondition to seizing the Court. Furthermore, it refused to see in the Contadora process a “regional arrangement” within the meaning of the aforesaid provision. Coherently with its pronouncement on the second and third objections to the admissibility of the Application the Court stressed the existence of separate functions of the Security Council and itself and refused to oppose each other. In treating them as separate but complementary, the Court recalled a passage from one of its previous decisions as expressing the principle that negotiations and judicial settlement can be pursued *pari passu*.⁹⁰

Conclusions

I. In the *Corfu Channel* case the Court did not do a disservice to itself when it did not espouse the British contentions concerning a “new” type of compulsory jurisdiction (ascribing at the same time a specific role to the Security Council as a kind of praetor). Legally, under the UN Charter and the Court’s Statute there is no place for any other compulsory jurisdiction than that under the provision of Article 36, paragraph 2 and 5, of the Statute. Even if the Council’s reluctance to act under Article 36, paragraph 3, of the Charter is to be deplored one cannot lose sight of the fact that its action could not serve as a substitute for the consent of States to appear before the Court.

II. The ICJ position to regard the SC resolutions as an important “circumstance” within the meaning of Article 41 of the Statute is to be firmly approved and, even more so, when the question is taken up on its own initiative. It is submitted that the Court has been properly fulfilling its obligations deriving from the aforesaid provision. All arguments which have been discussed before it and which revolved around a possible impact of the SC resolutions on the Court’s indication of provisional measures have been satisfactorily disposed of.

III. The Court has been right in declaring that under UN Charter there is no exclusion of its competence from the area allegedly reserved to the Security Council. The latter organ has no exclusive competence in respect of safeguarding international peace and security. Hence, the role which the Court has declared ready to assume is sound in point of law.

⁸⁹This submission can properly be regarded as the preliminary objection to the admissibility of the Application — cf. E. GRISEL, *Les exceptions d'incompétence et d'irrecevabilité dans la procédure de la Cour internationale de Justice*, Berne 1968, pp. 74—75.

⁹⁰ *ICJ Reports*, 1978, p. 12.

Territorial Asylum

by JANUSZ SYMONIDES

1. The Concept and Legal Foundations of Asylum

The institution of asylum has a long history going back to the antiquity. The very word "asylum" is of Greek origin and means "freedom from seizure" or "something exempted from seizure".¹ Generally speaking, asylum consists in granting refuge by the State on its territory to any alien persecuted in his own country for reasons of beliefs or political, religious, social or scientific activities. In Europe, the practice of granting asylum to aliens persecuted for their religious beliefs, as defined in the works of Hugo Grotius and Emerich de Vattel, has been widely adhered to since the 17th century. However, a new dimension and particular significance of the institution of asylum became apparent in the period of the French Revolution. The French Constitution of 1793 stated in its Article 120:

"The French nation grants asylum to foreigners compelled to leave their native land for defending the cause of liberty, but refuses asylum to tyrants".

The right of asylum is widely guaranteed by the constitutions of the socialist States. The Polish Constitution in its Article 88 stipulates:

"The Polish People's Republic shall grant asylum to nationals of other countries, persecuted on account of their defending the interests of the working people, the struggle for social progress, for the defence of peace, the struggle for national liberation, or as a result of scientific activities".

Under the Polish Law on Aliens of 1963, the decision on granting asylum is issued by the Minister of Internal Affairs, while the right to give such decision may be, in consultation with the Minister of Foreign Affairs, delegated to organs subordinated to him.

The Soviet Constitution of 1977 states in its Article 38:

¹ Cf. L. BOLESTA-KOZIEBRODZKI, *Le droit d'exile*, Leiden 1962, p. 14; A. GRAHLMADSEN, *Territorial Asylum*, Stockholm 1980, p. 1.

"The USSR shall accord the right of asylum to foreign nationals persecuted for upholding the interests of the working people and the cause of peace, for participating in the revolutionary and national liberation movement, for progressive socio-political, scientific or other creative activities".

The constitutions of other socialist countries contain similar formulations, while insignificant differences between them and those mentioned above consist, i.a., in introducing into the fundamental laws of such socialist States as Albania, Yugoslavia, Hungary and Vietnam differently worded stipulations on granting the right of asylum to, for instance, foreigners persecuted for the propagation of democratic opinions and attitudes, or for the participation in democratic movements. However, the 1976 Cuban Constitution contains a more elaborate enumeration of reasons for granting asylum; its Article 13 mentions the struggle against imperialism, fascism, colonialism and neo-colonialism, and also the struggle for the abolition of racial discrimination.²

As to the constitutions of the capitalist States, their approach to the right of asylum, in comparison with that of the socialist States, is rather general in character.³

The Constitution of the Federal Republic of Germany lacks any specific clause on the right of asylum, and only Article 16(2) states that

"[...] The politically persecuted shall enjoy the right of asylum".⁴

The Italian Constitution of 1947 provides:

"[...] The foreigner who is denied in his own country the effective exercise of democratic freedoms provided for by the Italian Constitution has a right to asylum in the territory of the Republic in accordance with the provisions of law".⁵

As a rule, the constitutions of the Latin American States forbid extradition of political criminals.

A number of Western fundamental laws as, for instance, those of Belgium, Finland, Iceland, Norway, Sweden, Switzerland or the United States lack specific provisions relating to the right of asylum, while the questions related thereto are directly or indirectly regulated by their national legislations concerning aliens or extradition. For instance, the Norwegian law on aliens

² Cf. *Konstytucja Republiki Kuby [The Cuban Constitution]*, Wrocław 1978, p. 40.

³ This solution creates, on the one hand, a considerable freedom of evaluation of particular requests for asylum and, on the other, it may be also, in the absence of provisions invoking regulations of a lower grade, understood as acceptance of the respective international legal norms, though they hardly could be regarded as complete.

⁴ Cf. Basic Law for the Federal Republic of Germany, *Constitutions of Nations* (second edition by Amos J. Peaslee), vol. 2, The Hague 1956, p. 33.

⁵ *Ibid.*, p. 483.

stipulates that a political refugee, if there are no specific contraindications, will receive asylum in the Norwegian territory.⁶

Since the practice of granting territorial asylum is universally accepted, the thesis that the institution of asylum may be regarded in its general shape as a norm of universal customary law is fully justified. However, the differences in this practice, concerning the scope of laws and duties of the State granting asylum, or third States, as well as those concerning the situation of a person enjoying refuge, have necessitated for a rather long time now codification of the provisions relating to asylum.

As yet, asylum has only been to a limited degree the subject of international treaties. The existing treaty regulations have rather a fragmentary character. They are related mainly to the problem of refugees or that of the definition of offenses in question. To the first group belong the Arrangement Relating to the Legal Status of Russian and Armenian Refugees of 30 June, 1928, the Convention Concerning the Status of Refugees Coming from Germany of 10 February, 1938, the League of Nations Convention Relating to the International Status of Refugees of 28 October, 1933, and the UN Convention Relating to the Status of Refugees of 28 July, 1951 and the Protocol Relating to the Status of Refugees of 31 January, 1967. To the second group, stipulating what crimes cannot be recognized as political, and *eo ipso* cannot constitute a basis for granting asylum, belong the Convention for the Prevention and Punishment of Terrorism of 16 November, 1937, the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis of 18 August, 1945, the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December, 1948, the Hague Convention for the Suppression of Unlawful Seizure of Aircraft of 16 December, 1970, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents of 14 December, 1973.

On 10 December, 1948, the United Nations adopted the Universal Declaration of Human Rights which in its Article 14 mentions the right of asylum, and on 14 December, 1967, the UN General Assembly adopted the Declaration on Territorial Asylum. The Declaration amplifies the general formulations of the Universal Declaration, and defines the principles of granting asylum, the persons who may apply for asylum and enjoy it.

⁶ A review of the provisions of constitutions and national legislations in this question — cf. A. GRAHL-MADSEN, *op. cit.*, pp. 24—33; T. PEZACKA-GRABLEWSKA, "Deklaracja ONZ o azylu terytorialnym" [The UN Declaration on Territorial Asylum], in: *Prawo i obowiązki obywatelskie w Polsce i świecie* [Civil Rights and Duties in Poland and in the World], pp. 447—448; E. WIERZBICKI, *Pojęcie przestępstwa politycznego w prawie międzynarodowym* [The Concept of Political Offense in International Law], Warszawa 1979, pp. 116—122.

and the duties of the State granting it. However, from the formal point of view, both these acts are not legally binding.

More comprehensive regulations concerning asylum have been worked out within regional agreements. In the first place, we should mention here agreements concluded by the Latin American States such as the Havana Convention Fixing the Rules to be Observed for the Granting of Asylum of 20 February, 1928, and the Caracas Convention on Territorial Asylum of 28 March, 1954. Also the African States, acting within the Organization of African Unity, concluded on 10 September, 1969, the Convention Governing the Specific Aspects of Refugees Problems in Africa. The above-mentioned agreements deal only with some legal problems concerning the right of asylum and, besides, they are binding only for a limited number of States, hence we cannot maintain that there exist in international law some universally binding treaty norms regulating the right of asylum.

2. Territorial and Diplomatic Asylum

Apart from territorial asylum, there also exists in international law the concept of diplomatic asylum.⁷ The basic difference between these two institutions consists in that, in the first case, it is the State that grants refuge to a person on its own territory, which is under its full sovereignty, whereas in the second, the State grants asylum in its diplomatic mission situated in the sphere of territorial sovereignty of another subject of international law.⁸ This is why diplomatic asylum impends over the sovereignty of the territorially competent State and, as a result of it, is not universally recognized. It is applied only (*almost exclusively*) in Latin America, mainly on the basis of treaties, and partially as a local usage. In view of the frequent occurrence, especially in the past, of revolutions and internal

⁷ In Polish literature this problem is dealt with by: M. GAŚSIOROWSKI, *Dyplomaci i konsulowie* [Diplomats and Consuls], Warszawa 1966; K. LIBERA, *Zasady międzynarodowego prawa konsularnego* [Principles of International Consular Law], Warszawa 1960; J. MAKOWSKI, *Organy państwa w stosunkach międzynarodowych* [State Organs in International Relations], Warszawa 1957; J. SUTOR, *Prawo dyplomatyczne i konsularne* [Diplomatic and Consular Law], Warszawa 1977; L. SOSNOWSKI, *Azyl dyplomatyczny we współczesnym prawie międzynarodowym* [Diplomatic Asylum in Modern International Law], Kraków 1980; J. SYMONIDES, "Azyl dyplomatyczny" [Diplomatic Asylum], in: *Encyklopedia prawa międzynarodowego i stosunków międzynarodowych* [Encyclopaedia of International Law and Relations], Warszawa 1976; B. WIERZBICKI, "Azyl dyplomatyczny w Ameryce Łacińskiej" [Diplomatic Asylum in Latin America], *Przegląd Stosunków Międzynarodowych*, 1980, No. 1.

⁸ Diplomatic asylum also leads very frequently to a situation when a national of the State on the territory of which an alien representation is situated seeks asylum therein, and that also results in the infringement of the principle of personal sovereignty.

instability. diplomatic asylum fulfilled and is still fulfilling a humanitarian task by protecting the persons whose life and liberty are endangered.

In trying to find legal grounds for diplomatic asylum, attempts were sometimes undertaken to resort to the concept of extritoriality of the foreign diplomatic mission.⁹ This concept, once recognized in international practice and attributed to Grotius, is based on a fictitious premise that a diplomatic mission (embassy or legation), is situated "outside the territory" of the receiving State and, should be regarded as if it were a part of the sending State territory. This theory is clearly at variance with reality, since the essence of a diplomatic mission consists exactly in its presence on the territory of another State. It leads to absurd consequences if it is taken *verbatim*. The exemption of a diplomatic mission from under the territorial sovereignty of the receiving State would, in fact, be tantamount to giving the right to grant refuge, since it would constitute a specific mutation of territorial asylum. The acceptance of such a theory would mean that the airspace over the diplomatic mission and the subsoil beneath it are exempted from under the sovereignty of the receiving State, and also that there exists an artificial frontier which is crossed any time a person enters or leaves the mission. As things are, this theory has been totally rejected both by the doctrine and practice of international law.

Also the immunity which under international law is enjoyed by the premises of diplomatic missions cannot be regarded as a basis of diplomatic asylum. The Vienna Convention on Diplomatic Relations of 1961 states explicitly in Article 41(3):

"The premises of the mission must not be used in any manner incompatible with the functions of the mission as laid down in the present Convention or by other rules of general international law or by any special agreements in force between the sending and the receiving State".

A similar view is also expressed by national legislations of many States. For instance, Article 7 of the Soviet Law of 1966 on Diplomatic and Consular Missions of Foreign States on the USSR territory states that the immunity of diplomatic missions may not be exercised for purposes incompatible with the functions of a diplomatic mission.

Thus only the consent of the States concerned, expressed in the form of a treaty, or the existence of customary norms, may constitute a basis for diplomatic asylum. Universal International Law as such does not contain any norms in this respect. The institution of diplomatic asylum is not known in Europe, and the sporadic cases when the receiving States tolerate attempts at refuge on the territory of their diplomatic missions cannot be interpreted

⁹ R. GENET, *Traité diplomatique et du droit diplomatique*, Paris 1931, vol. 1, p. 1121; E. SATOW, *A Guide to Diplomatic Practice*, London 1932, p. 199.

as recognition of the institution of diplomatic asylum, but as renouncement in a given case from the request to surrender persons staying in a foreign mission or, if surrender is denied, from the application of a fully justified pressure to achieve this aim.¹⁰

The legal basis for granting diplomatic asylum exists only in relations between those Latin American States which have concluded a few international agreements thereon. The admissibility of diplomatic asylum was first formulated in the Treaty on International Penal Law signed in Montevideo in 1889, and subsequently in the Havana Convention of 1928, Montevideo Treaty on Political Asylum and Refuge of 1939 and the Caracas Convention on Diplomatic Asylum of 1954.

Although the practice of diplomatic asylum is frequently adhered to in Latin America, it is not possible — as stated by the International Court of Justice in the 1950 Asylum case between Colombia and Peru — to assert the existence of a regional customary norm in this respect.¹¹ The Court drew attention to reciprocity, good neighbourliness and humanitarian considerations which should be taken into account in shaping the practice of granting asylum, but recognized them as extralegal aspects of the institution of diplomatic asylum.

Potential uncertainties about the terms of granting diplomatic asylum, the competences for qualifying whether or not a person requesting asylum has the right to enjoy it, and the termination of asylum may be resolved by treaty norms binding the Latin American States, and also by recourse to their practice and national legislations.

As to the places where asylum may be granted, the Havana Convention of 1928 states that they include legations, warships, military camps or military aircraft. The 1933 Montevideo Convention states that the heads of missions may grant refuge not only in embassies and legations, but also in their residences, if they do not reside on the territory of embassies or legations. This question is explained even more accurately in the 1954 Caracas Convention; it stipulates that the term "legation" means any seat of regular diplomatic mission, the residence of the heads of mission, and the premises provided by them for the dwelling places of asylees when the number of the latter exceeds the normal capacity of the buildings. War vessels or military aircrafts that may be temporarily in shipyards, arsenals, or shops for repair may not constitute a place of asylum.

¹⁰ Although there were cases of granting temporary refuge in diplomatic missions by the United States or Great Britain, these States, as stated by G. SCHWARZENBERGER in his *International Law*, vol. 1, 3rd edition, London 1957, p. 258, neither advanced claims to granting diplomatic asylum, nor recognized such claims on the part of other States.

¹¹ Cf. *International Court of Justice, Reports 1950*, p. 20 ff., and p. 40 ff.

The right to enjoy refuge in diplomatic missions may be granted only to persons sought for political reasons or political offences. According to the 1928 Havana Convention, this right cannot be conferred upon persons accused of or condemned for common crimes, and they shall be surrendered on the request of the local government. Furthermore, the Caracas Convention of 1954 explains that asylum must not be granted to persons who, at the time of requesting it, are under indictment or on trial for common offences or have been convicted by competent regular courts and have not served the respective sentence. Also deserters from military forces may not enjoy asylum unless the acts committed by them are clearly of a political nature.

An additional condition justifying the granting of asylum to a political offender is urgency. This requirement was in the 1928 Havana Convention as follows: "Asylum may not be granted except in urgent cases". This provision was clarified in the 1954 Caracas Convention by stating that it takes into account situations in which

"the individual is being sought by persons or mobs over whom the authorities have lost control, or by the authorities themselves, and is in danger of being deprived of his life or liberty because of political persecution."

Refuge may be granted only for a period strictly necessary to ensure safety. Interpreting the meaning of "urgency", the International Court of Justice stated that it exists so long as "in the guise of justice" arbitrary action was substituted for the rule of law, as when the administration of justice was corrupted by "measures clearly prompted by political aims", but this notion of urgency cannot lead to an intervention into the internal matters of the receiving State.

Only the State, in whose mission refuge is to take place, is qualified to determine the basis for granting asylum.¹² If it is granted, the decision thereon must be particularly penetrating and accurate since, should it be questioned by the receiving State, a dispute may arise impeding the termination of asylum.

The State granting asylum in its diplomatic mission is not bound to settle the asylee in its territory, unless he is unable to ensure his safety in his own country, and no other State is willing to receive him. Asylum is terminated by departure from the territory of the receiving State or by relinquishing its continuation when the danger ensuing from the "situation of urgency" has been averted.

¹² The Montevideo Convention of 1933 stipulates in its Article 2 that the judgment of political delinquency concerns the State which offers asylum. According to Article 2 of the 1939 Convention, the evaluation of reasons justifying asylum lies with the State granting it. The 1954 Caracas Convention explicates in its Article 4 that the State granting asylum determines the nature of the offense or the motives for persecution.

The person enjoying diplomatic asylum shall, on the request of the territorial State, leave its territory as soon as possible. If such request has been submitted, the requesting State shall give necessary guarantees (the so-called safe-conduct) that the person in question will be able to leave its territory without any interference.

The institution of diplomatic asylum is sometimes qualified as political asylum since refuge is granted to offenders or persons persecuted for political reasons, and this makes it resemble territorial asylum. But differences prevail over similarities, and first of all the difference ensuing from the place where asylum is granted, since diplomatic asylum, contrary to territorial asylum, is an institution of regional American law not recognized in universal international law. Also the Universal Declaration on Human Rights and other international legal instruments adopted by the United Nations do not mention diplomatic asylum. Thus when the doctrine or the practice adhere to the right of asylum without any additional qualification, it is territorial and not diplomatic asylum that is meant thereby.

3. Asylum as the Right of the State and of the Individual

There is no doubt that the granting of asylum within the scope of international law lies entirely within the internal competence of the State. As it is the State that determines the basis for granting to an alien asylum on its territory, and decides on granting or refusing asylum, the grant of asylum is a right of the State.¹³ This opinion is corroborated by a number of international treaties as well as constitutions which stress that the State, as a subject of international law, grants asylum to aliens persecuted for specific activities.

The question is, however, whether the contention that asylum constitutes the right of the State must lead to the exclusion of another contention, namely, that the right of asylum is also a right of the individual. The opinion regarding asylum, either as the right of the State or as the right

¹³ Cf. L. GELBERG, *Zarys prawa międzynarodowego [An Outline of International Law]*, Warszawa 1979, p. 154 where he writes: "The right of asylum is the right of the State to grant a refugee the permission to enter into its territory, and to stay therein, as well as the right to refuse his extradition, but not the right of the refugee himself". A. KLAFKOWSKI in his *Prawo międzynarodowe publiczne [International Public Law]*, Warszawa 1979, p. 202 states: "The right of asylum is applied by the State on the ground of free evaluation. Thus the concept of asylum is linked to the territory of the State and to territorial sovereignty; also the State designates the organs entitled to grant the right of asylum to aliens".

of the individual was presented in discussions at the United Nations in connection with the need to work out provisions concerning territorial asylum. In Committee III of the UN General Assembly of 1962, Philippines and Italy¹⁴ were in favour of recognizing asylum as a right of the individual, whereas the majority of other States represented an opposite opinion. Their standpoint was presented by India which stated that it is a commonly accepted principle of international law that the individual has no right of asylum whatever, and that the State is not obligated to grant it.¹⁵ These divergencies also came to light at the UN Conference on Territorial Asylum in 1977.

There are, however, certain arguments in favour of the recognition of the right of asylum as the right of the individual, too. An analysis of internal legislations regulating the procedure of acquiring asylum leads to the conclusion that, as a rule, the individual has the right to request it from the competent internal organs. Also some constitutions stipulate that the individual on the ground of internal law. Such point of view in the Soviet Frequently the approach to a person requesting asylum as to a subject leads some authors to the contention that inasmuch as on the ground of international law asylum is a right of the State, it is a right of the individual on the ground of internal law. Such point of view in the Soviet literature is represented by L. Galenska.¹⁷

Also the wording of the Universal Declaration on Human Rights of 1948 favours the contention that asylum should be treated as the right of the individual. Article 14 of the Declaration states:

"Everyone has the right to seek and to enjoy in other countries asylum from persecution".

The right of asylum is also implied by the wording of Article 13:

"(1) Everyone has the right to freedom of movement and residence within the borders of each State. (2) Everyone has the right to leave any country, including his own, and to return to his country".

The Declaration on Territorial Asylum, adopted in 1967, reaffirms in its Preamble the wording of Article 14 of the Universal Declaration of

¹⁴ Doc. A/C. 3/SR. 1197. Doc. A/C/SR. 1196.

¹⁵ Doc. A/C. 3/SR. 1194.

¹⁶ As an instance, we may mention here the already mentioned Constitution of the FRG. According to the Austrian Law on the right of residence of refugees of 7 March, 1968, the person requesting asylum is entitled to stay in Austria until his request is decided on.

¹⁷ Cf. L. N. GALENSKA, *Pravo ubežišta*, Moskva 1968, pp. 51—52. The author justifies her standpoint quoting of a rather controversial argument that while the respect for human rights is already an institution of national law, it is still in making in international law. But it is already beyond doubt, including the Final Act of the Helsinki Conference of 1975, that the respect for human rights has become a well-founded principle of international law.

Human Rights envisaging the right of everyone to seek asylum. It also indicates in its Article 1(2) that this right may not be invoked by certain category of persons. At the same time, however, the Declaration stresses that the evaluation of the grounds for the grant of asylum rests with the State.

The International Covenant on Civil and Political Rights of 1966 does not contain any clause on the right to seek asylum, and that is sometimes interpreted as calling in question the contention that asylum be understood as the right of the individual.¹⁸ However, this point of view is not very convincing, since the official documents of the UN clearly indicated that the proposals to include in the Covenant provisions concerning asylum had been rejected, partly in view of the difficulties to reach agreement on the category of persons entitled thereto. At the same time, however, the Covenant on Civil and Political Rights contains such provisions closely linked to asylum as those envisaging, on the one hand, the right of everyone to leave any country, including his own, and, on the other, ensuring any foreigner staying lawfully in a given State that he may be expelled therefrom only in pursuance of a decision taken in accordance with law.¹⁹

Thus it may be said that the institution of asylum is both the right of the State to grant asylum and the right of the individual to request it.²⁰ But we should note a clear trend towards limiting the freedom of decision of the State in cases when the claims of the individual are justified. Also the right to seek asylum is still not tantamount to the right to it, since no legally binding international obligation to grant asylum in justifiable circumstances is operative as yet. And in the event that asylum is refused, the individual cannot appeal to a third party or any international organ. Besides, it seems that at present no proposals in this respect have any chance of being universally adopted.

4. Persons Entitled to Asylum

Generally, it may be said that asylum may be enjoyed by persecuted persons or those who committed a political offence. The notion of political offence is not understood unequivocally and mostly two types thereof are

¹⁸ B. WIERZBICKI, *op. cit.*, p. 974 writes: "Finally, the fact that asylum is not a human right is confirmed by the omission of that right in the International Covenants on Human Rights [...]".

¹⁹ Cf. Article 12(2) and 13 of the International Covenant on Civil and Political Rights, respectively.

²⁰ Similarly A. M. VOJCEHOVIČ, "O ponjati institutu prava ubežišća" [On the Concept of the Right of Asylum Institution], *Gosudarstvo i pravo*, 1981, No. 4 p. 95.

distinguished: pure and relative. In the first case, it comprises actions aimed directly at the State as an organization and, in the second, such actions of natural persons, which have the features of a common crime, though they have been undertaken for a political purpose or from a political motive.²¹

To avoid entirely unrestricted freedom in qualifying offences justifying the grant of asylum, international legal acts, and also a number of national legislations, contain more specific formulations defining circumstances when asylum may or may not be granted.

The Universal Declaration on Human Rights states generally in its Article 14 that everyone may enjoy asylum from persecution, but may not invoke the right thereto in the case of prosecution resulting from an ordinary crime or from acts contrary to the purposes and principles of the United Nations. A person is regarded as persecuted when upon the return to his native country he would be victimized by the authorities, or is already exposed to persecution in his own country and can indicate the reasons thereof. A closer explication what is meant in practice by an "act contradictory to the purposes and principles of the United Nations" is to be found in the Declaration on Territorial Asylum of 1967 which states that the purposes proclaimed in the UN Charter are to maintain international peace and security, to develop friendly relations among all nations and to achieve international cooperation in solving international economic, social, cultural or humanitarian problems, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion.²² On the one hand, the Declaration indicates that also persons struggling against colonialism should be included in the category of persecuted persons, and on the other, refuses the right of asylum to the individuals who have committed crimes against peace, war crimes or crimes against humanity, as defined in relevant international instruments. To such international instruments belong the Charter of the International Military Tribunal of 8 August, 1945, the Geneva Conventions relating to the Protection of Victims of War of 1949, and the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December, 1948.

The charter of the International Military Tribunal enumerates in a general manner all three kinds of crimes. Article 6 defines as crimes against peace

"planning, preparation, initiation or waging of war of aggression, or a war in violation of international treaties, agreements or assurances".

²¹ Cf. T. PEZACKA-GRABLEWSKA, *op. cit.*, p. 49.

²² It may also be assumed that the aims and purposes of the United Nations are specifically formulated in Articles 1 and 2 of the Charter.

as war crimes "violation of the laws or customs of war". and as crimes against humanity

"murder, extermination, enslavement, deportation and other inhuman acts committed against any civilian population, before or during the war, or persecution on political, racial or religious grounds".²³

More elaborate description of persons entitled to enjoy asylum are to be found in regional agreements.²⁴ The Caracas Convention on Territorial Asylum of 28 March, 1954, envisages in its Article 2 the grant of asylum to persons persecuted for their beliefs, opinions, or political affiliations, or for acts which may be considered as political offences.

The draft articles on territorial asylum discussed at the UN Conference²⁵ proposes in its Article 2 to grant the benefits to a person seeking asylum, if he is faced with a definite possibility of persecution for reasons:

a) of race, colour, national or ethnic origin, religion, nationality, kinship, membership of a particular social group or political opinion, including the struggle against colonialism and apartheid, foreign occupation, alien domination and all forms of racism; or

b) prosecution or punishment for reasons directly related to the persecutions as set forth in (a), if a person is unable or unwilling to return to the country of his nationality, or, if he has no nationality of the country of his former domicile or habitual residence.

According to Article 2, the right of asylum shall not apply to any person liable to prosecution or punishment for:

²³ The Convention on the Prevention and Punishment of the Crime of Genocide of 1948 explains in its Article II that genocide means "any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

"a) Killing members of the group;

"b) Causing a serious bodily or mental harm to members of the group;

"c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

"d) Imposing measures intended to prevent births within the group;

"e) Forcibly transferring children of the group to another group".

²⁴ Cf. United Nations Conference on Territorial Asylum. UN Documents A/CONF. 78/12.

²⁵ European Convention on the Suppression of Terrorism of 1977 excludes from political offenses: unlawful abduction of aircraft, as defined in the Hague Convention for the Suppression of Unlawful Seizure of Aircraft of 1970 and the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation of 1971, serious offense comprising an attack directed against the life or liberty of persons enjoying international protection, offenses comprising abduction, taking hostages or serious unlawful detention, and offences by using bombs, hand-grenades, rockets, automatic weapons or bombs dispatched in parcels.

a) a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

a(bis) other grave crimes as defined in multilateral conventions to which a contracting State is a party;

b) an offence which would be a serious criminal offence if committed in the State from which asylum is requested;

c) acts contrary to the Purposes and Principles of the United Nations.

Article 2 also explicates that asylum may not be granted to a person requesting it for purely economic reasons, or to a person in respect of whom there are serious reasons for considering that he would endanger the security of the State in which asylum is sought.

The enumeration of reasons for granting or refusing asylum, as put forward in the Draft Convention of 1977, should be considered to be the most comprehensive, and the more so as it adduces other multilateral agreements which restrict the possibility of defining such crimes as maritime, air and radio piracy, abduction of diplomats, or acts of terror as political offences.

5. Rights and Duties of States in Respect of Territorial Asylum

The right of granting asylum by States is universally recognized and interpreted as an expression of their sovereignty. However, some inclinations may be noted towards restricting the freedom of refusal of asylum in circumstances when the person requesting asylum has reasons to enjoy it. Although the proposal to establish a clear obligation of States to grant asylum failed to get approval as too far-flung, a number of draft conventions on territorial asylum of the 1970s, and also the draft discussed at the UN Conference of 1977 embodied the following formulation:

"Each contracting State shall endeavour in a humanitarian spirit to grant asylum in its territory to any person eligible for the benefits of this Convention".²⁶

This trend was also reflected in recommendations of the Council of Europe of 7 October, 1977, on certain aspects of the right to asylum, which called on all governments of the member States to reaffirm their intention of maintaining their liberal attitude towards persons requesting asylum in their territories.²⁷

²⁶ Cf. draft articles of 9 May, 1975, prepared by a UN Group of Experts, UN Doc. A/10177, Art. 1; a draft article agreed upon at the UN Conference of 4, February 1977, UN Doc. A/CONF. 78/12.

²⁷ Recommendation 817/1977 of the Council of Europe on Certain Aspects of the Right of Asylum. Cf. A. GRAHL-MADSEN, *op. cit.*, p. 212.

Also the increasing acceptance of the principle of "non-refoulement" (prohibition of expulsion or return) reflected the humanitarian approach of States to the institution of asylum. It has been formulated in Article 33 of the Convention Relating to the Status of Refugees of 1951²⁸, and also in Article 2 of the OAU Convention of 10 September, 1969. Moreover, the Declaration on Territorial Asylum prohibits in its Article 3 rejection at the frontier, expulsion or compulsory return of the persons who have already entered the territory in which they seek asylum, if as a result of such return they may be subjected to persecution. The principle of "non-refoulement" was also introduced into all drafts of conventions on asylum, including the one discussed at the 1977 Conference.²⁹

There is also a new solution concerning asylum, which was submitted by a group of experts from the Carnegie Foundation,³⁰ envisaging the acceptance of a temporary or provisional asylum while the request for asylum is examined. A similar formulation is to be found in Article 4 of the Draft Convention submitted by the UN Group of Experts on 9 May, 1975.

The grant of asylum is a peaceful and humanitarian act and therefore it should not be regarded as an unfriendly act against another State. It should also be respected by the whole international community. As civil wars, *coup d'états*, or local and regional conflicts may result in a great influx into the neighbouring State or States of refugees requesting asylum, which may exceed the possibilities of admittance of a given State and also create economic difficulties, the Declaration on Territorial Asylum envisages in such circumstances granting international assistance to the State concerned. This assistance may be extended individually or collectively, or through the United Nations in the spirit of international solidarity, to lighten the burden of that State.

Also the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa of 10 September, 1969, envisages in its Article II/4 that

"where a Member-State finds difficulty in continuing to grant asylum to refugees, such Member-State may appeal directly to other Member-States and through the OAU, and such other Member-States shall in the spirit of African solidarity and international cooperation take appropriate measures to lighten the burden of the Member-State granting asylum."

²⁸ Cf. *United Nations Treaty Series*, vol. 189, p. 132 ff.

²⁹ The "non-refoulement" principle does not apply to persons in respect of whom there are reasonable grounds for regarding they will constitute a danger to the security of the State or that they, having been convicted by a final judgement of a particularly serious crime, constitute a danger to the community of a given country.

³⁰ Cf. Draft Convention on Territorial Asylum of 15 January, 1972, prepared by the Carnegie Endowment Working Group.

6. Legal Position of Persons Enjoying Asylum

As asylum is something more than only the admittance of an alien to its own territory or the refusal of his extradition, and since — according to a correct definition of the Institute of International Law of 1950 — it constitutes a protection accorded by the State on its own territory,³¹ the position of an asylee should not be worse than that of other aliens or refugees.

According to the prevailing opinion in the doctrine, the institution of asylum is linked to the possibility of enjoying the basic laws and freedoms of man.³² And what is more, the very notion of “protection” implies that persons enjoying asylum should have the possibility of creating for themselves normal conditions of existence.

A review of treaty provisions concerning directly or indirectly this question permits us to ascertain the existence of certain obligations on the part of the State granting asylum. And so the Caracas Convention on the Territorial Asylum of 1954 envisages that no third State may lodge complaints in connection with enjoying freedom of thought by asylees or refugees, or with opinions publicly expressed by them against that State or its government, except when these concepts constitute systematic propaganda inciting to the use of force or violence against the government of the complaining State. Similarly, no State has the right to request that another State restrict for the political asylees the freedom of assembly or association, while this freedom is granted to all aliens, unless such assembly or association has as its purpose fomenting the use of force or violence against that State. However, the Convention envisages in its Article 9 that

“at the request of the interested State, the State that has granted refuge or asylum shall take steps to keep watch over, or to intern at a reasonable distance from its border, those political refugees or asylees who are notorious leaders of a subversive movement, as well as those against whom there is evidence that they are disposed to join it”.³³

Also the OAU Convention of 1969 states in its Article 2 that for reasons of security, the countries of asylum shall — as far as possible — settle refugees at a reasonable distance from the frontier.

³¹ Cf. *Annuaire de l'Institut de Droit International*, 1958, vol. 2, p. 375.

³² Cf. L. BOLESTA-KOZIEBRODZKI, *op. cit.*, p. 173 ff; A. VOJCEHOVIČ, *op. cit.*, p. 96; T. PEZACKA-GROBLEWSKA, *op. cit.*, p. 451; B. WIERZBICKI, *op. cit.*, p. 125. This point of view is argued for on the ground that asylum would be nonsensical should the person leaving his country in view of being unable to enjoy basic laws and freedoms therein be also deprived of them in the country in which he has obtained asylum.

³³ The evaluation of a reasonable distance from the border is left by the Convention to the State which has granted asylum.

In the absence of specific treaty restrictions in respect of the freedom of settlement of the persons enjoying asylum, nothing diminishes the validity of Article 12 of the International Covenant on Civil and Political Rights of 1966, which states:

"1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. 2. Everyone shall be free to leave any country, including his own".³⁴

Incidental to this provision is the right of the individual to terminate asylum and return to his own country.

The person enjoying asylum has not only rights but also duties. Among the latter we should mention especially the respect for the legislation of the host State. As stated by the Declaration in Territorial Asylum of 1967, the State granting asylum cannot permit persons who have received asylum to engage in activities contrary to the purposes and principles of the United Nations.³⁵

³⁴ These rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order, public morals, or the rights and freedoms of others.

³⁵ Generally, it may be stated that the State is as responsible for the activities of the person enjoying asylum as for the activities of its own national.

Poland's Multilateral Treaty Relations*

by RENATA SZAFARZ

1. In the mid-1986 Poland was bound by 471 multilateral inter-state and inter-governmental treaties. This number should be supplemented with approximately 211 inter-departmental treaties which the present writer has had access to. Thus, Poland was bound altogether by over 682 multilateral treaties at that time.

2. Among these 682 treaties 363 were inter-state treaties, accepted by means of ratification (or accession to the treaty equivalent to ratification). Consequently, over half of the multilateral treaties binding on Poland are still solemn treaties.

3. Among these 682 treaties 351 were published in *Dziennik Ustaw* [*Journal of Laws*].

4. 109 multilateral treaties still binding on Poland were concluded in the period prior to 1939.

5. Approximately 300 of the above-mentioned 682 multilateral treaties were concluded within the framework of CMEA. All inter-departmental agreements fall within this group. Only several of the multilateral treaties concluded by the CMEA Member States were ratified and published in *Dziennik Ustaw* [*Journal of Laws*].

6. The oldest multilateral treaty binding on Poland is the Convention on the establishment and maintenance of the International Bureau of Weights and Measures, commonly referred to as the Meter Convention, signed in Paris on 20 May, 1875.

The most recent multilateral treaty which the present paper takes into consideration is the agreement on cooperation in the field of production and application of normalized Standards of CMEA materials and Regulations concerning a normalized CMEA standard, signed in Berlin on 5 July, 1985.

* The present paper contains conclusions from a monograph under the same title (in print).

7. The most — for as many as 358 — multilateral treaties (including inter-departmental) deal with economic relations. The successive fields are:

- II — transport and communication — 103 treaties;
- III — labour and social insurance — 78 treaties;
- IV — political relations — 42 treaties;
- V — foreign legal turnover — 28 treaties;
- VI — education, science and culture — 19 treaties;
- VII — health protection and social assistance — 16 treaties;
- VIII — natural environment protection — 15 treaties;
- IX — human and civil rights — 12 treaties;
- X — status of different area and space — 11 treaties.

8. It is possible to anticipate that, like in the previous years, the number of multilateral treaties binding on Poland will increase most rapidly in the economic as well as the transport and communication fields. An increase in the youngest field of natural environment protection is also expected. In the remaining spheres the increase shall be rather moderate. This also applies to the sphere of labour and social insurance as a result of recent perturbations in the relations between Poland and the International Labour Organization.

9. The analysis of multilateral treaties binding on Poland in the political field is indicative that among Polish political aims are: peace, security, an alliance with the socialist states of Eastern Europe and proper relations and cooperation with all other States. The whole complex of treaties dealing with armed conflicts is only an expression of the bitter political experiences of Poland.

10. The largest group of homogeneous treaties among the multilateral treaties binding on Poland embraces treaties on specialization and cooperation of production, concluded within the framework of CMEA. At present their number exceeds 200 which is, i.a. an indication of an economic integration of these States.

11. Poland was a party to approximately half of the international labour conventions adopted within the framework of the International Labour Organization.

12. Exclusively in the solemn form were concluded multilateral treaties binding on Poland in the following fields:

- political relations,
- human and civil rights,
- labour and social insurance,
- health protection and social assistance.

The solemn or simplified form of concluding multilateral treaties was applied in the following fields:

- status of different areas and spaces,
- economic relations,

- natural environment protection.
- transport and communication.
- education, science and culture.
- foreign legal turnover.

13. No multilateral treaties binding on Poland have been concluded within the framework of the CMEA in the following fields:

- human and civil rights.
- natural environment protection.
- labour and social insurance.
- health protection and social assistance.

14. Among universal multilateral treaties binding on Poland there are both treaties constituting a codification (i.e. treaties which ascertain, specify or precise) customary law in force, and treaties containing new rules. Mainly of the latter kind are treaties concluded between Member States of CMEA.

15. Being a State created by the fusion of three territories which had been separated from their predecessors (Russia, German and Austria-Hungary), Poland did not become a party to any treaty by way of succession. According to the consistent and unequivocal standpoint of Poland and the whole international community the legal position of our country in relation to treaties concluded by the partitioning powers was determined by the *tabula rasa* principle.

16. Pursuant to the Versailles Treaties of 1919 Poland was obliged to accede to approximately 20 treaties concluded prior to its gaining independence. Poland acceded to the treaties and the following of them are still binding on it: Convention on the prohibition of night work of women in industrial employment of 26 September, 1906; Convention on the Prohibition of the Use of White (yellow) phosphorus in the manufacture of matches of 26 September, 1906; Convention for the Suppression of the White Slave Traffic of 18 May, 1904, and of 4 May, 1910; International Paris Convention on the Protection of Industrial Property of 20 March, 1883, revised at Washington in 1911 (at present the version of 14 July, 1967 is binding); International Berne Convention for the Protection of Literary and Artistic Works of 9 September, 1886, revised at Berlin on 13 November, 1908, and completed at Berne on 20 March, 1914 (at present the version of 2 June, 1928, is binding); International Opium Convention of 23 January, 1912, and the Protocol of the Third Opium Conference of 25 June, 1914.

17. In accordance with Polish constitutional tradition the Sejm (Parliament) should be equipped with certain powers in the field of conclusion of treaties — at least those concerning statutory matters.

18. In the inter-war period, when Poland was to accede to a treaty, not signed by it and belonging to the category of treaties which, pursuant to the March or the April Constitutions required the approval of the Parliament,

then the complete ratification procedure was applied, e.g. passing an act of ratification, etc.

19. Sometimes a single instrument of ratification concerns several treaties.

20. In certain cases, in pursuance of treaty requirements, an ordinary instrument of ratification is deposited at the depositary as an instrument of "acceptance". Such is the case if the requirements of Polish municipal law are in conflict with the relevant treaty. This occurred in connection with the Amendments to the Convention on the Inter-Governmental Maritime Consultative Organization of 6 March, 1948, adopted on 17 October, 1974 (*Dziennik Ustaw*, 1978, No 9, item 33 and 34).

21. Although, in general, among multilateral treaties binding on Poland solemn treaties prevail, in two fields of international cooperation treaties concluded in a simplified form are preponderant. These are: economic cooperation and generally — cooperation within the framework of CMEA.

22. Polish treaty practice knows the following ways, besides ratification, of concluding multilateral treaties:

- a) resolution of the State Council on the acceptance of a treaty;
- b) approval of a treaty by the Council of Ministers;
- c) acceptance of a treaty by the Council of Ministers;
- d) acceptance of a treaty by the Presidium of the Government;
- e) signing of a treaty by plenipotentiaries;

f) accession to a treaty following: a resolution of the State Council, a resolution of the Council of Ministers, a decision of the Prime Minister or the Economic Committee of the Council of Ministers. Some of the above-mentioned methods were applied only sporadically.

23. At five occasions Poland acceded for the second time to a multilateral treaty which it had previously denounced. Such was the case with the Convention on International Expositions of 22 November, 1928; Constitution of the World Health Organization of 22 July, 1946; International Convention for the Unification of Certain Rules concerning the Immunity of State-owned Ships of 10 April, 1926; Agreement on the International Monetary Fund of 22 July, 1944 and Agreement on the International Bank of Reconstruction and Development of 22 July, 1944.

24. The above-mentioned ways of expressing consent to be bound by a multilateral treaty in Polish treaty practice fall within the legal framework of the Joint Resolution of the State Council and the Council of Ministers of 28 December, 1968, as well as the provisions of the Vienna Convention on the Law of Treaties of 23 May, 1969.

25. At present Poland is provisionally bound by four multilateral treaties. These are: the Sixth International Tin Agreement of 26 June, 1981; the Agreement on the Establishment of the International Institute for Scientific Research on Management of 9 July, 1976; the Agreement on cooperation in scientific research and experimental and construction work in the field

of elaborating quick big power reactors of 13 June, 1980 and the Agreement on cooperation in scientific research and experimental and construction work in the field of controlling WWER 1000 blocks of 13 June, 1980. The last three treaties were concluded in the circle of Member States of CMEA.

26. Multilateral inter-departmental treaties were concluded by Poland exclusively within the framework of CMEA. They are an expression of the economic integration of these states. Most of the agreements, approximately 200, were concerned with specialization and cooperation of production.

27. According to the aforesaid Joint Resolution of the State Council and the Council of Ministers of 1968 the Ministry of Foreign Affairs ought to establish and keep a register of inter-departmental agreements, including multilateral agreements. So far no such register has been created.

28. Research carried out in the Ministry of Foreign Affairs disclosed that, for various reasons, fourteen multilateral treaties ratified by the State Council have not yet been published in *Dziennik Ustaw*. Some of them have not so far entered into force, others are probably being prepared for publication but it seems that this is not true of all of these treaties.

29. On the other hand, nine multilateral treaties accepted by means of a procedure other than ratification (or accession to a treaty, equivalent to ratification) have been published in *Dziennik Ustaw*.

30. Generally speaking, it would be desirable if all ratified multilateral treaties were published in *Dziennik Ustaw* with no exceptions and treaties accepted by means of other procedures were published more frequently than up till now.

31. In *Zbiór umów międzynarodowych PRL* [Collection of International Treaties of the Polish People's Republic] issued by the Polish Institute of International Affairs and covering the period 1950—1968 no more than ten multilateral treaties not published previously in *Dziennik Ustaw* were taken into consideration. In case this edition were resumed, a greater emphasis should be laid on inserting the texts of treaties which have not been published before.

32. The following irregularities in the publication of treaties in *Dziennik Ustaw* were observed:

- the ratification and publication of final acts of international conferences is unnecessary;

- insertion of the complete texts of resolutions of international organs containing, i.e., amendments to statutes, is superfluous;

- there was no need to ratify and publish the Agreement between the United Nations and the Universal Postal Union, i.e. a treaty to which Poland is not a party.

33. Treaties which were subject to ratification by a statute passed by the Sejm (Parliament) and were published in *Dziennik Ustaw* (such was the practice

until 1952) up till now are of statutory rank in the Polish legal order.

34. When the Polish legal order refers to a treaty it is insignificant whether the treaty was ratified or accepted by means of a different procedure. The publication of the treaty is also of no consequence. What matters is the fact that the treaty was concluded by Poland in a legally effective way and is still binding.

35. The legal concept of effectiveness of treaties (not transformed, to which Polish law does not refer, etc.) in present Polish law *ex proprio vigore* is persuasive and rightful, but insufficient.

36. The lack of a specified place of treaties in Polish municipal law is an evident lacuna in the present Polish constitutional law. This lacuna ought to be filled. According to a resolution of the Conference of experts in the field of international law, adopted at Jablonna in 1985, the following rules should be accepted in Polish legislation, including the Constitution of Poland:

"a) International law binding on Poland is a constituent part of the Polish legal order.

"b) Judicial, administrative and other organs, together with supreme State administrative organs apply international law, including international treaties binding on Poland. Both natural and juridical persons have rights and duties flowing from international law. They are entitled to vindicate, before courts and administrative organs, the rights granted them by international law, including international treaties binding on Poland.

"c) In the case of conflict between an internal norm and a norm of international law the latter has priority".

37. In the inter-war period Poland formulated reservations to five multilateral treaties, binding on it up to the present day. They are: Protocol on Arbitration Clauses of 24 September, 1923; Convention on the suppression of contraband of alcoholic merchandise of 19 August, 1925; Convention providing a uniform law for bills of exchange and promissory notes of 7 June, 1930; Convention providing a uniform law for cheques of 19 March, 1931 and the Convention for facilitating the international circulation of films of an educational character of 11 October, 1933. All the above enumerated treaties, with the exception of the third, explicitly authorized the kind of reservations which Poland had formulated.

38. Posterior to 1945 Poland formulated reservations — one or more — to 43 multilateral treaties at present binding on it. This concerned exclusively inter-state and inter-governmental treaties. Only approximately 10 of these treaties contain no reservation clauses. This number proves that Poland is far from abusing the institution of reservations (reservations were formulated only in relation to approximately 10% of all inter-state and inter-governmental treaties binding on Poland).

39. Poland did not formulate any reservations to multilateral treaties concluded within the framework of CMEA.

40. An analysis of the contents of Poland's reservations to multilateral

treaties allows to conclude that most of them concerned exclusion of judicial and arbitration clauses. They were formulated in relation to approximately 40 treaties concluded posterior to 1945.

41. The reservations in Polish practice aim at excluding, limiting, broadening or changing *sensu stricto* (substitution) of the legal effect of treaty provisions.

42. What calls for approbation is the fact that in Polish treaty practice there is no reservation whatsoever, not uncommon to the practice of other States, making in vague terms the scope of the application of a treaty dependent upon its compliance with municipal law (which, after all, is subject to arbitrary change).

43. When information on reservations is published in *Dziennik Ustaw* inaccuracies occur now and then. Sometimes mention of a reservation is not included in the instrument of ratification and is referred to only in the governmental statement on placing the instrument of ratification on deposit, on other occasions — the procedure in question is contrariwise. Mention of reservations should be inserted both in the instrument of ratification (accession, etc.) and in the governmental statement.

44. Polish reservations impair the integrity of treaties to a minimal degree, they seldom concern the substance of the treaties and are never incompatible with the object and purpose of the treaty.

45. Hitherto Poland has not withdrawn any of its reservations to multilateral treaties.

46. In relation to 11 multilateral treaties 44 times objections to Polish reservations were raised by some states. This concerned 4 treaties authorizing reservations (and regulating i.a. the effects of such objections) and 7 treaties not containing reservation clauses.

47. The maximum effect (i.e. preclusion of entry into force of the treaty as between the objecting and reserving states) comes into question in the case of:

— objections of Canada, Taiwan, Denmark, Ethiopia, Norway, Pakistan, Sweden and Izrael expressed to Poland's reservations to the Convention on the Political rights of women of 31 March, 1953;

— objections of Brazil, Taiwan and the Netherlands relating to Poland's reservations to the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December, 1948;

— objection of Madagascar to Poland's reservation to the Convention on the High Seas of 29 April, 1958.

All the remaining objections have a minimum effect (i.e. preclusion of entry into force of the mere provision which the reservation concerns as between the objecting and the reserving States, within the scope of the reservation).

The first type of objection is also referred to as a qualified objection, while the second — as a simple objection.

48. Poland has objected to reservations made by other States only twice. Poland's objections regarded the reservation of Tunisia to the Convention on the Recovery Abroad of Maintenance of 20 June, 1956, and — probably — the reservation of Malta to the Additional Protocol to the Convention concerning customs facilities for touring, relating to the importation of tourist publicity documents and material of 4 June, 1954. In case Poland acceded to the Vienna Convention on the Law of Treaties of 23 May, 1969, it would be in her interest to object to reservation "C" made by Syria, relating to Article 62 paragraph 2 of the Convention. This provision excludes the principle of fundamental change of circumstances from being applied to treaties establishing a boundary.

49. In Polish literature it is rightly held that the Potsdam Agreement of 2 August, 1945, is effective both in relation to Poland, as a rightful third state, and in relation to the two German states being successors to the aggressor — the German Reich.

50. Governmental statements on the denunciation by Poland of altogether 28 multilateral treaties have been published in *Dziennik Ustaw*. In all these cases there was an express or implicit (in the case of the Constitution of the World Health Organization of 1946) right to denounce the treaty.

51. Many other multilateral treaties ceased to be binding on Poland as a result of Poland becoming party to successive treaties relating to the same subject-matter. Nor are binding any more several multilateral treaties which introduced the peace order after World War I.

Information on these forms of termination of treaties in relation to Poland is not published in *Dziennik Ustaw*. It would be desirable if a practice of publishing such information in this official organ was established.

52. The issue of the possible termination in relation to Poland of the two following treaties should be elucidated. They are: The Agreement concerning the preparation of a transit card for emigrants of 14 June, 1929, and the Agreement on the statistics of causes of death of 19 June, 1934.

53. In the to date practice only once Poland invoked the institution of suspension of a treaty. Namely, prior to the denunciation of the Constitution of the International Labour Organization which took place on 17 November, 1984, the Polish Government suspended its application on 24 June, 1983.

54. As a result of denunciations the Convention on Civil Procedure of 17 July, 1905, has become a bilateral treaty and at present is binding only on Poland and Iceland.

55. The Polish Government is a depositary of 17 multilateral treaties (inter-state and inter-governmental).

56. As regards different multilateral treaties Poland has accepted the fol-

lowing ways of settling disputes concerning their interpretation or application: compulsory jurisdiction of the International Court of Justice, non-compulsory jurisdiction of the ICJ, compulsory arbitration, non-compulsory arbitration, non-compulsory conciliation and compulsory consultations.

57. Compulsory jurisdiction of the International Court of Justice has been accepted in relation to six treaties, namely: Convention on Privileges and Immunities of the United Nations of 13 February, 1946; Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery of 7 September, 1956; Convention on the Nationality of Married Women of 20 February, 1957; Single Convention on Narcotic Drugs of 30 March, 1961; Universal Copyright Convention of 6 September, 1952; and Universal Copyright Convention of 24 July, 1971 (revised).

58. As regards 9 multilateral treaties Poland has consented to compulsory arbitration. They are:

- European Agreement concerning the International Carriage of Dangerous Goods by Road (ADR) of 30 September, 1957;
- International Convention to facilitate the importation of commercial samples and advertising material of 7 November, 1951;
- Convention on the International Maritime Satellite Organization "INMARSAT" of 3 September, 1976;
- Operating Agreement on the International Maritime Satellite Organization "INMARSAT" of 3 September, 1976;
- Convention on the International Hydrographic Organization of 3 May, 1967;
- International Convention relating to Intervention on the High Seas in cases of Oil Pollution Casualties of 29 November, 1969;
- Customs Convention on Containers of 2 December, 1972;
- International Convention for Safe Containers (CSC) of 2 December, 1972;
- International Telecommunications Convention of 6 November, 1982.

59. Non-compulsory conciliation is provided for by 8 multilateral treaties binding on Poland.

60. No mention of the International Court of Justice, arbitration or conciliation is found in multilateral treaties concluded by Poland within the circle of Member States of CMEA.

61. Six multilateral treaties binding on Poland provide for compulsory consultations in case any problems, including disputes, arise in connection with the interpretation or application of the treaties. They include both universal treaties and treaties concluded within the framework of CMEA.

62. As regards the institutions of the law of treaties analysed in the present paper it can be ascertained that Polish practice is in conformity

with the provisions of the Vienna Convention on the Law of Treaties of 23 May, 1969.

63. There is no obstacle to Poland's accession to the Vienna Convention on the Law of Treaties of 1969.

64. According to present trends in the sphere of functions of treaties it is foreseeable that also in multilateral treaties concluded by Poland in the future, projecting and regulating functions (regarding internal relations) shall more frequently come into prominence.

International Law-making Factors. An Attempt at Systematization

by KAROL WOLFKE

The proliferation of international organizations, their growing normative functions and, in particular, the activity of development and codification of international law under the aegis of the United Nations, have initiated a new wave of interest in the international law-making process.

Besides the old, still controversial problems connected with the traditional international law-making instruments (treaty and custom) and with the interpretation of Article 38 of the Statute of the International Court of Justice, new institutions and procedures bearing upon the development of international law have become the object of heated discussions in the theory of the so-called "sources of international law".¹

Progress in reaching common ground in this field, in spite of the already abundant literature, is, however, still meagre. This is caused not only by the basic differences in the very concept of international law, but also by a more elementary reason — the lack of a minimum of precision regarding the terms used.

Most responsible for the existing misunderstandings in the theory of international law-making is the vague, still widely used term "source of international law". By this term very different aspects and stages of the formation

¹ See, e.g., T. O. ELIAS, "Modern Sources of International Law," in: *Transnational Law in a Changing Society. Essays in Honor of Philip C Jessup*, New York 1972; M. BOS "The Recognized Manifestations of International Law. A New Theory of 'Sources'," *German Yearbook of International Law*, vol. 20, 1977; Ch. SCHREUER, "Recommendations and the Traditional Sources of International Law," *ibid.*; R. GEIGER, "Die zweite Krise der völkerrechtlichen Rechtsquellenlehre," *Österreichische Zeitschrift für öffentliches Recht und Völkerrecht*, vol. 30, 1979; G. I. TUNKIN, "Soviet Theory of Sources of International Law," in: *Völkerrecht und Philosophie, Internationales Festschrift für Stephan Verosta*, Berlin 1980; R. MONACO, "Observations sur la hiérarchie des sources du droit international," in: *Völkerrecht und Rechtsordnung, Internationale Gerichtsbarkeit, Menschenrechte, Festschrift für Herman Mosler*, Berlin 1983; G. J. van HOOFF, *Rethinking the Sources of International Law*, Alphen aan den Rijn 1983.

of international law are understood.² Such sources have been also divided according to various, no more precise, criteria.³

True, the ambiguity of the term "source of international law" has been already heavily criticized by several authors,⁴ but it is still being used by them or, at most, replaced by other terms, no more appropriate and most often too narrow for the description of the present international law-making processes.⁵

Certainly, a total removal from the theory and practice of international law of a term with such a long tradition as that of "source of international law" is unrealistic. It should, however, be reserved only for very general purposes in a broad meaning, as is the case, for example, in the Introduction of the United Nations Charter.⁶ For the discussion of more specific questions

² E.g. STREBEL notes that the term "source of international law" "can mean the kind of creative process and the ground of validity of a rule as well as the result of the creative process, the rule itself" — "Quellen des Völkerrechts als Rechtsordnung," *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 36, 1976, No. 1—3, p. 343; meaningful is Parry's statement that "what the sources of international law are cannot be stated; it can only be discussed", C. PARRY, *The Sources and Evidences of International Law*, Manchester 1965, p. 27. See also van HOOFF, *op. cit.*, pp. 13—16, 57—60.

³ E.g. Jaenicke discerns formal and material, and primary and secondary sources, G. JAENICKE, "Völkerrechtsquellen," in: K. STRUPP and H. J. SCHLOCHAUER, *Wörterbuch des Völkerrechts*, 3, Berlin 1962, pp. 766—767; Monaco writes about traditional and "antypiques" sources of international law, *ibid.*, p. 599.

⁴ For example, Kelsen is of the opinion that "the ambiguity of the term 'source' of law seems to render the term rather useless [...] one ought to introduce an expression that clearly and directly describes the phenomenon one has in mind", H. KELSEN, *Principles of International Law*, II ed., Revised and edited by R. W. Tucker, New York 1966, p. 438; The term has been even stronger criticized by Tunkin. He writes that it itself "has greatly contributed to the confusion in the theory of sources of international law." G. J. TUNKIN, *op. cit.*, p. 67. Bos stating that the term "has been and still is being used to indicate all and sundry of these very divergent factors behind the real sources, and even more than that" thinks that the term 'source' should be thrown out altogether," M. BOS, *op. cit.*, p. 10. Sørensen, on the contrary, sees no inconvenience in the term nor objection against keeping it but on condition, as he writes: "qu'on se rende compte du sens exact dans lequel on entend l'employer". M. SØRENSEN, *Les sources du droit international*, Copenhagen 1946, p. 13.

⁵ For example, Kelsen instead of the term "source of international law" uses "methods of creating international law", R. W. KELSEN, *op. cit.*, p. 438. Tunkin although using as he writes a generally accepted term 'sources' discusses a general theory of "the norm-creating process in international law." G. J. TUNKIN, *op. cit.*, p. 67. Bos replaces the term by "recognized manifestation of law," M. BOS, *op. cit.*, p. 10. Whereas Schwarzenberger has "thoroughly eradicated the term 'sources' in favour of the distinction between law-creating processes and law-determining agencies," G. SCHWARZENBERGER, *The Inductive Approach to International Law*, London 1965, p. 2.

⁶ "[...] to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained [...]."

of the international law-making process the term "source of international law" is useless and even harmful, making coherent, scientifically valuable conclusions impossible. In place of it a still broader and at the same time unequivocal term should be introduced, embracing all possible instruments and, in general, factors which play or can play any role in the formation of international law.

For such a universal term *international law-making factor* is proposed here. With appropriate additional determinants it enables, it seems, a much fuller and more consistent than hitherto orientation in the more and more complex process of development of international law.

The number of so broadly conveyed international law-making factors is of course practically innumerable. Only an attempt at a possibly clear-cut systematization of such factors can enable a practical and, at the same time, logically sound orientation in the variety of factors participating in the formation of international law.

Among them, primarily, one should, it seems, single out the relatively small group of factors already described, or at least mentioned, in positive international law. One might call them "*legal* international law-making factors", in contrast to the vast majority of the remaining ones, the *non-legal* factors, not regulated, no even taken into consideration, in positive international law. The former can be found among others in such important documents as The United Nations Charter with the Statute of the International Court of Justice, the Vienna Convention on the Law of Treaties or in several constitutions of other international organizations which foresee procedures for elaboration of legal regulations or include other provisions factually contributing to the law-making process.⁷

Among legal international law-making factors of special importance are those which, according to positive international law, are relatively *self-sufficient*⁸ that is, which can without additional law-making factors produce norms of international law. The principal law-making instruments, treaty and custom, belong here.

Other legal international law-making factors are *non-self-sufficient* because to originate valid rules of international law they must be supplemented by additional factors. For example, the international practice mentioned in Article 38, 1b of the Statute of the World Court, constituting only one of the two necessary elements of international custom, must still be "accepted as law" to become such a custom. Normative recommendations of the UN General Assembly (e.g., the so-called declarations

⁷ See, e.g., K. SKUBISZEWSKI, "Enactment of Law by International Organs," *British Yearbook of International Law*, vol. 41, 1965—66.

⁸ "Relatively," since it may be questioned whether absolutely self-sufficient legal law-making factors exist at all.

of principles and adopted draft conventions) can become binding as law only on express or at least presumed (i.e. customary) recognition as such by states.

Still controversial is the character of the "general principles of law recognized by civilized nations" (Para. 1c of the above mentioned Article). On the one hand, since in principle municipal law cannot of itself be binding on international plane, the general principles in question to be sure constitute legal, but at most non-self-sufficient international law-making factors. On the other hand, however, one might assert not without reason that precisely paragraph 1c of Article 38 constitutes a formal introduction of such principles into positive international law and thus they have become self-sufficient international law-making factors.

All the factors discussed so far, whether self-sufficient or not, may be qualified as *formal*, since their law-making function is more or less explicitly determined in the provisions of positive international law. There are, however, yet other such factors which may also be found in that law, but without any express law-making function. They too, participate in the formation of international law rules but only factually and, therefore, may be called merely "*informal* legal international law-making factors". The self- (or non-self-) sufficiency of such factors depends only on their real authority in each case.

As examples, the "subsidiary means for the determination of rules of law" (Art. 38, 1d) may be mentioned primarily.

Judicial decisions constitute legal, formal and self-sufficient law-making factors only for the parties. There is, however, no doubt that judicial precedents play a very important role as an informal law-making factor. Being *expressis verbis* mentioned in positive international law they are legal. They are, however, only informal for they have no prescribed law-making function. It is, for example, undisputed that the rules formally only determined in such cases as the Corfu Channel case, the Nottebohm case, the Anglo-Norwegian Fisheries cases, and several others were in fact, to a considerable degree, created by the Court.⁹

A similar informal law-making function, though certainly in much lesser degree, is exercised by "most highly qualified publicists of the various nations". They do not merely determine existing unequivocal rules of international law, but, among others, confront them with new practice and reformulate, thus shaping them.¹⁰ At present, a considerable law-making role of such

⁹ See, e.g., H. LAUTERPACHT, *The Development of International Law by the International Court*, London 1958, pp. 3—25 and 394—400.

¹⁰ For example Virally states rightly: "The researches of scholars continue [...] to be useful not only for the ascertainment of the positive law, but also as guidance for its development and as a means of filling its deficiencies. M. VIRALLY, "The Sources of International Law," in: *Manual of Public International Law*, London 1968, p. 153.

experts may be observed in the International Law Commission where, as rapporteurs, they draft conventions. In fact, one might even say that the experts' opinions have already become formal legal international law-making factors, since they are *expressis verbis* included in the procedure of the Commission.¹¹

As far as unbinding resolutions are concerned, their formal or informal character as law-making factors depends mainly on their content. For example, a UN General Assembly resolution recommending the acceptance of a draft convention should be numbered among typical formal though non-self-sufficient legal law-making factors. Whereas non-normative recommendations expressing only an opinion of this organ, hence not yet being a stage expressly foreseen in the law-making procedure, can constitute to be sure an important, but merely informal, legal law-making factor.

In connection with legal international law-making factors, in order to avoid misunderstandings, it should be stressed that they can of course have their basis also in customary international law. For example, the principal legal and self-sufficient factors, custom and treaty, have their foundation in both, general customary and conventional law. Whereas, for example, the unilateral declarations of States, as it follows from the judgment of the International Court of Justice in the Nuclear Tests cases, constitute, on certain conditions, yet only a customary legal self-sufficient international law-making factors are *non-legal* since they are not even mentioned in organizations as international law-making factors is still only of conventional character, to be found in the constitutions of such organizations.

As has been already stated above, the vast majority of international law-making factors are *non-legal* since they are not even mentioned in positive international law, but practically play a more or less important role in the formation of that law.

Considering a great variety of such factors, the number of possible criteria for their division is practically unlimited. For the discussion of the international law-making process of special use may be their division into *normative* and *non-normative*, that is, into those constituting already a non-legal norm (or set of norms) of conduct and all other non-legal factors.

¹¹ See Statute of the International Law Commission and other Resolutions of the General Assembly to the International Law Commission (A/CN. 4/4, 2 Feb., 1949), Articles 16 and 20.

¹² This results clearly from the following well known passage in the Judgment: "43. It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations [...]", "Nuclear Tests Case," *ICJ Reports*, 1974, p. 267. One may of course doubt if the Court only determined an already ripe customary rule, or rather, like in many other cases, in fact to some degree made it.

As it is already well known, various kinds of moral norms were in the past and still are an important motive, inspiration or even ready standard in the process of international law formation. It suffices here to mention the rapidly developing international law protecting the human person with the Human Rights Covenants and the law of armed conflicts at the head. Similarly, rules of politeness, friendliness and good manner between States, of which a few have in time become rules of general international law, for example, in that of diplomatic relations.¹³ Included here should also be the already numerous purely technical regulations and standards elaborated by technicians and scientists, which more and more often are incorporated into international law, for example, into conventions protecting the human environment, health or safety. Finally, an important normative though, strictly speaking, only non-legal law-making factor is constituted by some rules of municipal law.¹⁴

As far as non-normative non-legal international law-making factors are concerned, their range is, in fact, very wide, from trivial and remote to basic ones of paramount importance in the process of the international law formation. Here, too, a division may be useful, namely into *expressed* and *unexpressed* ones. The expressed ones are those already mentioned in legal or non-legal regulations as their motive or objective, most often in their introductions. The other, unexpressed ones, though acting only in the background, are by no means only secondary in importance. As examples it suffices to mention such as the mutual confidence of the contracting parties, the anticipated costs of the implementation of the proposed regulation or, in general, the whole political situation.

Among possible international law-making factors one should yet mention the purely technical means, mainly various types of publications of documents and other records, which make the content of international law accessible. Such means are called by some authors "cognitive sources of international law"¹⁵ or "technical subsidiary means for the determination of rules of

¹³ For example, until the codification of 1961 the exemption of diplomatic agents from duties of goods for their private use was granted only by courtesy. see E. SATOW, *A Guide to Diplomatic Practice*, IV ed., London 1958, pp. 228—230.

¹⁴ For example. British navigation regulations have been accepted by all maritime States, see G. A. FINCH, "Les sources modernes du droit international," *Recueil des cours de l'Académie de droit international*, vol. 53, (1953—III), p. 583.

¹⁵ E.g., W. GÓRALCZYK, *Prawo międzynarodowe publiczne w zarysie* [Public International Law], III ed., Warszawa 1983, p. 62; R. BIERZANEK, J. JAKUBOWSKI, J. SYMONIDES, *Prawo międzynarodowe* [International Law], Warszawa 1980, p. 89.

Law".¹⁶ Some writers number them even among "formal sources of international law".¹⁷

In fact, the term "source" seems to be in this case sufficiently unequivocal and is universally used in research. It does not, therefore, need replacing. The division of such technical sources into *official* and *unofficial* (or private) and into *international* and *national* is also quite clear and useful.

In connection with technical sources it should be added that they, too, constitute *sui generis*, though certainly only non-self-sufficient international law-making factors, since the knowledge of *lex lata* and of practice, rendered possible by such technical sources, is indispensable for the international law-making and undoubtedly influences the content of rules. They have also been mentioned in the Statute of the International Law Commission and listed in other United Nations documents.¹⁸ Considering their specific character among international law-making factors, one might call them alternatively "technical international law-making factors".

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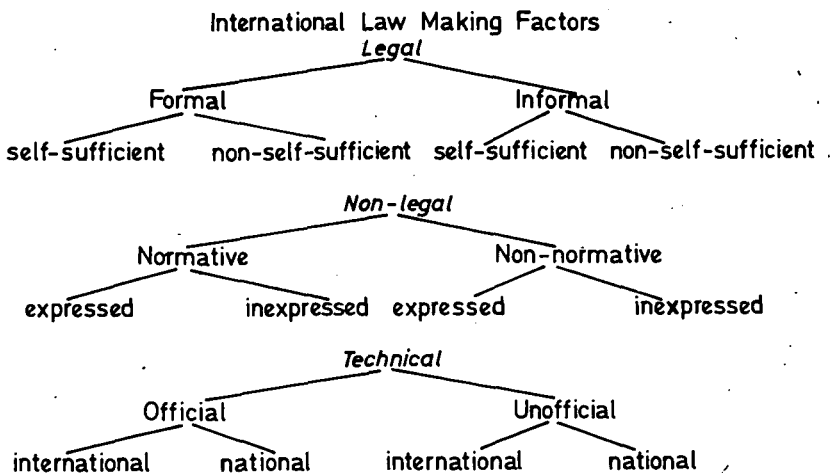
The proposed here systematization¹⁹ is of course merely another one,

¹⁶ E.g., F. BERBER, *Lehrbuch des Völkerrechts, Erster Band: Allgemeines Friedensrecht*, II ed., München 1975, p. 77.

¹⁷ E.g., L. EHRLICH, *Prawo międzynarodowe [International Law]*, IV ed., Warszawa 1958, p. 21.

¹⁸ *Statute, op. cit.*, Articles 19, 20 and 24; see e.g., *Ways and Means of Making the Evidence of Customary International Law More Readily Available* (A/CN. 4/6, 7 March, 1949).

¹⁹



and certainly not yet the best of the possible remedies for the terminological confusion in the theory of international law-making. It might, for instance, prove far more acceptable to keep after all the term "source of international law" on the sole condition of introducing a sound division of such sources.

Treaties Establishing Territorial Regimes

by ANNA WYROZUMSKA

A certain category of treaties referred to by some authors as territorial, real or establishing international servitudes and by others as localized or dispositive treaties has been for long a matter of interest for the doctrine of international law. These agreements bestow upon a part of State's territory a legal status, which for example provides for demilitarization or neutralization of such territory. Agreements concerned with free navigation on rivers and water-courses, establishing right of passage through a territory of another State and regulating international communication are also included in this category. A liable State is under an obligation to restrain its certain activities in the area or to tolerate certain acts of other States on the part of its territory.

In the present paper a notion of "treaties establishing territorial regimes" is used to denote such agreements. Using this term we leave aside controversial theoretical issues which arise when other terms are used.¹ Besides the notion accepted in this paper points directly at the phenomenon which is a real problem of international law — that is at territorial regimes. Very often treaties establishing boundaries and respective regimes are considered as treaties establishing territorial regimes, though the former do not regulate matters connected with the use of State's territory but with the spatial delimitation of States' sovereignty. The present dissertation does not deal with boundary treaties as such, however, certain issues related to these agreements are discussed, for many problems are common to all treaties establishing territorial regimes.

Distinction of treaties establishing territorial regimes is connected with specific features which are being attributed to them. An opinion is often expressed that a close connection of rights established by such treaties with

¹ For example the notions of "real treaties" or "treaties establishing international servitudes" are based upon a controversial assumption that real rights, which are effective *erga omnes*, exist in international law. On the other hand, the notion of "dispositive treaties" suggests an analogy with the transfer of ownership that is known in internal law.

the State's territory makes them more permanent than other agreements. This permanency is expressed by inadmissibility of unilateral denunciation of such treaties, by rejection of the application to them of the principle of *rebus sic stantibus* — that is a fundamental change of circumstances cannot be called upon as a reason of their termination — or by their automatic devolvement upon any legal successor of territory in question, in other words by their *ipso iure* succession.

The problem of treaties establishing territorial regimes has appeared recently in works of the ILC on the law of treaties and on the law of succession. For this reason it seems interesting to investigate whether territorial treaties possess specific features and whether this fact is reflected by codifications concerned with the mentioned areas.

I. Treaties Establishing Territorial Regimes in the Light of the Law of Treaties

1. Treaty Territorial Regimes as Objective Regimes

Treaties establishing territorial regimes are often recognized by the doctrine of international law as agreements creating the so-called objective regimes which are effective towards any other subject, that is *erga omnes*.² Already in 1929, during his Hague lectures A. Verdross underlined that the principle of *pacta tertiis nec nocent nec prosunt* "n'est pas valable pour les conventions créatrices de droits territoriaux"³ for these rights "une fois établis, sont valables vis-à-vis de toute autorité".⁴ This opinion was shared by J. Hostie,⁵ who during his Hague lectures stated three years later, that territorial rights are effective *erga omnes* and preserve their validity in case of succession.

² See e.g. G. SCHELLE, *Cours de droit international public*, Paris 1947, p. 623; Ch. de VISSCHER, *Théorie et réalités en droit international public*, Paris 1953, p. 314 ff; A. McNAIR, *The Law of Treaties*, Oxford 1961, p. 255 ff; P. REUTER, "Principles du droit international public", in: *Recueil des Cours de l'Académie de Droit International (RCADI)*, vol. 2, 1961, p. 448 ff; R. BATURO, *Umowy międzynarodowe a państwa trzecie [International Agreements and Third States]*, Wrocław 1971, p. 112 ff; J. F. PREVOST, *Les effets des traités conclus entre Etats à l'égard des Etats tiers*, Paris 1973; P. CAHIER, "Effets des traités à l'égard des Etats tiers," RCADI, vol. 3, 1974, No. 143, p. 653; NGUYEN QUOC DINH, *Droit International Public*, Paris 1980, p. 231 ff; J. C. F. ROZAS, "La succession d'Etats en matière des conventions fluviales", in: *The Legal Regime of International Rivers and Lakes*, ed. R. Zacklin, L. Caflisch, The Hague, Boston, London 1981, p. 148 ff.

³ A. VERDROSS, *Règles générales du droit international de la paix*, RCADI, vol. 5, 1929, No. 30, p. 301.

⁴ *Ibid.*, p. 376.

⁵ J. HOSTIE, "Examen des quelques règles du droit international dans le domaine des communications et du transit," RCADI, 1932, No. 40, p. 447 ff.

of States. In 1965 the International Law Association defined territorial treaties as treaties

"which are in the nature of objective territorial régimes created in the interest of one nation or the community of nations; are applied locally in virtue of territorial application clauses; touch or concern a particular area of land,"⁶

thus an objective legal effectivity of such agreements was recognized.

The special legal effectivity of territorial treaties was also noticed by the Committee of Jurists of the League of Nations in the Aland Islands case of 1920⁷ and by the Permanent Court of International Justice (PCIJ) in the *Wimbledon* case of 1923.⁸

Nowadays, the fact that certain treaties are effective towards States, not Parties to them, is not questioned. The existence of such agreements was confirmed by the Vienna Convention on the Law of Treaties of 1969. A step further was taken by the International Court of Justice (ICJ) in 1970, in the case concerning the Barcelona Traction, Light and Power Company Ltd., when it was stated that there are obligations in international law in the protection of which all States are interested in, and that they are effective *erga omnes*.⁹ However, the doctrine of international law is not in agreement on what treaties create objective regimes and why these treaties have specific legal effects.

A great amount of attention was paid to objective regimes during preparatory proceedings of the Vienna Convention on the Law of Treaties of 1969. Several Articles (i.e. 14, 17, 18 and 26) of the draft prepared by G. Fitzmaurice, special rapporteur of the ILC, were devoted to these issues. All of them were based upon an assumption that the *erga omnes* effect is not created by a treaty itself. Such an effect results instead from

*"[...] le devoir général des Etats de respecter, de reconnaître et d'accepter, au sens juridique du terme, les conséquences d'actes internationaux licites et valides conclus entre d'autres Etats et ne portent pas atteinte aux droits des Etats qui n'y sont pas parties."*¹⁰

Consequently Article 18 imposed upon all States an obligation

*"de reconnaître et de respecter les situations de droit ou de fait établies par les traités licites et valides".*¹¹

⁶ *The Effect of Independence on Treaties, International Law Association, Committee on State Succession to Treaties and Other Governmental Obligations, A Handbook*, London 1965, pp. 352—353.

⁷ See *The League of Nations Official Journal*, Octobre 1920, Special Supplement, No. 3, pp. 16—19.

⁸ See *The Permanent Court of International Justice (PCIJ)*, (1923), Series A No. 1, p. 22.

⁹ *The International Court of Justice (ICJ), Reports*, 1970, p. 32.

¹⁰ Cinquième rapport de sir Gerald Fitzmaurice sur le droit de traités, Doc. A/CN.4/130, *Annuaire de la Commission de Droit International (ACDI)*, vol. 2, 1960, p. 93, para. 71.

¹¹ See *ibid.*, p. 76 and the commentary p. 92.

As G. Fitzmaurice explained, the main purpose of this provision was to point out that States cannot question the validity of a treaty which they are not Parties to. States are obligated to respect provisions of a treaty and, if they want to benefit from such provisions, they must comply with conditions thus established.¹² It resulted further from Articles 14, 17 and 26 that the effectivity of treaties providing for objective regimes towards a third State arises either from consent or acquiescence of this State, expressed by a compliance with treaty provisions or from the fact that contractual obligations, after securing a substantial degree of acceptance, have been transformed into customary obligations. Propositions presented by special rapporteur were considered by the ILC with a great amount of caution. Partly because despite preliminary rejection of an assumption of "*mystique ésotérique qui s'attacherait à certains types de traités*,"¹³ as G. Fitzmaurice called it himself, his conceptions were not free of it. It is sufficient to look at the final wording of Article 14 paragraph 2.¹⁴ Similarly, when speaking about a presumption resulting from the principle of *pacta tertiis nec nocent nec prosunt*, G. Fitzmaurice stated that it is

*"affaiblie, et peut disparaître lorsque, compte tenu de sa nature ou des circonstances, le traité, doit être considéré, ou est en fait considéré, comme produisant des effets erga omnes."*¹⁵

Thus he admitted that the *erga omnes* effect can result from the nature of a treaty.

The draft prepared by G. Fitzmaurice was not discussed by the ILC for H. Waldock was nominated a new special rapporteur. H. Waldock's considerations of issues being the subject of our interest, resulted in a proposal of Article 63 of the convention on the law of treaties.¹⁶ This article defined

¹² *Ibid.*, p. 92 ff.

¹³ *Ibid.*, p. 93, para. 71.

¹⁴ Art. 14 stated that: "1. Lorsqu'il fait usage du territoire maritime ou terrestre d'un autre Etat et que les conditions de l'usage dudit territoire aux fins dont s'agit font l'objet d'un traité auquel l'Etat tiers intéressé n'est pas partie, les navires et les ressortissants de l'Etat, ou le cas échéant l'Etat lui-même, sont tenus de respecter les conditions en question.

"2. La même règle s'applique pour ce qui est de l'usage d'un territoire placé par traité sous un régime international prévoyant l'usage en commun à des fins et dans des conditions fixées par le traité, et dans des circonstances telles que traité produit ses effets erga omnes ou vient à être considéré comme tel" (emphasis added), *ibid.*, p. 75, commentary, p. 87.

¹⁵ *Ibid.*, p. 73.

¹⁶ Art. 16 reads:

"A treaty establishes an objective regime when it appears from its terms and from the circumstances of its conclusions that the intention of the parties is to create in the general interest general obligation and rights relating to the particular region, State, territory, locality, river, waterway, or to a particular area of sea, sea-bed, or air-space; provided

the notion of "objective regime" and, at the same time, the sources of *erga omnes* effect were explained. Article 63 pointed out that the objective regime can be established if Parties have intention to create in the interest of all, an obligation effective towards any other subject and if legal relations concerning land, sea, airspace or outer space are the object of a treaty. It is also required that State or States possessing territorial competence with respect to the subject matter of a treaty are present among Parties or have at least accepted provisions concerned with the said regime.¹⁷ From paragraph 2 and 3 of Article 63 resulted further that the effectivity of objective regime towards a third State flows from the consent or lack of objection, over a certain period of time, on the part of this State. G. Fitzmaurice was therefore closer to ascertain the automatic, *erga omnes* effect of treaties as a result of their specific features.

H. Waldock's proposal was met with criticism within the ILC, despite its moderation. A substantial majority of Commission's members declared themselves against Article 63¹⁸ though generally the idea of this article was accepted.¹⁹ Anxieties prevailed that this provision could become a law-

that the parties include among their number any State having territorial competence with reference to the subject-matter of the treaty, or that any such State has consented to the provision in question.

"2. a) A State not a party to the treaty, which expressly or impliedly consents to the creation or to the application of an objective regime, shall be considered to have accepted it.

"b) A State not a party to the treaty, which does not protest against or otherwise manifest its opposition to the regime within a period of X years of the registration of the treaty with the Secretary-General of the United Nations, shall be considered to have impliedly accepted the regime.

"3. A State which has accepted a regime of the kind referred to in paragraph 1 shall be:

"a) bound by any general obligation which it contains; and

"b) entitled to invoke the provisions of the regime and to exercise any general right which it may confer; subject to the terms and conditions of the treaty.

"4. Unless the treaty otherwise provides, a regime of the kind referred to in paragraph 1 may be amended or revoked by the parties to the treaty only with the concurrence of those States which have expressly or impliedly accepted the regime and have a substantial interest in its functioning", Third Report on the Law of Treaties by Sir H. Waldock, Doc. A/CN.4/167 and Add., *Yearbook of the International Law Commission (YILC)*, vol. 2, 1964, p. 26 ff.

¹⁷ See YILC, vol. 2, 1964, p. 33, especially para. 19 and 20. According to the explanation presented by H. Waldock Art. 63 did not cover treaties establishing objective regimes that is law-making treaties relating to the general international law and treaties establishing international organizations. See the exemplification of treaties establishing objective regimes contained in P. CAHIER, *op. cit.*, p. 660; J. P. JACQUÉ, *Eléments pour une théorie de l'acte juridique du droit international public*, Paris 1972, p. 459; A. ALVAREZ, *La codification du droit international*, Paris 1912, p. 494 ff.

¹⁸ See YILC, vol. 1, 1964, p. 96 ff.

¹⁹ See e.g. the statements of Briggs, *ibid.*, p. 103; of Verdross, p. 99; of Luna, p. 99; of Paredes, p. 97; of Rosenne, p. 103; of Tunkin, p. 103; of Yasseen, p. 101.

making tool and could be used by powerful States to impose their will upon the weaker ones.²⁰ As a result, a conclusion was reached by the Commission that the issue of objective regimes is causing too much controversies and States, on the other hand, would not accept any provisions which allow for the establishment of objective regime, under certain conditions, by the own force of a treaty. The Commission decided not to foster any provisions in this matter.²¹

In this manner principles relating to other treaties providing for rights and obligations in favour or to disadvantage of a third State are contained in Articles 34—38 of the Vienna Convention on the Law of Treaties of 1969 apply also to objective regimes. It can be therefore inferred that an objective regime is created as a result of consent of a third State or through transformation of a treaty rule into a customary one.²²

Reasoning reflected in Articles 34—38 of the Vienna Convention of 1969 is often accepted by the doctrine. On the other hand, however, a statement that the effect of a treaty towards a third State, not Party to it, results from the consent of such State²³ does not explain the objective effect of this treaty, since a consent to be bound by a treaty is in contradiction with such an effect. Thus J. P. Jacqu   is correct in observing that

*"le recours    une explication volontariste de l'opposabilit   des r  gimes objectifs repose sur une fiction."*²⁴

An opinion is equally often proclaimed that effectivity of such agreements as for example: agreements concerning international communication or navigation through international water-ways and straits, towards third States results from the transformation of provisions contained therein into international custom.²⁵ Therefore, a third State is bound by a customary rule and

²⁰ See *ibid.*, pp. 101—103, the statements of Yasseen and Tunkin.

²¹ See YILC, vol. 2, 1966, p. 231.

²² Compare T. O. ELIAS, *The Modern Law of Treaties*, A. W. Sijthoff, Leiden 1974, p. 59 ff.

²³ Among the advocates of this conception are P. REUTER, *Introduction au Droit des Trait  s*, Paris 1972, p. 114; G. SCHWARZENBERGER, *A Manual of International Law*, London 1960, p. 458; Ch. de VISSCHER, *op. cit.*, p. 329; M. LACHS, "Le d  veloppement et des fonctions des trait  s multilat  raux," RCADI, vol. 2, 1957, No. 92, p. 315 ff.

²⁴ J. P. JACQU  , *op. cit.*, p. 473.

²⁵ E.g. J. L. BRIERLY, "R  gles g  n  rales du droit de la paix," RCADI, vol. 4, 1936, No. 58, p. 223; Ch. de VISSCHER, "La question des Iles d'Aland," *Revue de Droit International et de L  gislation Compar  e*, 1921, p. 262; C. J. HOYT, *The Unanimity Rule in the Revision of Treaties, A Re-examination*, The Hague, Nijhoff 1959, p. 242; E. VITTA, "Le trait   multilat  ral peut-il   tre consid  r   comme un acte l  gislatif?," *Annuaire Fran  ais de Droit International* (AFDI), 1960, p. 228; E. J. ROUCOUNAS, "Le trait   et les Etats tiers," *Revue hell  nique de droit international*, 1964, p. 320.

not by treaty provisions. This thesis though valid in certain cases, has its weaknesses.²⁶ Namely it assumes that general, permanent and consistent with treaty provisions practice is required for a custom to be established. Custom can already be established as a result of competent State's consent to certain activities conducted by other States. For example, if a riparian State permits of free navigation on water-way situated within its territory. In case of a treaty which establishes such a right in favour of third States, the treaty itself imposes upon a riparian State an obligation to permit of free navigation by third States. If therefore the right of free navigation has existed prior to the respective practice, it is unnecessary to explain the effect of legal regime towards third State with the help of custom. Besides for the establishment of custom passage of certain period of time is required, whereas the objective effect of a treaty arises at the very moment of its entry into force and not after a certain time.

Apart from the already mentioned, other explanation of objective effect of a treaty often occurs. Some authors²⁷ believe that the absolute effect of a treaty is brought about by the general duty of all States to respect the lawful and valid treaties entered into between other States. This principle, like the principle of *pacta sunt servanda*, constitutes a fundamental element of the law of treaties and contributes to the notion of legal act in international law. It offers a straightforward explanation of why existence of a certain legal regime becomes a fact for third States. References to this principle are not sufficient, however, to justify the establishment of treaty rights and obligations valid with respect to States, not Parties to such treaty.

Very often an argument is being put forward that the objective character of certain treaties results from intention of Parties to create universal rights and obligations which are consistent with the general, international interest.²⁸

²⁶ Compare the remarks of E. KLEIN, (*Statusverträge im Völkerrecht*, Berlin — Heidelberg — New York 1980, p. 154 ff; and of J. F. PREVOST (*op. cit.*, p. 480 ff).

²⁷ See P. BRAUD, "Recherches sur l'Etat tiers en droit international public," *Revue Général de Droit International Public* (RGDIP), vol. 72, 1968, p. 84 ff; compare the opinion of the ICJ of 1949 in the case concerning the reparation for injuries suffered in the service of the United Nations, (*Cour Internationale de Justice, Recueil*, 1949, p. 185) — the existence of the UN was recognized by the ICJ as effective with respect to the whole world. Therefore it is a duty of third States to refrain from any action that would make impossible the accomplishment of the treaty creating this organization — was this statement not based on the principle of respect for lawful and valid treaties.

²⁸ It is important to note that in the definition of an objective regime, presented by H. Waldock, and in Articles 35 and 36 of the Vienna Convention of 1969 the "intention of Parties" is seen as a significant element of the construction of treaties effective with the respect to third States. The importance of this element for the determination of treaty's effect was also recognized by the PCIJ in the Wimbledon case. Namely, the intention of drafters of the Versailles Treaty of 1919 to secure free access to and navigation on the Kiel Canal was underlined. (*Cour Permanente de Justice Internationale* (CPJI) *Recueil*, 1923, series

It is by all means certain that the intention of Parties is one of elements that have to be considered when treaty's character is being evaluated. The analysis of Parties' intention may lead also to the opposite conclusion when States decide to limit the effects of concluded agreement. This was done, for example, by the Parties to the Paris Treaty of 1954 on navigation over the Mekong River. Article 2 of this treaty granted the right of navigation on Mekong only to States which were recognized by the contracting Parties.²⁹ However, the intention of Parties is not the sole element which denominates the character of a treaty. For instance the Hay-Pauncefote Treaty of 1901 limited explicitly its effects to Parties, this, however, did not prevent the creation of an objective situation with respect to the Panama Canal.³⁰

Participation of great powers in treaties was often called upon to justify the *erga omnes* effect of such agreements. Well known historical cases were cited, when great powers, using their position, imposed their decisions upon other States.³¹ A question therefore arises whether or not such facts can be legally valid. All those who ascertain that this is first of all a political phenomenon are correct.³² Nowadays, imposition of will by powers upon other States is contradictory to the fundamental principle of international law, to the principle of sovereign equality of States contained in Article 2 of the

A, No. 1, pp. 23, 28; compare YILC, vol. 2, 1964, p. 29, para. 10; similarly the ICL in the case concerning reparations for injuries suffered in the service of the United Nations underlined the intention of States-members of the UN to "[...] créer une entité possédant une personnalité internationale objective [...]" CIJ, *Recueil*, 1949, p. 185.

²⁹ Compare NGUYEN QUOC DINH, "L'Internalisation de Mékong," AFDI, 1962, p. 91 ff.

³⁰ Compare R. F. ROXBURGH, *International Conventions and Third States*, London 1917, pp. 63—70; J. F. PREVOST, *op. cit.* p. 381. In the case of Panama Canal the objective situation has been created with the passage of certain period of time and as result of specific application of treaty in question. It is only in this context that we can say that a treaty created an objective situation. Compare YILC, vol. 2, 1964, p. 29, para. 10.

³¹ See e.g. L. L. PANKRURST, *The Obligations of Treaties in Relation to the Concert of Nations*, 1887, p. 236; J. WESTLAKE, *International Law*, Cambridge 1919, vol. 1, p. 321; R. F. ROXBURGH, *op. cit.*, p. 62 ff; G. SCELLE, *Précis de droit des gens, Principes et systématique*, Paris 1934, vol. 2, p. 187; R. QUADRI, "Le fondement du caractère obligatoire du droit international public," RCADI, 1952, vol. 82, p. 625 ff; K. WOLFKE, *Zwyczaj we współczesnym prawie międzynarodowym [Custom in Modern International Law]*, Wrocław 1963, p. 83 ff; IDEM, *Great and Small Powers in International Law from 1814 to 1920*, Wrocław 1961, p. 126 ff; J. TOUSCOZ, *Le principe l'effectivité dans l'Ordre International*, Paris 1964, p. 91; R. QUADRI, *op. cit.*, p. 625; compare also Art. 110 J. C. BLUNTSCHLI, *Le droit international codifié*, Paris 1874.

³² E.g. J. TOUSCOZ, *op. cit.*, p. 93.

United Nations Charter. J. F. Prevost is correct in observing that in such case

*"les Etats font usage de leur puissance en violation du droit et en aucun cas cela ne saurait fonder l'effet des traités qu'ils concluent, à l'égard des Etats tiers. Admettre le contraire serait affirmer qu'une illégalité pourrait fonder un droit; le droit, pour effectif qu'il soit n'en demeurerait pas moins «illégal»."*³³

Therefore, the principle of *ex iniuria ius non oritur* as well as the fact that explanation of legal effectivity of treaties can not be of political nature, precludes the validity of the mentioned conception.

Despite the rejection of the former, certain authors accept that in favourable conditions States can act similarly to legislator in internal law, that is they can dictate law to other States.³⁴ Such "superiority" can result from many factors e.g. military or economic power of States, their geographic position or their number. These conceptions are based upon an assumption that the objective regime is created

*"[...] non pas précisément par le seul effet du traité qui est à son origine, mais du fait de son effectivité, en d'autres termes, de l'exécution qu'il a recue".*³⁵

The phenomenon of effectivity of a treaty cannot be used as an explanation of its unconditioned effect, for as J. F. Prevost observes,³⁶ this phenomenon comes into being at the moment of or after the entry of a rule into the body of positive law. It is therefore, subsequent to the legal process of creation of a norm. The effectivity of a treaty can be, however, an important supporting element of the *erga omnes* result of an agreement.

The above-mentioned conceptions lead to general conclusion that the *erga omnes* effect of a treaty

*"repose sur la volonté et la capacité des Etats parties d'en garantir le respect par les autres Etats".*³⁷

States, in order to establish rights and obligations of objective effect have to represent, as Nguyen Quoc Dinh states: *"ensemble d'Etats suffisamment représentatifs"*.³⁸ As we have already indicated, the intention of Parties

³³ J. F. PREVOST, *op. cit.*, p. 485 ff.

³⁴ E.g. P. BRAUD, *op. cit.*, pp. 77, 80, 84; Ch. ROUSSEAU, *Droit international public*, Paris 1970, vol. 1, p. 66 ff.

³⁵ Ch. de VISSCHER, *Les effectivités du droit international public*, Paris 1967, p. 47. Similarly P. GUGGENHEIM, *Traité de droit international public*, Genève 1967, vol. 2, p. 443.

³⁶ J. P. PREVOST, *op. cit.*, p. 488.

³⁷ See NGUYEN QUOC DINH, *Droit*, Paris 1980, p. 237; and P. CAHIER, *op. cit.*, p. 653; P. REUTER, "Principes du droit international public," *RCADI*, vol. 2, 1961, p. 418 ff.

³⁸ NGUYEN QUOC DINH, *Droit*, Paris 1980, p. 327; similarly P. REUTER, *Principes*, p. 446 ff; see also J. F. PREVOST, *op. cit.*, p. 491.

to cause effects valid with respect to third States is of significance for the establishment of objective regime. It is equally important, that Parties to a treaty are able to express such an intention. Such a capacity can result, for example, from territorial jurisdiction or generally from States' competency with respect to the subject matter of a treaty.³⁹ Representativeness of an assembly should not be evaluated from the point of view of political power of its members, not by the affiliation of great powers to it.

It is observed by G. Scelle that sometimes

*"les gouvernants d'un seul Etat ou d'un groupe restreint d'Etats, vont formuler des principes régissant la communauté internationale globale, ou une communauté internationale plus large que le groupe interétatique auquel ils se rattachent. Cette prétention et cette initiative peuvent être juridiquement légitimes si la règle formulée correspond à l'intérêt social et si le législateur international, agissant unilatéralement, peut être considéré comme ayant compétence à cet effet".*⁴⁰

Thus, G. Scelle underlined an important element which may influence the effectivity of a treaty, namely its conclusion in the general interest or in the interest of a group of States. The same element is also pointed at by advisory opinions and judgments of organs settling international disputes.⁴¹ Conclusion of a treaty in the objectively valid interest of States, of one State or of the whole of international community underlines the importance of subject matter and purpose of an agreement. Thus, this specific purpose of a treaty, and subsequently its subject matter, seems to be a co-deciding element of *erga omnes* effect.

Considerations presented so far lead to conclusion, that origins of the *erga omnes* effectivity of a treaty should be sought in a treaty itself, in its internal features. Other factors do not prejudice whether or not a treaty can create the *erga omnes* effect, though they can strengthen such an effect. This special, objective effectivity of a treaty must result from its specific features such as: the intention of Parties to establish rights and obligations which are effective *erga omnes*; the capacity of Parties to conclude such treaty (Parties have to represent "an assembly of States sufficiently representative" in regard to the subject-matter of a treaty and the ability to ensure the effectivity of its provisions), and the special purpose and subject-matter of a treaty (i.e. its conclusion in the objective interest of all

³⁹ Compare J. P. JACQUÉ, *op. cit.*, p. 475; compare Art. 63 of H. Waldock's draft; see YILC, vol. 2, 1964, p. 26 ff, and especially para. 18. See also J. F. PREVOST, *op. cit.*, p. 491.

⁴⁰ G. SCELLE, *op. cit.*, p. 324 and P. REUTER, *Principes*, p. 446 ff.

⁴¹ See e.g. the case of Aland Islands, the L. of N. *Off. Journal*, Oct. 1920, Special Supp., No. 3, pp. 16—19; the Wimbledon case, *PCIJ Reports*, 1923, series A, No. 1, p. 22; the advisory opinion on the international status of S.W. Africa, *ICJ Reports*, 1950, p. 132; the case of Barcelona Traction, Light and Power Company Ltd., *ICJ Reports*, 1970, p. 32.

States, of a group of States or in the interest of a single State). It seems, therefore, that it is the objective validity of interest, in protection of which a treaty has been concluded, that decides about its *erga omnes* effect.

2. Unilateral Denunciation of Treaties Establishing Territorial Regimes

When at the beginning of the 20th century a point of view permitting unilateral denunciation of a treaty, in case when such a right was not foreseen in its contents, prevailed⁴² opinions were also expressed, by W. E. Hall for example, that a treaty can be unilaterally renounced only if its contents clearly indicates the intention not to establish a permanent regulation.⁴³ Similarly, L. Oppenheim distinguished treaties which can be denounced for they

"[...] are either not expressly concluded for ever, or apparently not intended to set up an everlasting condition of things".⁴⁴

e.g. commercial treaties and alliances, and treaties which cannot be denounced for they

"[...] are apparently intended, or expressly concluded, for the purpose of setting up an everlasting condition of things",⁴⁵

e.g. peace treaties and boundary treaties. The contemporary authors are of an opinion that it is the intention of Parties that decides about the unilateral denunciation of a treaty which contains no direct provisions on this matter.⁴⁶ The determination of Parties' intentions can be based upon the evaluation of treaty provisions, of circumstances of conclusion of an agreement or of its legal character. According to these opinions, treaties establishing territorial regimes could not be unilaterally renounced.

The same attitude towards the problem of unilateral denunciation of treaties was adopted by the ILC during its works on the convention on the law of treaties. Presented by commission's special reporters propositions of provision on unilateral denunciation of treaties were based upon differentiation of treaties according to their specific legal nature G. Fitzmaurice was of an opinion that a treaty could expire only if the right of unilat-

⁴² See on this subject M. FRANKOWSKA, *Wypowiedzenie umowy międzynarodowej* [Denunciation of International Agreement], Wrocław 1976, p. 134 ff; E. KLEIN, *op. cit.*, p. 254.

⁴³ W. E. HALL, *A Treatise on International Law*, Oxford 1909, p. 341.

⁴⁴ L. OPPENHEIM, H. LAUTERPACHT, *International Law*, London 1955, p. 938; and J. L. BRIERLY, *The Law of Nations. An Introduction to the International Law of Peace*, Oxford 1942, p. 330 ff.

⁴⁵ *Ibid.*

⁴⁶ Cf. Art. 34 of the Harvard Draft, *American Journal of International Law* (AJIL), 1935, vol. 29, p. 1173; A. McNAIR, *op. cit.*, p. 511; D. P. O'CONNELL, *International Law*, London 1965, p. 284; Ch. ROUSSEAU, *op. cit.*, p. 213.

teral renouncement could be deduced from Parties' intent and from the nature of treaty itself.⁴⁷ Therefore, specific subject matter of certain agreements would preclude the application of this right to such treaties. H. Waldock devoted Articles 16 and 17 of his draft to the problem of denunciation of treaties. Article 17, in several of its clauses, enumerates categories of treaties which cannot be unilaterally renounced: among others, treaties establishing State's boundaries, treaties on cession of territory or granting territorial rights (para. 1), as well as treaties establishing a special international regime for a particular area, territory, river, waterway or airspace (para. 2)⁴⁸. The ILC accepted none of these propositions and in the draft of convention Article 39 was inserted which stated that:

"A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless it appears from the character of the treaty and from the circumstances of its conclusion or the statements of the parties that the parties intended to admit the possibility of a denunciation or withdrawal".⁴⁹

In the final draft of convention (Art. 53) all additional elements allowing for the determination of whether or not a treaty can be denounced were erased, and only "the intention of parties"⁵⁰ was left. However, States participating in the Vienna conference protested against this action. Therefore, an amendment to Article 53, proposed by Great Britain, was accepted. Introduction of "character of a treaty" as an additional qualifier was suggested to allow the abolition of an assumption favourable to inadmissibility of denunciation.⁵¹ Finally, Article 56, paragraph 1 of the Vienna Convention of 1969 states that:

"Un traité qui ne contient pas de disposition relatives à son extinction et ne prévoit pas qu'on puisse le dénoncer ou s'en retirer ne peut faire l'objet d'une dénonciation ou d'un retrait, à moins:

"a) qu'il ne soit établi qu'il entraînait dans l'intention des parties d'admettre la possibilité d'une dénonciation ou d'un retrait; ou

"b) que le droit de dénonciation ou de retrait ne puisse être déduit de la nature du traité".⁵²

⁴⁷ See YILC, vol. 2, 1956, p. 105; YILC, vol. 2, 1957, p. 22 ff and p. 30.

⁴⁸ YILC, vol. 2, 1963, p. 64.

⁴⁹ *Ibid.*, p. 200.

⁵⁰ See YILC, vol. 2, 1966, p. 183 and the commentary p. 250 ff, for the discussion in the ILC see also *ibid.*, vol. 1, the remarks of Verdross, Tunkin and Rossenne, p. 44; remarks of Briggs, Yasseen, p. 47; remarks of Bartoš, p. 48.

⁵¹ See A/CONF.39/C.1/L.311; in favour of the amendment 26 votes, 25 against and 37 absentions.

⁵² Text according to *Conférence des Nations Unies sur le Droit des Traités, Deuxième session, Vienne, 9 avril—22 mai 1969, Documents Officiels*, p. 116.

When a *contrario* reasoning is applied to Article 56, paragraph 1 it seems clear that the right of unilateral denunciation cannot apply to treaties establishing territorial regimes because of their special legal nature. Confirmation of this statement can be found in the ILC's commentary on Article 53 of the draft convention where it was clearly stated that "the very character of some treaties"⁵³ excludes the possibility of their denunciation — peace treaties and boundary treaties were cited as examples.

3. Application of the Principle of Fundamental Change of Circumstances to Treaties Establishing Territorial Regimes

Apart from controversies surrounding the principle of *rebus sic stantibus*, the doctrine of international law⁵⁴ for long has been pointing out that this principle cannot be applied to treaties establishing territorial regimes. This tendency was followed by G. Fitzmaurice, whose propositions of provisions on fundamental change of circumstances (Articles 21, 22, 23) mentioned "system or régime creating treaties"⁵⁵ as exceptions to the rule. Territorial treaties were treated in a similar manner by H. Waldock. Provision proposed by him stated, that:

"An essential change in the circumstances forming the basis of a treaty may not be invoked for the purpose of terminating —

"a) stipulations of a treaty which effects a transfer of territory, the settlement of a boundary, or a grant of territorial rights;

"b) stipulations which accompany a transfer of territory or boundary settlement and are expressed to be an essential condition of such transfer or settlement".⁵⁶

This special distinction of territorial treaties was criticized by members of the ILC.⁵⁷ The identical treatment of treaties granting territorial rights and boundary treaties and, above all, the exclusion of the former from the scope of application of principle of *rebus sic stantibus* was strongly objected to.

⁵³ See YILC, vol. 2, 1966, commentary to Art. 53, p. 250.

⁵⁴ See on this subject: T. JASUDOWICZ, *Wpływ zmiany okoliczności na obowiązywanie umów międzynarodowych* [Effect of a Change of Circumstances on the Binding of International Agreements], Toruń 1977 — an extensive monograph; T. O. ELIAS, *op. cit.*, p. 119; J. L. BRIERLY, *The Law of Nations*, p. 205 ff; J. F. GARNER, "The Doctrine of *Rebus Sic Stantibus* and the Termination of Treaties," AJIL, vol. 21, 1927, p. 509; G. CRUSEN, *Les servitudes internationales*, Paris 1929, p. 119.

⁵⁵ See YILC, vol. 2, 1957, pp. 32–33; commentary p. 56 ff; Art. 22 in connection with Art. 19 of the draft, in: Second Report on the Law of Treaties by Sir Gerald Fitzmaurice.

⁵⁶ The draft of Art. 22, para. 5 YILC, vol. 2, 1963, p. 80, see the commentary p. 85, para. 17.

⁵⁷ See *ibid.*, vol. 1, the remarks of Tabibi, p. 139; of Lachs, p. 140; of El-Erian, p. 144; of Elias, p. 147; of Bartoš, p. 149; of Pal, p. 150.

It was also pointed out that the proposed exception would be contradictory to the right of nations to self-determination, would consolidate treaties concluded without consideration of interests of newly independent States as well as unequal treaties. The same remarks were later raised by States' representatives commenting the draft convention on the law of treaties⁵⁸ as well as during the Vienna conference.⁵⁹ For this reason, already in Article 44, paragraph 3, point a of the Commission's draft and later in Article 59, paragraph 2, point a, only treaties establishing boundaries were excluded from the application of the principle of *rebus sic stantibus*.⁶⁰

The problem of treaties establishing territorial regimes was reopened during the Vienna conference of 1968 when the United States proposed the inclusion of treaties "establishing territorial status or settling territorial disputes" in paragraph 2, point a of the already then, Article 62.⁶¹ It should be mentioned here that the participants were in agreement as to the very idea of this amendment.⁶² However, objections were raised by the exemplification of treaties establishing territorial status, as cited in the amendment. Agreements establishing the *status quo* of islands, treaties on national minorities and custom concessions as well as the Antarctic Treaty were mentioned⁶³ — in other words, all these agreements inclusion of which into a category of treaties establishing territorial status could be challenged. Thus doubts were expressed whether it is at all possible to define treaties which would fall within the scope of proposed provision.⁶⁴ Besides, anxieties reappeared that territorial treaties concluded with the use of force could be consolidated.⁶⁵ For this reason the amendment was rejected.⁶⁶

4. Final Remarks

Considerations presented above show how little and, at the same time,

⁵⁸ See e.g. the statements of representatives of Cameroon and Venezuela, YILC, vol. 2, 1966, p. 41 ff.

⁵⁹ See *Conférence des Nations Unies sur les Droits des Traités, Première Session, Documents Officiels*, New York 1968, the statements of delegates from Afghanistan, p. 406; Bolivia, p. 402; Ecuador, p. 408; Byelorussia, p. 411.

⁶⁰ See YILC, vol. 2, 1963, p. 207 ff, especially para. 12.

⁶¹ See UN. Doc. A/Conf./39/C.1/L.335.

⁶² See *Conférence...*, *Première Session*, 1968, the statements of representatives of Italy, Japan, Switzerland and of H. Waldock, pp. 414, 399, 401 and 415 respectively.

⁶³ See *ibid.*, p. 399.

⁶⁴ See the statements of representatives of Czechoslovakia, *ibid.*, p. 403; of France, p. 410; of Byelorussia, p. 411; of Hungary, p. 412.

⁶⁵ Cf. the statements of delegates from: Poland, *ibid.*, p. 404; Spain, p. 403; India, p. 406; Ecuador, p. 408; Morocco, pp. 412—413.

⁶⁶ The amendment was rejected by 43 votes against, 14 in favour and 28 absentions; see *ibid.*, p. 415.

how much was needed in 1969 to secure full recognition of a special character of treaties establishing territorial regimes. In the Vienna Convention on the Law of Treaties of 1969 this problem was hidden among other provisions. In general, these treaties are treated similarly to other agreements. With one exception, the former cannot be a subject of unilateral denunciation. This prohibition results a contrario from Article 56. On the other hand, Article 62 admitted the claim of fundamental change of circumstances with respect to these treaties. Also, by the virtue of Articles 34—38 the objective effect of territorial treaties was connected with the consent of a third State to such a result as well as with the transformation of a treaty norm into a customary one. That is, with the same factors which determine the effectivity of all other agreements towards third States. The convention as such does not exclude the existence of treaties effective *erga omnes*, though the explanation of such an effect, contained therein, is not satisfactory. All this allows for somehow different evaluation of the next product of the ILC's work, that is of the Vienna Convention on Succession of States in Respect of Treaties of 1978.

II. Treaties Establishing Territorial Regimes in the Light of the Law of Succession

1. Treaties Establishing Territorial Regimes in the Law of Succession of States

A substantial part of international law doctrine is of an opinion that treaties establishing territorial regimes become effective with respect to successor State at the date of the succession of States.⁶⁷ Already in 17th century such treaties were connected with a broader category of real rights, binding on each new sovereign, as distinct from personal obligations, connected with the ruler himself and which expire with his death. S. Pufendorf⁶⁸ explained the succession of territorial treaties with the help of principle

⁶⁷ E.g. W. E. HALL, *A Treatise on International Law*, Oxford 1904, p. 92; M. UDINA, "La succession des états quant aux obligations internationales autres que les dettes publiques," RCADI, vol. 2, 1933, No. 44, p. 696; R. W. MURALT, *The Problem of State Succession with Regard to Treaties*, The Hague 1954, p. 40; S. PRAKASH SINHA, *New Nations and the Law of Nations*, Leyden 1967, p. 69; R. SONNENFELD, "Sukcesja nowych państw niepodległych w odniesieniu do umów międzynarodowych" [Succession of Newly Independent States with Respect to International Agreements], *Sprawy Międzynarodowe*, 1973, No. 11, p. 121; R. SZAFARZ, *Sukcesja państw w odniesieniu do traktatów we współczesnym prawie międzynarodowym* [Succession of States with Regard to Treaties in Contemporary International Law], Wrocław 1982, p. 311 ff.

⁶⁸ S. PUFENDORF, *De iure naturae gentium*, 1688, vol. 8 and 10, Oxford 1934, chap. XII, para. 1—5.

of respect for acquired rights. E. de Vattel referred on his side to principles of *nemo plus iuris in alium transferre potest quam ipse habet* and of *res transit cum suo onere*. And commenting upon the transition of Silesia under the Prussian sovereignty he stated that Prussia can "acquire Silesia only as it is at the moment of conquest, together with its rights and obligations".⁶⁹

The succession of treaties establishing territorial regimes was also recognized by international adjudication. Among more acknowledged examples, the case of Aland Islands, considered by the Committee of Jurists of the League of Nations in 1920 and the case of custom-free zones of Upper Savoy and the District of Gex, decided by the PCIJ in 1932, should be cited here. In the first case the succession of Finland with respect to the Treaty of 1856, concluded between Russia, France and Great Britain, was recognized. By the virtue of this treaty Russia was forbidden to fortify the Aland Islands and the Committee concluded that Finland was bound by obligations imposed by "a settlement of European interests".⁷⁰

In 1932, the PCIJ⁷¹ recognized the effectivity of the Turin Treaty of 1816, concluded between Sardinia and Switzerland, with respect to France, the successor of Sardinia in Upper Savoy and in the District of Gex. This recognition was indirectly based upon a conception of treaty "running with the land".⁷²

A number of contemporary authors is of an opinion that the principle of *ipso iure* succession of treaties establishing territorial regimes, in case of cession, secession, uniting and separation of States, is a well established principle of customary law. In case of newly independent States, this principle is, at the minimum, an emerging principle of customary law.⁷³ A review of States' practice and of opinions of authors leads to conclusion that conviction exists that

"[...] certain treaties attach a régime to territory which continues to bind it in the hands of any successor State".⁷⁴

The problem of territorial treaties occupied a special position in the

⁶⁹ E. de VATTEL, *Prawo Narodów [The Law of Nations]*, Warszawa 1958, translation, ed. of 1758, chap. XIII, para. 191.

⁷⁰ See *The L. of N. Off. Journal*, Oct. 1920, Special Supp., No. 3, p. 18; see also *ILC Report*, 1974, p. 101.

⁷¹ PCIJ Series A/B, 1932, No. 46.

⁷² See R. W. G. MURALT, *op. cit.*, p. 43; D. P. O'CONNELL, *State Succession in Municipal Law and International Law*, Cambridge 1967, vol. 2, p. 238.

⁷³ See e.g. H. BOKOR-SZEGŐ, "La succession de nouveaux Etats et les traités internationaux", *Acta Juridica Academiae Scientiarum Hungaricae*, vol. 5, 1963, No. 3/4, p. 339 ff; cf. G. SCHWARZENBERGER, *op. cit.*, p. 90.

⁷⁴ *ILC Report*, 1974; *YILC*, vol. 2, 1974, part 1, point 35, p. 206.

ILC's conception of succession of treaties.⁷⁵ This issue was also one of the most difficult that the ILC had to solve. Article 12 regulating this matter became one of the most controversial provisions of the convention proposed by the ILC. Article 12 of the Vienna Convention on Succession of States in Respect of Treaties of 1978 entitled *Other Territorial Regimes*⁷⁶ states:

"1. A succession of States does not as such affect:

"a) obligations relating to the use of any territory, or to restrictions upon its use, established by a treaty for the benefit of any territory of a foreign State and considered as attaching to the territories in question;

"b) rights established by a treaty for the benefit of any territory and relating to the use, or to restriction upon the use, of any territory of foreign State and considered as attaching to the territories in question.

"2. A succession of States does not as such affect:

"a) obligations relating to the use of any territory, or to restrictions upon its use, established by a treaty for the benefit of a group of States or of all States and considered as attaching to that territory,

"b) rights established by a treaty for the benefit of a group of States or of all States and relating to the use of any territory, or to restrictions upon its use, and considered as attaching to that territory.

"3. The provisions of the present article do not apply to treaty obligations of the predecessor State providing for the establishment of foreign military bases on the territory to which the succession of States relates".

According to the above cited provision the succession of State by itself does not influence the fate of territorial regimes established by a treaty. In this manner, the principle of *ipso iure* succession of territorial regimes established by a treaty was accepted with respect to all cases of succession of States, including newly independent States. Certain criteria, allowing for characterization of a territorial regime were introduced in Article 12. Paragraph 1 is concerned with the territorial regime established for the benefit of one State. A close connection of rights and obligations with a particular territory, and not with a State which is entitled or responsible, is underlined in this paragraph. Paragraph 2 applies to territorial regimes established for the benefit of a group of States or of the international community. The attachment of rights established by a treaty with the territory in question is not required by this paragraph, since the specific nature of territorial regime in relation to the right established by a treaty lies in its creation for the benefit of a group of States or of all States.

Article 12 was accepted after long debates during which doubts were expressed whether or not it is all possible to speak about the *ipso iure*

⁷⁵ See *ibid.*, p. 167, para. 49.

⁷⁶ Text according to A/Conf.80/31. Art. 11 entitled "Boundary Regimes" applies also to the territorial regimes.

succession in international law⁷⁷ and whether a common principle can be found for all kinds of treaties that fall into this category.⁷⁸ Opinions calling for the development of general rules that could protect situations established for the benefit of good-neighbourhoodly relations, of a group of States or of international community were also advanced.⁷⁹ From the very beginning, however, the formulation of the principle of *ipso iure* succession of territorial regimes with respect to newly independent States was strongly objected to. It was suggested that in this case a successor State should be provided with certain amount of freedom of decision, for the succession concerns treaties concluded by the colonial authorities not always in conformity with the interests of territories in question.⁸⁰ Hence, it was also raised that the principle formulated in Article 12 contradicts the right of nations to self-determination and to the principle of permanent sovereignty of every people and every State over its natural wealth and resources.⁸¹ This objection forced the ILC to change its original proposition. Thus a conviction resulted that the exclusion of territorial regimes established by a treaty from the effects of succession of States is reflected by a custom, created by practice. It is symptomatic that despite stormy debates over the content of Article 12 none of States participating in the Vienna Conference of 1977 demanded its exclusion from the convention nor any State, except Somalia, was against the principle expressed by this article. However, problems of post-colonial States were noticed by the participants to the conference. Issues connected with the succession of unequal treaties, of agreements providing for the establishment of military bases and the problem of the role of principle of permanent sovereignty of every people and every State over its natural wealth and resources in the law of succession were thus considered. This discussion resulted in the acceptance of concrete provisions. First of all paragraph 3 was added to Article 12. By its virtue the application of principle of *ipso iure* succession of territorial regimes established by a treaty was excluded with respect to treaty obligations providing for the establishment of military bases.⁸² Furthermore, Article 13 was added which confirmed the

⁷⁷ See ACDI, vol. 1, 1972, the remarks of Tabibi and Ušakov, pp. 268, 285.

⁷⁸ E.g. Hambro, *ibid.*, p. 282.

⁷⁹ See *ibid.*, p. 286, especially the remarks of Yasseen, Quentin-Baxter, El-Erian, p. 283; of Tsuruoka, p. 284; of Ago, p. 285.

⁸⁰ E.g. Hambro, Thiam, Elias, *ibid.*, p. 282.

⁸¹ See UN. Doc. A/8892, Report of the Sixth Committee 15/1972. See the remarks presented in the name of Tanzania, Morocco and Afghanistan, in: YILC, vol. 2, 1974, part 1, pp. 75, 76, 73 respectively.

⁸² This is the consequence of the recognition of States' right to give or withhold their consent for military activities of another State to be conducted on their territories — this right results from the right to self-defense.

validity of principle of permanent sovereignty of every people and every State over its natural wealth and resources in the law of succession.⁸³ Finally, Article 14 should be mentioned here for this provision allows for the nullification of unequal territorial treaties.⁸⁴ These three provisions put limits to the application of the principle of *ipso iure* succession of territorial regimes established by a treaty.

Special attention should be paid to the fact that the principle formulated in Article 12 is concerned with the effects of a treaty and not with the treaty itself. In this case the ILC resorted to compromise in order to avoid the problem of special legal character of territorial treaties. The Commission preferred not to consider this controversial issue and the choice made was motivated by a statement that it is the nature of treaty's effects, and not the treaty itself, that makes territorial situations permanent.⁸⁵ Article 12 leaves aside this theoretical problem but in reality it confirms the special and permanent legal character of territorial treaties though this was not aimed at by the drafters. For it is difficult to make a distinction between rights or obligations established by a treaty and the legal instrument itself. In this manner the Vienna Convention of 1978 underlined the specific nature of treaties establishing territorial regimes. It should be added here that no other category of agreements was treated in similar way and also none was distinguished because of its special purpose and character.⁸⁶

The same reluctance towards recognition of specific character of territorial treaties as existed already during the drafting of the Convention on the Law of Treaties was thus overpassed in 1978. In both cases the same objections were raised with respect to "consolidation" of territorial treaties: the inconsistency of such decision with the right of nations to self-determination, the danger of consolidation of unequal treaties and difficulties in stating which treaties belong to agreements establishing territorial regimes — all were pointed at. In 1978 it was possible to work out general criteria that distinguish treaties establishing territorial regimes and also the possibility of liberation from effects of unequal treaties was confirmed. As the third issue is concerned, it was an opinion of the majority of participants

⁸³ Art. 13: "Nothing in the present Convention shall affect the principles of international law affirming the permanent sovereignty of every people and every State over its natural wealth and resources".

⁸⁴ Art. 14: "Nothing in the present Convention shall be considered as prejudging in any respect any question relating to the validity of treaty".

⁸⁵ See ACDI, vol. 1, 1972, p. 298.

⁸⁶ The very same principle was introduced in Art. 11 of the Vienna Convention of 1978 with respect to States' boundaries and boundary regimes — these are also territorial regimes.

of the Vienna Conferences of 1977 and 1978 that the right of nations to self-determination is of a general nature and applies to rights of individuals and groups and thus it cannot provide a legal base for territorial claims.⁸⁷

2. Conceptions Explaining the Automatic Succession of Treaties Establishing Territorial Regimes

Various theories are being put forward by the doctrine of international law in order to explain the automatic succession of treaties establishing territorial regimes. The conception of real rights⁸⁸ provides one of the oldest explanations of this phenomenon. This theory, employing an analogy between property and authority executed by a sovereign with respect to the State's territory, allows the creation of real rights on the territory of one State for the benefit of another (*iura in re aliena*), that is of something similar to servitudes, known already in the Roman law. According to the classical theory,⁸⁹ international servitudes are recognized as real rights, effective *erga omnes*, and established with the purpose of better "distributing of Earth's resources".⁹⁰ These rights are territorial in nature and hence of permanent character. The principle of *rebus sic stantibus* does not apply to them and they are not affected by the unilateral denunciation, the outbreak of war between the Parties or by the succession of States.

The conception of international servitudes does not explain, however, the phenomenon of territorial regimes in a manner that is satisfactory to everyone. Maybe because it aims, with the help of one general theory, to solve a number of different problems of international law. A question

⁸⁷ See e.g. *United Nations Conference on Succession of States in Respect of Treaties, Official Records, First Session, 1977*, vol. 1, p. 129 ff; see the statement of Waldock, in: *YILC*, vol. 1, 1963, p. 256.

⁸⁸ Among the advocates of this conceptions are: J. L. KLÜBER, *Droit des gens moderne de l'Europe*, Paris 1831, p. 233 ff; W. E. HALL, *op. cit.*, ed. of 1904, p. 43 ff; E. NYS, "Les prétendues servitudes internationales," *Revue de Droit et de Législation Comparée*, 1911, ser. 2, vol. 13; J. BASDEVANT, "L'affaire des pêcheries des côtes septentrionales de l'Atlantique," *RGDIP*, 1912; P. B. POTTER, "The Doctrine of Servitudes in International Law," *AJIL*, vol. 9, 1915; the adherents of the so-called modern conception of the international servitudes are e.g. G. CRUSEN, *op. cit.*; H. D. REID, *International Servitudes in Law and Practice*, Chicago 1932; A. VÁLI, *Servitudes of International Law, A Study of Rights in Foreign Territory*, London 1958.

⁸⁹ On this subject see also A. VÁLI, *op. cit.*, p. 36 ff; A. J. ESGAIN, "Military Servitudes and The New Nations", in: *The New Nations in International Law and Diplomacy*, ed. by W. V. O'Brien, New York—Washington 1965, p. 48 ff, A. WYROZUMSKA, "Problem istnienia w prawie międzynarodowym publicznym służebności międzynarodowych" [Problem of Existence of International Servitudes in Public International Law], *Acta Universitatis Lodziensis, Folia Iuridica*, vol. 7, 1982, p. 71 ff.

⁹⁰ P. B. POTTER, *op. cit.*, p. 627.

also arises, how to reconcile this theory with the fact that the Vienna Convention of 1969 permits of application of the principle of fundamental change of circumstances to treaties establishing servitudes. On the other hand, it is doubtful whether all these features of servitudes influence the connection of rights and obligations with the State's territory, that is with a *res*. First of all, it is difficult to explain why certain obligations of territorial character, which are connected with a *res*, and thus which can be considered as servitudes, at present possess no qualities of servitudes — military bases for example. Article 12, paragraph 3 of the Vienna Convention of 1978 excluded the application of the principle of *ipso iure* succession of territorial regimes established by a treaty with respect to such case.⁹¹ On the other hand, however, the contemporary international law has accepted the principle of continuity of rights relating to the territorial regime by every successor, despite the fact that such rights are not attached to specific territory (see Articles 12, paragraph 2, point b of the Vienna Convention of 1978). It can be concluded therefore, that, at present, the succession of obligations is determined not only by their territorial character.

Critical remarks expressed in connection with the conception of real treaties prompted several authors⁹² to distinguish between "localized" and "not localized" treaties. The succession of the former is never questioned and all other treaties would fall into the second category. In reality this division helps a little and the whole theory is very similar to the already mentioned conception. For it seeks in the "localization of a treaty", that is in its application to a precisely defined area, an element that is decisive for the question of succession. And, as we have already explained, the application of a treaty to particular territory does not provide a sufficient ground for the ascertainment of succession of obligations.

The conception of dispositive treaties is yet another explanation of passing on a successor of rights and obligations of territorial character. Advocates

⁹¹ See on this subject K. ZEMANEK, "State Succession after Decolonisation," RCADI, vol. 3, 1965, No. 126, p. 239; H. BOKOR-SZEGÖ, *New States and International Law*, Budapest 1970, p. 103; J. TYRANOWSKI, *Sukcesja państw a traktaty w sprawie granic* [Succession of States and Treaties on Boundaries], Poznań 1979, p. 30; J. SHEARER, "La Succession d'Etats et les Traités Nonlocalisés," RGDIP, 1964, p. 6 ff.

⁹² E.g. J. SHEARER, *op. cit.*, p. 6 ff; G. FITZMAURICE, "The Juridical Clauses of the Peace Treaties," RCADI, vol. 73, 1948, p. 248 ff; R. REDSLOB, *Les principes du droit des gens moderne*, Paris 1935, p. 15; M. JONES, "State Succession in the Matter of Treaties", *British Yearbook of International Law* (BYIL), vol. 24, 1947, p. 362; M. MARCOFF, *Accession à l'indépendance et succession d'Etats aux traités internationaux*, Fribourg 1969, p. 205 ff; R. W. G. MURALT, *op. cit.*, p. 42; K. J. KEITH, "Succession to Bilateral Treaties by Seceding State," AJIL, vol. 61, 1967, p. 521; A. G. MOCHI ONORY, "Les aspects récents du problème de la succession aux traités," RGDIP, 1968, No. 3, p. 584.

of this theory divide treaties into "ordinary" and "dispositive".⁹³ This last category of treaties is characterized by the fact that obligations established by these agreements are of permanent nature. In other words, a permanent status is bestowed upon a territory and therefore, not the treaty itself but the factual situation created by a treaty is the subject of succession. Similar category of treaties was already known to Vattel. The so-called "executed" treaties have a single legal act as their object and the fulfilment of this act exhausts such treaty but established situation is of ultimate nature.⁹⁴ For this reason, treaties establishing States' boundaries are most often considered as executed treaties and consequently, the theory of dispositive treaties was applied especially to this group of territorial treaties.⁹⁵ Category of dispositive treaties is composed not only of treaties establishing States' boundaries but also a treaties establishing all other territorial regimes. This fact complicates the clarity of this conception for such treaties require continuous execution and it is difficult, in such a case, to discriminate between the factual situation established by a legal instrument and the instrument itself. Besides, the conception of dispositive treaties does not explain why a territorial status is or should be of permanent nature. No other explanation is thus provided beside the one already known in the theory of international servitudes — again the connection of rights and obligations with a *res* justifies their effectivity with respect to a successor.⁹⁶ The reviewed theory has another weakness, namely it assumes that a treaty expires at the moment of its consumption. In international law it is still doubtful whether execution of a treaty can be viewed as a prerequisite of its termination. A proof of this statement is provided by the works of the ILC on the law of treaties⁹⁷ and by the Vienna Convention of 1969. Part III of this Convention

⁹³ E.g. J. WESTLAKE, *International Law*, Cambridge 1910—1913, p. 60; H. WHEATON, *Elements of International Law*, Oxford 1936, p. 340; D. P. O'CONNELL, *The Law of State Succession*, Cambridge 1956, p. 49; A. McNAIR, *The Law of Treaties*, Oxford 1961, p. 656.

⁹⁴ Cf. J. MAKOWSKI, *Rewizja traktatów na tle Paktu Ligi Narodów* [*Revision of Treaties against the Background of the Pact of the League of Nations*], Warszawa 1923, p. 213; J. CYBICHOWSKI, *Międzynarodowe prawo wojny* [*International Law of War*], Lwów 1914, p. 28.

⁹⁵ See e.g. C. W. JENKS, "State Succession in Respect of Law-Making Treaties," *BYIL*, vol. 29, 1952, p. 107; D. I. DETTER, *International Law and the Independent States*, Gower Press 1974, p. 179; A. C. CUKWURAH, *The Settlement of Boundary Disputes*, Oxford 1967, p. 105; A. G. PEREIRA, *La succession d'Etats en matière de traités*, Paris 1969, p. 111; F. Ch. OKOYE, *International Law and the New African States*, London 1972, p. 94.

⁹⁶ J. TYRANOWSKI correctly points out that "if an argument based upon a servitude is removed as a basis of the dispositive character of a treaty this means that a criterion of this dispositive character becomes illusive", *op. cit.*, p. 36.

⁹⁷ See the commentary of the ILC to Art. 39 of the Draft Convention on the Law of Treaties of 1966, *YILC*, vol. 2, 1966, p. 236 ff.

which is concerned with the termination and suspension of treaties contains no provisions relating to this matter.⁹⁸

The justification of passing of territorial obligations on a successor is often based upon a well known to Roman law principles of *res transit cum suo onere*, of *nemo dat quod non habet*, and of *nemo plus iuris in alium transferre potest quam ipse habet*.⁹⁹ These principles imply univocally that a successor can acquire only such an amount of rights as was in the possession of his predecessor. Thus any successor is bound not only by State's boundaries but also by all obligations of territorial nature. The mentioned principles are recognized as general principles of law,¹⁰⁰ and are accepted in all legal systems. According to Article 38, paragraph 1, point c, of the Statute of the ICJ the adjudication of the Court is based upon general principles of law, hence these principles represent a source of international law. However, doubts still exist in international law as to the meaning and importance of general principles of law. Even the very notion used in Article 38, paragraph 1, point c is controversial. And furthermore, the practice of the Court does not clarify the issue.¹⁰¹ In this context it seems clear that the principles of *res transit cum suo onere* and *nemo plus iuris* cannot provide a sufficient basis for the ascertainment of succession of territorial obligations. Though it is obvious that a legal reasoning applied to the *ipso iure* succession of treaties establishing territorial regimes is founded upon these principles.

A number of authors connect the permanency of territorial treaties with the intention of Parties to establish territorial status which is of permanent nature and which is effective *erga omnes* also with respect to a successor State.¹⁰² But sometimes it is difficult to find out the intention of the Parties

⁹⁸ An additional argument is cited by R. SZAFARZ, *op. cit.*, p. 318. The author states that Art. 62, para. 2, point a, of the Vienna Convention of 1969 would be meaningless if recognition is given to the fact that boundary treaty expires at the moment of its accomplishment.

⁹⁹ In this manner e.g. L. OPPENHEIM, H. LAUTERPACHT, *op. cit.*, p. 159; A. McNAIR, *op. cit.*, p. 656.

¹⁰⁰ In 1960, in case concerning the right of passage over Indian territory, Portugal referred to the general principles of law to support its claim for the recognition of right of passage over the territory in question. The ICJ recognized, however, that the right of free transit, claimed by Portugal, has its foundation in general principles of law but based its judgement on the custom established between these States; see *ICJ Pleadings*, vol. 1, 1960, p. 714.

¹⁰¹ On this subject see J. GILAS, "Zasady ogólne prawa w pracach MTS" [General Principles of Law in the Works of ICJ], *Zeszyty Naukowe Uniwersytetu Mikołaja Kopernika w Toruniu*, 1966, Prawo VI, No. 19, p. 38 ff.

¹⁰² E.g. H. LAUTERPACHT, *Private Law Sources and Analogies of International Law*, London 1927, p. 122 ff; M. UDINA, *op. cit.*, p. 665, D. P. O'CONNELL, *The Law*, p. 15; M. JONES, *op. cit.*, p. 374; A. P. LESTER, "State Succession and Localised Treaties," *Harvard International Law Club Journal*, 1963, April, p. 150; J. SHEARER, *op. cit.*, p. 58.

and this does not necessarily mean that a treaty is not liable to succession. Thus this criterion is not sufficient to determine succession of a treaty.

Many authors¹⁰³ are of an opinion that treaties establishing territorial regimes are binding upon a successor only because a consent to such an effect was expressed by a State in question, even indirectly. This theory does not answer, however, the question of why territorial treaties are accepted *ipso iure* and why they are effective at the very moment of succession of States. A notice should be taken here of the fact that the PCIJ, in the case of free-custom zones of Upper Savoy and of the District of Gex, drew the obligation of France to maintain the free-custom zones not only from the explicit consent of this State to be bound but also from the special nature of rights and obligations established for the benefit of Switzerland.¹⁰⁴ Furthermore, as it is demonstrated by practice, States often accept predecessor's rights and obligations of territorial nature because of their specific character.

The explanation of succession of territorial rights and obligations is often based upon a foundation that a successor does not "inherit" a treaty establishing territorial status because a treaty only stimulates the process of creation of custom. As a result, successor is not bound by a contractual obligation but by a custom.¹⁰⁵ Such an explanation of the automatic succession of territorial obligations is not valid, however, with respect to all cases. Moreover, this conception introduces an additional problem of how to explain the fact that successor is bound by the predecessor's rights and obligations of customary nature, that are concerned with the use of his territory by other State, and why this principle should not apply to the treaty itself.

None of the above presented conceptions was able to provide a satisfactory explanation of the *ipso iure* succession of treaties establishing territorial regimes. At the same time, a striking and not accidental similarity exists between the reviewed conceptions and the theories that were mentioned previously as explanation of the *erga omnes* effectivity of territorial treaties. It seems therefore that in reality it is one and the same problem. Hence,

¹⁰³ See e.g. A. CAVAGLIERI, "Règles générales du droit de la paix," RCADI, vol. 1, 1929, No. 26, p. 375 ff; E. J. S. CASTRÉN, "Aspects récents de la succession d'Etats," RCADI, vol. 1, 1951, No. 78, p. 437 ff; O. UDOKANG, *Succession of New States to International Treaties*, New York 1972, p. 164; D. W. GREIG, *International Law*, London 1976, p. 13 ff.

¹⁰⁴ See PCIJ, Series A/B, 1932, No. 46.

¹⁰⁵ See A. ALVAREZ, *op. cit.*, p. 148; F. F. ROXBURGH, *op. cit.*, p. 112; L. OPPENHEIM, H. LAUTERPACHT, *op. cit.*, p. 36, vol. 2; E. ROLIN, "Les principes de droit international public," RCADI, vol. 2, 1950, No. 77, p. 338; D. I. DETTER, *op. cit.*, p. 229.

it is the special legal nature of treaties establishing territorial regimes that determines the problem of succession of these treaties. The adherents of theories of dispositive, real and localized treaties also pointed to the same element though they looked for it in the territorial character of obligations. Therefore we shall refer to the remarks presented in part I, point 1 of the present paper in order to find a solution of the problem of succession. It was stated there that an effectivity of a treaty towards the States, not Parties to it, is decided by the following elements: the intention of Parties to establish obligations effective with respect to any other subject, the competency of parties with respect to treaty's subject-matter as well as the purpose and the object of a treaty. The usefulness of the first element was demonstrated when the conception based on the intent was discussed. The second element is so obvious that it requires no further comments. And finally the purpose and the object of a treaty. It seems that the special legal character of a treaty results first of all from its purpose and subject matter. It is therefore the purpose and the subject-matter of a treaty that determines the question of its succession. It should be observed here that treaties establishing territorial regimes limit the execution of States' territorial sovereignty. States consent to such agreements unwillingly and only in exceptional cases. Thus the acceptance of obligations in question is motivated by important interests of Parties. This statement is also supported by the practice of States, which points to the fact that the establishment of a territorial regime in a certain and important interest, for example in the general one, was often the prerequisite of succession of a treaty.¹⁰⁶

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This leads to the general conclusion that treaties establishing territorial regimes possess specific features and entail special legal effects. Also the regulatory functions fulfilled by these treaties made them to be indispensable to the international community. At present it is important to work out

¹⁰⁶ See e.g. the case of Aland Islands and of the custom-free zones of Upper Savoy and the District of Gex — in these two cases, the validity of territorial regimes established as a part of the so-called "European settlement" with respect to successor State was recognized. The same element was present in the case concerning Belgian succession of obligation of the Netherlands to maintain fortresses on the former boundary between France and the Netherlands. The problem of neutralization of Chablais and of Faucigny after their cession to France is yet another example. The conception in question is also referred to in cases of regimes relating to international rivers and water-ways (e.g. Congo, Niger, Rhine, Sues Canal). Cf. YILC, vol. 2, 1974, part I, p. 204, para. 31 ff.

certain guarantees to preserve their durability. The main purpose of treaties establishing territorial regimes is the protection of certain interests of international community, for example they are concluded in order to provide certain facilities for communication, or even the protection of security in certain regions. By the virtue of these treaties States restrain the execution of their territorial jurisdiction. By doing so for the benefit of another State, of a group of States or in the interest of all States they confer a special legal status on a part of their territories. This status, because of the objective importance of an interest protected, gains therefore the objective legal effectivity.

Norms of Competence Concerning Competence of Law and Organs in Civil and Family Matters in Agreements Concluded between Poland and Socialist States

by JAN CISZEWSKI

1. Introduction

Among the sources of the Polish international private law and international civil law procedure an important role is played by international agreements concluded between Poland and other States concerning legal assistance in the broad sense. The significance of these agreements is such that they, i.a., rank in priority to internal legislation.¹ Thus they exclude to a large extent the application of internal legislation of each State, considerably limiting the likelihood of conflict against the background of different provisions of these legislations. Although the significance of agreements concluded with capitalist and developing countries is undisputed, the expediency of singling out and separately discussing the agreements concluded by socialist States needs to be emphasized in particular. The analysis of these agreements shows that they are much the same, from the point of view of both objective scope *ratione materiae* and particular law institutions. With that in mind some authors claim that certain common principles regulating individual legal relations have been formed creating foundations i.a. for isolating a socialist private law.²

The first agreement concluded by Poland after the end of World War II was the Agreement with Czechoslovakia, which was signed on 1 January, 1949.

The years 1957—1962 were a period of lively contacts between the socialist States and in consequence most of the agreements in question were concluded

¹ Cf. J. JODŁOWSKI, "Zasady przewodnie polskiego międzynarodowego prawa procesowego cywilnego" [Leading Principles of Polish International Law of Civil Procedure], in: *Księga pamiątkowa ku czci K. Stefki* [In Honour of K. Stefka], Warszawa 1970.

² Cf. E. WIERZBOWSKI, "Tendencje rozwojowe prawa małżeńskiego w umowach krajów socjalistycznych" [Growth Trends of Matrimonial Law in Agreements of Socialist States], *Studia Cywilistyczne*, Kraków 1966, vol. 7, p. 169.

by them then. In these years Poland concluded agreements with Bulgaria, Czechoslovakia, the German Democratic Republic, Romania, Hungary and the USSR.³ In the next years also agreements with Mongolia and Cuba came into force.⁴

At the end of the 1970s measures were taken aiming at alterations and supplementation of the earlier concluded agreements. This was justified by the numerous changes of the civil and family legislations which had taken place in the course of the previous 20 years. Moreover, it turned out advisable to adapt some provisions of the agreements to the current needs of the conduct of legal transactions. As a result supplementary protocols to the agreements with Bulgaria, the GDR, Hungary and the USSR came into operation.⁵

³a. Agreement between the Polish People's Republic and the People's Republic of Bulgaria on legal assistance and legal relations in civil, family and criminal matters signed in Warsaw on 4 Dec., 1961 (*Dziennik Ustaw — Journal of Laws*, 1963, No. 17, items 88 and 89).

³b. Agreement between the Polish People's Republic and the Czechoslovak Socialist Republic on the settlement of legal relations in civil, family and criminal matters signed in Warsaw on 4 July, 1961 (*Dziennik Ustaw*, 1962, No. 23, item 103 and 104).

³c. Agreement between the Polish People's Republic and the Socialist Federal Republic of Yugoslavia on legal relations in civil and criminal matters signed in Warsaw on 6 Feb., 1960 (*Dziennik Ustaw*, 1963, No. 27, item 162 and 163).

³d. Agreement between the Polish People's Republic and the German Democratic Republic on legal relations in civil, family and criminal matters signed in Warsaw on 1 Feb., 1957 (*Dziennik Ustaw*, 1958, No. 27, item 114 and 115).

³e. Agreement between the Polish People's Republic and the Socialist Republic of Romania on legal assistance and legal relations in civil, family and criminal matters signed in Bucarest on 25 Jan., 1962 (*Dziennik Ustaw*, 1962, No. 63, item 301 and 302).

³f. Agreement between the Polish People's Republic and the Hungarian People's Republic on legal relations in civil, family and criminal matters signed in Budapest on 6 March, 1959 (*Dziennik Ustaw*, 1960, No. 8, item 54 and 55).

³g. Agreement between the Polish People's Republic and the Union of the Soviet Socialist Republics on legal assistance and legal relations in civil, family and criminal matters signed in Warsaw on 28 Dec., 1957 (*Dziennik Ustaw*, 1958, No. 32, item 147 and 148).

⁴ Agreement between the Polish People's Republic and the Mongolian People's Republic on legal assistance and legal relations in civil, family and criminal matters signed in Warsaw on 14 Nov., 1971 (*Dziennik Ustaw*, 1972, No. 36, item 244 and 245) and Agreement between the Polish People's Republic and the Republic of Cuba on legal assistance in civil, family and criminal matters signed in Havana on 18 Nov., 1982 (*Dziennik Ustaw*, 1984, No. 47, item 247 and 248).

⁵a. Protocol to the Agreement between the PPR and Bulgaria signed in Sofia on 7 June, 1980 (*Dziennik Ustaw*, 1981, No. 10, item 43 and 44).

⁵b. Protocol to the Agreement between the PPR and the GDR signed in Warsaw on 18 April, 1975 (*Dziennik Ustaw*, 1977, No. 14, item 80 and 81).

⁵c. Protocol to the Agreement between the PPR and Hungary signed in Warsaw on 18 Nov., 1980 (*Dziennik Ustaw*, 1982, No. 5, item 32 and 33).

⁵d. Protocol to the Agreement between the PPR and the USSR signed in Moscow on 23 Jan., 1980 (*Dziennik Ustaw*, 1980, No. 28, item 121 and 122).

As it was mentioned above, a wide subject-matter of regulations is characteristic of the agreements between the socialist States. In addition to norms of competence concerning law and jurisdiction in individual categories of civil and family matters these agreements regulate in detail i.a. acknowledgement and enforcement of court judgments in civil and family matters, extradition and legal assistance in civil, family and criminal matters and how to facilitate proceedings for foreign citizens (exemption from securing the costs of proceedings, court fees and free of charge representation in court).

In connection with the problem considered in the present paper it needs to be explained that the scope of application of norms of competence which concern law applicable in a given case and jurisdiction is restricted to cases of applying substantive law of States which are parties to a given agreement. The situation is alike when defining competent organs: the agreements point out the competent organs of States participating in a given agreement.

Moreover, it results from the contents of the norms of competence enclosed in the agreements that they are applicable only to the citizens of the States Parties to a given agreement.⁶

2. Legal Capacity and Capacity to Legal Transactions

As far as legal capacity and capacity to legal transactions of natural persons is concerned the jurisdiction of the national law has been adopted.⁷ The jurisdiction of the national law is also provided for by: the Agreement with Romania — in the field of legal capacity it does not regulate the competence of law to appraise capacity to legal transactions (Art. 21, para.1) and the Agreement with the USSR — as concerns capacity to legal transactions (Art. 22, para. 1) — it does not contain any norms of competence for the legal capacity of a natural person. The Agreement with the GDR does not contain any norms of competence concerning these problems at all.

By way of an exception to the principle providing for the applicability of the national law, the agreements with the USSR (Art. 22, para.1) and Cuba (Art. 18, para.3) provide for the applicability of another law for the appraisal of the capacity to legal transactions in certain matters. They include the capacity to conclude agreements in petty current matters of

⁶ A. MĄCZYŃSKI, *Rozwód w prawie prywatnym międzynarodowym* [Divorce in International Private Law], Warszawa 1983.

⁷ Such a settlement is contained in Art. 16, para. 1 of the Agreement with Bulgaria, Art. 7, para. 1 of the Agreement with Czechoslovakia, Art. 20, para. 1 of the Agreement with Yugoslavia, Art. 22, para. 1 of the Agreement with Mongolia, Art. 29, para. 1 of the Agreement with Hungary and Art. 18, para. 1 of the Agreement with Cuba.

every-day life (agreements aiming at the satisfaction of elementary needs are mentioned in the text of the Agreement with Cuba). In this sphere these agreements provide for the applicability of the law of the State on whose territory these agreements have been concluded.

The legal capacity and the capacity to legal transactions of legal persons have been regulated in all agreements but the Agreement with the GDR. The solution most often applied is the appraisal of this problem according to the law of the State in accordance with which a legal person has been established.⁸ That the law of the State on whose territory a legal person has been established shall be applied has been stipulated in the Agreement with Bulgaria (Art. 16, para.2). On the other hand, the Agreements with Yugoslavia (Art. 20, para.2) and Mongolia (Art. 22, para.2) in these matters provide for the applicability of the law of the State on whose territory the seat of the legal person is situated. In spite of the existing differences in wording, in most cases the above solutions lead to the same result, because the law in accordance with which a specific legal person is established is as a rule the same as the law of the State where the legal person has been established and where its seat is situated.

3. Legal Incapacitation

All agreements with the socialist States except with Mongolia regulate the conflicting questions concerning legal incapacitation. The agreements hold to the principle that the law to be applied and the courts competent are those of the State whose citizen is the person to be incapacitated.⁹ The Agreement with Yugoslavia is the only that does not go further. The agreements with the remaining States contain further provisions. And so, if the organ of one State establishes that there exist grounds for legal incapacitation of a citizen of another State who has his place of permanent or temporary residence within the district of that organ, then it should

⁸ Art. 7, para. 2 of the Agreement with Czechoslovakia,
Art. 21, para. 2 of the Agreement with Romania,
Art. 29, para. 2 of the Agreement with Hungary,
Art. 22, para. 2 of the Agreement with the USSR,
Art. 18, para. 2 of the Agreement with Cuba.

⁹ Art. 17 of the Agreement with Bulgaria,
Art. 8 of the Agreement with Czechoslovakia,
Art. 21 of the Agreement with Yugoslavia,
Art. 34 of the Agreement with the GDR,
Art. 30, para. 1 and 2 of the Agreement with Romania,
Art. 40 of the Agreement with Hungary,
Art. 23 of the Agreement with the USSR,
Art. 20 of the Agreement with Cuba.

notify the organ of the other State about it.¹⁰ When the organ notified in accordance with the above mentioned regulations replies that it leaves further actions to the organ of permanent or temporary residence of the person in question, or does not reply within 3 months, then the organ of permanent or temporary residence shall be competent to carry off proceedings concerning incapacitation of the alien. The law of the court giving the decision shall be applied on the condition that the cause of incapacitation is provided for by the person's national law.¹¹

Moreover, in urgent cases the organ of permanent or temporary residence of a person who should be incapacitated and is a citizen of another State can issue interim orders necessary for the protection of this person or his property. These measures are adopted on the basis of the State's own law.¹² The orders are abrogated if the court of the native State rules otherwise.¹³

The majority of the agreements call for the application of the discussed principles also to abrogation of incapacitation.¹⁴ In this field the Agreement with Romania provides for only national law to be applied and it does not regulate domestic jurisdiction (Art. 30, para. 1). The Agreement with Yugoslavia does not contain norms concerning abrogation of incapacitation.

4. Declaring a Person Dead and Declaration of Death

All agreements with the socialist States, except with Romania, use the connecting factor of citizenship. They provide that the courts competent

¹⁰ Art. 18, para. 1 of the Agreement with Bulgaria, Art. 9, para. 1 of the Agreement with Czechoslovakia, Art. 35 of the Agreement with the GDR, Art. 31, para. 1 of the Agreement with Romania, Art. 41 of the Agreement with Hungary, Art. 24 of the Agreement with the USSR, Art. 21, para. 1 of the Agreement with Cuba.

¹¹ Art. 18, para. 2 of the Agreement with Bulgaria, Art. 9, para. 3 of the Agreement with Czechoslovakia, Art. 35 of the Agreement with the GDR, Art. 32, para. 1, 2 and 3 of the Agreement with Romania, Art. 41 of the Agreement with Hungary, Art. 24 of the Agreement with the USSR, Art. 21, para. 2 of the Agreement with Cuba.

¹² Art. 19 of the Agreement with Bulgaria, Art. 9, para. 2 of the Agreement with Czechoslovakia, Art. 36 of the Agreement with the GDR, Art. 31, para. 2 of the Agreement with Romania, Art. 42 of the Agreement with Hungary, Art. 25 of the Agreement with the USSR, Art. 21, para. 3 of the Agreement with Cuba.

¹³ Art. 36 of the Agreement with the GDR, Art. 31, para. 2 of the Agreement with Romania, Art. 42 of the Agreement with Hungary, Art. 25 of the Agreement with the USSR, Art. 21, para. 3 of the Agreement with Cuba.

¹⁴ Art. 20 of the Agreement with Bulgaria, Art. 10 of the Agreement with Czechoslovakia, Art. 37 of the Agreement with the GDR, Art. 43 of the Agreement with Hungary, Art. 26 of the Agreement with the USSR, Art. 22 of the Agreement with Cuba.

and the law applicable in matters concerning declaring a person dead and declarations of death are those of the State whose citizen was the deceased before his death according to last information.¹⁵

Further treaty provisions which under certain conditions base jurisdiction upon other connecting factors should be treated as an exception to the said principle. Two types of solutions have been applied here. To the first group belong agreements which provide that the court of one State can declare a citizen of another State dead or issue a declaration of death at the request of persons who are residents of this State if in accordance with the law of the State of which the court is to pass the judgment these persons are entitled to make such a request.¹⁶

The agreements that can be included in the second group give a more detailed description of the circumstances at the occurrence of which a court can declare a person dead or issue a declaration of death concerning a citizen of another State.¹⁷ This can be done in two situations. The first one arises when the request is submitted by the person who wishes to realize his right of inheritance¹⁸ or the right resulting from matrimonial property relations¹⁹ concerning immovable²⁰ or movable²¹ property which is in the State whose court is to give the judicial decision.²²

The second situation allows the possibility of declaring a foreigner dead or issuing a declaration of death at the request of the spouse of the dead person if at the time when the request was submitted he was resident

¹⁵ Art. 21, para. 1 and 4 of the Agreement with Bulgaria, Art. 11, para. 1 and 3 of the Agreement with Czechoslovakia, Art. 31, para. 1 of the Agreement with Yugoslavia, Art. 23, para. 1 and 3 of the Agreement with Mongolia, Art. 25, para. 1 of the Agreement with the GDR, Art. 30, para. 1 of the Agreement with Hungary, Art. 27, para. 1 and 4 of the Agreement with the USSR, Art. 19, para. 1 and 3 of the Agreement with Cuba.

¹⁶ To this group belong the Agreements with Bulgaria (Art. 21, para. 2 and 4), Czechoslovakia (Art. 11, para. 2) and notwithstanding occurring differences Agreements with the USSR (Art. 27, para. 2) and Cuba (Art. 19, para. 2).

¹⁷ The Agreement with the GDR (Art. 25, para. 2) admits of such a possibility only with reference to declaring a person dead.

¹⁸ Art. 31, para. 2, point a of the Agreement with Yugoslavia, Art. 23, para. 2, pt a of the Agreement with Mongolia, Art. 25, para. 2, pt a of the Agreement with the GDR, Art. 20, para. 2, pt a of the Agreement with Hungary.

¹⁹ Art. 31, para. 2, pt a of the Agreement with Yugoslavia.

²⁰ Art. 31, para. 2, pt a of the Agreement with Yugoslavia, Art. 23, para. 2, pt a of the Agreement with Mongolia, Art. 25, para. 2, pt a of the Agreement with the GDR, Art. 30, para. 2, pt a of the Agreement with Hungary.

²¹ Art. 23, para. 2, pt a of the Agreement with Mongolia, Art. 25, para. 2, pt a of the Agreement with the GDR and Art. 30, para. 2, pt a of the Agreement with Hungary.

²² Art. 31, para. 2, pt a of the Agreement with Yugoslavia, Art. 25, para. 2, pt a of the Agreement with the GDR, Art. 30, para. 2, pt a of the Agreement with Hungary.

of the country whose court is to give the decision.²³ The Agreement with Yugoslavia (Art. 31, para. 2, pt b) includes additional requirements: an applicant must have an interest in establishing the existence (non-existence) of marriage and the last joint place of residence of spouses must have been in the State whose court is to give the judicial decision.

Norms of competence concerning the law to be applied when proceedings against an alien are taking place vary widely. In this field most of the agreements do not provide for departure from a person's national law.²⁴ But some of the agreements have a tendency to adjust the law to be applied and jurisdiction of courts to the law obligatory in the seat of the court.²⁵ The Agreement with Yugoslavia in Article 31, paragraph 3 provides for the application of the law of either of the States.

Although the regulations concerning domestic jurisdiction regarding aliens have been extended, some of the agreements provide for a limited effectiveness of judicial decisions given under such conditions. These agreements²⁶ stipulate that a judicial decision shall have legal consequences only in the State in which it was given. Also, at the request of the interested person the court will abrogate or change its decision given on account of an alien if the court of his native State decides differently in this matter, for instance, fixes a different date of death or abrogates the request.

As mentioned before, the Agreement with Romania contains totally different solutions. It provides for the jurisdiction of the courts of the State on whose territory the missing (dead) person had his last place of residence (Art. 36, para. 1). As an exception to this rule, the possibility to give decisions concerning a State's own citizen who had the place of residence in another State — party to the agreement, is admitted if the circumstances are in accordance with Article 36, paragraph 2. These circumstances are worded almost identically to the circumstances described in Article 31, paragraph 2 of the Agreement with Yugoslavia (see above). Moreover, the Agreement with Romania provides that the law of the State whose court gives the decision in a given case must be applied (Art. 36, para. 3).

²³ Art. 23, para. 2, pt b of the Agreement with Mongolia, Art. 25, para. 2, pt b of the Agreement with the GDR and Art. 30, para. 2, pt b of the Agreement with Hungary.

²⁴ Art. 11, para. 3 of the Agreement with Czechoslovakia, Art. 21, para. 3 of the Agreement with Mongolia, Art. 25, para. 1 of the Agreement with the GDR, Art. 30, para. 1 of the Agreement with Hungary.

²⁵ Art. 21, para. 4 of the Agreement with Bulgaria, Art. 27, para. 4 of the Agreement with the USSR, Art. 19, para. 3 of the Agreement with Cuba.

²⁶ With Bulgaria (Art. 21, para. 2 and 3), Yugoslavia (Art. 31, para. 4 and 5), the USSR (Art. 27, para. 2 and 3), and partly the Agreement with Cuba (Art. 19, para. 2).

5. Contracting a Marriage

The bilateral agreements in force contain separate regulations on substantial prerequisites of contracting a marriage and its form. The most difficult for interpretation is Article 28 of the Agreement with the USSR which does not contain a clear distinction of both these elements. Hence various proposals for interpretation have appeared in Polish and Soviet²⁷ publications. The difference between the proposed solutions amounts in particular to the fact that according to some opinions this regulation concerns exclusively the form of contracting a marriage, and according to others it also concerns the substantial and legal prerequisites of contracting a marriage.

So, in the field of substantial prerequisites of contracting a marriage almost all agreements provide that these prerequisites are appraised according to the national law of the person to contract a marriage.²⁸ Only the Agreement with the USSR (Art. 28, sentence 1) wholly submits the appraisal of these prerequisites to the law of the State on whose territory the marriage contract is concluded. The partial application of the law of the State on whose territory a marriage contract was concluded is provided for by the Agreement with Yugoslavia (Art. 25, para. 2). It stipulates that regulations concerning impediments resulting from previous marriage, kinship, mental illness and incapability to control own behaviour are also applied to the citizens of the other State. In relation to the form of contracting a marriage some agreements provide for the competence of the law of the State before whose organ marriage is concluded.²⁹ In this matter the remaining agreements provide for the competence of the law of the State on whose territory a marriage contract is concluded.³⁰ The outcome of both solutions is very similar if not identical. This distinction is of certain significance when appraising the form of consular marriages (see below).

²⁷ A review of these standpoints can be found in my article "Zmiany w umowie między PRL a ZSRR o pomocy prawnej i stosunkach prawnych w sprawach cywilnych, rodzinnych i karnych" [Alterations in the Agreement between the PPR and the USSR on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters], *Palestra*, 1981, No. 6.

²⁸ Art. 22, para. 1 of the Agreement with Bulgaria, Art. 12, para. 1 of the Agreement with Czechoslovakia, Art. 25, para. 2 of the Agreement with Yugoslavia, Art. 24, para. 2 of the Agreement with Mongolia, Art. 21, para. 1 of the Agreement with the GDR, Art. 22, para. 3 of the Agreement with Romania, Art. 31, para. 2 of the Agreement with Hungary, Art. 24, para. 1 of the Agreement with Cuba.

²⁹ Art. 22, para. 2 of the Agreement with Bulgaria, Art. 12, para. 2 of the Agreement with Czechoslovakia, Art. 25, para. 1 of the Agreement with Yugoslavia, Art. 24, para. 1 of the Agreement with Mongolia, Art. 31, para. 1 of the Agreement with Hungary.

³⁰ Art. 21, para. 2 of the Agreement with the GDR, Art. 22, para. 1 of the Agreement with Romania, Art. 28, first sentence of the Agreement with the USSR, Art. 24, para. 2 of the Agreement with Cuba.

Just like for the appraisal of substantial prerequisites of contracting a marriage the agreements with Yugoslavia (Art. 22, para. 3) and the USSR (Art. 28, sentence 2) contain particular provisions concerning the form of contracting a marriage. The Agreement with Yugoslavia provides for the competence of national law if the persons to enter a marriage contract have the citizenship of the same State and are its residents, and they conclude marriage in another State (in this scope is excluded the competence of the law of the State before whose organ marriage is concluded). The Agreement with the USSR contains a subsidiary norm stipulating that when citizens of one State conclude marriage on the territory of the second State it is sufficient to keep the due form provided for by their national law.

It is interesting that some of the agreements on legal assistance contain additional provisions concerning the form of contracting marriage before a diplomatic representative or consular officer. The insertion of such provisions was justified in those agreements which for the form contracting a marriage declare that the law of the State on whose territory marriage is concluded shall be applied. For, the lack of a particular provision concerning the form of consular marriages would mean submitting the form of such marriages to the law of the State on whose territory a diplomatic representation or consular office functions (law of the receiving State).

The competence of the law of the State sending a diplomatic representative or consular officer as far as it concerns the form of contracting a marriage before such an official is provided for by the agreement with the GDR (Art. 21, para. 3), Romania (Art. 22, para. 2), and Cuba (Art. 24, para. 3). A similar regulation is also included in the Agreement with Bulgaria (Art. 22, para. 3) and consular conventions with Mongolia³¹ (Art. 34, para. 1, pt d), Hungary³² (Art. 34, para. 1, pt d) and the USSR³³ (Art. 31, para. 1, pt d). Considering the fact that consular conventions between socialist States stipulate that a consular officer has the right to receive a declaration of marriage on the condition that both parties are citizens of the sending State, the law applied for the appraisal of the form of contracting a consular marriage will always be the national law of the persons contracting a marriage.

³¹ Consular Convention between the PPR and the Mongolian People's Republic signed in Ulan Bator on 31 May, 1973 (*Dziennik Ustaw*, 1974, No. 3, item 22).

³² Consular Convention between the PPR and the Hungarian People's Republic signed in Warsaw on 5 June, 1973 (*Dziennik Ustaw*, 1974, No. 5, item 28).

³³ Consular Convention between the PPR and the Union of Soviet Socialist States signed in Warsaw on 27 May, 1971 (*Dziennik Ustaw*, 1972, No. 15, item 106).

6. Personal and Property Relations Between Spouses

In accordance with the agreements concluded with the socialist States personal and property relations between spouses come within the scope of their national law. In the situation when the spouses do not have the citizenship of the same State the law to be applied is of that State on whose territory they have or had their last place³⁴ of residence.³⁵ The Agreement with Hungary also contains a solution for a situation when spouses with different citizenships neither have nor had a joint place of residence in Poland or in Hungary. In such a situation the law to be applied is the law of the court giving the decision (Art. 32, para. 3).

The Agreement with the USSR provides for a totally different solution as far as the law applicable in matters relating to personal and property relations between spouses is concerned. In the first place the law to be applied is that of the State on whose territory the spouses have joint place of residence (Art. 29, para. 1). If the spouses reside in different States the law applicable is their joint national law (Art. 29, para. 2). If the citizenships are different and the spouses reside in different States then the law to be applied is of the State on whose territory the spouses had their last joint place of residence (Art. 29, para. 3).

Concluding the discussion of the problem concerning the law applicable, it has to be mentioned that the Agreement with the GDR (Art. 22, para. 4) contains a particular provision which regulates differently the competence of law in agreements on marriage settlement. In accordance with this provision the law applicable is that of the State on whose territory such an agreement was concluded.

Somewhat greater differentiation exists in the sphere of regulating domestic jurisdiction of the matters in question. Although the only connecting factors used are those of citizenship and place of residence, they remain in various

³⁴ The agreements with Yugoslavia, the GDR, Hungary, Cuba and the USSR use partly also for jurisdictional purposes the connecting factor *joint* place of permanent residence of spouses. Polish judicature and doctrine hold the opinion that in the case when the provision of an international contract links domestic jurisdiction (including law applicable in a given case) with the joint place of permanent residence of parties then taking up residence by the parties simultaneously, even if apart, on the territory of the same State meets this requirement, since from the international aspect "joint domicile" means taking up residence on one State territory (Cf. J. JODŁOWSKI, "Gloss to the resolution of the Supreme Court of 20 May, 1973, III CZP 62/72," *Nowe Prawo*, No. 4, 1974, p. 531).

³⁵ Such solutions have been applied in the Agreements with Bulgaria (Art. 23, para. 1 and 2), Czechoslovakia (Art. 13, para. 1 and 2), Yugoslavia (Art. 23, para. 1 and 2), Mongolia (Art. 25, para. 1 and 2), the GDR (Art. 22, para. 1, 2, 3), Romania (Art. 23, para. 1 and 2), Hungary (Art. 32, para. 1 and 2), Cuba (Art. 25, para. 1, 2 and 3).

configurations. To the largest group belong States that provide for the jurisdiction of the courts of the State whose citizens are both spouses. If they are citizens of that State and reside in another State competent are the courts of that State (optional jurisdiction). When joint citizenship is lacking, competent are courts of the State on whose territory the spouses have or had their last place of residence.³⁶

The Agreement with Hungary contains a provision (Art. 32, para. 3) which is similar to the norm of competence concerning the law to be applied. It provides that, in the case when spouses are not citizens of the same State and they are not, and never were, joint residents in Poland or Hungary the courts of both States are competent.

Similar regulations are also included in the agreements with Yugoslavia (Art. 26, para. 3) and Romania (Art. 23, para. 1 and 2). Compared with the solution discussed above they do not contain a provision on optional jurisdiction in the case when the spouses with the same citizenship reside in another State.

Another group of agreements omits the connecting factor of citizenship providing for the exclusive jurisdiction of the courts of the State on whose territory the spouses have or had their last place of residence.³⁷

Finally the Agreement with the USSR (Art. 29, para. 4) provides that the competent court shall always apply the law of the place of its proceedings (see above).

7. Divorce

Norms of competence and jurisdiction concerning divorce will be discussed on the basis of the most typical factual situations.

In a situation when spouses are citizens of the same State the courts competent and the law to be applied are those of that State. If spouses with the same citizenship reside in another State the jurisdiction of the court of the State where the spouses reside is optional.³⁸ An additional remark

³⁶ Art. 28, para. 1 and 2 of the Agreement with Mongolia, Art. 22A, para. 1 and 2 of the Agreement with the GDR, Art. 32, para. 1 and 2 of the Agreement with Hungary, Art. 25, para. 4 of the Agreement with Cuba.

³⁷ Art. 23, para. 1 and 2 of the Agreement with Bulgaria, Art. 13, para. 1 and 2 of the Agreement with Czechoslovakia, Art. 25, para. 2 of the Agreement with Mongolia.

³⁸ Art. 24, para. 1 of the Agreement with Bulgaria, Art. 14, para. 1 of the Agreement with Czechoslovakia, Art. 27, para. 1 of the Agreement with Yugoslavia, Art. 27, para. 1 and Art. 28, para. 1 of the Agreement with Mongolia, Art. 23, para. 1 of the Agreement with the GDR, Art. 33, para. 1 of the Agreement with Hungary, Art. 30A, para. 1 and 30 B, para. 1 of the Agreement with the USSR and Art. 26, para. 1 of the Agreement with Cuba.

is necessary in connection with the content of Article 27, paragraph 1 of the Agreement with Yugoslavia. This provision departs from the principle of application of national law in the case when the spouses with the same citizenship reside in another State and the suit is pending before the court of that State. In such a situation the judgment on divorce may be passed only on the basis of the causes provided for both by national law and the law of the State — place of residence of the parties.

Moreover, the Agreement with Romania does not contain a norm of competence for a situation when spouses have the citizenship of the same State while residing in different States Parties to the Agreement. The Agreement (Art. 24, para. 1 and 2) stipulates that in the case when spouses with the same citizenship reside in another State courts of both States are competent. The courts apply the national law of the parties.

In the case when spouses have the citizenship of different States Parties to the agreement and reside on the territory of one of them, competent are the courts of that State. They apply their own law.³⁹ The agreements with Romania (Art. 24, para. 2) and Cuba (Art. 26, para. 2) provide for other solutions. For a situation as described above these agreements provide for the jurisdiction of the courts of both States, which apply their own law.

The Agreement with the GDR does not contain a norm of competence for the discussed situation.

In situations when spouses do not have the citizenship of the same State and they reside in different States Parties to the agreement, some agreements call for the jurisdiction of courts and competence of the law of that State on whose territory the spouses had their last place of residence.⁴⁰ The remaining agreements provide that courts of both States are competent and the law of the court giving the decision should be applied.⁴¹ Similar norms are included in the Agreement with Hungary (Art. 33, para. 4) for the situation when spouses with different citizenships have never resided in one State.

³⁹ Art. 24, para. 2 of the Agreement with Bulgaria, Art. 14, para. 2 of the Agreement with Czechoslovakia, Art. 27, para. 3 of the Agreement with Yugoslavia, Art. 27, para. 2 and Art. 28, para. 2 of the Agreement with Mongolia, Art. 33, para. 3 of the Agreement with Hungary, Art. 30A, para. 2 and 30B, para. 2 of the Agreement with the USSR.

⁴⁰ Art. 24, para. 2 of the Agreement with Bulgaria, Art. 14, para. 2 of the Agreement with Czechoslovakia, Art. 27, para. 2 and Art. 29, para. 2 of the Agreement with Mongolia, Art. 33, para. 3 of the Agreement with Hungary.

⁴¹ Art. 23, para. 2 of the Agreement with the GDR, Art. 24, para. 2 of the Agreement with Romania, Art. 30A, para. 2 and 30B, para. 2 of the Agreement with the USSR and Art. 26, para. 2 of the Agreement with Cuba.

8. Establishment of Existence and Non-existence of Marriage and its Nullification

Most of the agreements link the question of the law applicable in the discussed category of cases with the law that ought to have been applied for the appraisal of a marriage contract. There is also a clear distinction between cases concerning the breach of substantive prerequisites (with the exception of the Agreement with the USSR), which are subject to the law which ought to have been applied for their appraisal, and cases where the due form has not been kept, which are subject to the law which ought to be applied for the appraisal of the form.⁴² The agreements with the remaining States (Yugoslavia, Hungary and partly Romania) contain a different construction. The point is that in the appraisal of existence or non-existence, or nullification of marriage the law to which a marriage contract was subject is not examined; the law to be applied is indicated by a defined connecting factor irrespective of the fact whether the contract of marriage was subject to this law. These agreements provide for the competence of the joint national law of spouses, and if it is lacking — the law of the State on whose territory spouses have their place of residence.⁴³ The Agreement with Hungary (Art. 33, para. 3 and 4) provides for the competence of the law of the State on whose territory the spouses had their joint place of residence, and in the next place — the law of the seat of the court giving the decision in the case when spouses do not reside on the territory of the same State Party to the agreement.

Moreover, the agreements with Yugoslavia and Hungary provide for the possibility of nullification of a marriage concluded by citizens of one State before an organ of the second State Party to the agreement, only if conditions for nullity of marriage have been provided for by the national law of spouses and the law of the State before whose organ marriage was concluded.⁴⁴ A similar provision is included in Article 25, paragraph 1 of the Agreement with Romania but only with reference to the form of contracting marriage. Thus the discussed provisions provide for a cumulative application of law of both States.

⁴² Art. 25, para. 1 and 2 of the Agreement with Bulgaria, Art. 15, para. 1 and 2 of the Agreement with Czechoslovakia, Art. 26, para. 1 and 2 of the Agreement with Mongolia, Art. 24, para. 1 of the Agreement with the GDR, Art. 25, para. 1 and 2 of the Agreement with Romania, Art. 30, para. 1 of the Agreement with the USSR and Art. 27, para. 1 of the Agreement with Cuba.

⁴³ Art. 27, para. 1 and 3 of the Agreement with Yugoslavia and Art. 33, para. 1 and 3 of the Agreement with Hungary.

⁴⁴ Art. 27, para. 2 of the Agreement with Yugoslavia and Art. 33, para. 2 of the Agreement with Hungary.

The jurisdiction of the discussed category of matters has been regulated in a similar way as in divorce cases⁴⁵ in all agreements except in the Agreement with the USSR.

The only agreement which regulates independent jurisdiction for these cases is with the USSR (Art. 30, para. 2). In accordance with this provision competent are organs of that State on whose territory spouses have or had their last joint place of residence. From the subsequent content of this provision it results that the idea is that the spouses in reality are to have a joint place of residence, i.e. within a domestic community. Consequently it is insufficient to establish only that they reside on the territory of the same State. The competence of the organs of the State on whose territory spouses had their last place of residence is optional as organs of the State on whose territory spouses reside, even if separately, are also competent.

9. Legal Relations Between Parents and Children

Before discussing norms of competence in this matter it is advisable to define the notion of "legal relations between parents and children". Here the notion embraces cases concerning a child's parentage (recognition of fatherhood or motherhood, establishment and denial of paternity or maternity), maintenance for children, parental authority and other matters (e.g. concerning a child's property).

For these matters most of the agreements contain a norm of competence in accordance with which a child's national law is applicable.⁴⁶ This statement is of a general nature and some supplements are necessary. From the majority of the mentioned agreements it results that a child's citizenship at the moment of instituting legal proceedings is decisive. The Agreements with the GDR (Art. 27, para. 1) and Cuba (Art. 28, para. 1) provide that in cases concerning a child's parentage the law applicable is the law of the State whose citizenship a child acquired by birth. The Agreement with the GDR also contains a provision that if a child acquired by birth the citizenship

⁴⁵ Art. 25, para. 3 of the Agreement with Bulgaria, Art. 15, para. 3 of the Agreement with Czechoslovakia, Art. 27, para. 1 and 3 of the Agreement with Yugoslavia, Art. 28, para. 1 and 2 of the Agreement with Mongolia, Art. 24, para. 2 of the Agreement with the GDR, Art. 25, para. 3 of the Agreement with Romania, Art. 33, para. 1, 3, 4 of the Agreement with Hungary and Art. 27, para. 2 of the Agreement with Cuba.

⁴⁶ Art. 26 of the Agreement with Bulgaria, Art. 16, para. 1 of the Agreement with the CSSR, Art. 28 of the Agreement with Yugoslavia, Art. 29 of the Agreement with Mongolia, Art. 26, para. 1 and Art. 27, para. 1 of the Agreement with the GDR, Art. 26, para. 1 and Art. 27, para. 1 of the Agreement with Romania, Art. 34 of the Agreement with Hungary, Art. 28, para. 1 and 2 of the Agreement with Cuba.

of both States the law to be applied is of the State in which a child resides from the time of its birth. A similar statement is included in Article 26, paragraph 1 of the Agreement with the GDR which, in addition to a child's parentage, deals with other matters on legal relations between parents and children. In accordance with this provision if a child has the citizenship of both States the law of the State on whose territory a child has its place of residence is applicable. The Agreement with Romania (Art. 26, para. 2 and Art. 27, para. 1) provides for the possibility of application instead of a child's national law of the law of the State on whose territory a child has its place of residence if the law of that State is for the child more advantageous. The Agreement with Hungary contains a similar regulation which concerns, however, exclusively cases of establishing a child's parentage (Art. 34).

The Agreement with the GDR provides for a special regulation (Art. 27, para. 2) according to which it is sufficient to recognize a child by way of preserving the form requested by the law of the State on whose territory parenthood or motherhood was recognized.

Contrary to the discussed agreements the Agreement with the USSR submits the legal relations between parents and children (excluding relations of a child born out of wedlock)—to the law of the State on whose territory is the joint place of residence of the parents and children (Art. 31, para. 1). If there is no joint place of residence on the territory of one State, the child's national law is to be applied (Art. 31, para. 2). This Agreement also contains a regulation (Art. 31, para. 3) which is similar to the regulations included in the Agreements with Romania and Hungary providing that when a child is the citizen of one State and resides in another State and the law of that State is for the child more advantageous then it is to be applied.⁴⁷

The next problem to be discussed is jurisdiction in cases concerning relations between parents and children. With regard to the contents of the regulations of these cases the agreements may be divided into three groups.

The first group calls for optional jurisdiction of the courts of a child's native State and the courts of the State on whose territory the child has its place of residence.⁴⁸

⁴⁷ Judicial Decision of the Supreme Court of 26 June, 1968, II CZ 111/68. *Orzecznictwo Sądu Najwyższego Izba Cywilna i Izba Pracy* [Judicial Decisions of the Civil Law Division and Labour Law Division of the Supreme Court] 1969/5/item 95. The Supreme Court pointed out that the manner of maintenance adjudication resulting from the family law in the USSR (denomination of maintenance in fractional parts) is more advantageous for the child.

⁴⁸ Art. 27 of the Agreement with the GDR, Art. 35 of the Agreement with Hungary, Art. 28, para. 3 of the Agreement with Cuba.

The second group provides for jurisdiction of the courts of a child's native State. It is possible to bring an action to the court of the State on whose territory a child resides on the condition that both parties reside in the same State.⁴⁹

The Agreement with Romania contains a significant supplement (Art. 28, para. 3). In accordance with this regulation in cases concerning maintenance competent are also the courts of the State on whose territory is the place of residence of the defendant.

The jurisdictional regulations of the Agreement with the USSR must be discussed separately. Article 33 of this Agreement ties jurisdiction with the law applicable, and it provides for the jurisdiction of the courts of the State whose law is applicable. This means that cases concerning children born out of wedlock shall be examined by a child's native court. In remaining cases competent are courts of the State on whose territory the parties have their places of residence. In the case when there is no joint place of residence competent are the child's native courts or courts of the State on whose territory the child has its place of residence, depending on the law of which State is for the child more advantageous.

10. Claims for Alimony and Maintenance

The agreements in question do not contain one provision pertinent to all claims for alimony and maintenance. For a child's claims for maintenance the competent norm is indicated by provisions concerning the relations between parents and children. In claims for alimony between spouses the competent norm is indicated by provisions concerning property relations between spouses. Moreover, some agreements contain additional provisions which point out the norms of competence and jurisdiction for the obligation of maintenance between (other) relatives, between persons whose marriage was nullified or dissolved, and between the adopting person and the adoptee. The claims for maintenance between these parties fall under the native law of the entitled person,⁵⁰ and competent are the courts of the State on whose territory is the place of residence of the entitled person.⁵¹

Moreover, the Agreements with Bulgaria (Art. 27A), Hungary (Art. 35A)

⁴⁹ Art. 27, para. 1 and 2 of the Agreement with Bulgaria, Art. 16, para. 2 of the Agreement with Czechoslovakia, Art. 29, para. 1 and 2 of the Agreement with Yugoslavia, Art. 30, para. 1 and 2 of the Agreement with Mongolia, Art. 28, para. 1 and 2 of the Agreement with Romania.

⁵⁰ Art. 29, para. 1 of the Agreement with Bulgaria, Art. 17, para. 1 of the Agreement with Czechoslovakia.

⁵¹ Art. 29, para. 2 of the Agreement with Bulgaria, Art. 17, para. 2 of the Agreement with Czechoslovakia.

and the USSR (Art. 33) contain special norms of obligation of maintenance of children towards their parents. In this case the courts competent and the law applicable are those of the State on whose territory the entitled person has his place of residence.

11. Adoption

All the agreements, except with Yugoslavia, stipulate that in cases concerning adoption the law applicable is the national law of the adopting person. In the case of adoption at the request of both spouses who have different citizenships it is necessary to comply with requirements resulting from the legislation of each of the spouses.⁵² The agreements make an exception to the principle of application of the national law of the adopting person (or persons). Thus if the national law of the adopting person provides that his consent is required, or the consent of his statutory representative, or permission of a competent organ of the State, then such consent or permission is necessary.⁵³

As far as the question of jurisdiction is concerned, priority has been given to the organs of the State whose citizen is the adopting person. If the child is adopted by spouses with different citizenships competent are courts of the State on whose territory they have their place of residence or had their last joint place of residence.⁵⁴ A different norm has been included in the Agreement with Mongolia (Art. 32) which provides for the exclusive jurisdiction of the courts of the native State of the adoptee.

The regulations in the Agreement with Yugoslavia differ from the above principles. This agreement provides for cumulative competence of the national law of the adopting person and the adoptee (Art. 30, para. 1). Competent are

⁵² Art. 28, para. 1 and 3 of the Agreement with Bulgaria, Art. 18, para. 1 and 3 of the Agreement with Czechoslovakia, Art. 31, para. 1 and 2 of the Agreement with Mongolia, Art. 33, para. 1 and 3 of the Agreement with the GDR, Art. 29, para. 1 and 2 of the Agreement with Romania, Art. 36, para. 3 of the Agreement with Hungary, Art. 34, para. 1 and 2 of the Agreement with the USSR, Art. 29, para. 1 and 3 of the Agreement with Cuba.

⁵³ Art. 28, para. 2 of the Agreement with Bulgaria, Art. 18, para. 2 of the Agreement with Czechoslovakia, Art. 31, para. 3 of the Agreement with Mongolia, Art. 33, para. 2 of the Agreement with the GDR, Art. 29, para. 3 of the Agreement with Romania, Art. 36, para. 2 of the Agreement with Hungary, Art. 34, para. 3 of the Agreement with the USSR, Art. 29, para. 2 of the Agreement with Cuba.

⁵⁴ Art. 28, para. 4 of the Agreement with Bulgaria, Art. 18, para. 4 of the Agreement with Czechoslovakia, Art. 33, para. 4 of the Agreement with the GDR, Art. 29, para. 4 of the Agreement with Romania, Art. 36, para. 4 of the Agreement with Hungary, Art. 35 of the Agreement with the USSR, Art. 29, para. 4 of the Agreement with Cuba.

courts of the State whose citizen is the adoptee. When the person adopting and the adoptee both reside in the native State of the adopting person the jurisdiction of the courts of that State is optional (Art. 30, para. 2 of the Agreement with Yugoslavia).

As concerns the question of dissolving adoption all agreements, with the exception of the Agreement with Romania, stipulate that the provisions concerning adoption are applied respectively.⁵⁵

12. Guardianship and Care

All the international agreements discussed in this paper devote much place to the question of care and guardianship. In addition to general provisions specifying the competent organs and law applicable in these cases the agreements contain a number of special provisions.

The principle resulting from these agreements is that the person who is subject to care or guardianship is submitted to the law and organs of the State whose citizen he is.⁵⁶ Only the Agreement with the GDR does not contain a general norm concerning the law applicable in this case.

The subsequent provisions in this subject which will be mentioned below are exceptions to the said principle. So, the relations between a guardian and a person submitted to care and guardianship are subject to the law of the State whose organ established the guardian.⁵⁷ The duty of accepting the function of a guardian results from the national law of the person who is to become the guardian.⁵⁸

The principle holds that as a guardian should be appointed a citizen

⁵⁵ Art. 28, para. 5 of the Agreement with Bulgaria, Art. 18, para. 5 of the Agreement with Czechoslovakia, Art. 30 of the Agreement with Yugoslavia, Art. 33 of the Agreement with Mongolia, Art. 33 of the Agreement with the GDR, Art. 36, para. 5 of the Agreement with Hungary, Art. 36 of the Agreement with the USSR, Art. 29 of the Agreement with Cuba.

⁵⁶ Art. 30, para. 1 of the Agreement with Bulgaria, Art. 19, para. 1 and 2 of the Agreement with Czechoslovakia, Art. 23, para. 1 of the Agreement with Yugoslavia, Art. 34, para. 1 and 2 of the Agreement with Mongolia, Art. 30, para. 1 of the Agreement with the GDR, Art. 33, para. 1 and 4 of the Agreement with Romania, Art. 37, para. 1 of the Agreement with Hungary, Art. 37, para. 1 of the Agreement with the USSR, Art. 30, para. 1 and 2 of the Agreement with Cuba.

⁵⁷ Art. 30, para. 2 of the Agreement with Bulgaria, Art. 19, para. 3 of the Agreement with Czechoslovakia, Art. 34, para. 3 of the Agreement with Mongolia, Art. 30, para. 2 of the Agreement with the GDR, Art. 33, para. 3 of the Agreement with Romania, Art. 37, para. 2 of the Agreement with Hungary, Art. 30, para. 3 of the Agreement with Cuba.

⁵⁸ Art. 30, para. 3 of the Agreement with Bulgaria, Art. 19, para. 4 of the Agreement with Czechoslovakia, Art. 34, para. 4 of the Agreement with Mongolia, Art. 33, para. 2 of the Agreement with Romania, Art. 37, para. 3 of the Agreement with Hungary, Art. 30, para. 4 of the Agreement with Cuba.

of the same State whose citizenship has the person submitted to care or guardianship. A citizen of one State may be appointed a guardian of a citizen of another State if he resides in the State in which the care and guardianship is to be exercised and if such a decision is more advantageous for the person subject to care or guardianship.⁵⁹

In the case when it is necessary to undertake actions in the interest of a citizen of one State whose place of residence or temporary residence is in another State there exists the duty to immediately inform the native organ.⁶⁰ In urgent cases the guardianship organ of the place of residence or temporary residence of the person requiring assistance may issue interim orders. The interim orders remain in force until a different decision is given by the native organ.⁶¹

A different regulation concerning this matter is included in the Agreement with the USSR (Art. 37, para. 2). This regulation stipulates that a competent organ with regard to the place of residence or temporary residence of the person requiring care may establish care or guardianship over a citizen of another State on the basis of its own law on the condition that such a provision has not been issued in the native State.

Moreover, the agreements provide for the possibility of the native organ of the person requiring care to apply to the guardianship organ of the State on whose territory such a person has his place of residence or temporary residence to exercise (take over) guardianship or to issue indispensable interim orders.⁶²

⁵⁹ Art. 30, para. 4 of the Agreement with Bulgaria, Art. 19, para. 5 of the Agreement with Czechoslovakia, Art. 34, para. 5 of the Agreement with Mongolia, Art. 33, para. 5 of the Agreement with Romania, Art. 37, para. 4 of the Agreement with Hungary, Art. 30, para. 5 of the Agreement with Cuba.

⁶⁰ Art. 31, para. 1 of the Agreement with Bulgaria, Art. 20, para. 1 of the Agreement with Czechoslovakia, Art. 23, para. 1 of the Agreement with Yugoslavia, Art. 35, para. 1 of the Agreement with Mongolia, Art. 31, para. 1 of the Agreement with the GDR, Art. 38, para. 1 of the Agreement with Hungary, Art. 31, para. 1 of the Agreement with Cuba.

⁶¹ Art. 31, para. 2 of the Agreement with Bulgaria, Art. 20, para. 2 of the Agreement with Czechoslovakia, Art. 23, para. 2 of the Agreement with Yugoslavia, Art. 35, para. 2 of the Agreement with Mongolia, Art. 31, para. 2 of the Agreement with the GDR, Art. 38, para. 2 of the Agreement with Hungary, Art. 31, para. 2 of the Agreement with Cuba.

⁶² Art. 32, para. 1 of the Agreement with Bulgaria, Art. 21, para. 1 of the Agreement with Czechoslovakia, Art. 24, para. 1 of the Agreement with Yugoslavia, Art. 36, para. 1 of the Agreement with Mongolia, Art. 32, para. 1 of the Agreement with the GDR, Art. 39, para. 1 of the Agreement with Hungary, Art. 38, para. 1 of the Agreement with the USSR, Art. 32, para. 1 of the Agreement with Cuba.

13. Inheritance

The problem of inheritance, just like in the case of guardianship, has been taken into consideration extensively. In addition to fundamental norms concerning the law applicable in these cases and organs competent, both agreements on conduct of legal transactions and consular conventions contain provisions concerning equality of rights of citizens of both States in the field of inheritance, notification of the occurrence of death, rights of diplomatic representatives and consular officers, securing inheritance, reading and publication of a will and delivery of inheritance.

As far as the norms of competence are concerned most of these agreements hold to the principle of the cohesion of estate. They stipulate that independently of the structure of the estate the law applicable in this case is the national law of the decedent at the moment of his death.⁶³ The agreements with Bulgaria (Art. 35A) and the USSR (Art. 42) contain different solutions which depend on the elements of the estate. In the part concerning movables the law applicable is the national law of the decedent at the moment of his death, and in the part concerning immovables — the law of the place where the immovable property is situated.

It should be added that in this respect the Agreement with Romania does not contain any provisions.

Subsequent provisions indicate the law applicable for the appraisal of the capacity to draw up or revoke a will and the consequences of defect in a declaration of will. In this respect the national law of the decedent at the moment when the will was drawn up is to be applied.⁶⁴ The national law at the moment of death of the decedent is also applicable to the appraisal of the form of the will, however, it is sufficient to conform with the law of the place where the will was drawn up.⁶⁵

⁶³ Art. 22, para. 1 of the Agreement with Czechoslovakia, Art. 36 of the Agreement with Yugoslavia, Art. 42 of the Agreement with Mongolia, Art. 41, para. 1 of the Agreement with the GDR, Art. 47, para. 1 of the Agreement with Hungary, Art. 34, para. 1 of the Agreement with Cuba.

⁶⁴ Art. 36, para. 1 of the Agreement with Bulgaria, Art. 24, para. 1 of the Agreement with Czechoslovakia, Art. 37 of the Agreement with Yugoslavia, Art. 43, para. 2 of the Agreement with Mongolia, Art. 44, para. 2 of the Agreement with the GDR, Art. 38, para. 2 of the Agreement with Romania, Art. 49, para. 2 of the Agreement with Hungary, Art. 35, para. 1 of the Agreement with Cuba.

⁶⁵ Art. 36, para. 2 of the Agreement with Bulgaria, Art. 24, para. 2 of the Agreement with Czechoslovakia, Art. 38 of the Agreement with Yugoslavia, Art. 43, para. 1 of the Agreement with Mongolia, Art. 44, para. 1 of the Agreement with the GDR, Art. 38, para. 1 of the Agreement with Romania, Art. 49, para. 1 of the Agreement with Hungary, Art. 44 of the Agreement with the USSR, Art. 35, para. 2 of the Agreement with Cuba.

Some agreements contain provisions concerning estate in abeyance. If the succession passes into the possession of a State by virtue of law then the immovable property falls to the State on whose territory it is situated, and the movables fall to the native State of the decedent.⁶⁶

In the field of jurisdiction all the agreements divide the estate into movables and immovables stipulating that in the sphere of movables competent are organs of the State whose citizen was the decedent at the moment of death, and in the sphere of immovables competent are organs of the State on whose territory the immovable property is situated.⁶⁷

Moreover, the agreements provide for the possibility of deciding on inheritance by the organs of the State on whose territory all of the movable property is left by the citizen of the other State if the decedent submits a suitable request and if all his heirs express their consent.⁶⁸

14. Form of Legal Transactions

In accordance with the provisions of most of the discussed international agreements the form of a legal transaction is subject to the law which is applicable to a given legal action. It is, however, sufficient to keep to the requirements of the law which is in force in the place of drawing up the legal document.⁶⁹ The mentioned provisions do not include legal transactions concerning immovable property, as the form of the legal transaction

⁶⁶ Art. 36A of the Agreement with Bulgaria, Art. 43 of the Agreement with the GDR, Art. 48 of the Agreement with Hungary, Art. 43 of the Agreement with the USSR.

⁶⁷ Art. 37, para. 1 and 2 of the Agreement with Bulgaria, Art. 25, para. 1 and 2 of the Agreement with Czechoslovakia, Art. 42 and Art. 43, para. 1 of the Agreement with Yugoslavia, Art. 44, para. 1 and 2 of the Agreement with Mongolia, Art. 45, para. 1 and 2 of the Agreement with the GDR, Art. 39, para. 1 and 2 of the Agreement with Romania, Art. 50, para. 1 and 2 of the Agreement with Hungary, Art. 45, para. 1 and 3 of the Agreement with the USSR, Art. 36, para. 1 and 2 of the Agreement with Cuba.

⁶⁸ Art. 37, para. 4 of the Agreement with Bulgaria, Art. 25, para. 3 of the Agreement with Czechoslovakia, Art. 43, para. 2 of the Agreement with Yugoslavia, Art. 44, para. 4 of the Agreement with Mongolia, Art. 45, para. 4 of the Agreement with the GDR, Art. 39, para. 3 of the Agreement with Romania, Art. 50, para. 1 of the Agreement with Hungary, Art. 45, para. 2 of the Agreement with the USSR and Art. 36, para. 3 of the Agreement with Cuba.

⁶⁹ Art. 45, para. 1 of the Agreement with Bulgaria, Art. 34, para. 1 of the Agreement with Czechoslovakia, Art. 32, para. 1 of the Agreement with Yugoslavia, Art. 38, para. 1 of the Agreement with Mongolia, Art. 44, para. 1 of the Agreement with Hungary, Art. 41, para. 1 of the Agreement with the USSR, Art. 23, para. 1 of the Agreement with Cuba.

relating to immovables has been submitted to the appraisal of the law of the State on whose territory the immovable property is situated.⁷⁰

The agreements with the GDR and Romania do not contain norms of competence concerning the form of legal transactions.

15. Immovables

Some of the agreements contain norms of competence concerning law and jurisdiction in the field of immovables. These provisions rank in priority to provisions of agreements concerning obligations. This means that, for instance, when the law applicable in a legal action concerning immovables is to be determined then the law applicable as well as the competent organs shall be indicated by norms which are to be discussed below and not by norms concerning obligations.

In cases concerning immovables the law applicable and courts competent are those of the State on whose territory the immovable property is situated.⁷¹

The agreements with Mongolia, the GDR, Romania, the USSR and Cuba lack respective norms.

16. Obligations Resulting from Legal Transactions

The question of norms of competence concerning obligations resulting from legal transactions is included only in the agreements with Bulgaria, Yugoslavia, Mongolia and Hungary.

It must be stressed that all these agreements hold to the principle of the parties' will. The parties to an obligation may submit their relations in the sphere of contractual obligations to the law of their choice. In the agreements with Bulgaria, Yugoslavia and Hungary the option of laws is unlimited. On the other hand, the Agreement with Mongolia clearly stipulates that the chosen law must remain in connection with the obligation. In the case when the parties of a relationship resulting from an obligation

⁷⁰ Art. 45, para. 2 of the Agreement with Bulgaria, Art. 34, para. 2 of the Agreement with Czechoslovakia, Art. 32, para. 2 of the Agreement with Yugoslavia, Art. 38, para. 2 of the Agreement with Mongolia, Art. 44, para. 2 of the Agreement with Hungary, Art. 41, para. 2 of the Agreement with USSR, Art. 23, para. 2 of the Agreement with Cuba.

⁷¹ Art. 46, para. 1 of the Agreement with Bulgaria, Art. 35, para. 1 of the Agreement with Czechoslovakia, Art. 33 of the Agreement with Yugoslavia, Art. 45, para. 1 of the Agreement with Hungary.

have not made a choice of law the obligation is subject to the law of the State on whose territory the agreement was concluded.⁷² The Agreement with Bulgaria (Art. 47, para. 1) employs the connecting factor of the place of an obligation's origin. As a rule this place will be the same as the place of the conclusion of the agreement.

Also, in the sphere of jurisdiction in the field of contractual obligations the parties may make a choice. While the Agreement with Hungary (Art. 45A, para. 3) stipulates that a prorogation contract may establish the jurisdiction of the courts of only one of the States Parties to the agreement, the agreements with the remaining States do not introduce such a restriction.

When the choice of a competent court has not been made the jurisdiction of the courts of the State on whose territory the defendant resides is taken into consideration. Such is the regulation of the Agreement with Yugoslavia (Art. 34, para. 1). The agreements with the remaining States⁷³ provide, in addition, for optional jurisdiction of the courts of the State on whose territory the defendant has his place of residence if the object of litigation or the property of the defendant is situated there.

17. Obligations Resulting from Illicit Acts

The problem of obligations resulting from illicit acts has been included in all agreements with the exception of the agreements with the GDR, Romania and Cuba. The principle is that these obligations are subject to the law of the State on whose territory the event which is the source of the obligation took place.⁷⁴ The agreements with Hungary (Art. 45B, para. 1) and the USSR (Art. 41A, para. 2) provide for the possibility to accept the law of another State as the law to be applied. In accordance with the Agreement with Hungary when the parties of the relationship resulting from an obligation have their place of residence on the territory of the other State Party to the agreement, the law applicable in this case is the law of this State. According to the Agreement with the USSR, instead of the law of the State where the event inflicting damage took

⁷² Art. 34, para. 1 of the Agreement with Yugoslavia, Art. 39, para. 1 of the Agreement with Mongolia, Art. 45A, para. 1 and 2 of the Agreement with Hungary.

⁷³ Art. 48, para. 1 of the Agreement with Bulgaria, Art. 40, para. 1 of the Agreement with Mongolia, Art. 45A, para. 3 of the Agreement with Hungary.

⁷⁴ Art. 47, para. 2 of the Agreement with Bulgaria, Art. 36 of the Agreement with Czechoslovakia, Art. 34, para. 2 of the Agreement with Yugoslavia, Art. 39, para. 2 of the Agreement with Mongolia, Art. 45B, para. 1 of the Agreement with Hungary, Art. 41A, para. 1 of the Agreement with the USSR.

place, the law applicable shall be the national law of the parties of the relationship resulting from an obligation, if the plaintiff and defendant are citizens of the same State.

The question of jurisdiction has been taken into consideration in all agreements regulating obligations resulting from illicit acts with the exception of the Agreement with the USSR. These regulations can be divided into two kinds.

The first jurisdictional solution is very flexible. Competent are the courts of the State on whose territory the event which was the source of the obligation took place or on whose territory the defendant resides, as well as the courts of the State on whose territory the property of the defendant is.⁷⁵

The second kind of regulations is included in the agreements with Bulgaria (Art. 48, para. 1) and Mongolia (Art. 40, para. 1). Competent are courts of the State on whose territory the defendant resides. A statement of claim may be submitted to the court of the State on whose territory the defendant has his place of residence if the object of litigation or the property of the defendant is situated there.

⁷⁵ Art. 36 of the Agreement with Czechoslovakia, Art. 34, para. 2 of the Agreement with Yugoslavia, Art. 45B, para. 2 of the Agreement with Hungary.

Review of Awards of the Court of Arbitration at the Polish Chamber of Foreign Trade

by ANDRZEJ W. WIŚNIEWSKI

1. Award of 21 August, 1985, Case No. 43/84

In a contract concluded on the "ex works" basis according to INCOTERMS", the buyer bears the risk of deterioration of the quality of goods during transportation. The appointment of a representative for the acceptance of the goods needs not be made in writing. The buyer cannot put into question the fact of appointment of the representative for the acceptance nor of the extent of that acceptance if he did not indicate another representative and, nevertheless, had sent the means of transport for the acceptance of the goods.

Excerpt from Reasons

A foreign enterprise having its seat in Warsaw claimed from the respondent, a firm from Hamburg, the sum of DM 41,248 with interest and costs of proceedings.

The claimant explained that he concluded with the respondent a contract for the delivery of 100 tons of apple concentrate. The delivery under contract would be made at the producer's works in Poland in the 3rd quarter of 1983; the acceptance of goods would be performed by an authorized Polish specialist. The basis for the payment of the amount due for the delivered goods had to be the acceptance report (both quantitative and qualitative) signed by him.

After the goods arrived at the respondent's in the Federal Republic of Germany on 19 September, 1983, the respondent claimed that the goods are of improper quality and refused to pay the price.

The claimant refused to acknowledge the quality claim alleging that the delivery had been both agreed upon and performed, on the "ex works" basis to the buyer's cistern and that the goods were of the required quality at the time and place of their loading.

The Panel of Arbitrators took the following under consideration:

1. The arbitration clause and the applicable law

The arbitration clause contained in the contract provides for the competence of the Court of Arbitration for the examination of this claim which competence had, as a matter of fact, been in no way questioned by any of the parties during the proceedings.

The parties included no provision in the contract as to the applicable substantive law in view of which the Panel of Arbitrators, acting under the provision of paragraph 29, section 1 of the Rules of the Court of Arbitration, laid down that the Polish law was applicable in this case, as the law most closely connected with the legal relation under examination (the contract had been concluded in Poland, its performance took place in Poland, the parties arranged for the competence of the Polish Court of Arbitration for the solution of possible claims). This is, besides, in conformity with the Polish conflict norm (Art. 37 of the Polish Act on Private International Law). Specifically applicable in this instance are provisions of the Polish Civil Code regarding the contract of sale. The issue of the proper substantive law had not been taken up by the parties during the proceedings, while the applicability of the Polish law, referred to by the claimant, had not been contested by the respondent.

2. Problems pertaining to the substance of the case

Under the contract of sale the seller engaged himself to transfer onto the buyer property in the goods (apple juice concentrate) of properties indicated in the contract, and to deliver them to him; while the buyer engaged himself to accept those goods and to pay to the seller their price (Art. 535 of the Polish Civil Code). The sale had been agreed on the "ex works" basis, and the transfer of property, the delivery and acceptance of the goods had to take place in Poland at a site agreed upon, namely at the producer's works. Following the contract, the claimant sent for the acceptance of the goods a motor cistern on 15 September, 1983. On that same day the goods were loaded onto that cistern, the acceptance report of the goods was signed, and the cistern with the goods aboard left the works. The parties do not question those circumstances. While the following issues require solution:

1) Were the delivery of the goods by the seller (the plaintiff) and their acceptance by the buyer (the defendant) legally effective?

2) Were the goods delivered to the buyer, at the moment of delivery, of the quality agreed upon?

3) Who is liable for the deterioration of the quality of the goods, if any took place, after their delivery to the buyer?

Ad 1) The parties agreed that the acceptance of the goods should be made by a Polish specialist, authorized by the buyer; and a report should be signed at the moment of loading onto the cistern, confirming the quantity and quality of the accepted goods. Thus it had been up to the buyer to indicate the person authorized to accept the goods in his name. As it results from depositions of witnesses, the buyer indicated Mr. X to be that person. The same results from the written declaration of Mr. X included in the report of acceptance signed by him. The same is confirmed by the respondent himself in his telex to the claimant of 19 October, 1983 in which he does not question the fact of authorizing Mr. X, but merely the scope of that authorization, claiming that he was empowered to the quantitative, but not the qualitative acceptance. In the light of this declaration of the respondent the Panel of Arbitrators could not believe the subsequent statement of his representative that Mr. X had not been known to the respondent.

The contract of the parties does not include the requirement that the authorization for the person having to accept the goods must be issued in any specific form. Neither does the requirement of a written form of such an authorization result from the provision of the law (Art. 99 of the C.C. requires this merely for a general power of attorney). Besides, the respondent himself gave evidence of having indeed previously designated the person authorized for the acceptance of the goods in accordance with the provision of point 5 of the contract, since he dispatched the cistern for the goods without having designated any other person. The defendant could not, as a matter of fact, expect that the goods would be handed out to him without signature of the acceptance report provided for in the contract, the submission of which report was, under that contract, the condition essential for obtaining payment by the respondent. In that way the respondent confirmed the written authorization for the acceptance of the goods in his name, given to Mr. X by Mr. Y. The fact that Mr. Y — as was subsequently claimed by the representative of the respondent — exceeded his competences cannot be accepted as prejudicial to the claimant, as the obligation to indicate properly the person authorized for the acceptance of the goods is up to the respondent. The bringing up by the respondent of this objection only in the course of the proceedings must be recognized as an action *contra factum suum*.

Ad 2) The parties agreed in the contract that the apple concentrate

purchased by the defendant would have 65—66 brigs in accordance with the Polish export norm.

The certificate of the Central Inspectorate of Standardization submitted by the claimant stated that the goods were admitted for export as being in conformity with the contract; a closer description of the goods was also included from which it resulted that they had no undesirable flavour, contained no alcohol, and were up to 65.2 brigs. The only objection against the CIS certificate was the statement of the representative of the respondent that the contract did not provide for such a certificate. This cannot shake the conclusive evidence of that certificate. Moreover, also under the procedure agreed upon by the parties the adequate quality of the goods was confirmed by the person authorized for the acceptance.

Ad 3) The parties agreed in the contract that delivery of the goods would occur on the conditions defined by the trade term "ex works" onto cisterns brought up by the buyer. As per interpretation of that term made by the International Chamber of Trade ("INCOTERMS" 1953) any risk connected with the goods shall be borne by the buyer from the moment the goods were already in his disposal. In the case under reference this occurred at the moment of their loading onto the buyer's cisterns. Thus, from that moment on, according to Art. 559 of the C.C., the seller is not responsible under the guarantee for any physical defects of the goods, unless resulting from a cause already previously existing in them. As it results from the facts indicated above, the goods at the moment of their loading were of an adequate quality and conform with the contract, so that there is no reason for assuming that their subsequent deterioration occurred because of their bad quality prior to the passage of the risk to the buyer. Specifically, such a reason cannot be found either in the quality certificate issued after the cistern arrived at the buyer's, or in the declaration of the cistern's driver. The certificate of 27 September, 1983 cannot cancel the CIS certificate or determinations of the acceptance report of the goods, as it involves goods which had been under the buyer's control for the past 5 days; and it was determined in the course of the proceedings that there prevailed within that time along the transportation route temperatures favouring fermentation. It is to be remarked that — in spite of the objection of the claimant — the respondent did not explain the reasons for which the transportation of the purchased concentrate took such a long time. It is, therefore, highly probable that this had been the reason for the deterioration of the quality of the goods. Such circumstances constitute the usual commercial risk which cannot, however, burden the claimant in the transaction concluded on "ex works" basis.

Moreover, the written declaration of the driver, admitted by the Court on the motion of the defendant, has no adequate power of evidence. It has to be stated first of all that the driver had no authorization

whatever for assuming an attitude in the case of the quality of the load, to which another person had been authorized. None of the witnesses confirmed that the driver submitted any reservations regarding the load. It is doubtful if he has adequate qualifications to make his assessment of the quality of the goods able to undermine the official certificate, or even the opinion of the specialist designated by the party. The claim that he has great experience in the carriage of apple concentrate does not change anything here, having besides not been supported by any evidence.

To recapitulate, the Panel of Arbitrators admitted that the quality of the goods delivered by the claimant to the respondent was adequate and in conformity with the contract, while its possible deterioration after its taking over by the latter resulted from causes for which the respondent is to be held liable. For those reasons the claimed amount was adjudged.

The claimant did not determine the amount of the interest, nor did he indicate the date starting from which he claims interest. In view thereof the Panel of Arbitrators adjudged the interest as per the legal percentage rate from the date on which the claim had been submitted.

The claimant did not submit the specification of his costs of proceedings, in view of which the Panel of Arbitrators adjudicated on his behalf from the respondent only the refund of the amount of the arbitration fee and of expenses connected with the proceedings borne by the Panel of Arbitrators from the advance money paid by the claimant.

2. Award of 18 October, 1985, Case No. 74/83

The non-opening by the buyer of the letter of credit in the time indicated in the contract does not lead automatically to any change in the contract nor is it tantamount with the demand for stopping the deliveries. The buyer is under the obligation to pay for the goods dispatched in accordance with the contract even if the seller decided, instead of a letter of credit, to submit the documents for collection.

Excerpt from Reasons

The Polish foreign trade enterprise filed on 14 April, 1983 a claim against a French firm to the amount of Fr.Fr.111,920.40 plus 8 per cent of interest starting 16 October, 1981 to the date of payment and costs of proceedings.

The claimant also explained that the claimed amount represents the price of the part of goods not paid by the respondent and delivered by the

claimant in accordance with the contract concluded by the parties on 4 March, 1981. To justify his claim the claimant attached to it the photocopy of the invoice of 16 October, 1981, mailed to the defendant, in the amount of Fr.Fr.111,920.40, and several requests for a voluntary payment.

The competence of the Court of Arbitration at the Polish Chamber of Foreign Trade was substantiated by the claimant by his choice within limits of the option envisaged in point 18 of the general sales conditions attached to the contract so as to constitute its integral part, and signed by both parties.

The defendant, in spite of the summons by the Panel of Arbitrators, made no reply to the claim nor did he report at any of the hearings.

On 25 June, 1985 the claimant notified the Panel of Arbitrators that — as it results from the opinion of one of the French trade agencies — the firm of the respondent changed its name without at the same time changing its seat. In that situation the notification about the successive date of the hearing fixed for 17 September, 1985 was transferred by the Panel of Arbitrators to the respondent, while sending at the same time a telex notification about that date also to the new firm. The return receipt of the notification was received from the firm of the respondent. However, in spite of that notification the respondent did not report at the hearing, nor did he file any motions concerning the proceedings. On the other hand, the claimant maintained his claim in full.

In view of the above the Panel of Arbitrators decided it proper to settle the claim on the basis of documents and explanations presented by the claimant.

The Panel of Arbitrators took the following premises into account:

It results from the data submitted by the plaintiff that, although the contract provided for payment for the goods by way of a letter of credit, the respondent dispatched the goods and presented documents for collection. The claimant explained at the hearing that the dispatch of the goods, even though the letter of credit had not been opened by the respondent and he did not give any dispatch instructions, had been performed in good faith and in the belief that the amount due would be paid by the respondent by way of collection as had been the case with the previous partial delivery within the same contract; the more so that the part under reference was the ninth in turn and the last.

The fact of acceptance of the goods by the respondent was proved by the claimant by the confirmation of receipt by the French forwarding agent with destination for the firm of the defendant. The confirmation of receipt was made on the reverse of the bill of lading.

As evidence of the refusal by the defendant to pay for the goods the plaintiff submitted a letter of the Bank Polska Kasa Opieki in Paris informing

about the return of the collection documents by the bank of the defendant without indication of any reasons (*sans avis*).

The Panel of Arbitrators assumed that, by not opening the letter of credit, the defendant was by no means released from the obligation of paying for the goods considering that they had actually been delivered. Consistently, the Panel of Arbitrators recognized the claim as justified. The Panel of Arbitrators adjudicated from the respondent to the claimant interest in accordance with the interest rate in force in the country of the claimant.

The costs of arbitration are to be paid by the respondent as the losing party.

3. Award of 22 November, 1985, Case No. 221/79

If, in the contract, the parties cut down the legal period of time for submitting claims involving the quality of the goods, as laid down in paragraph 72, point 1a of the CMEA GCD¹ 1968/75 without changing the provision of paragraph 72, point 3, it has to be presumed that the effect of violation of the time-limit fixed in the contract is the same as of the legal time-limit — meaning the loss of right to refer to arbitration the claim not submitted in due time.

Excerpt from Reasons

By its claim of 13 November, 1979 the claimant — a Hungarian foreign trade enterprise — moved for adjudication on its behalf from the respondent, a Polish foreign trade enterprise, the amount of 32,351 roubles for excession of the guarantee rebate. The claimant based his claim on provisions of the sales contract and of the technical servicing contract.

In reply to the claim the respondent moved for its dismissal bringing up objections involving the merits of the case, and the allegation of running out of the limitation of action period in respect of the claims.

By letter of 29 April, 1980, mailed from Budapest on 12 May, 1980, the claimant submitted a new claim determining explicitly its amount at 82,683 roubles, and that on another grounds than previously, demanding in particular the respondent to cover the additional costs of repair of the

¹ General Conditions of Delivery of Goods between Economic Organizations of the Member-Countries of the Council for Mutual Economic Assistance.

spare parts delivered by him in the event of discovering serial defects. The plaintiff dropped thereby his previous claim, and the arbitration fee paid by him was accounted to his credit as the fee for the new claim.

As regards the new claim in the amount of 82,683 roubles, the respondent's attitude was identical as in the previous instance.

The claimant supported his claim by 227 claim reports attached to it.

The respondent submitted the following objections:

1) The claimant lost the right to refer his claims to arbitration by reason of having failed to observe the time-limit fixed for their submission (para. 72, sec. 3 of the CMEA GCD 1968/75/79);

2) The claims are prescribed in view of the lapse of the time-limits provided for in para. 94, point 2b of the CMEA GCD 1968/75/70.

To justify his standpoint the respondent submitted a detailed specification of all the claims, indicating in it the dates on which the claims occurred and those of their submission.

The Panel of Arbitrators, under consideration of the documentation existing in the case, and of explanations of the parties given during the proceedings, made the following findings.

Ad 1) In point IX of the contract it was laid down that applicable in all questions not regulated therein are provisions of the CMEA GCD (1968/75). As per annex No. III to this contract it was laid down that for the taking over by the claimant of guarantee obligations the respondent would grant him a 3 per cent rebate from the price, and that the guarantee servicing would be performed under conditions of the servicing contract. In the same annex No. III certain changes were introduced in some of the provisions of the servicing contract. There can be no doubt, therefore, that the servicing contract, concluded prior to the contract of delivery, together with the changes introduced by annex No. III, became a part of the contract of delivery by adjusting conditions of the guarantee servicing; and to this contract, as well as to the contract of delivery, provisions of the CMEA GCD 1968/75 should be applied in the issues not covered by it.

Under paragraph 14 of the servicing contract, in the instance of occurrence of serial defects in the spare parts of the combines supplied by the defendant, he shall — regardless of the lump sum provided for this purpose — refund to the plaintiff any costs connected with the repair of such defects. Recognized as serial defects are those of a similar kind appearing in at least 10 per cent of the quantity of the goods supplied.

Assuming that in the four kinds of spare parts the number of claims of the same kind exceeded 15, which represents 10 per cent of the part of machines supplied in 1979, the claimant demanded in his claim the defendant to cover the costs resulting therefrom.

The defendant brought up the objection of non-fulfilment by the plaintiff

of the requirement provided for in paragraph 16 of the servicing contract: to report any defect and claim not later than within 60 days from the moment of its occurrence. As it results from the detailed specification made by the defendant in the statement of claim of 16 September, 1985, the reporting of claims involving serial defects was made much later than required by the respective time-limit (with the exception of merely two instances in the category of double-stream pumps). The respondent indicated also in his data, not questioned by the claimant, the number of days after which the next, 16th claim was reported (as regards single defects — 89, 85, 151 and 194 days respectively).

The Panel of Arbitration assumed that the date of reporting the 16th claim is of a decisive significance for the establishment of the number of days by which the 60-day time-limit laid down in the servicing contract of the parties was exceeded; for it had been just that claim which, inasmuch as the one exceeding the 10 per cent of defects, authorized the claimant to demand payment for the costs of those repairs in excess of the lump-sum provided for in the contract.

After having established the foregoing, the Panel of Arbitration went over to the assessment of the legal effects resulting from the non-keeping by the claimant of the 60-day time-limit for reporting the claims. The standpoints of the parties were contradictory here; the claimant maintained, contrary to the argumentation of the respondent, that the respective provision of the servicing contract had merely the force of an instruction, and could not bring about the loss by the plaintiff of the right of satisfying his claims by arbitration. The Panel of Arbitration did not agree with that opinion. As had been previously laid down, applicable are, in all controversial issues — both with regard to the delivery contract and to the servicing contract closely connected with the former and appropriately modified — the provisions of the CMEA GCD 1968/75/79; which, however, did not deprive the parties of the right of departing from some of the CMEA GCD provisions if so required by specific properties of the goods or of conditions of their delivery (Sec. 2 of the CMEA GCD Preamble). This was what the parties did in the case of the servicing contract, which provided in its paragraph 14 that the report of claims involving the quality of the goods is to be made within 60 days from the date of discovery of the defect, and not within 6 months after the delivery date, as provided in paragraph 72, point 1a of CMEA GCD (1968/1975); and, contrary to the statement of the plaintiff, it was recognized that there were no grounds for questioning the qualitative character of the claims submitted by him. Moreover, the Panel of Arbitrators recognized as groundless the statement of the claimant that the lapse of the 60-day time-limit for reporting the claims is not followed by legal effects in the form of loss of right to refer to arbitration. Considering that, in the servicing contract, the parties laid down the time-limit

for reporting claims different from that contained in paragraph 72, point 1a of the CMEA GCD while leaving unchanged the provision of paragraph 72, point 3, then the effect envisaged in that provision, consisting in the loss of claims, remains in force. On those grounds it was recognized that all claims reported later than 60 days after the occurrence of the serial defect shall be dismissed.

Ad 2) As mentioned above, merely 2 claims were reported prior to the lapse of the time-limit in force, to a total amount of 518.85 roubles. Although with regard to those claims the respondent submitted the objection of limitation of action under Article 93 of the CMEA GCD, yet that objection could not be recognized for the claims were reported to the respondent on 20 September, 1979, while the claim was filed with the Court of Arbitration on 12 May, 1980, thus earlier than the one-year time limit provided for in the CMEA GCD.

BOOK REVIEWS * COMPTES RENDUS

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Andrzej GÓRBIEL, *Międzynarodowe prawo kosmiczne [International Law of Outer Space]*, Warszawa 1985, PWN, 232 pp.

Man's venture into outer space besides opening a new dimension for human activities has created also a variety of legal problems that has have to be solved if peaceful and orderly exploration of this space is to be secured. Thus, it was the task of lawyers to draft rules that would, on one hand, secure basic interests of international community and on the other, not hinder the future technical developments in this field.

Poland has actively participated in the drafting of the rules in question, especially through its representatives in the Legal Sub-Committee of the UN Outer Space Committee. Also the legal issues connected with the space explorations were subject of a number of monographs and many articles and dissertations. However, there had been a need for more extensive introduction to the legal issues connected with interpretation and implementation of the five so far accepted legal instruments. This requirement is met, to some extent, by the monograph *International Law of Outer Space* by A. Górbiel.

Chapter I of this book discusses a number of introductory issues such as: the terminology, history, sources and subjects of international space law. The author accepts notions of "space law", *jus spatiale*, and "the law of extra-atmospheric space" as synonyms for international law of outer space (page 12). In this context the use of the term of the law of extra-atmospheric space can give rise to certain doubts for it is difficult to determine the spatial limits of the space in question. The author himself while discussing the problem of delimitation of outer space points at this fact as a major obstacle to accept the theory of air-less space (p. 158).

When evaluated the main sources of international space law (especially the Outer Space Treaty of 1967) the author rightly observes that they are of a general nature and that their proper interpretation and implementation shall require the elaboration of additional legal instruments. In this context the author underlines the role played by the world legal doctrine of international law seeing its works as a stimulating factor for the drafting of new norms relating to the use of outer space. As far as the subjects of international space law are concerned the author is of an opinion that only States possess a full and unlimited legal subjectivity (p. 27). Other entities, namely international inter-governmental organizations possess limited, so to say derivative subjectivity (p. 28). This stipulation is somehow controversial especially in the light of Article 16 of the Moon Agreement of 1979. For, it is clearly stated there that after the fulfilment of certain conditions an international inter-governmental organization can become a subject of rights and obligations foreseen in this instrument. Furthermore, since the basic principles of space law have been accepted as being of customary nature they apply directly to any entity conducting space activities.

The second chapter is concerned with the general legal status of outer space. The author rejects frequent attempts to determine the basic rights and obligations of States in outer space with the help of civil or roman law concepts — such as *res nullius* *res extra commercium* or *res communis omnium* (p. 47 ff.). He is also of the opinion that the specific nature of outer space and of activities conducted therein does not permit any analogy

with the law of the sea or any other international regulations accepted for regions not under exclusive jurisdiction of any State (p. 48). Though we agree with the author that concepts derived from any branch of municipal law cannot be applied into the domain of international law. However, it should be mentioned here that analogy has played its positive role in the development of international law. It is, of course, important to secure that this tool of law-making process is employed with great care and only after a careful consideration of a number of elements — including the geophysical nature of environment to which the new rules would apply. But there is nothing wrong in the transformations of legal principles which serve well the interests of international community in one region to the other if the basic interests to be protected and expectations to be fulfilled are similar. The basic elements of the legal status of the outer space as confirmed in the Outer Space Treaty of 1967 are clearly based upon analogous institutions of the law of the sea (the Geneva Convention on the High Seas of 1958). Of course, it goes without saying that the final development of space activities may call for the elaboration of specific legal rules but as far as the basic principles are concerned we cannot say that they were formed without any references to the already existing principles of law.

The third chapter analyses the scope of admissibility of the use of outer space. First of all, it should be pointed out that the author underlines the fact that the freedom of outer space does not mean an unlimited freedom of activities (p. 57). States in their practical implementation of this right are bound by provisions of space agreements as well as by general international law. Among the former the author points at an obligation that outer space should be used "for the benefit and in the interest of all nations". He states that by the virtue of this provision it is a duty of States to conduct their space activities with due regard for protected interests of other States (p. 59). This is a very important point since opinions were expressed that this provision of the Outer Space Treaty

has no legal connotation. Further on, an analysis of controversies surrounding the remote sensing and direct broadcasting by satellites is presented.

Chapter four is concerned with space objects. After a presentation of a number of definitions of space objects, the author states that this notion covers "all technical devices which serve the purpose of use and exploration of outer space and are placed beyond the regions of atmosphere which are subject to State jurisdiction" (p. 97). It should be underlined here that the author univocally rejects opinions that the law of outer space does not need the concept of nationality. He underlines the necessity of maintaining of registration of every space object as a legal link between this object and a State (p. 92 ff.). For this link, in turn, determines the State which is responsible for the proper conduct of any space mission. This chapter deals also with questions of States' rights with respect to their space objects, with the legal status of astronauts and with the international responsibility for damages caused by space objects.

Chapter five is devoted to the issues connected with the legal status of celestial bodies. The author critically reviews the different definitions of a celestial body proposed so far by the doctrine. He himself defines this notion as covering all objects or material forms in outer space, the exploration of which by a State or group of States would make their use by other States impossible (p. 133). Further on, the author discusses the implications of Article 4, paragraph 2 of the Outer Space Treaty, which requires the use of celestial bodies to be "exclusively for peaceful purposes". In his opinion it was this provision that caused the controversy over the very meaning of the notion "peaceful" — whether it means "non-aggressive" or "non-military" use. The author advocated the non-military connotation of this principle and this opinion is shared here. It should be mentioned here, however, that the whole controversy in question did not concern so much celestial bodies — in this case the provisions of the basic legal instruments are perfectly clear and univocal — but

the use of the outer space as such. Another point is that the issue of permitted, if at all, activities of military nature of outer space should have been considered more extensively by the author especially in the light of the present developments (the Strategic Defensive Initiative and the Soviet Demilitarization Initiatives presented to the UN Space Committee in 1981 and 1983). This chapter deals further with regulations relating to the use of natural resources of celestial bodies. The author underlines his critical position as far as the notion of common heritage of mankind is concerned, stating that it can become in the future a source of conflict its interpretation and implementation (p. 139). Further on, the legal status of space stations of celestial bodies is discussed. It is important to note here the mentioned in chapter four Article 13, paragraph 3 of the Moon Agreement deserves more detailed analysis. We have here a unique provision which allows for the use of objects belonging to one State by other States in cases presenting a danger to life or health of astronauts. It is important to note that such a use is not conditioned by the requirement of prior notification or consent of the State of registry. This humanitarian provision may, however, cause significant problems in the future. First of all, there is a question of responsibility for excessive or unnecessary use. Is the State acting in accordance with this provision liable to pay damages in such cases? The Agreement is also silent on eventual recompositions for a "proper execution of this Article" — perhaps the solution can be sought on the basis of regulation accepted in the Rescue Agreement of 1968. It seems that an extensive review of problems as presented above should be contained in any monograph on the law of outer space.

Chapter six evaluates a number of theories which were put forward when the question of delimitation of outer space was being intensively discussed. The author points out that all of these theories were rejected because of their failure to provide a stable and clearly defined criterium upon which the establishment of a lower boundary of outer space could be based. It is his

conclusion that the delimitation of outer space can be based upon an analysis of a number of factors such as: the technical requirements of space activities, the geophysical nature of different layers of atmosphere and the protection of State sovereignty. Therefore, he proposes to establish the lower boundary of outer space at the height of 100 kilometers (p. 176).

Chapter seven contains an extensive presentation of issues concerning the nature and the use of the geostationary orbit. The author presents a detailed account of the claims which were put forward by the so-called equatorial States in the Bogota Declaration of 1976. We are in the full agreement with his conclusion that the legal status of this orbit cannot be different from that of the outer space as such.

The final chapter presents the different institutional forms of international cooperation in the use of outer space and celestial bodies. The author reviews the activities of both international inter-governmental organizations (such as INTEDSAT or INTERSPUTNIK) and of non-governmental organizations such as International Astronautical Federation or Committee of Space Research.

The reviewed monograph is supplemented with an annex containing the texts of five basic space law instruments (in Polish) and with an extensive bibliography.

It is important, however, to note that certain issues of fundamental importance are not presented in the reviewed volume to the extent they require. The question of delimitation occupies the whole chapter yet this issue is no longer in the focus of legal discussions concerning the use of outer space. More attention should have been paid to the problems of militarization of outer space, of jurisdiction of States, of commercialization of space activities and direct broadcasting by satellites. These are the problems which are not regulated univocally enough by the space law instruments — the provisions in question are too general and thus open for different and contradictory interpretations. Furthermore these issues can become in the

near future a source of acute political controversies. Thus, an urgent demand for their extensive evaluation exists. These remarks do not, of course, diminish the value of this

volume for any Polish reader interested in space law problems.

Ryszard Hara

Wojciech GÓRALCZYK, *Zarys prawa międzynarodowego publicznego* [*Précis de droit international public*], Warszawa 1983, PWN, 408 p.

Remigiusz BIERZANEK, Janusz SYMONIDES, *Prawo międzynarodowe publiczne* [*Droit international public*], Warszawa 1985, PWN, 438 p.

Il serait difficile de soutenir que la science et la pratique polonaises aient jamais souffert d'une surabondance de manuels de droit international. Dans la période de l'entre-deux-guerres des manuels ont été publiés par Zygmunt Cybichowski, Ludwik Ehrlich et Julian Makowski. A part les versions actualisées des manuels de L. Ehrlich et de J. Makowski ont aussi paru après la Seconde Guerre mondiale en Pologne populaire de nouveaux ouvrages: un travail collectif en deux volumes sous la rédaction de Marian Muszkat, les manuels de Alfons Klafkowski et de Ludwik Gelberg ainsi que deux des trois tomes projetés de tout un système plutôt que d'un manuel de Cezary Berezowski. Ces livres, édités généralement à des tirages insuffisants, disparaissaient très rapidement des vitrines des librairies. Il faut exprimer une joie d'autant plus grande que nous avons sur le marché des livres polonais non seulement deux excellents manuels de droit international, mais en plus des livres que l'on peut acquérir sans difficulté.

Le livre de Wojciech Góralczyk, professeur de la Faculté de droit à l'Université de Varsovie est la troisième réédition déjà d'un ouvrage de 1977. Cette réédition est actualisée, abrégée et partiellement revue par rapport aux versions précédentes, bien que l'auteur souligne que ses conceptions fondamentales n'aient pas changé.

Les auteurs du second livre sont d'une part le professeur, actuellement en retraite, Remigiusz Bierzaneck, autrefois enseignant de droit international à la Faculté de droit de l'Université de Łódź et à la Faculté de journalisme et de sciences politiques de l'Université de Varsovie et, d'autre part, le professeur Janusz Symonides, ancien

enseignant à la Faculté de droit de l'Université Nicolas Copernic à Toruń, actuellement depuis plusieurs années directeur de l'Institut Polonais des Affaires Internationales, enseignant de droit international au Cours supérieur du service diplomatique et à la Faculté de journalisme et de sciences politiques de l'Université de Varsovie. Les deux auteurs ont publié en 1980 avec le professeur Jerzy Jakubowski un manuel intitulé *Droit international et relations internationales* qui contenait un exposé de droit international public enrichi de considérations sur les relations internationales et un exposé de droit international privé (J. Jakubowski en était l'auteur)¹. C'était un assemblage, semble-t-il, quelque peu mécanique, causé par les exigences du programme des études juridiques en Pologne à l'époque, puisque les deux parties du manuel, l'une consacrée au droit public, l'autre au droit privé, existaient en fait indépendamment. Maintenant R. Bierzaneck et J. Symonides viennent de présenter une version légèrement remaniée, mais surtout actualisée du manuel et qui est consacrée uniquement au droit international public.

D'habitude les critiques des manuels contiennent une présentation générale du contenu et une polémique sur des sujets qui y sont présentés de manière à pouvoir évoquer des doutes. Nous voudrions dans notre analyse renoncer au deuxième de ces éléments et nous limiter à montrer les similitudes et les différences qu'il y a entre les deux manuels.

¹ Voir la critique de ce manuel dans: «Polish Yearbook of International Law», 1981—1982, pp. 243—248.

Commençons avec la définition du droit international. Selon W. Góralczyk, «le droit international moderne est un ensemble de normes régissant les relations internationales dans le sens large du terme: non seulement, les relations entre Etats, mais aussi les relations entre Etats et autres sujets de droit international ainsi qu'entre ces différents sujets, c'est à dire les relations entre différents sujets de droit international qui sont indépendants entre eux et ne sont pas soumis à un quelconque pouvoir d'Etat commun» (p. 8). J. Symonides définit le droit international comme «un ensemble de normes régissant les relations mutuelles entre Etats et organisations internationales et autres participants des relations internationales qui jouissent de la capacité de contracter dans les relations internationales» (p. 21).

Tout comme les définitions les modes de systématisation sont assez semblables dans les deux manuels. Le professeur Góralczyk a divisé son livre en seize parties: I. Questions générales; II. Evolution du droit international; III. Sources du droit international; IV. Sujets du droit international; V. Rapports, faits et actes juridiques internationaux; VI. Responsabilité internationale; VII. Territoire; VIII. Droit maritime; IX. Droit international aérien et spatial; X. Population de l'Etat; XI. Droit diplomatique et consulaire; XII. Organisations internationales; XIII. Accords et organisations économiques; XIV. Règlement de litiges internationaux; XV. Droit contre la guerre; XVI. Droit des conflits armés.

Le deuxième manuel divise le matériel en dix chapitres: I. Questions générales de droit international; II. Introduction à l'histoire du droit international et à l'histoire de sa science; III. Sources du droit international; IV. Sujets du droit international; V. Organes de l'Etat dans les relations internationales; VI. Territoire en droit international; VII. Population en droit international; VIII. Organisations internationales; IX. Règlement pacifique des litiges internationaux; X. Droit des conflits armés. Les chapitres II—III et VIII—X ont été écrit par R. Bierzanek; les chapitres I et IV—VII par J. Symonides. En comparant le contenu

des deux manuels, on peut remarquer que la spécification adoptée par le professeur Góralczyk est avant tout plus détaillée.

Il est clair qu'une structure semblable des deux manuels n'exclut pas les différences en ce qui concerne la classification de certains problèmes ou la grandeur de certains chapitres ou paragraphes. Ce ne sont pas cependant des différences décisives. Parmi les questions auxquelles W. Góralczyk a accordé plus de place, nous pouvons noter des problèmes tels que les rapports entre le droit international et le droit interne, la coutume, les organisations internationales en tant que sujets du droit international, le droit maritime. Par contre R. Bierzanek et J. Symonides traitent plus au long des problèmes tels que les sanctions, l'histoire du droit international, le principe de la coexistence pacifique, la reconnaissance internationale, les organes internes dans les rapports internationaux le territoire de l'Etat et la souveraineté territoriale, la protection internationale des droits de l'homme, le règlement pacifique des litiges internationaux, le droit des conflits armés. Les différences citées ne résultent pas d'une conception adoptée au départ, mais du fait que les auteurs sont intéressés par divers sujets, ce que l'on peut constater en consultant plusieurs monographies publiées auparavant, surtout par R. Bierzanek et J. Symonides.

Ce qui mérite d'être souligné c'est une grande convergence d'opinions chez les auteurs des deux manuels et ceci dans des questions qui suscitent souvent dans la doctrine du droit international des controverses. Faut-il en déduire que les divergences d'opinion disparaissent du droit international polonais? C'est une conclusion qui va peut-être trop loin. Il est utile de rappeler que W. Góralczyk ainsi que R. Bierzanek et J. Symonides ont, en dehors de leur activité scientifique, pris une part active à la vie internationale pratique, en tant que représentants de la Pologne à de nombreuses conférences internationales. Il est possible qu'à part un large savoir théorique, ce soit cette connaissance directe de la réalité internationale et des aspects pratiques de l'élaboration du droit international qui ait

contribué à une approche convergente, souvent moderne et réaliste aux problèmes présentés dans les manuels analysés.

Une des divergences des plus importantes qu'on peut signaler réside dans la compréhension des principes généraux du droit. En commentant l'article 38 alinéa 1 du Statut de la Cour Internationale de Justice, R. Bierzaniec constate que la notion des sources de droit n'est pas du tout identique avec la notion des fondements des décisions judiciaires de la C.I.J. Il est d'avis que les principes généraux du droit ne constituent pas, en dehors de l'accord ou de la coutume, une source indépendante du droit international. W. Góralczyk, tout en admettant que les principes généraux du droit constituent un fondement des décisions judiciaires, souligne la différence qu'il y a entre ces principes d'une part et l'accord et la coutume d'autre part. Il écrit que «par les principes généraux du droit il faut entendre les principes communs à tous les systèmes juridiques, c.à.d. de droit interne tout comme de droit international [...] Car il existe certains principes de droit qui sont admis dans tous les systèmes juridiques, indépendamment de leur provenance, et indépendamment même de leur caractère de classe. Ils sont souvent

à la base même de la logique juridique» (pp. 64—65).

Il y a aussi une certaine divergence en ce qui concerne la question de la personnalité des individus dans le droit international. Pendant que J. Symonides constate que «l'existence du droit de pétition — droit facultatif et très restreint — comme forme unique aujourd'hui d'intervention d'un individu dans les relations internationales, ne justifie pas encore la thèse sur sa personnalité» (p. 141), W. Góralczyk semble admettre cette personnalité, bien que dans d'étroites limites. Il écrit que «la personnalité des individus dans le droit international est une chose exceptionnelle et que son champ est très limité» (p. 146).

Il faut affirmer en guise de conclusion que si un manuel est, par définition, un livre didactique, contenant un ensemble de notions générales dans un domaine, présentées d'une manière claire et précise, alors les deux livres analysés répondent parfaitement aux exigences d'une telle définition. C'est avec conviction que nous pouvons les recommander aussi bien aux étudiants qu'à tous ceux qui s'intéressent au droit international.

Andrzej Jacewicz

Wojciech MULTAN, *Porozumienia rozbrojeniowe po II wojnie światowej* [*Accords de désarmement après la Seconde Guerre mondiale*, Warszawa 1985, PWN, 400 p.

«Il est tout aussi difficile, écrit l'auteur du livre analysé, d'évaluer les accords de désarmement conclus du point de vue de leur effet direct sur le niveau de sécurité internationale et des prémisses d'une durable paix mondiale que de définir les implications politiques de ces accords. Car il est difficile de dire avec précision ce qui serait arrivé si ces accords n'avaient pas été conclus. Notre civilisation, serait-elle disparue de la surface de la Terre à l'issue d'une catastrophe nucléaire, ou bien, d'une manière ou d'une autre, on aurait réussi à éviter une telle

extrémité? Il n'y a pourtant aucun doute que les accords conclus ont contribué à augmenter le sentiment de sécurité dans le monde, à atteindre, malgré tout, une plus grande stabilité dans les relations internationales. Il est aussi hors de doute et de toute discussion que grâce aux accords négociés la course aux armements n'a malgré tout pas atteint le niveau auquel elle serait certainement arrivée si aucun engagement de limitation n'avait existé».

Il serait difficile de ne pas souscrire à une telle constation. Il n'empêche pourtant qu'en

ce qui concerne les spécialistes de droit international, ce n'est que sporadiquement et sans enthousiasme qu'ils se réfèrent à la problématique de désarmement. Il suffit de consulter le premier manuel venu de droit international pour se rendre compte que la quantité et la qualité des considérations sur le sujet laisse beaucoup à désirer. Le projet de Wojciech Multan de présenter l'ensemble des accords de désarmement conclus après la Seconde Guerre mondiale mérite donc une pleine acceptation. L'auteur du livre analysé a énuméré une quarantaine environ de ces accords. Il faut tout de suite préciser que par désarmement W. Multan entend «les entreprises des Etats ayant pour but l'introduction de certaines limitations en ce qui concerne le nombre, la qualité et la dislocation des forces armées et (ou) des armements, leur liquidation complète ainsi que l'introduction des limitations dans la possibilité de recourir à l'utilisation de ces forces dans les rapports entre Etats». C'est une définition assez large. En plus l'auteur ne se limite pas aux accords concernant le désarmement dans le sens ci-dessus du terme; il présente aussi des accords qui n'ont qu'un rapport indirect avec le sujet du livre, les mesures de confiance par exemple. En ce qui concerne la forme et le caractère juridique des accords présentés, leur choix est aussi très ample. Il est aussi bien question d'accords internationaux bilatéraux et multilatéraux qui sont entrés en vigueur ou pas, que d'actes de caractère différent, entre autres des déclarations unilatérales des Etats ou de l'Acte final de la CSCE.

Après avoir présenté dans une introduction les conditions qui influencent le développement des armements et le surgissement de nouveaux types d'armements, ainsi qu'une évolution des formes institutionnelles des négociations sur le désarmement, l'auteur a divisé le matériel du livre en six chapitres: I — «Limitation des armements nucléaires»; II — «Elimination d'autres types d'armes de destruction massive»; III — «Limitations des armements stratégiques»; IV — «Moyens de prévenir la guerre nucléaire»; V — «Accords sur l'interdiction et la limitation de l'emploi de certaines armes conventionnelles»; VI —

«Mesures de confiance». Le livre est en plus muni d'un annexe comportant la traduction polonaise de vingt-quatre documents. Les titres des diverses parties du livre sont suffisamment explicites pour qu'il soit nécessaire de présenter leur contenu. Il faut toutefois mentionner les doutes évoqués par la comparaison entre le titre et le contenu du premier chapitre.

Sans aucun doute, dans les problèmes de désarmement il est parfois difficile de trouver un critère de sélection de la matière analysée qui permettrait d'éviter des incon séquences. C'est un danger auquel n'a pas échappé W. Multan. Le premier chapitre, qui constitue l'essentiel du livre, aurait dû, suivant son titre, être exclusivement consacré au problème de la limitation des armements nucléaires. Prenons par exemple des accords internationaux dont il est question dans ce chapitre et qui n'y sont pas analysés uniquement sous un aspect nucléaire — tels que le Traité sur l'Antarctique de 1959 ou bien le Traité sur les principes régissant les activités des Etats en matière d'exploration et d'utilisation de l'espace extra-atmosphérique, y compris la Lune et autres corps célestes, de 1967. Ces accords, introduisant la démilitarisation d'un certain espace géographique dans le premier cas et de corps célestes dans le second, devraient comprendre l'interdiction d'utiliser ces derniers dans n'importe quel but militaire et par conséquent non seulement l'interdiction de disloquer et de faire des essais avec les armes nucléaires. D'autre part l'interdiction de disloquer les armes dans tout l'espace cosmique ne concerne pas uniquement les armes nucléaires mais tous les types d'armes de destruction massive. Ce genre d'interdiction est aussi prévu dans le Traité sur l'interdiction de l'installation des armes nucléaires et des autres armes de destruction massive dans le fonds des mers et des océans et dans leur sous-sol de 1971, dont il est aussi question dans le premier chapitre. Or, en voulant analyser le côté non nucléaire des interdictions formulées dans ce genre d'accords, en dehors du chapitre I, l'auteur serait sans doute contraint à recourir à de nombreuses répétitions. Le rétrécissement, indiqué dans le titre, du contenu

de ce chapitre, aux problèmes des limitations des essais et de la prolifération des armes nucléaires aurait peut-être été une solution. Les autres considérations de ce chapitre concernant aussi bien les armes nucléaires que d'autres limitations dans la matière d'armements auraient pu constituer un chapitre à part traitant sur des limitations concernant certains milieux ou espaces géographiques.

Un autre doute concerne le mode de présentation du sujet du livre. Une exégèse de résolutions des documents de désarmement choisis — accord par accord — y prédomine. Étant donné que le livre a été, comme on l'a signalé plus haut, muni des textes de la plupart de ces accords, il aurait été beaucoup plus utile, semble-t-il, si l'auteur avait consacré plus de place à une approche de valeur et de synthèse, conformément d'ailleurs à ce qui a été annoncé dans l'introduction. Ceci ne veut bien sûr pas dire que l'auteur ne tente pas d'évaluer les accords analysés. Cette évaluation, cependant, aurait pu être élargie et approfondie et comprendre des éléments tels qu'une vue d'ensemble sur les règlements de désarmement existants, une mise en lumière de leur côtés positifs et négatifs, une tentative de synthèse en ce qui concerne la portée de ces accords, le système de leur vérification, les problèmes d'implantation.

L'auteur n'a pas su non plus éviter quelques erreurs qui ne sont pas des plus importantes du point de vue politologique, dominant semble-t-il dans le livre, mais qui frappent le spécialiste en droit international. Deux exemples pour ne pas parler en vain. La constatation selon laquelle les mers et les océans ainsi que l'espace cosmique auraient été proclamés le patrimoine commun de l'humanité (p. 43) n'a pas de fondement. Il semble que l'auteur a confondu le manque

de suprématie territoriale avec la conception du patrimoine commun (p. 80). La conviction de l'auteur suivant laquelle le Traité cosmique de 1957 devrait interdire dans son article IV les essais avec n'importe quel type d'armes dans tout l'espace cosmique (p. 103) est tout aussi erronée. Cette conviction conduit l'auteur à la conclusion que les essais — comme il dit — avec les «satellite hunter-killers» sont illégaux (pp. 103—104). En réalité, l'interdiction des essais avec n'importe quel type d'armes de l'article IV du Traité cosmique ne concerne que les corps célestes.

On pourrait montrer dans le livre encore plusieurs erreurs du même genre. À part cela on remarque un nombre considérable de fautes dans les dates et les noms, dont il faut, semble-t-il, inculper l'éditeur. Malheureusement, ces erreurs, les unes et les autres, contribuent à désinformer un lecteur peu éclairé sur les problèmes discutés.

Il semble que dans ce genre de publication un index des signataires des accords multilatéraux mentionnés ainsi qu'un lexique de termes et d'abréviations fondamentales auraient été d'une très grande utilité.

Malgré ces remarques il faut constater avec conviction que la monographie présentée peut servir d'introduction aux problèmes des accords de désarmement. La littérature scientifique polonaise avait une lacune en ce qui concerne une vue d'ensemble de ce sujet. Il faut d'ailleurs espérer que l'auteur n'en arrêtera pas là ses efforts et recherches et qu'il proposera au lecteur une nouvelle version de son travail qui contiendra aussi bien un tableau analytique des accords de désarmement qu'une ample synthèse du problème.

Andrzej Jacewicz

Maciej LIS, *Umowy resortowe w praktyce taktowej PRL* [*Inter-departmental Agreements in Polish Treaty Practice*], Wrocław 1985.

The book by Dr. M. Lis is the first monograph in Polish literature devoted to Polish treaty practice. It covers a sector of

this practice, namely — the conclusion of inter-departmental agreements. This sector is, however, of considerable importance, for,

as the author stresses in his introductory remarks, over half of the agreements at present binding on the Polish People's Republic are inter-departmental agreements. This fact is connected with the contemporary tendency to speed up legal turnover.

The book is composed of four chapters.

In Chapter I the author analyzes the concept of inter-departmental agreements. He begins with a presentation of different doctrinal definitions of international agreements in general (it seems that he unnecessarily pays to them so much attention, p. 5 ff.) and against this background he formulates a definition of an inter-departmental agreement. He rightly states that "an inter-departmental agreement is concurrent statement of will, with the purpose to impose an obligation upon a State, which is delivered definitively by departmental organs and falls within their objective competence" (p. 24). The definition of an inter-departmental agreement formulated in the terms of the Vienna Convention on the Law of Treaties of 1969 and the joint resolution of the Council of State and the Council of Ministers of the Polish People's Republic of 1968 is as follows: an inter-departmental agreement is "an agreement in written form falling under international law, concluded by States, regardless of the number of documents forwarded and its specific denomination. Consent to be bound by the agreement is definitively expressed by ministers or equivalent organs within their objective competence" (p. 24).

Chapter II is devoted to the capacity of organs of the Polish People's Republic to conclude inter-departmental agreements. The author analyses scrupulously the competences in question from the point of view of both Polish domestic law and international law. By comparing acts of Polish law which are in force and the relevant practice the author has established that "inter-departmental agreements are concluded also by those organs of the Polish People's Republic on which rules of domestic law do not confer any competences in the sphere of foreign relations" (p. 29). The author also draws attention to the resolution of the Council of State and the Council of Ministers of

1968 concerning the conclusion and termination of international agreements according to which "inter-departmental agreements are signed by the competent minister or on his behalf". Moreover, paragraph 23 of the resolution widens the scope of organs competent to conclude inter-departmental agreements by Heads of Commissions and Committees which are supreme organs of state administration, Heads of central organs and other central organs of administration and economy as well as the General Prosecutor of the Polish People's Republic (p. 30).

On p. 31 the author discusses resolution No. 196 of the Council of Ministers of 1973 concerning the organization and coordination of foreign relations (no more in force). In general, the author indicates that departmental organs are expressly or impliedly granted competence to conclude treaties falling within the subject-matter of their activities (p. 30—35). This is, however, regulated by Polish domestic law in a manner displaying inconsistency and lack of uniformity (p. 37). In connection with this, M. Lis puts forward a postulate to issue "a legal act of appropriate rank, involving all departmental organs which would clearly and precisely regulate the above-mentioned competences as well as different forms of their performance" (p. 37).

Considering competences of organs resulting from international law the author concentrates on inter-departmental agreements being executive to basic treaties and to resolutions of the CMEA (p. 37 ff.). Moreover, he ascertains that the Vienna Convention on the Law of Treaties of 1969 does not sufficiently deal with the already existing presumption that departmental organs are competent to conclude treaties (p. 45).

In Chapter III Dr. Lis classifies inter-departmental agreements. In the first place, he distinguishes multilateral and bilateral agreements and points out that the former are still concluded only exceptionally (p. 47). Further considerations lead the author to the division into independent and executive agreements, the latter including executive agreements to other treaties and to resolutions of international organizations (p. 52 ff.).

Another classification is based on the distinction of inter-ministerial and other agreements (p. 57). Considering new tendencies in treaty practice the author tackles, i.a., the problem of quasi-departmental, "inter-institutional" agreements. Their existence is linked with the process of ever increasing decentralization of competences to conclude agreements (e.g. agreements concluded between academies of sciences of different States). Quasi-departmental agreements acquire an international character when the concluding organ acts on behalf of its State (p. 61). "When, however, the organ acts within its own legal personality, distinct from that of the State, the obligations entered into have no legal effect as far as international law is concerned" (p. 61). In concluding his considerations Dr. Lis is right to observe that the adoption by States of qualified recommendations of CMEA does not transform them into international agreements.

Chapter IV deals with specific features of inter-departmental agreements to which the Polish People's Republic is a party. In the first place, the author points out their functional character (that is, the conformity of the subject-matter of the agreement with the objective competence of the concluding organ, p. 73). Next, he concentrates on characteristic features of the procedure leading to the conclusion of an inter-departmental agreement (p. 78) and those concerning their registration and publication (p. 81). His considerations on this subject end by the

remark that "just like there is no practice of registration of inter-departmental agreements concluded by organs of the Polish People's Republic neither are they published in the Polish *Journal of Laws* [*Dziennik Ustaw PRL*]" (p. 83). The remaining part of Chapter IV is devoted to characteristic features of the structure of inter-departmental agreements.

In his final remarks the author repeats the conclusions which follow from the previous chapters.

When assessing the reviewed book it must be observed that it has been based on a solid scientific workshop and written according to a logical plan, and it takes into account all fundamental issues concerning inter-departmental agreements. This appraisal cannot be changed by a few defects, such as the author's lack of knowledge that the Vienna Convention on the Law of Treaties of 1969 has entered into force (see remark on p. 19) and his use of the unpublished version of the book of M. Frankowska while in 1981 its corrected and supplemented version was published (cf. M. Frankowska, *Umowy międzynarodowe w formie uproszczonej* [*International Agreements in Simplified Form*], Ossolineum, Wrocław 1981).

The book of Dr. M. Lis will surely be of considerable interest for both theoreticians and practitioners in the field of international public law.

Renata Szafarz

Tadeusz GADKOWSKI, *Międzynarodowa kontrola pokojowego wykorzystania energii atomowej* [*International Control of Peaceful Utilization of Atomic Energy*], Poznań 1985, Wydawnictwo Naukowe Uniwersytetu, 109 pp.

The aim of the author of this publication, stated in the introduction, is to present international control of peaceful utilization of atomic energy as an international legal institution. The principal problem to be also examined is to what extent the presently existing and functioning legal mechanisms

allow actual assurance of exclusively peaceful utilization of atomic energy.

The main aim of the book has been fully achieved. As concerns the principal problem, however, it exceeds the framework of legal analysis in the matter of effectiveness of the present international legal system of

safeguards against the utilization of atomic energy for non-peaceful purposes, and to settle this problem a wider consideration of conditions other than legal, in the first place political, is indispensable.

In the first chapter of his book the author concisely presents the history of the use of atomic energy, first for military purposes — as bombs, and next for civil purposes — mainly as atomic power plants. Concentrating on this last matter he quotes up-to-date statistical data on the state of nuclear power industry in the world and the perspective of its further development. He emphasizes the advantages and superiority of this source of electric energy over other types of fuel and states that it is practically unfailing, the purest, sufficiently safe and economically competitive. He also stresses the chief danger resulting from the development of nuclear energy; the increase of resources of nuclear materials, and plutonium in particular, entering into wide circulation, which facilitates access and utilization for the production of nuclear explosives, both by governments and other entities.

Brief remarks on the subject of the so called international atomic law and the nature of international control introduce subsequent deliberations.

Chapter II is devoted to the historic outline of the formation of the system of international control of the utilization of atomic energy — from the first resolution of the General Assembly of UN in 1946 through Baruch's plan, ineffectual works of UN's commissions, till the establishment of the International Atomic Energy Agency in 1957.

In chapter III the author analyzed: 1) the model of control specified in the statute of IAEA; 2) provisions of relevant instruments adopted by this organization stipulating in detail the principles and rules of application of safeguards which aim at the verification of whether States that have submitted to them fulfill their obligations concerning peaceful utilization of atomic energy; 3) international agreements which are the legal base for the application of such safeguards by IAEA.

The role of the IAEA's control within the system of non-proliferation of nuclear weapons which came into existence on the basis of the treaty of 1968 has been discussed in chapter IV. In the same chapter the author devoted a few pages (pp. 69—76) to the problem of effectiveness of international control within the NPT system. He paid attention to the role of the so called London club in which the chief suppliers of nuclear materials and technology participated.

The author explicitly states that the NPT system together with the control kept by IAEA does not secure the exclusively peaceful utilization of atomic energy nor even further non-proliferation of nuclear weapons. He pertinently sees the cause of this system's weakness in its not universal reach (p. 72). He also accentuates the standpoint of the so called Zangger's Committee that the regime of trade agreements on transactions in nuclear materials and technology ought to be essentially strengthened. The author, however, does not present the standpoint of another group — the non-aligned and developing countries which constitute an overwhelming majority of those State-parties to NPT which have renounced nuclear weapons and in practice taken almost the whole burden of obligations upon themselves. The author omitted the fact that the II survey conference of NPT, which took place in 1980, ended in a failure. This was a sign of the crisis of the NPT system. The nonaligned countries sharply criticized the atomic powers and the main suppliers of nuclear materials and technology charging the suppliers that they had not carried out their obligations on the basis of NPT, mainly in the field of nuclear disarmament and facilitation of the transfer of nuclear technology for peaceful purposes.

In chapter V the author presented regional systems of the control of utilization of atomic energy, namely: in the European Community — Euratom, in Latin America — OPANAL.

The virtue of this book (it was the author's doctor's dissertation) is the conciseness which has not had an unfavourable effect on the

completeness of presentation and analysis of the considered topic. Its great value lies also in a very extensive list of scientific publications cited concerning this topic. The

author took into consideration almost all Polish and Russian publications.

Wojciech Morawiecki

Lech GARDOCKI, *Zarys prawa karnego międzynarodowego* [Outline of International Criminal Law], Warszawa 1985, PWN, 235 pp.

The increasing importance of the international criminal law has been calling attention for years. At least two phenomena set the significance of this field of law; first, a considerable quantitative development of traditional institutions of the international criminal law (in the sense of their practical application), this is especially displayed by a large number, growing steadily, criminal cases with a "foreign element"; second, recent appearance of utterly new solutions, trends and institutions, such as conveyance of prosecution, enforcement of foreign judgement. This dynamically developing branch of law, finding an increasing practical application, has secured a permanent place in the legal system of every State and on the international scene. At present no lawyer may ignore it.

Nevertheless, it would be difficult to defend the argument for the development of this field of science in Poland. The number of publications is small and a number of problems have not been given shape to. Also, among the jurists-practitioners knowledge of these problems, the newest solutions in particular, is unsatisfactory. It seems, however, that such a situation in our country results from the difficulty in obtaining materials, data and publications rather than from ignorance or underestimation of this field of law. For example, not all students of law get to know these problems because only a few universities conduct classes on this subject; and anyway, as a rule, they are optional (as distinct from penal law, penal law procedure, public international law, domestic relations, etc.).

This long introduction was necessary on the one hand to visualize the significance

of L. Gardocki's book for Polish science of law, and on the other hand to emphasize its basic value for our reader: exposition of the basic principles and institutions of international penal law. It is the more valuable as most of the literature concerning this field is available only in foreign languages. L. Gardocki's book can be described as the first attempt in our country to thoroughly approach the problems concerning this branch of law.

A few years ago a work by this author¹ was published, devoted to the same topic, but because of the printing technique and minimal circulation (500 copies) it was as, a matter of fact, almost secret.² The book published this time has corrected those mistakes. Both works are closely related to each other. This is revealed i.a. by the partly similar range of topics: chapters XI and XIV—XVI of the *Outline* constitute four from among the six chapters of the *Problems*. The considerations included in the *Outline* are more coherent and as a rule they summarize and present the quintessence of the arguments presented in 1979. Thus it is necessary from time to time to reach for that book in order to find the grounds for some of the held opinions or to reconstruct the chain of reasoning which led the author to adopt a specific position. The

¹ L. GARDOCKI, *Zagadnienia internacjonalizacji odpowiedzialności karnej za przestępstwa popełnione za granicą* [Problems of Internationalization of Criminal Responsibility for Offences Committed Abroad], Warszawa 1979. Wyd. Uniw. Warsz.

² This was rightly pointed out by M. Filar in his review of L. Gardocki's book in *Państwo i Prawo*, 1980, No. 9, p. 111.

necessity also results from the fact that the reviewed work is relatively poorly documented (e.g. in comparison with the *Problems*). Sometimes this is shocking: in chapter XVI ("Enforcement of Foreign Criminal Judgment") the whole "scientific workshop" mentioned by the author includes three positions: Convention of the Council of Europe, No. 112 of 1983, the book by C. Lombois: *Droit pénal international* (Paris 1971) and the *Problems* by L. Gardocki. While in addition to some scores of books in foreign languages there are a few native works.³ I would like to stress that it is not a matter of "ornamentation" but of putting to real use, and it would have allowed the author to avoid certain inaccuracies (see below).

It is not possible to discuss all the problems included in the book. However, it is worth mentioning some of them.

The book begins with an excellently written and well documented chapter: "The Concept of International Criminal Law", known to the readers of "Państwo i Prawo"⁴. The author does not only analyze this concept presenting his own notion, but he also presents in an interesting way its evolution, finding its elements already in the criminal law of the Medieval towns in Italy. Would it not have been maybe better to begin from the institution (office) *praetor peregrinus* in Ancient Rome? In the question of the definition of international criminal law the author adopts a very broad approach, so far the broadest in our doctrine (p. 19). In my opinion this is an accurate notion

and more modern, as it embraces a whole branch composed of many various regulations and institutions which are not restricted exclusively to criminal and material norms. In this place it is impossible to refrain from asking about the question of including into this branch international assistance (judicial) in criminal matters. In my opinion the answer should be positive.⁵ The author does not do it directly, he only uses a general concept "institutions of international co-operation in criminal cases". If the author's intention was to include the mentioned question then omission of its discussion in the book (for instance, in the form of a separate chapter) is the more evident and unjust.

It is worth mentioning the complex presentation of the problems of responsibility for crime against peace, war crimes and crime against humanity (chapter II—IX). The author discusses the shaping of the principles of this responsibility in a historic approach. He concentrates on presenting the basic facts and legal controversies concerning the trials of war criminal after World War II as, in his opinion, it was then that the turning-point in the development of the international criminal law (p. 13). This piece of historic knowledge, which does catch the attention of the reader, was certainly necessary, although I have serious doubts that the proportions in the arrangement of the whole book have been upset as this "piece" takes up almost half of its volume (pp. 22—116).

I cannot, unfortunately, agree with the author's firm stand that "punishment of foreigners in the State in which they have committed crime radically narrows the list of means of punishment possible to apply" (p. 195). Irrespective of the way it is interpreted (either as a legal inhibition or as ascertainment of the state of practice) it is improper *de lege lata* and unacceptable in practice. On the normative surface it leads to the conflict with the prohibition of discrimination of a foreigner before criminal

³ R. GÓRAL, "Wykonywanie kary orzeczonej przez sądy zagraniczne na tle konwencji berlińskiej" [Execution of Sentence Decided by Foreign Courts Against the Background of Berlin Convention], *Nowe Prawo*, 1979, No. 11; M. PLACHTA, "Uznawanie i wykonywanie zagranicznych orzeczeń karnych. Zagadnienia podstawowe" [Recognition and Execution of Foreign Sentences. Basic Problems], *Państwo i Prawo*, 1985, No. 3; M. PLACHTA, "Wykonywanie zagranicznych wyroków karnych — zarys historycznego rozwoju instytucji" [Execution of Foreign Sentences — A Historic Outline of Development of the Institution], *Nowe Prawo*, 1985, No. 11—12.

⁴ L. GARDOCKI, "Pojęcie prawa karnego międzynarodowego" [Concept of Foreign International Criminal Law], *Państwo i Prawo*, 1984, No. 5.

⁵ Similarly C. LOMBOIS, *Droit pénal international*, Paris 1971, Dalloz, pp. 543—557; *A Treatise on International Criminal Law*, ed. M. Cherif BASSIOUNI, Ved P. NANDA, Springfield 1973, Vol. 2, pp. 171—260.

law if the authorization of the legislator is also lacking. In court practice, for instance, the author's opinion would mean the necessity to sentence *every* foreigner to imprisonment ("measures connected with deprivation of liberty cannot be applied", *ibid.*), which in many cases would have to be considered as the grounds for appeal by virtue of Art. 387, pt. 4 of the code of criminal procedure which would necessitate the reversal of the judgement of the court of first instance. In my opinion, until an optimal and operative model of cooperation in criminal cases is introduced into domestic and international practice — and one that would enable it to include *every* foreigner — it is out of question to narrow the list of means of punishment applied to foreigners. Such a situation can be found not only in our country, but all over the world.⁶

Concerning the execution of foreign penal sentences (ch. XVI), it is a pity that the author did not touch on one of the basic problems: the relationship of this institution towards the interests of the person sentenced, the attitude of the interested person himself to the problem of transferring him to his native country, as well as the legal significance of his declaration concerning this question.⁷ Its consideration is a precondition for analysis of the function of this institution.⁸ Moreover,

in his presentation of the models of execution of foreign penal sentences (p. 221) the author did not take into account at least two more models: the Arabic and American.⁹ The omission of the last one is a particularly serious drawback considering its great significance in this field.¹⁰

It is also regretful that in chapter XI ("The Scope of the Binding Force of Penal Statute and Domestic Jurisdiction in Criminal Cases") the author did not attempt to define the concept of jurisdiction, as in our literature it is used in a very narrow sense, limited only to courts on the one hand, and on the other — to the "examination" of cases. Moreover, one more factor has to be pointed out "making elastic" the territorial principle and eliminating inconveniences arising from too rigid adherence to it, i.e. the execution of foreign penal sentences.¹¹ Totally improper and inadequate to the content of the regulations is the definition of the jurisdictional grounds for a decision from Art. 114 of the Penal Code as the representation principle, because this regulation lacks the principal element which decides about the essence of this principle (*le principe de la compétence par représentation*): the demand, request or, expressed in any other way, the will to prosecute the perpetrator by the foreign State on whose territory the perpetrator committed the crime.¹² In view of a substantial similarity to the universal principle, in my opinion, the term: "relative universal principle" i.e. restricted by the condition of

⁶ Cf. eg. M. C. DESDEVISES, *La délinquance étrangère (Analyse statistique)*, Grenoble 1976, Université de Rennes.

⁷ "Constitutional Problems in the Execution of Foreign Penal Sentences: the Mexican — American Prisoner Transfer Treaty," *Harvard Law Review*, vol. 90 (1977), pp. 1523—1525; A. ABRAMOVSKY, S. J. EAGLE, "A Critical Evaluation of the Mexican — American Transfer of Penal Sanctions Treaty," *Iowa Law Review*, vol. 64 (1979), pp. 298—302.

⁸ Particular attention was given to the possible influence of the offender and his will in the transfer proceedings during the latest XIIIth International Congress of Criminal Law — Section IV (Cairo, October 1—7, 1984). Most participants agreed that the prisoner's consent should be an indispensable condition for his repatriation as the main goal of the application of this instrument, i.e. the prisoner's social resettlement, could only be achieved if the prisoner contributed to these efforts. See H. EPP, "Structures and Methods of International and Regional Cooperation in the Field of Criminal Law," *Revue internationale de droit pénal*, 1985, No. 3—4, p. 536.

⁹ M. PŁACHTA, *Uznawanie... [Recognition...]*, pp. 92—93.

¹⁰ M. PŁACHTA, *Wykonywanie... [Execution...]*, pp. 111—117.

¹¹ This was called to attention during the International Conference of the International Institute of Higher Studies in Criminal Sciences: M. RUSCA, "Expansion of Extraterritorial Penal Jurisdiction," *New Horizons in International Criminal Law, Nouvelles Etudes Pénales*, 1985, vol. 6, p. 78.

¹² H. SCHULTZ, "Compétence des juridictions pénales pour les infractions commises à l'étranger," *Revue de science criminelle et de droit pénal comparé*, 1967, No. 2, p. 326.

double punishability,¹³ expresses this regulation in the most accurate way.

The presented critical remarks do not

diminish the value of the book, written in a communicative language. It should be read by every lawyer.

Michał Plachta

¹³ Article 114 of the Polish Criminal Code states: "The Polish penal law shall apply to aliens who committed an offense abroad, provided, however, that liability for such act is likewise recognized as an offence by a law in force in the place of its commission".

Accords internationaux entrés en vigueur à l'égard de la Pologne en 1985

La liste publiée ci-dessous comprend les principaux accords internationaux, bilatéraux et multilatéraux, entrés en vigueur à l'égard de la Pologne (ou dénoncés par elle) en 1985. Les arrangements administratifs (accords conclus entre les ministres) sont absents de ce registre qui ne contient que les accords conclus au nom du Conseil d'Etat ou du gouvernement polonais. Les protocoles (p. ex. protocoles annuels rentrant dans le cadre d'un accord à long terme), les plans et les programmes d'exécution joints aux accords en question ne figurent non plus sur cette liste.

Conformément à la Constitution polonaise, le Conseil d'Etat — composé de 17 députés à la Diète (parlement) — est le seul organe autorisé à ratifier et à dénoncer les traités internationaux. La ratification mise à part, le droit polonais prévoit que le consentement à être lié par un accord peut également être valablement exprimé par le Conseil des ministres, soit sous forme d'approbation (*approval*), soit sous forme de signature par un plénipotentiaire dûment autorisé; certains accords sont conclus par un échange de notes. Enfin, les ministres ont également la compétence pour conclure des accords internationaux à condition que la matière régie par l'accord soit du ressort d'un ministre.

La Constitution polonaise ne précise pas quels sont les accords internationaux qui nécessitent la procédure de ratification. Selon la résolution conjointe du Conseil d'Etat et du Conseil des ministres, en date du 28 décembre 1968, relative à la conclusion et à la dénonciation des traités, sont soumis à la ratification les traités ayant une importance particulière dont:

- les traités de paix ainsi que les traités d'amitié, de coopération et d'assistance mutuelle,
- autres traités ayant le caractère politique,
- les traités concernant les matières régies, en droit interne, par les lois,
- les traités contenant des dispositions qui diffèrent des solutions retenues par la législation interne,
- autres traités pour lesquels la Pologne s'est engagée à suivre la procédure de ratification afin de satisfaire aux exigences de droit de l'autre partie contractante, ou si les parties sont convenues de procéder de cette manière pour des raisons particulières.

La résolution de 1968 ne spécifie pas quels traités doivent être obligatoirement soumis à la procédure d'approbation.

Dans la pratique, seulement 15 à 20 pour cent des traités conclus par la Pologne suivent la procédure de ratification. Tous les traités ratifiés sont publiés dans «Dziennik Ustaw» (Journal des Lois) destiné à la publication des lois et des règlements. Les traités non ratifiés sont publiés très sélectivement. Il n'existe pas en Pologne un recueil officiel des traités.

Les traités bilatéraux figurent sur cette liste par pays, dans l'ordre alphabétique (alphabet français) selon le schéma suivant: titre du traité, lieu et date de sa signature, mode d'expression par la Pologne du consentement à être lié, date de l'entrée en vigueur à l'égard de la Pologne. Les traités multilatéraux observent le même schéma. Les titres des accords conclus dans une autre langue que l'anglais ou le français sont traduits en l'une de ces langues.

Traités bilatéraux

Afghanistan

- Consular Convention; Kabul, 11 June 1984; ratification; 6 May 1985.

Algérie

- Convention consulaire; Alger; le 4 décembre 1983; ratification; le 14 mars 1985.

République Démocratique Allemande

- Accord sur la coopération dans le domaine du bâtiment; Berlin, le 5 juin 1985; signature; le 5 juin 1985.

République Fédérale d'Allemagne

- Accord sur les transports aériens civils; Varsovie, le 22 mai 1975; approbation; le 18 juillet 1985.

Argentine

- Agreement for Cooperation in the Field of Veterinary Activities; Buenos Aires, 19 September 1983; approval; 8 November 1985.

République Populaire de Chine

- Convention consulaire; Pékin, le 14 juillet 1984; ratification; le 21 février 1985.
- Accord commercial à long terme pour les années 1986—1990; Varsovie, le 25 mai 1985; signature; le 25 mai 1985.

Chypre

- Agreement on Cooperation in the Field of Merchant Shipping; Warsaw, 18 July 1984, approval; 17 August 1985.

République Démocratique Populaire de Corée

- Programme de coopération entre les ministères des Affaires étrangères pour les années 1985—1986; Varsovie, le 24 avril 1985; signature; le 24 avril 1985.
- Accord relatif aux échanges de marchandises et aux paiements pour les années 1986—1990; Phenian, le 28 novembre 1985; signature; le 28 novembre 1985.

Cuba

- Accord sur la coopération en matière d'amélioration du service technique des machines, installations et autres produits fournis par Pologne à Cuba; Varsovie, le 12 mars 1985; échange de notes; appliqué provisoirement dès la date de la signature.

Espagne

- Accord de coopération économique et industrielle; Varsovie, le 13 décembre 1984; approbation; le 27 mai 1985.

Etats-Unis

- Air Transport Agreement; Warsaw, 16 April 1985, approval; 9 May 1985.

Hongrie

- Accord sur les échanges compensés de marchandises pour les années 1986—1990; Varsovie, le 12 septembre 1985; signature, le 12 septembre 1985.

Iraq

- Agreement on International Road Transport; Warsaw, 20 September 1984; approval; February 1985.

Italie

- Accord de coopération économique; Varsovie, le 21 décembre 1984; approbation; le 30 mars 1985.

Kampuchéa

- Accord de coopération culturelle et scientifique; Varsovie, le 6 août 1984; ratification; le 16 mars 1985.

Laos

- Protocole concernant la prorogation de la validité de l'accord sur les échanges commerciaux et les paiements pour l'année 1982 à 1985; Varsovie, le 20 septembre 1985; signature; le 20 septembre 1985.

Libye

- Convention consulaire; Tripolis, le 16 juin 1982; ratification; le 2 septembre 1985.

Mongolie

- Accord sur la coopération entre les ministères des Affaires étrangères pour les années 1986—1990; Varsovie, le 20 septembre 1985; signature; le 20 septembre 1985.
- Accord relatif aux échanges de marchandises et aux paiements pour les années 1986—1990; Varsovie, le 2 octobre 1985; signature; le 2 octobre 1985.

Syrie

- Convention consulaire; Varsovie, le 10 avril 1981; ratification; le 30 octobre 1985.

Tchécoslovaquie

- Protocole concernant l'exécution de la Convention sur les déplacements des ressortissants polonais et tchécoslovaques dans les zones frontalières des deux pays, signée à Prague le 4 juillet 1959; Varsovie, le 24 mai 1984; signature; le 24 mai 1985.
- Accord relatif aux conditions de location et de loyers dans les bâtiments et locaux de service et d'habitation des ambassades et des offices consulaires de Pologne et de Tchécoslovaquie; Varsovie, le 12 octobre 1984; signature; le 1 janvier 1985.
- Accord relatif à la coopération en matière d'exploitation des gisements de charbon situés dans le région frontalière polono-tchécoslovaque; Katowice, le 2 décembre 1984; approbation; le 30 avril 1985.
- Accord aux échanges de marchandises et aux paiements pour les années 1986—1990; Varsovie, le 25 novembre 1985; signature; le 25 novembre 1985.

Union Soviétique

- Accord sur la coopération et les livraisons jusqu'à l'an 2000 des équipements complémentaires aux grues hydrauliques automotrices de capacité de levage de 25, 40, 63, 100, 163 et 250 Mg sur châssis spéciaux, et aux machines de construction, pontières et d'industrie communale; Varsovie, le 24 juin 1985; signature; le 24 juin 1985.
- Accord de coopération dans le domaine des télécommunications; Varsovie, le 14 novembre 1985; signature; le 14 novembre 1985.

Viêt-nam

- Accord relatif aux paiements réciproques; Hanoi, le 7 décembre 1984; signature; le 1 janvier 1985.

Yougoslavie

- Agreement for the Avoidance of Double Taxation with Respect to Taxes on Income and on Capital; Warsaw, 10 January 1985; ratification; 27 December 1985.
- Accord relatif aux échanges de marchandises pour les années 1986—1990; Belgrade; le 12 octobre 1985; échange de notes; appliqué provisoirement dès la date de la signature.

Zimbabwe

- Trade Agreement; Harare, 26 September 1984; approval; 1 June 1985.

Traités multilatéraux

- Convention on Road Traffic; Vienna, 8 November 1968; ratification; 23 August 1985.
- Convention on Road Signs and Signals; Vienna, 8 November 1968; ratification; 23 August 1985.
- Convention on Special Missions; New York, 16 December 1969; ratification; 21 June 1985.
- European Agreement Supplementing the Convention on Road Traffic; Geneva, 1 May 1971; adhesion; 23 August 1985.

- European Agreement Supplementing the Convention on Road Signs and Signals; Geneva, 1 May 1971; adhesion; 23 August 1985.
- International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage; Brussels, 18 December 1971; ratification; 15 December 1985.
- European Agreement on Main International Traffic Arteries (AGR); Geneva, 15 November 1975; ratification; 7 February 1985.
- Convention on Long-Range Transboundary Air Pollution; Geneva, 13 November 1979; ratification; 17 October 1985.
- Constitution of the United Nations Industrial Development Organization; Vienna, 8 April 1979; ratification; 2 June 1985.
- Convention relative aux transports internationaux ferroviaires (COTIF); Berne, le 9 mai 1980; ratification; le 1 mai 1985.
- Accord sur la coopération multilatérale en matière d'étude et de mise en oeuvre à la production d'un système uniforme de moyens de télétransmission chiffrée; Sofie, le 4 juillet 1981; approbation, le 25 janvier 1985.
- Accord concernant l'application des documents des douanes dans les transports routiers directs de marchandises; Varsovie, le 17 novembre 1983; approbation; le 6 juillet 1985.
- Protocole portant prolongation de la durée du Traité d'amitié, de coopération et d'assistance mutuelle signé à Varsovie le 14 mai 1951; Varsovie, le 26 avril 1985; ratification; le 31 mai 1985.

par Joanna Gomula

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