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Les bases juridiques et politiques de la coexistence pacifique à l'époque de la détente

par JANUSZ SYMONIDES

Aussi bien la pratique internationale que la doctrine désignent les années soixante-dix comme une période de la détente entre l'Est et l'Ouest. Pourtant, le sens et le contenu de cette notion ne sont pas toujours identiques. Selon une acception la plus générale, la détente est un processus qui consiste à réduire les tensions dans les rapports entre les États à régimes sociaux et économiques différents et à créer une situation et un sentiment de sécurité entre les États [1].

I

Comment, au point de vue de la conception de la coexistence pacifique, pourrait-on caractériser la détente et quelle serait la différence entre les années cinquante et les années soixante-dix? En simplifiant, on peut constater que les années cinquante furent une période où les pays socialistes — formant un bloc à l'échelle mondiale — présentèrent la conception léniniste de la coexistence pacifique et luttèrent pour mettre au point une liste de ses principes de base [2]. Quant aux années soixante,

[1] Dans son discours, prononcé le 18 janvier 1977 à Toula, Leonid BREŻNEV a ainsi caractérisé la détente : « La détente c'est surtout dépasser la guerre froide et passer aux relations normales et égales des États. La détente c'est la disposition à aplanir les divergences et à régler les différends non par la contrainte ou la menace, mais par les moyens pacifiques, à table de négociations. La détente c'est une certaine confiance et l'aptitude de tenir compte des demandes justifiées du partenaire » («Nowe Czasy», 1977, n° 5, p. 4).

[2] Dans les années 1950, en liaison avec le fameux accord sur le Tübet, entre la Chine populaire et l'Inde, conclu en 1954, on distinguait les principes suivants : 1° le respect mutuel de l'intégrit territoriale et de la souveraineté des États ; 2° la non-agression mutuelle ; 3° la non-intervention dans les affaires intérieures ;

elles ont vu se concrétiser et codifier les principes juridiques de la coexistence pacifique. Les travaux menés au sein de l'O.N.U. ont permis de dégager une idée commune selon laquelle la codification des principes de la coexistence pacifique devrait prendre pour point de départ la Charte des Nations Unies ainsi que la pratique des États membres et de l'Organisation même. En 1962, l'Assemblée Générale adopta la résolution 1815 (XVII) relative à l'examen des principes du droit international touchant les relations amicales et la coopération entre les États conformément à la Charte des Nations Unies. Cette résolution proclamait sept principes qui ont été mis à l'étude au sein d'un Comité spécial, créé un an plus tard par la résolution 1966 (XVIII). La tâche essentielle du Comité spécial consistait à examiner les sept principes en question pour assurer leur développement progressif et leur application plus efficace. Finalement, les travaux du Comité spécial, menés dans la période 1964 - 1970, ont abouti à l'adoption, le 24 octobre 1970, au cours de la XXV[e] session commémorative de l'Assemblée Générale, de la Déclaration relative aux principes du droit international touchant les relations amicales et la coopération entre les États.

La Déclaration, adoptée à l'unanimité, constitue — aux yeux de l'Assemblée Générale — un moment crucial dans le développement des relations interétatiques. Elle doit être en même temps considérée comme une codification des principes juridiques de la coexistence pacifique[8]. Ainsi, grâce à la persévérance des pays socialistes et des pays en voie de développement, on a abouti à conférer une forme juridique impérative à la conception de la coexistence pacifique.

Ces principes juridiques de base de la coexistence pacifique, valables pour tous les États et dans toutes les circonstances, sont les suivants:

— le principe que les États s'abstiennent, dans leurs relations internationales, de recourir à la menace ou à l'emploi de la force, soit contre l'intégrité territoriale ou l'indépendance politique de tout État, soit de toute autre manière incompatible avec les buts des Nations Unies ;

4° l'égalité et les profits réciproques ; 5° la coexistence pacifique. Au cours de la conférence de Bandung en 1955, il était question de dix principes. Dans les travaux de l'Association de Droit International, qui ont débuté en 1956, le nombre des principes dépassait dix.

[8] Telle est la position dominante de la doctrine ; cf. à cet égard J. BARATAŠVILI, *Meždunarodno-pravovye principy mirnogo sosuščestvovanija*, «Meždunarodnaja Žizn'», 1972, n° 1 ; D. B. KOLESNIK, V. I. KUZNECOV, R. A. TUZMUHAMEDOV, *Deklaracija principov mirnogo sosuščestvovanij*, «Sovetskoe Gosudarstvo i Pravo», 1971, n° 6; A. P. MOVČAN, *Kodifikacija i progressivnoe razvitie meždunarodnogo prava*, Moskva 1972 ; S. SAHOVIĆ, *Relations amicales et coopération entre États*, « Recueil des cours de l'Académie de Droit international », vol. 137, 1972.

— le principe que les États règlent leurs différends internationaux par des moyens pacifiques de telle manière que la paix et la sécurité internationales ainsi que la justice ne soient pas mises en danger ;

— le principe relatif au devoir de ne pas intervenir dans les affaires relevant de la compétence nationale d'un État, conformément à la Charte ;

— le devoir des États de coopérer les uns avec les autres conformément à la Charte ;

— le principe de l'égalité des droits des peuples et de leur droit à disposer d'eux-mêmes ;

— le principe de l'égalité souveraine des États, et

— le principe que les États remplissent de bonne foi les obligations qu'ils assument conformément à la Charte.

La coexistence pacifique n'est pas seulement une conception juridique, mais également une conception politique. Il faut constater que les règles et les principes du droit des gens sont soit pleinement respectés, soit ouvertement violés. Étant donné la spécificité des relations internationales résultant de l'absence d'une autorité suprême et des possibilités restreintes de sanctions, on est tenu de souligner que la mise en oeuvre et l'efficacité des règles et des principes du droit international dépendent dans une grande mesure de la volonté des États.

Au début des années soixante-dix, une situation nouvelle est apparue avec l'acceptation formelle de la conception de la coexistence pacifique par les pays occidentaux. Ce changement s'opéra d'abord dans les relations bilatérales. Le texte des Principes de la coopération franco-soviétique, signé au cours de la visite en France, en 1971, de Leonid Brežnev, n'est autre chose qu'un ensemble des règles politiques régissant les rapports entre les États à régimes sociaux différents. On insiste dans ce document sur une grande importance de la coopération entre la France et l'U.R.S.S. pour le maintien de la paix, pour la poursuite de la politique de la détente et pour le renforcement de la sécurité et des relations pacifiques entre les pays européens.

Parmi les éléments essentiels de la coexistence en Europe, on relèvera encore les accords signés par l'U.R.S.S., la Pologne, la R.D.A. et la Tchécoslovaquie avec la R.F.A. Tout en mettant fin au processus de reconnaissance politique et territoriale du *statu quo* en Europe, ces accords ont jeté les bases d'un nouveau système de sécurité et de coopération paneuropéen. Les accords en question contiennent toute une série des principes juridiques et traduisent en même temps l'acceptation politique de la coexistence pacifique. L'article premier de l'accord conclu entre l'Union Soviétique et la R.F.A, en 1970, déclare formellement que les deux parties considèrent la paix mondiale et la détente comme

un important objectif de leurs politiques. Le préambule de l'accord signé en 1970 par la Pologne et la R.F.A énonce la volonté des deux parties de créer les bases durables pour une coexistence pacifique et le développement de bonnes relations mutuelles.

En 1972, ce sont les États-Unis qui ont officiellement reconnu les principes de la coexistence pacifique. Le document relatif aux principes de base des rapports soviéto-américains, signé ou cours de la visite à Moscou du Président américain Richard Nixon, souligne notamment qu'il n'existe pas, à l'âge nucléaire, d'autre plate-forme de ces rapports que les principes de la coexistence pacifique. Selon ce document, les divergences idéologiques et le caractère différent des régimes politiques des deux pays ne constituent pas l'obstacle au développement entre eux des rapports normaux, réciproquement profitables, basés sur les principes de la souveraineté, de l'égalité et de non-ingérence dans les affaires intérieures.

La Conférence sur la Sécurité et la Coopération en Europe apparaît comme le point culminant du processus d'acceptation de la coexistence pacifique. Le préambule de l'Acte final réaffirme, dans sa partie consacrée aux problèmes de la sécurité, que les pays signataires ont pour objectif de contribuer à l'amélioration de leurs relations mutuelles et d'assurer les conditions dans lesquelles les peuples puissent vivre dans un état de paix véritable et durable. Le préambule exprime également la conviction des pays participants qu'il est nécessaire de déployer des efforts pour faire de la détente un processus tout à la fois continu, viable et universel. Enfin, il est indiqué dans ce même préambule que le dessein commun qui anime les États participants dans la réalisation des objectifs proclamés par la Conférence devrait mener au développement entre ces États des relations meilleures et plus étroites dans tous les domaines, de façon à surmonter la confrontation. D'autre part, la Déclaration sur les principes régissant les relations mutuelles des États, faisant partie intégrale de l'Acte final, approuve les principes juridiques de la coexistence pacifique[4]. Plusieurs déclarations et communiqués bilatéraux, signés au cours de la Conférence et à l'issue de ses travaux, traduisent également la volonté des participants de respecter les principes proclamés par l'Acte final, ceci indépendamment des différences de régimes[5].

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[4] J. SYMONIDES, *Deklaracja zasad stosunków międzypaństwowych KBWE* [*Déclaration des principes régissant les relations entre États adoptée par la C.S.C.E*], «Sprawy Międzynarodowe», 1975, n° 10, pp. 24 et s.

[5] Citons, à titre d'exemple, la Charte des principes de la coopération amicale entre la France et la Pologne (juin 1975); la Déclaration sur le développement des relations amicales entre la Suède et la Pologne (juillet 1975); la Déclaration

Cette consécration des principes de la coexistence pacifique de la part des pays occidentaux ainsi que leurs déclarations relatives à la mise en oeuvre des règles approuvées à Helsinki ont plusieurs causes. Le changement du rapport des forces dans le monde en faveur du socialisme est, à n'en pas douter, l'élément de tout premier plan. L'accroissement continu du potentiel économique des pays socialistes, le renforcement de leurs capacités défensives, leur alliance et leur coopération avec les forces révolutionnaires, démocratiques et pacifiques, ont considérablement contribué à augmenter les possibilités de leur influence sur la transformation et le façonnément des rapports internationaux. D'autre part, l'établissement de la parité nucléaire réelle entre les États-Unis et l'U.R.S.S. a certainement incité les États-Unis à se rallier à la conception de la coexistence pacifique. La révolution scientifique et technique, et son influence sur les progrès de la technologie, notamment dans le domaine militaire, constituent un autre élément stimulant la coexistence pacifique des États, ceux-ci étant parfaitement conscients des conséquences tragiques d'une guerre nucléaire où il n'y aurait pas de vainqueurs. Enfin, la nécessité de résoudre plusieurs problèmes communs à toute l'humanité — ce qui appelle un effort de tous les États — représente un facteur non négligeable de l'acceptation de la coexistence pacifique.

En conclusion, la détente consiste à reconnaître la coexistence pacifique, dans sa forme juridique et politique, comme une base des relations entre États à régimes sociaux différents, bref entre l'Est et l'Ouest. Par conséquent, les bases de la coexistence pacifique ne se limitent pas uniquement aux principes énoncés par la Déclaration des principes de l'O.N.U. de 1970, mais elles comprennent également de nouvelles règles politiques, élaborées au cours des dernières années. Parmi les traits caractéristiques de la détente, on relève la tendance à renforcer et à développer les bases juridiques de la coexistence pacifique.

II

Avant de répondre à la question de savoir quels sont les principes ou les normes politiques qui régissent, dans la période de la détente, le comportement des États à régimes sociaux différents, nous allons consacrer un peu de place à l'explication des différences entre les règles politiques et les règles juridiques. I. Lukašuk remarque à juste titre

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sur le développement des relations amicales entre la Pologne et la Grande-Bretagne (août 1975).

que la norme politique internationale est une règle politique de comportement, en vigueur dans la vie internationale[6]. Elle diffère d'une règle juridique parce qu'elle na fait pas partie des actes ayant force obligatoire au point de vue du droit international comme p. ex. un traité; elle figure plutôt dans diverses déclarations ou résolutions. La transgression d'une norme politique n'entraîne que la responsabilité politique de l'Etat et les litiges en ce domaine ne se prêtent pas à des solutions juridiques ou juridictionnelles.

Il convient également de souligner que si les règles de droit ont surtout pour but de mettre des limites à la liberté d'action des États et, de ce fait, font souvent recours à des interdictions, par contre, les règles politiques insistent plutôt sur la nécessité d'une action positive des États et imposent certains comportements en vue de réaliser les objectifs fixés à l'avance. Ainsi, les deux types des règles sont complémentaires, les règles politiques inspirant ou interprétant les règles juridiques.

La pratique contemporaine des États permet de dégager au moins cinq principes politiques régissant la coexistence pacifique. Sans prétention de les mettre dans un ordre hiérarchique, on peut énumérer des principes suivants: le principe du renforcement de la sécurité et de la paix (de la détente) en Europe, le principe des consultations politiques, le principe du *consensus*, le principe de la sécurité égale pour toutes les parties et le principe de la confiance et de la coopération mutuellement avantageuse.

Le principe du renforcement de la sécurité et de la paix (de la détente) en Europe n'appelle pas de commentaire particulier. Il peut être considéré comme ayant caractre supérieur par rapport à toute action politique des pays signataires de l'Acte final. Il constitue en même temps une brève exposition de l'objectif visé par la C.S.C.E. Bien qu'il se rapporte uniquement à l'Europe, l'importance que revêtent pour le monde entier le renforcement et la stabilisation de la paix et de la sécurité sur le Vieux Continent, a pour effet de conférer à ce principe un caractère universel.

Le principe des consultations politiques est le corollaire du principe du règlement pacifique des différends. Toutefois, le second des deux principes est appliqué au moment de la naissance d'un différend ou d'une divergence d'opinions entre les États, tandis que le premier a pour but

[6] I. I. LUKAŠUK, *Meždunarodnye političeskie normy v uslovijah razrjadki naprajaženności*, «Sovetskoe Gosudarstvo i Pravo», 1976, n° 8, p. 107; DU MEME AUTEUR, *Prawo w systemie stosunków międzynarodowych* [*Le droit dans le système des relations internationales*], «Sprawy Międzynarodowe», 1977, n°2; pp. 41 et s.

de prévenir ces situations et de favoriser l'action positive des États pour renforcer le processus de la détente. Les pays socialistes, dont surtout l'Union Soviétique, font souvent recours à la méthode des consultations politiques. La Pologne maintient des consultations politiques régulières, au niveau de ministres ou autres représentants gouvernementaux avec la France, les États-Unis, la Suède, la Grande-Bretagne, la R.F.A. et le Canada. Ces consultations protent aussi bien sur les questions bilatérales que sur les problèmes internationaux dont surtout la sécurité et la coopération en Europe. Selon la Charte des principes de la coopération amicale entre la France et la Pologne, du 20 juin 1975, les consultations devraient permettre non seulement un échange d'opinions sur les problèmes internationaux d'intérêt commun, mais également, en cas de besoin, la recherche d'initiatives communes.

Le principe du *consensus,* qui se répand de plus en plus dans les organisations internationales, a été appliqué au cour de la Conférence sur la Sécurité et la Coopération en Europe. Cette méthode consiste à adopter une décision par la constatation de l'absence d'opposition des États participants. Si l'on aboutit àtrouver une solution acceptable pour tous, il faut admettre en même temps l'existence d'une volonté et d'un intérêt communs à tous les participants pour mettre en oeuvre la décision adoptée. Dans un certain sens, cette méthode constitue le développement du principe de l'égalité souveraine des États et elle garantit qu'aucune décision ne sera prise sans l'assentiment de tous les groupements politiques. Ainsi, le *consensus* devient un des principes de la coexistence pacifique.

Le principe de la sécurité égale pour toutes les parties concerne surtout les négociations et les accords dans le domaine du désarmement. Il n'existe pas de doute que les progrès de la détente politique devraient s'accompagner de ceux en matière de réduction des forces armées et des armements, surtout en Europe centrale. Toutefois, les mesures envisagées ne peuvent et ne doivent pas porter atteinte à la sécurité des parties intéressées. La Déclaration sur le développement des relations amicales entre la Pologne et la Grande-Bretagne de 1975 exprime clairement ce point de vue. Le principe de la sécurité égale pour toutes les parties constitue une confirmation de la thèse selon laquelle l'équilibre militaire étant à l'origine du processus de la détente, il est essentiel de le maintenir pour que ce processus puisse continuer.

Si le désarmement doit assurer la sécurité mutuelle des parties, la coopération doit être mutuellement avantageuse et approfondir la confiance réciproque. Le principe de la confiance et de la coopération mutuellement avantageuse est une règle de portée universelle et il concerne tous les contacts interétatiques, surtout dans le domaine

économique et culturel. Selon la Déclaration commune sur le développement des relations amicales entre la Suède et la Pologne, signée le 3 avril 1974, les deux États se déclarent prêts à rechercher et à promouvoir des formes nouvelles, mutuellement profitables, du développement de leurs rapports économiques, dont surtout en matière de coopération industrielle.

III

La période de la détente a vu se développer de nouveaux principes juridiques de la coexistence pacifique. En effet, la Déclaration des principes de l'O.N.U. de 1970 contenait sept principes, cependant la Déclaration sur les principes régissant les relations mutuelles des États participants à la Conférence d'Helsinki en énonce dix. Les trois nouveaux principes sont: l'inviolabilité des frontières, l'intégrité territoriale des États et le respect des droits de l'homme et des libertés fondamentales, y compris la liberté de pensée, de conscience, de religion ou de conviction. Le rang élevé conféré par la Déclaration de la C.S.C.E. au principe de l'inviolabilité des frontières est le résultat de son importance particulière sur notre continent. En effet, l'acceptation du *statu quo* politique et territorial constitue une condition indispensable pour la construction et le renforcement du système de sécurité et de coopération en Europe. Il convient cependant de souligner que l'inviolabilité des frontières n'était pas, au moment de la convocation de la C.S.C.E., une suggestion particulière, car ce principe était déjà en vigueur en Europe par suite de sa formulation dans les accords signés par la R.F.A. avec l'Union Soviétique et la Pologne en 1970. La Déclaration de l'O.N.U. de 1970 mentionne également ce principe, quoique dans le contexte du non-recours à la menace ou à l'emploi de la force. Le principe de l'intégrité territoriale figure aussi dans la Déclaration de l'O.N.U., dans le même contexte que le principe de l'inviolabilité des frontières. Pour ce qui est de la Déclaration de la C.S.C.E., ses formules concernant l'intégrité territoriale vont beaucoup plus loin que la simple interdiction du recours à la menace ou à la force. En effet, elles imposent aux États l'obligation de s'abstenir des mesures comportant un recours direct ou indirect à la force contrevenant au droit international. Il s'agit en l'occurrence d'un pas en avant par rapport à la Déclaration de l'O.N.U. de 1970 [7].

[7] Cf. B. RYCHŁOWSKI, J. SYMONIDES, *Bezpieczeństwo i współpraca europejska a koncepcja pokojowego współistnienia* [*La sécurité et la coopération en Europe et la conception de la coexistence pacifique*], «Sprawy Międzynarodowe», 1975, n° 9, pp. 10 - 11; J. SYMONIDES, *Deklaracja...*, pp. 33 - 37; S. DĄBROWA, *Zasady nienaruszalności granic i integralności terytorialnej na KBWE* [*Les principes*

Le chapitre particulier consacré au respect des droits de l'homme constitue également un progrès en comparaison de la Déclaration de l'O.N.U., bien que certaines de ses interprétations suscitent des réserves.

L'adoption par la C.S.C.E. de la Déclaration des principes ne doit et ne peut pas signifier la clôture du processus de renforcement et de développement des principes juridiques de la coexistence pacifique. L'intention de compléter certains principes résulte notamment de la partie de l'Acte final relative à la mise en oeuvre de certains des principes énoncés dans la Déclaration. Les parties y confirment leur volonté de respecter effectivement la règle internationale interdisant le recours à la menace ou à l'emploi de la force, et se déclarent prêtes à poursuivre les travaux sur le projet de convention instituant un système européen de règlement pacifique des différends, présenté par la Suisse lors de la deuxième phase de la C.S.C.E.

Les pays signataires de l'Acte final ont mis l'accent dans plusieurs interventions et déclarations — au cours de la Conférence et à son issue — sur leur volonté et sur l'utilité de conclure des accords bilatéraux et multilatéraux en vue de concrétiser, confirmer et même élargir le sens de certains principes contenus dans l'Acte final.

Le Parti communiste d'U.R.S.S., désireux de construire un large système d'obligations conventionnelles visant l'approfondissement et le renforcement de la coexistence pacifique, a notamment présenté, à son XXV^e Congrès, un projet de convention mondiale interdisant le recours à la force dans les relations internationales. Au cours de la XXXI^e session de l'Assemblée Générale de l'O.N.U., le Gouvernement soviétique a proposé de conclure un accord mondial portant sur l'interdiction générale et universelle de l'emploi de la force dans les relations internationales [8]. Ce projet, comportant un vaste préambule et huit articles, prévoit notamment l'obligation absolue des parties contractantes de ne pas recourir à la force ou à la menace de son emploi. Cette interdiction concernerait tout recours à n'importe quelle force armée, sans distinction d'armes, et engloberait aussi les armes nucléaires et toutes sortes d'armes d'extermination massive.

de l'inviolabilité des frontières et de l'intégrité territoriale à la C.S.C.E]. «Sprawy Międzynarodowe», 1975, n° 11.

[8] Cf. Š. SANAKOEV, *OON i problema ustranenija ugrozy novoj mirovoj vojny*, «Meždunarodnaja Žizn'», 1976, n° 11, pp. 15 et s.; V. MENŽINSKIJ, *Otkaz ot primenenija sily i meždunarodnaja bezopasnost'*, Meždunarodnaja Žizn'», 1977, n° 1, pp. 31 et s.; K. BORISOV, *W trosce o pokój [Dans le souci de la paix]*, «Nowe Czasy», 1976, n° 41, pp. 4 et s.; V. KARENOV, *Realna droga do rozbrojenia [Le chemin réel du désarmement]*, «Nowe Czasy», 1976, n° 39, pp. 4 et s.; V. VASILEV, *Novyj vklad SSSR v ukreplenie mira, razvitie meždunarodnogo sotrudničestva*, «Meždunarodnaja Žizn'», 1977, n° 3, pp. 11 et s.

Tout en soulignant qu'il n'existe aucune circonstance qui puisse justifier le recours à la force ou à la menace de son emploi, le projet soviétique réaffirme l'obligation du règlement pacifique des différends. Le projet prévoit en même temps le devoir des parties de déployer leurs efforts en vue de diminuer la confrontation militaire et la course aux armements.

Au moment où il présentait le projet à l'Assemblée Générale de l'O.N.U., M. Andrej Gromyko, Ministre soviétique des Affaires étrangères, a souligné que le but principal d'un tel accord serait la prévention et l'interdiction de toute agression. Cependant, l'accord en question ne saurait pas priver les peuples de leur droit de légitime défense ou dresser des obstacles pour la lutte de libération des peuples sous la domination coloniale.

En quoi consiste la valeur essentielle de l'accord proposé par l'Union Soviétique ? Sans tenter de répondre exhaustivement à cette question, il semble que son principal mérite serait la consécration à l'échelle internationale du principe de non-recours à la force. L'obligation par laquelle les États signataires s'engageraient de ne pas recourir à la force, s'accomplirait dans des conditions nouvelles résultant de l'adoption, en 1974, de la nouvelle définition d'agression et des formules concernant le non-recours à la force, énoncées par la Déclaration de l'O.N.U. de 1970 et par l'Acte final de la C.S.C.E. Étant donné cette évolution du principe de non-recours à la force, la conclusion de l'accord proposé par l'Union Soviétique contribuerait non seulement à renforcer ce principe de base des relations internationales, mais également à actualiser son contenu juridique.

L'interdiction du recours à la force, y compris l'interdiction — formulée explicitement par le projet soviétique — de l'emploi de l'arme nucléaire et de toute autre arme de destruction massive, revêtirait donc une importance particulière. Il est en effet a souligner qu'il n'y a pas jusqu'à présent de régle conventionnelle interdisant directement le recours à l'arme nucléaire, et une partie de la doctrine bourgeoise refuse de reconnaître l'existence de cette interdiction malgré la résolution de l'Assemblée Générale du 29 novembre 1972 sur le non-emploi de la force et l'interdiction permanente de l'emploi des armes nucléaires. Enfin, pour la première fois un accord international interdisant le recours à la force imposerait aux parties l'obligation de réduire la confrontation militaire et de déployer leurs efforts pour aboutir à un désarmement complet et universel.

Un tel accord posséderait, à n'en pas douter, une grande importance politique. Ayant ses origines dans le processus de consolidation et de développement des principes politiques et juridiques de la coexistence

pacifique, l'accord en question faciliterait l'élargissement de la détente sur tous les continents et contribuerait au renforcement de la sécurité de tous les États, de la paix et de la confiance dans le monde.

Enfin, la conclusion de l'accord pourrait s'avérer un facteur non négligeable dans la formation de la conscience juridique et politique des peuples et surtout de jeunes générations.

Au cours du débat, qui s'est déroulé pendant la XXXI[e] session de l'Assemblée Générale, une forte majorité des États s'est prononcée en faveur du projet soviétique. Il est très significatif que parmi les adversaires du projet figurent la Chine populaire, l'Albanie, le Chili et l'Israël. La résolution concernant l'examen du projet soviétique a été adoptée par 88 voix contre 2 (l'Albanie, la Chine populaire) et 31 abstentions. Conformément à cette résolution, les États membres ont étudié le projet d'accord et ont présenté leurs suggestions au Secrétaire Général. Celui-ci a présenté son rapport à la XXXII[e] session de l'Assemblée Générale qui a mis à son ordre du jour le problème de la conclusion d'un accord mondial sur l'interdiction du recours à la force dans les relations internationales. Les discussions et les travaux qui se déraulent à ce propos au sein de l'O.N.U. constituent, sans aucun doute, un succès pour les pays de la communauté socialiste.

De nouvelles propositions en matière de non-recours à la force dans les relations internationales ont été présentées au cours de la réunion de Bucarest, en novembre 1976, du Comité politique consultatif du Traité de Varsovie. Dans leur souci d'écarter la possibilité d'une guerre nucléaire, les pays signataires du Traité de Varsovie ont proposé, dans la déclaration de Bucarest, de conclure un accord international qui imposerait à chacun des signataires de l'Acte final de la C.S.C.E. l'obligation de ne pas utiliser le premier l'arme nucléaire contre un autre État signataire de l'Acte final. Le projet d'accord, qui puise dans la conception de zones dénucléarisées, part du principe que l'arme nucléaire constitue pour l'humanité le danger le plus redoutable et son emploi en Europe conduirait à la destruction totale de ce continent. La conclusion d'un tel traité contribuerait à concrétiser les dispositions de l'Acte final, à renforcer la confiance réciproque et à réduire le degré de la confrontation militaire. Par conséquent, elle ne pourrait que favoriser l'amélioration du climat politique en Europe et en dehors de ses frontières. Il est cependant à regretter que les pays membres de l'O.T.A.N. aient rejeté cette proposition sans entamer une discussion de fond.

Les pays occidentaux mettent souvent en question l'utilité de conclure de nouveaux accords internationaux réaffirmant les principes de la

coexistence pacifique. Selon les opinions occidentales, ces accords ne seraient que des déclarations générales dépourvues d'éléments nouveaux et ils pourraient même affaiblir la valeur des principes figurant dans la Charte des Nations Unies ou dans l'Acte final d'Helsinki. Cette attitude suscite de sérieuses réserves. Premièrement, les projets d'accords en questions n'ont pas un caractère général, mais ils constituent un pas de plus vers la concrétisation du principe de non-recours à la force dans les relations internationales. Par la nature de choses, chaque nouvel accord traite d'un autre aspect de ce principe et constitue une importante étape sur la voie de sa consolidation. Deuxièmement, la conclusion de nouveaux accords de ce genre et la discussion qui les accompagne, deviennent un important facteur d'éducation politique. Par conséquent, on contribue à former des attitudes antibellicistes et à renforcer la confiance entre les parties contractantes. Troisièmement, et ceci compte le plus, le renforcement et le développement des principes de la coexistence pacifique témoignent de l'existence de la volonté politique favorable à leur mise en oeuvre et leur plein respect. La forme actuelle de la coexistence pacifique — la détente — est un processus qui, pour ne pas stagner ou même reculer, nécessite des stimulants positifs.

IV

L'acceptation et le développement des principes politiques et juridiques de la coexistence pacifique en Europe ont déjà apporté des résultats positifs. Bien que ni la Conférence sur la Sécurité et la Coopération en Europe ni le développement des rapports bilatéraux, n'aient pas abouti à l'établissement d'un système de sécurité collective (une nouvelle organisation internationale paneuropéenne n'est pas née), on peut déjà parler d'un noyau d'un tel système fondé sur les principes obligatoires du droit international et sur les principes politiques.

Quels sont les éléments essentiels de ce système ? Le rôle de premier plan revient à la Déclaration sur les principes régissant les relations mutuelles des États participants à la C.S.C.E., dans laquelle on insiste surtout sur le non-recours à la menace ou à l'emploi de la force, sur l'inviolabilité des frontières, sur l'intégrité territoriale et sur la non-intervention dans les affaires intérieures. L'acceptation d'un ensemble des règles par tous les États européens, y compris les États à régimes sociaux différents, paraît une condition *sine qua non* de la construction de tout système durable de sécurité.

D'autre part, l'acceptation du *statu quo* territorial et politique en Europe constitue un élément important de la paix sur notre continent.

Grâce à cette acceptation disparaît la principale source des conflits et tensions en Europe, tandis que le danger d'un conflit armé diminue. Le règlement pacifique, par l'Italie et la Yougoslavie, du statut de Trieste, en novembre 1975, est significatif à cet égard.

Le système, en voie de développement, de sécurité européenne s'appuie également sur les principes politiques énoncés par plusieurs déclarations internationales. Les États expriment sur cette voie leur intention de mettre en pratique et de respecter strictement les principes contenus dans l'Acte final, ceci afin de renforcer la sécurité en Europe et de conférer à la détente un caractère permanent. Le nouveau principe des consultations politiques bilatérales entre les États à régimes sociaux différents contribue également à renforcer la sécurité sur le Vieux Continent. Enfin, les échanges commerciaux et la coopération industrielle, scientifique et technique, jouent un rôle non négligeable dans la formation de ce qu'on appelle l'infrastructure de la paix en Europe. Des mesures communes des États européens en matière de protection de l'environnement, de transports ou d'énergie serviraient encore mieux le développement de cette infrastructure.

Le facteur psychologique est également indispensable au système de sécurité en Europe. La confiance mutuelle ne devrait pas cesser de s'approfondir. Les sondages d'opinion effectués dans les pays occidentaux prouvent que la majorité de la population de ces pays ne se sent pas militairement menacée et exclut la possibilité d'une guerre en Europe. L'approfondissement de la confiance mutuelle entre les États à régimes sociaux différents, qui ne cesse de s'approfondir malgré certains obstacles, est le fruit du développement de la coopération économique et politique, des consultations à haut niveau, des rencontres de dirigeants, des échanges culturels et des contacts entre les individus. Les mesures de confiance en matière militaire, prévues par l'Acte final, et notamment la notification préalable des manoeuvres militaires et l'échange d'observateurs, jouent un rôle non négligeble dans l'amélioration du climat politique en Europe.

L'édification d'un système de sécurité durable en Europe n'est pas encore terminée. Il est indispensable de le compléter des mesures de détente militaire et surtout des démarches ayant pour but le ralentissement de la course aux armements qui devrait aboutir au désarmement. Le principe politique dont devraient s'inspirer les États dans les négociations sur le désarmement est celui de la sécurité égale pour toutes les parties.

Toutefois, l'acceptation des principes politiques et juridiques de la coexistence pacifique comme base du système de sécurité et de coopération en Europe ne signifie nullement que l'établissement d'un tel système et la disparition future de la division de ce continent ont ou doivent

avoir pour but la suppression des différences entre les régimes socialiste et capitaliste, l'arrêt de l'émulation entre les deux systèmes ou la cessation de la confrontation idéologique. Au contraire, la notion même de coexistence admet l'existence des différences de régimes entre les États. L'acceptation des principes de la coexistence pacifique signifie cependant que la rivalité entre les États à régimes différents ne peut avoir qu'un caractère pacifique et doit se conformer aux règles du droit international et aux règles politiques convenues. Ainsi, l'acceptation de la détente et de la coexistence pacifique contribue à réduire la confrontation. Si, en effet, au cours de la période de la guerre froide, la confrontation se déroulait sur quatre plans — politique, économique, militaire et idéologique —, elle concerne aujourd'hui surtout la lutte idéologique, les parties se déclarant prêtes à diminuer le degré de la confrontation militare.

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The Relations of the Council for Mutual Economic Assistance with Third States and International Organizations

by JERZY RAJSKI

The Council for Mutual Economic Assistance, as an international organization of socialist states established by international treaty, is a subject of international law and, hence, comes under its provisions governing its international relations with member-states, non-member states and international organizations. From the legal point of view the Council has a separate personality from that of its member-states, being endowed with an appropriate institutional structure and rights, which not only do not detract, but add to the rights and obligations of these states which preserve, none the less, their complete national sovereignty. Thus, the Council can, within the limits of its competence defined by the provisions of its Charter [1], act on its own behalf in the field of international relations.

The aims and principles of the Council for Mutual Economic Assistance have been drafted to allow for a steady development of economic, scientific and technical cooperation of its membrstates with third states, which implies the establishment of appropriate ties of an international legal character.

In its preamble the Charter of the Council confirms unequivocally the readiness of its member-states to

"develop economic relations with all states, irrespective of their social and political system",

considering such a readiness to be an effective means "to achieve the objectives set forth in the United Nations Charter" which are of a uni-

[1] Charter of the Council for Mutual Economic Assistance signed in Sofia December 14, 1959. The official text which incorporates the changes introduced by the protocol of June 21, 1974 has been published in the publication of the Council entitled "Ekonomičeskoe Sotrudničestvo Stran-Členov SEV", 1975, No. 1, p. 109 and 112 and in the collection entitled *Mnogostronnee ekonomičeskoe sotrudničestvo socialističeskih stran*, documents for 1972 - 1975, edited by P. A. Tokarieva, Moskva 1976, pp. 5 - 14.

versal nature. Article III, paragraph 1 of the Charter of the Council lists among the functions and powers of the Council cooperation with member-states in the elaboration and implementation of joint undertakings in the field of

"exchange of goods and services between member-states of the Council (...) and other states".

The above mentioned principles have been developed in the comprehensive programme of socialist economic integration of member-states adopted at the XXV session of the Council in July 1971. The programme emphasizes, among other things, the need to coordinate the foreign economic policies of member-states

"in the interest of normalizing international trade and economic relations and, above all, of removing all discriminatory practicies in this field" (chap. I, p. 3).

It devotes also special provisions to the problems arising from

"the full or partial participation of states which are not members of the Council"

in the implementation of the programme (chap. 17, p. 6).

Thus, the activity of the Council for Mutual Economic Assistance is not limited to the area of relations between member-states, although it goes without saying that here lies its main interest. And in order to perform these tasks the Council was endowed with an appropriate legal status.

In accordance with Article XIV of its Charter the Council enjoys on the territory of its member-states the benefits of legal capacity indispensable to perform its functions and to achieve its stated objectives. It can be deduced from the broad wording of this provision that it regulates the problems of of the Council's legal capacity in both the field of civil legal and international legal relations. In the latter field the legal capacity of the Council is, obviously, not limited exclusively to relations with member-states, as mentioned by that provision. This conclusion is confirmed by several other provisions of the Charter, and in particular by Article III, paragraph 2b, which lists among the powers of the Council its capacity to conclude agreements with member-states, third states and international organizations [2].

Articles XI and XII, developing this provision, accord to the Council the right to establish also another kind of international relations with third states and international organizations. According to Article III, paragraph le the Council shall take other actions as may be required for the achievement of its purposes. It follows from these article that

[2] This provision was incorporated in the Charter in 1974.

the Council for Mutual Economic Assistance has the capacity to conclude international agreements (*ius contrahendi*) and to establish other forms of international relations. The Council enjoys, in this respect, appropriate privileges and immunities which are defined in accordance with Article XV, paragraph 3 of the Charter by provisions of a special Convention [3].

The official representative of the Council *vis-à-vis* officials and organizations of the member-states is, in accordance with Article X, paragraph 1 of the Charter, the Secretary of the Council who is its "chief officer". The Secretariat of the Council

"takes appropriate steps in accord with the decisions of the Session of the Council and the Executive Committee in order to establish and to maintain contacts with non-member states of the Council and with international organizations" (Art., I para. 1 of the Rules of Procedure of the Secretariat of the Council).

It can therefore be stated that the Council for Mutual Economic Assistance disposes of all necessary attributes of international legal personality, as confirmed by international practice [4].

The Council expresses its own will, formally independent of the will of its member-states, at first in the field of international relations with these states, concluding with their governments agreements concerning the settlement of problems connected with the seat of the Council's institutions on the territory of these states. The first such agreement was signed with the USSR government December 7, 1961. Similar agreements were concluded later with the governments of other member-states. [5] The Council has also concluded several agreements on cooperation with international organizations established by socialist states [6].

[3] Convention on legal capacity, privileges and immunities of the Council for Mutual Economic Assistance adopted in Sofia, April 14, 1959 (modified later in 1962 and 1974).

[4] See J. RAJSKI, *Les relations extérieure de Conseil d'Aide Economique Mutuelle*, "Journal du droit international," 1976, No. 3, p. 535 ff. Z. KLEPACKI, *Membership and Other Forms of Participation of States in the Activities of the Socialist Economic, Scientific and Technical Organization*, "Polish Yearbook of International Law," vol. 7, 1975, p. 57 ff. See also : O. V. BOGDANOV, *Pravovoj status SĖV kak meždunarodnoj organizacii*, in: *Sovet Ėkonomičeskoj Vzaimopomošči — Osnovnye pravovye problemy*, Moskva 1975, p. 125 ff.; H. de FIUMEL, *RWPG w stosunkach międzynarodowych [The Council for Mutual Economic Assistance in International Relations]*, "Sprawy Międzyynarodowe", 1976, No. 2, p. 25 ff.; J. RAJSKI, *Rozwój międzynarodowych stosunków umownych RWPG z państwami trzecimi [The Development of Contractual Relations of the Council for Mutual Economic Assistance with Third States]*, "Państwo i Prawo", 1976, No. 1, p. 40 ff.

[5] See O. V. BOGDANOV, *op. cit.*, pp. 128 and 134 - 139.

[6] V. FOMIN, *Otnošenija SĖV s mieždunarodnymi ekonomičeskimi organizacijami socialističeskih gosudarstv*, in: *Sovet Ėkonomičeskoj Vzaimopomošči...*, p. 286 ff.

The first agreement with a non member-state was signed in 1964 with a socialist state, namely Yugoslavia. In 1973 the first agreement on cooperation between the Council and a capitalist state was signed with Finland. Similar agreements were signed in 1975 with Irak and Mexico. Several other states have expressed their interest to regulate their relations with the Council in the same way (for example: Afghanistan, Angola, Columbia, Ethiopia, Guiana, India, Jamaica, Laos, Peru, Syria and the People's Democratic Republic of Yemen).

In 1975 the Council for Mutual Economic Assistance concluded its first agreements with international organizations whose member-states are of different social and economic systems, such as the Danube Commission and the International Atomic Agency.

I. Relations with International Organizations

1. Article XII of the Charter stipulates that the Council can establish and maintain relations with the organs of the United Nations Organization, with the Specialized Agencies and with other international organizations. The character and form of these relations are determined by the Council in agreement with the interested organizations. Thus, the Charter endowing the Council with the authority to establish relations with international organizations emphasizes clearly the exceptional importance of the Council's relations with the United Nations, its organs and with international organizations.

The Council for Mutual Economic Assistance maintains extensive relations with the organs and the Specialized Agencies of the United Nations, mainly through the intermediary of the Council's Secretariat [7]. The first contacts of the Council with international organizations date back to 1955 with the establishment of a working relationship with the Economic Commission for Europe, which developed since then quite extensively. The Secretariat of the Council participates in the main activities of the ECE, informs the ECE about the various activities of the Council and invites the representatives of the ECE to the sessions

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The texts of these agreements are published in the collections: *Mnogostoronnee èkonomičeskoe sotrudničestvo socialističeskih gosudarstv*, Moskva 1972, pp. 217 - 237 and *Mnogostoronnee ekonomičeskoe stotrudničestvo socialističeskih gosudarstv*, documents for 1972 - 1975, Moskva 1976, pp. 159 - 170.

[7] See N. V. FADIEJEW, *Rada Wzajemnej Pomocy Gospodarczej* [*Council for Mutual Economic Assistance*], Warszawa 1975, p. 79 ff.; V. FOMIN, *Otnošenija Soveta Èkonomičeskoj Vzaimopomošči c OON i drugimi meždunarodnymi organizacijami*, in: *Sovet Èkonomičeskoj Vzaimopomošči...*, p. 311 ff.

of the standing commissions of the Council and to other meetings organized by the Council. Cooperation between the Council and the Economic Commission for Europe includes such fields as electric power in Europe, housing, coal industry, steel industry, water economy, environmental protection, statistics and international standardization.

Eruitful cooperation is also being developed with other bodies of the UN and with the UN Specialized Agencies.

Cooperation of the Council for Mutual Economic Assistance with the UN Economic and Social Council acquired a new dimension in 1971 when the ECOSOC granted the Council for Mutual Economic Assistance consultative status. The representatives of the Council are regularly taking part in the session of the ECOSOC, informing the ECOSOC on the Council's experience in the coordination of national economic plans and on other matters in the ECOSOC's interest.

The Council for Mutual Economic Assistance, attaching great importance to the development of trade without discrimination and other barriers with all countries, takes an active part in the work of the United Nations Conference on Trade and Development (UNCTAD), which granted the Council special consultative status. The representatives of the Council participate regularly as observers in the UNCTAD conferences, while the representatives of the Council's Secretariat are present at the sessions of the UNCTAD's Council and Committees.

The Council for Mutual Economic Assistance cooperates extensively with the UN Commission for International Trade Law (UNCITRAL), informing the Commission on the harmonization and unification of international economic law of its member-states. The Conference of Representatives of Member-States of the Council on Legal Problems is organizing regularly meetings with the aim of exchanging views and information regarding the main problems considered by UNCITRAL.

The Council for Mutual Economic Assistance maintains ties with UN Specialized Agencies such as e.g. the United Nations Educational, Scientific and Cultural Organizations UNESCO, the Food and Agriculture Organization FAO or the United Nations Industrial Development Organization UNIDO. In 1971 the Council was granted consultative status by UNIDO. Representatives of the Council's Secretariat maintain contacts with the Economic Commission for Asia and the Far East (ECAFE) and with the Economic Commission for Africa (ECA).

The relations of the Council with the UN have entered a new stage in 1974 when the UN General Assembly granted the Council special observer status. Since then delegations of the Council have participated regularly in the sessions of the General Assembly.

Attaching great importance to the development of relations with the

UN and its Specialized Agencies, the Council for Mutual Economic Assistance maintains relations with a number of international organizations. As an example one may quote the Council's developing relations with the World Health Organization WHO or with the International Labour Organization ILO. The Council is also extending its ties to several regional organizations and international institutions such as, for example, the Nordic Council or the Centre for Industrial Development of Arab States. These ties lead to the exchange of various information and expert opinion, to the exchange of observers and to joint undertakings.

2. These cases in which relations between the Council for Mutual Economic Assistance and other organizations are based on international agreements signed by the interested parties merit special attention. Such from was given to the Council's relations with several international organizations established by its member-states. Of a similar nature are the Council's relations with the Danube Commission and with the International Atomic Energy Agency (IAEA). The agreement with the Danube Commission was signed in Budapest June 23, 1975 [8] and the agreement with the IAEA was signed in Vienna September 26, 1975.

The purpose of the Agreement with the Danube Commission is, according to Article 1, the development of cooperation in all matters related to the navigation on the Danube which are of interest to the contracting parties (the list of these matters is contained in an appendix to the Agreement).

In order to implement such cooperation the contracting parties agreed:

a) to exchange mutual information on work undertaken within the framework of their respective annual and long term plans and to strive to agree on the means which ought to be applied when solving problems of mutual interest;

b) to maintain necessary contacts and to exchange experience on matters of joint interest;

c) to exchange publications and documents issued bby both organizations as well as other materials and documents concerning matters of mutual interest (Art. 2).

Cooperation provided for in the Agreement is carried out by the Secretariats of both organizations which maintain for that purpose permanent working contacts (Art. 3).

Pursuant to Article 4 of the Agreement, the representatives of the

[8] The text of the agreement was published in the collection entitled *Mnogostoronnee èkonomičeskoe sotrudničestvo...*, pp. 171 - 177.

Council and of the Danube Commission are to be invited to participate as observers in sessions, meetings, conferences and other gatherings organized by them with the aim of discussing problems of mutual interests to both organizations. Both sides undertake to apply appropriate measures in order to safeguard the confidential character of exchanged documents which are not due for publication (Art. 5).

Wherever problems connected with the implementation of the agreement and requiring additional elucidation arise, both sides agree jointly on its interpretation (Art. 6).

The Agreement whose texts in Russian and French are equally authentic (Art. 9) was concluded for a indefinite period. However, each side is entitled to denounce the agreement at any time, provided that it informs the other side of its intention to do so not later that six months in advance (Art. 8).

The conclusion of the Agreement contributed to the further development of cooperation between the Council and the Danube Commission, which covered several problems connected with the expansion of navigation on the Danube.

The agreement signed by the Council for Mutual Economic Assistance with the International Atomic Energy Agency provides for the development of cooperation between the two organizations in the field of peaceful uses of nuclear energy, consultations on problems of mutual interest as well as for an exchange of information and documents. All this is to be carried out principally by the way of contacts between the Secretariats of both organizations.

3. Relations between the Council for Mutual Economic Assistance and the European Economic Community have not yet passed the stage of search for a mutually acceptable platform. The initiative in this respect belongs to the Council, which as far back as 1973 established through its Secretary N.V. Fadieyev the first contacts with the representatives of the EEC [9]. These resulted in the proposals submitted by the Council aiming at the conclusion of an agreement between the Council and its member-states on the one hand and the EEC and its member-states on the other, defining the basis of mutual relations in order to create conditions conducive to economic cooperation based on equality and mutual benefits. As it was pointed out in the Communique of the XXXI session of the Council for Mutual Economic Assistance held in June 1977, such an agreement

"would represent a positive contribution to the development of economic and commercial cooperation between momber-states of both organizations and, hence,

[9] See "Bulletin des Communautés Européennes," 1974, No. 9, p. 1201.

add substance to the process of detente and to the strengthening of peace in Europe in the spirit of the provisions of the Final Act of the Helsinki Conference".

4. The Executive Committee of the Council examines each year a report of the Secretariat on the implementation of decisions concerning contacts with international economic, scientific and technical organizations. It adopts also a plan dealing with the development of such contacts. These problems figure later on the agenda of the session of the Council which is the highest body of the organization.

Contacts of the Council with international organizations are considered by the organs of the Council as indispensable and useful [10]. They provide the opportunity for an exchange of experience, for a joint elaboration of specific problems, thus contributing to the development of cooperation between all states irrespective of their social and economic systems.

II. Agreements with Third Countries

1. Agreement on the Participation of a Non-member-state of the Council for Mutual Economic Assistance in the Activities of the Council

The conclusion of such an agreement results in the extension of scope of activities of the Council, thanks to the participation in the work of its organs of a non member-state. So far only one agreement of that type has been signed, namely the Agreement between the Council for Mutual Economic Assistance and the Government of the Yugoslav Socialist Federative Republic [11]. Its provisional entry into force took place on September 17, 1964. Pursuant to the provision of Article XI it entered definitely into force with the exchange of documents on the confirmation of the agreement by the Council and its ratification by the YSFR which took place on April 24, 1965.

The Agreement defines the scope and character of economic, scientific and technical cooperation between Yugoslavia and the member-states of the Council as implemented by Yugoslavia's participation in the work of the Council's organs. It regulates also various procedural questions arising from Yugoslavia's participation in the work of the Council's

[10] N. FADIEJEW, *op. cit.*, p. 82.

[11] The texst of the agreement was publisrod in *Podstawowe dokumenty RWPG i organizacji wyspecjalizowanych* [*Basic Documents of the Council for Mutual Economic Assistance and of Specialized Organizations*], selected and edited by B. Reutt, Warszawa 1972, pp. 185 - 190.

organs, from the adoption and execution of decisions, financial questions, etc.

According to the preamble of the Agreement, its purpose is to promote cooperation of the parties to the Agreement

"in the further development of economic cooperation and in solving economic problems which are of mutual interest to the member-states of the Council and the YSFR on the basis of equal rights, respect for sovereignty, national interests and mutual benefits".

Some spheres of that cooperation have been defined in Article I of the Agreement (foreign trade, foreign exchange relations, iron and steel industry, monferrous metals industry, machine industry, chemical industry, coordination of scientific and technical research). Others are determined on the basis of separate agreements concluded between the Executive Committee of the Council and the YSFR (Art. I alinea 2 of the Agreement).

Specific questions which are of mutual interest to the member-states of the Council and to the YSFR are defined on the basis of agreements reached by appropriate representatives of the YSFR with the competent organs of the Council (Art. I, alinea 3 of the Agreement).

Cooperation takes the form of participation of Yugoslav representatives in the work of the Council's appropriate organs. These representatives enjoy the same rights as the representatives of member-states.

"They are entitled to submit proposals, to take part in discussions, to make official statements and voice reservations on an equal footing as the representatives of memer-states" (Art. III, alinea 1).

Yugoslav experts may participate in meetings of working bodies of standing commissions and other organs of the Council which were given the task of preliminary preparation of materials and proposals concerning problems of joint and mutual interest (Art. VII).

Recommendations and decisions which are to be implemented with the participation of the YSFR may be adopted by the competent organs of the Council only with the consent of the representatives of Yugoslavia taking part in the work of theses organs. The recommendations and decisions are then submitted for consideration to the member-states of the Council and to Yugoslavia. The accepted recommendations of the Council's organs are implemented through decisions of the Governments or competent authorities of these countries, in conformity with the established legal procedure (Art. VII).

The scope of cooperation between the YSFR and the Council and its member-states, as defined above, may be enlarged by the accession of the YSFR to decisions and recommendations taken earlier by the

organs of the Council. Article V of the Agreement states that this depends only on the consent of the interested member-states.

The YSFR accepted obligations arising from its participation in the work of the organs of the Council, similar to those of the member-states as defined in Article II of the Council's Charter. Thus, pursuant to Article IV of the Agreement the YSFR undertook to: a) examine the recommendations of the Council's organs adopted without reservations by the representatives of the YSFR and to inform the Council on the results of such examination following the same procedure as that laid down for member-states ; b) ensure the implementation of the accepted recommendations of the Council's organs and to inform the Council of the action taken to that effect ; c) render assistance to the Council and to its official in the performance by them of duties arsing from the implementation of the Agreement ; d) make available to the Council materials and information needed by the Council's organs to work out measures of mutual interest ; e) cover the expenses arising from the participation of the YSFR in the work of the Council's organs to the amount fixed by common agreement of the representatives of the YSFR and the Council.

The Agreement regulates several procedural problems connected with Yugoslavia's participation in the work of the Council's organs such as information on the appointment of the representative of the YSFR to the meetings of the Council's organs, the procedure to be followed in informing the YSFR on the dates of the meetings of the Council's organs in which its representatives are due to take part, the transmission of documents and other materials, etc. The principle has been adopted according to which procedural question arising from the participation of the YSFR in the work of the Council's organs and not specifically dealt with in the Agreement are to be settled in conformity with the rules of procedure of these organs (Art. VII in fine of the Agreement). The Agreement imposes on both sides the obligation to treat all materials and information not intended for publication and exchanged between the YSFR and the Council as secret (Art. IX).

The Agreement has been concluded for an indefinite period. Both sides have the right to denounce it on six months notice. (Art. IX, alinea 3).

Yugoslavia has thus obtained a *special legal status* within in the framework of the Council for Mutual Economic Assistance, which represents a new type of institutionalized international cooperation of an organization of socialist states with another socialist non member-state [12].

[12] J. RAJSKI, *Rozwój międzynarodowych stosunków RWPG...*, [*Development of International Relations of the Council for Mutual Economic Assistance...*], p. 44.

In legal writings the status of the YSFR has been defined as close, but not identical with the status of an associated member. [13]

The agreement signed by the Council for Mutual Economic Assistance with the YSFR has created a legal and organizational framework for the promotion of economic, scientific and technical cooperation between Yugoslavia and the member-states of the Council. These relations as well as the participation of Yugoslavia in the work of the Council's organs have been developing very rapidly. Yugoslavia has been taking part in the work of the Council's highest organs: the Council Session and the Executive Committee. The YSFR participates also in some activities of the Council's Committees, of the majority of the Council's standing commissiens and of several other organs of the Council (among others, in the conference of representatives of member-states on legal matters).

The YSFR is party to more than a dozen multilateral agreements concerning specialization and cooperation in industrial production concluded within the framework of the Council for Mutual Economic Assistance. Yugoslav economic organizations are members of several international economic organizations set up by the member-states of the Council (for example, Intermetal, Interchim, Interatomenergo, Interchimvolokno, Interelektro). Yugoslavia concluded more than 50 agreements on cooperation with the member-states of the Council, dealing with specialization and cooperation in various fields of production. It takes also an active part in various economic, scientific and technical undertakings arising from the implementation of the Comprehensive Programme of Socialist Economic Integration of 1971. [14]

The results achieved so far are judged as highly satisfactory by the appropriate organs of the Council, by the Council's member-states and by the YSFR. The constant broadening and deepening of Yugoslavia's

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[13] B. BABOVIC, *Les aspects juridiques de la coopération de la Yugoslavie avec les pays du COMECON*, "Revue yougoslave de droit international," 1968, No. 1/2, p. 141. Western doctrine defines often the position of Yugoslavia as that of an associated member of the Council for Mutual Economic Assistance. See, for example, J. CAILLOT: *Le C.A.E.M. — Aspects juridiques et formes de coopération économique entre les pays socialistes*, Paris 1971, p. 38 and 41 ; C. A. COLLIARD, *Institutions des relations internationales*, Paris 1974, p. 458 ; M. LAVIGNE, *Le COMECON — Le programme du COMECON et l'intégration socialiste*, Paris 1973, p. 16. A. USCHAKOW, *Der Ostmarkt in COMECON*, Baden-Baden 1972, p. 29.

[14] See informations on that subject contained in an interview given by the head of the Yugoslav permanent mission at the Council for Mutual Economic Assistance A. Kovac to the editor of the journal published by the Secretariat of the Council — "Ėkonomičeskoe Sotrudničestvo Stran-Členov SĖV," 1975, No. 6, pp. 49 - 50.

cooperation with the member-states of the Council resulting from Yugoslavia's participation in the work of the Council's organs is stressed in the communique of the XXXI Session of the Council (June 1977).

About one-third of Yugoslavia's foreign trade is being transacted with the member-states of the Council for Mutual Economic Assistance. Compared to the previous five year period the value of their mutual trade increased twofold in 1971 - 1975. These figures illustrate eloquently the effectiveness of the Agreement concluded between the YSFR and the Council.

2. Agreements on Cooperation Between the Council for Mutual Economic Assistance and Non Member-States of the Council

A. The first agreement of that type was concluded on the initiative of the Finnish government, which proposed in December 1972 to start talks with the Council on the conclusion of an agreement on economic, scientific and technical cooperation between the Finnish Republic and the Council. [15] Subsequent negotiations resulted in the signing on May 16, 1973 of an agreement on cooperation between Finland and the Council, the first such agreement signed by the Council with a non socialist state.

The preamble to the Agreement emphasizes the fact that the member-states of the Council and Finland pursue a policy of peaceful coexistence of states with different economic and social systems and restates the readiness of the member-states of the Council, as expressed in the Council's Charter,

"to develop economic ties with other states on the basis of equality, mutual benefits and non interference in internal affairs".

Pursuant to Article 1 the aim of the Agreement is to promote multilateral economic, technical and scientific cooperation between the member-states of the Council and Finland in all spheres of mutual interest. The development of such cooperation, as intended by the parties, ought to promote

"economic and technical progress of the member-states of the Council for Mutual Economic Assistance and the Republic of Finland and the achievement of the aims listed in the United Nations Charter".

The Agreement set up a Commission on Cooperation between the Council and Finland (referred to later as the Commission) with the aim

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[15] N. FADIEJEW, *op. cit.*, p. 48. The text of the agreement published in *Mnogostoronnee èkonomičeskoe sotrudničestvo...*, 1976, pp. 153 - 156.

of reviewing constantly the possibilities to develop such cooperation and of organizing its process. The Commission includes representatives of the Council's member-states duly appointed by their respective state organs and representatives of Finland appointed by the president of the Finnish Republic (Art. 2 of the Agreement). The organization, powers and functions of the Commission are defined by the rules of procedure [16] which, in accordance with Article 5 of the Agreement, are an integral part of that Agreement.

In accordance with Article II of the rules of procedure the Commission exercises the following functions: a) it examines the possibilities to develop multilateral economic, scientific and technical cooperation between the Council and Finland and the steps which are to be taken to that effect; b) it determines and considers questions which are of mutual interest to the parties; c) it initiates work on proposals concerning multilateral agreements on cooperation to be signed by interested member-states of the Council and Finland or by their respective organizations and institutions; d) it considers problems arising from the implementation by the Council's member-states and Finland of recommendations adopted by the Commission or of multilateral international agreements concluded as a result of the implementation of such recommendations; e) it cooperates in the organization of mutual consultations and of the exchange of information between the Council and Finland or between their respective organs, organizations and institutions on matters of multilateral economic, scientific and technical cooperation which are the subject of mutual interest. The Commission is also performing other tasks which are necessary to accomplish its aims.

The member-states of the Council and Finland undertake to render to the Commission all necessary assistance in the performance of its duties and to make available to it (on the basis of appropriate agreed provisions) all necessary documents and information (Art. 4 of the Agreement). In order to accomplish its tasks the Commission can adopt recommendations on matters concerning economic, scientific and technical cooperation as well as decisions on organizational and procedural questions. Such recommendations and decisions can be adopted only if agreed by the interested member-states and Finland (Art. 3, alinea 1 and 2 of the Agreement). They are not binding on such member-states of the Council which declare not to be interested in the matter under consideration. Such member-states are however entitled to join at a later stage these recommendations and decisions adopted by the

[16] Text of the rules procedure published, *ibid.*, pp. 156 - 159.

other member-states of the Council and Finland (Art. III, alinea 1 of the rules of procedure).

The representatives of the member-states of the Council and of Finland in the Commission have the duty to submit all adopted recommendations to the appropriate organs of their governments for their consideration. They inform each other within 60 days from the date of signing of the appropriate protocol of the Commission about the results of such consideration. The Commission can, if necessary, fix another date (Art. III, alinea 2 of the rules of procedure).

Recommendations adopted by interested member-states of the Council and by Finland are put into practice through multilateral or bilateral agreements or other agreed instruments concluded by the interested states (their organs, organizations and institutions (Art. 3, alinea 3 of the Agreement). The Commission meets at least once annually (Art. IV, alinea 2 of the rules of procedure). The meetings are presided in turn by a representative of the Council's member-states and by a representative of Finland. The Secretary of the Council or an official appointed by him participates in the meetings of the Commission. A state participating in the work of the Council's organs on the basis of a special agreement is also entitled to take part in the work of the Commission. The conditions of such participation are fixed by agreement between the Commission and the state concerned (Art. IV, alinea 3 - 5 of the rules of procedure). The Commission held already several plenary meetings setting up various working bodies with the task of considering specific questions concerning Finland's cooperation with the member-states of the Council in the fields of economy, science and technology (including problems of environmental protection). The Commission and its organs dealt with problems arising from cooperation in foreign trade and industry (machine industry and chemical industry), transport, science and technology. Cooperation in the field of standardization and statistics was also considered. [17]

The first results of this cooperation are judged very favourably by the contracting parties. The Finnish prime minister Kalevi Sorsa stated in an interview published in the Polish daily "Trybuna Ludu" of July 20, 1977 that although "three years represents too short a period for the evaluation of the effects of an international agreement, it can be said that the years 1973 - 1976 bear the mark of a great intensification of economic relations between Finland and the Council

[17] See P. AVOMAA, *Échanges Est-Ouest — le modèle finlandais*, "EFTA Bulletin," 1975, No. 1, p. 7 ; Prokopjew, *SEV i Finlandia*, *"Ékonomičeskoe Sotrudničestvo Stran-Členov SÉV," 1975, No. 2, p. 106* ; E. RANTALA, *Plodotvornoe sotrudničestvo SÉV i Finlandii, ibid.*, p. 82 *ff.*

for Mutual Economic Assistance". The share of the member-states of the Council in Finland's foreign trade increased from 15 per cent in 1973 to 23 per cent in 1976. The dynamic growth of economic relations between Finland and the member-states of the Council is accompanied by a simultaneous decrease in the rate of growth of Finnish exports to the Western countries caused by the economic recession prevailing in these countries. "Finland, together with the member-states of the Council for Mutual Economic Assistance, said Kalevi Sorsa, got ahead of the spirit of Helsinki, concluding as early as 1973 an agreement on cooperation which marks a big step forward in the development of relations between countries of different political and economic systems".

The organs of the Council do not differ in their judgement of the results achieved so far in the cooperation with Finland. The communique of the XXXI Session of the Council (June 1977) states explicitely that the implementation of the agreement of cooperation with Finland is progressing in a satisfactory way.

All these facts prove that the agreement is an efficient instrument promoting overall economic, scientific and technical cooperation between the member-states of the Council for Mutual Economic Assistance and Finland. As emphasized by the Finnish Prime Minister Sorsa, over the relatively short period which succeeded the entry into force of the agreement between the Council and Finland one could notice with statisfaction a strengthening of the interrelationship between Finland's cooperation with the member-states of the Council on the bilateral and multilateral level. Multilateral cooperation provided new stimuli which influenced the development of bilateral relations.

The agreement between Finland and the Council stimulates contacts between Finland and each individual member-state of the Council. It ils up to the Commission to fill its framework with concrete proposals and projects concerning cooperation in specific economic, scientific and technical fields and in the opinion of the parties concerned the Commission is doing a very good job.[18] Pursuant to the recommendations of the Commission various organizations or enterprises of the member-states of the Council and Finland concluded many agreements concerning industrial specialization and cooperation as well as cooperation in science and technology. The conclusion of such agreements represents a new form of cooperation of states with different economic and social systems.

It has to be emphasized that Finland's cooperation with the member-

[18] See E. RANTALA, *op. cit.*, pp. 83 - 85 ; I. PROKOPEV, *K itogam Četvertogo zasadnija Komissii po Sotrudničesvu SĖV i Finlandskoj Respubliki*, "Ėkonomičeskoe sotrudničestvo Stran-Členow SĖV," 1977, No. 1, pp.. 101 - 103

states of the Council for Mutual Economic Assistance has no adverse effects on that country's cooperation with other states. Article 6 of the Agreement between the Council and Finland states explicitely that its provisions do not affect the obligations of the member-states of the Council and Finland arising from their participation in international organizations and from international treaties signed byb Finland and the member-states of the Council.

The agreement was signed for an indefinite period. The contracting parties can however denounce it giving notice of such intention six months earlier. Joint projects carried out by the member-states of the Council and Finland on the basis of accepted recommendations of the Commission are to be continued even after the termination of the agreement, unless one of the participating parties requires that their implementation be interrupted or curtailed. (Art. 9 alinea 1 of the Agreement). Pursuant to Article 9 alinea 2 the denounciation of the Agreement by one of the contracting parties does not affect the binding force of agreements concluded by the member-states of the Council and Finland, or by their organs, organizations and institutions on the basis of accepted recommendations of the Commission.

B. The agreements on cooperation concluded by the Council for Mutual Economic Assistance with Irak (July 4, 1975) and Mexico (August 13, 1975) express in their preambular parts the desire of the contracting parties to develop, improve and broaden constantly economic, scientific and technical cooperation based on the principles of equality, natural benefits and non interference in internal afairs. They stress also the policy of the member-states of the Council aimed at developing relations "with other states" (agreement with Irak) and, in particular, "with developing countries" (agreement with Mexico). In the latter it was pointed out that the member-states of the Council attach great importance to "the development of trade and economic, scientific and technical cooperation with developing states and to the strengthening of their national economies". It was also emphasized that the development of such cooperation "contributes to the strengthening of economic ties between socialist and developing countries". Thus, the agreement with Mexico has a broader aspect, going beyond the relations between the Council and Mexico. [19]

A characteristic feature of the agreement with Mexico is the emphasis placed on the specific situation of this country as a developing state.

[19] See J. RAJSKI, *Le développement des relations internationales du Conseil d'Aide Économique Mutuelle avec les pays en voie de développement*, in : *Droit international et développement. Actes du colloque international tenu à Alger du 11 au 14 octobre 1978*, Alger 1978, pp. 727 ff.

This was stated explicitely in Article 1 which defines the basic aim of the agreement in the following terms:

"Promotion of development of multilateral cooperation in various fields of economy, science and technology covering problems of mutual interest of member-states of the Council for Mutual Economic Assistance and the United States of Mexico as a developing country".

The agreements set up Commissions ("Joint Commission" in the agreement with Irak, "Mixed Commission" in the agreement with Mexico), whose task is the systematic examination of the possibilities to organize and develop cooperation in the fields prescribed in the agreements. The Commissions are composed of representatives of member-states of the Council and the other party, appointed by the appropriate organs of these states (Art. 2 of the Agreements). The structure, powers and functions of the Commissions are defined by the provisions of the rules of procedure which are an integral part of the two agreements (Art. 5). The powers and functions of the Commissions are set out in Article II of the rules of procedure. They include, among other things, a) the examination of possibilities of an intensive development of economic, scientific and technical cooperation between the member-states of the Council and the other contracting party, in particular in the fileds listed in the agreements (petroleum and gas industry, chemical and petrochemical industry, agriculture and foreign trade in the case of Irak ; the use of new technologies, foreign trade, financial problems and such fields which lend themselves to the establishment of joint enterprises, in particular in industry, agriculture, mining, sea transport in the case of Mexico) ; b) the undertaking of appropriate measures in order to foster such cooperation ; c) the initiating and preparing, or the joint elaboration of multilateral and bilateral projects and agreements concerning such cooperation ; d) the consideration of the results arising from the implementation of the Commissions recommendations, accepted by the interested member-states of the Council and the other contracting party as well as the implementation of multilateral international agreements concluded by the member-states of the Council and the other contracting party pursuant to the execution of the Commissions' secommendations ; e) the initiation and organization of consultations and the exchange of information between the member-states of the Council and the other contracting party concerning problems of mutual interest.

In order to carry out these functions the Commissions may adopt decisions and recommendations in the same manner and with the same effect as the Commission set up by the agreement between the Council

and Finland. The rules of procedure attached to both agreements regulate in the same way as the rules of procedure in the Finnish agreement several procedural problems connected with the sessions and chairmanship of the Commissions as well as with the participation in their work of the Secretary of the Council and of non member-states of the Council.

The agreement with Irak contains provisions (Art. 7) emphasizing *expressis verbis* that it does not interfere with the maintenance of direct bilateral relations between Irak and each of the member-states of the Council.

The two agreements contain similar provisions to those embodied in the agreement with Finland and concerning the obligations of the contracting parties arising from their membership in international organizations and from other international treaties. The two agreement, like all other agreements signed by the Council with third states, are concluded for an indefinite period. The contain similar denounciation clauses and provide for the same consequences in case of termination as regards implementation of cooperative projects under way.

3. General Characteristics of Contractual Relations of the Council for Mutual Economic Assistance with Third States

Agreements concluded by the Council for Mutual Economic Assistance with non member-states and providing for a general framwork of cooperation can be devided into two categories :

a) agreements concerning participation of such states in the work of the organs of the Council (internal cooperation with the Council)

b) agreements defining the principles which are to govern their cooperation with the Council (external cooperation with the Council).

The first category is, so far, represented only by the agreement with Yugoslavia. The remaining agreements signed by the Council with third states belong to the second category.

The agreement with Yugoslavia binds this country institutionally with the Council for Mutual Economic Assistance, allowing for the establishment of closer multilateral links of cooperation with the member-states of the Council as well as for the participation of the YSFR in the development of their economic integration. The participation of the YSFR in the activities of the Council's organs is based on the same principles which regulate the activities of the Council: full equality, respect of national sovereignty, national interests and mutual benefits. The legal framework of that cooperation includes instruments which ensure mutual adjustment of opinions and interests of the member-

states of the Council and the YSFR. The achievement of the goals set for the unanimous adoption of decisions and enabling the YSFR to accede at a later stage to the decisions and reeommendations adopted by the organs of the Council. Yugoslavia has been granted special legal status within the framework of the Council and this is justified by the common socialist ideological ties binding the YSFR and the member-states of the Council.

The agreements concluded by the Council with other third states aim at widening and deepening their economic, scientific and technical cooperation with the member-states of the Council, with the active participation of the Council in this process. These agreements go beyond traditional commercial and economic treaties and include some new objectives arising from the policy of developing cooperation in various fields of economy, science and technology with all states irrespective of their social and political system, pursued by the member-states of the Council. Trade represents one of the most essential, but not the unique element of this cooperation, which covers various forms of economic ties (e.g. industrial cooperation and various joint economic ventures), cooperation in science and technology, protection of the natural environment, standardization, statistics, etc.

As a rule, the agreements are of a general nature, providing only a legal and organizational framework promoting such cooperation. The task of filling the framework with concrete substance is given to specially established mixed commissions. These commissions although different in name (one is qualified as "cooperation" the other as "joint" the third as "mixed") perform similar function: they are here to add momentum to the cooperation provided for in the provisions of the agreements. The agreements have been signed on behalf of the Council by its Secretary. They have entered into force following their approval by the member-states of the Council and the ratification by the other contracting party, in conformity with its constitutional provisions.

This rather complicated ratification procedure results from the contents of the said agreements as well as from the character and competence of the Council for Mutual Economic Assistance as an international organization of severeign socialist states. The aims and objectives of these agreements are to a great extent implemented by the member-states of the Council (who are sovereign in determining their international economing relations), while the Council provides only the appropriate forum for the harmonization and coordination of their activities in this respect.

III. Other Forms of Participation of Third States in the Activities of the Council

Chronologically, the first form of participation of third states in the activities of the Council was the accreditation of observers.[19] The institution of observers in the practice of the Council was always treated as one of the available legal means enabling non member-states to participate in its activities.[20]

It has to be emphasized that the participation of some socialist states in the work of the Council by the accreditation of observers at the meetings of the Council's organs resulted from the fact that up to 1962 only European states could be members of the Council. Prior to their admission as full members to the Council representatives of Mongolia, and later Cuba, were taking part in the work of the Council's organs as observers. In the same capacity did the representatives of Yugoslavia participate in the work of the council's organs till 1964 i.e. prior to the conclusion of the agreement between the YSFR and the Council. Representatives of the Chinese People's Republic took also part as observers in the sessions of some organs of the Council from 1956 to 1966.

In 1957 - 1958 observers from the People's Democratic Republic of Korea and from the People's Democratic Republic of Vietnam make their first appearance in the sessions of some organs of the Council. The number of states participating through observers in the work of the Council's organs is steadily increasing. In the XXXI Session of the Council for Mutual Economic Assistance (June 1977) the following states were represented by observers : the Socialist Republic of Vietnam,[21] the People's Democratic Republic of Korea, the People's Republic of Angola and the People's Democratic Republic of Laos. Observer status opens to non member-states of the Council not only great opportunities of active participation in the work of the Council's organs but enables them also to implement economic, scientific and technical projects undertaken by member-states. The place granted to the observer status in the system of cooperation set up by the Council, which represents the central pivot of the institutionalized mechanism of socialist economic integration, demonstrates clearly how great is the importance attached by the member-states to the participation in the work of the Council's organs of observers from nom member-states.

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[20] See V. FOMIN, *op. cit.*, p. 257.

[21] The Socialist Republic of Vietnam has been admitted as a member state of the Council in June 1978. In the XXXII Session of the CMEA the Ethiopia was also represented by on observer.

Observers from non member-states of the Council take part in the work of various organs of the Council, such as the Session, the Executive Committee, the Committees, standing commissions and conferences. Forms of participation and procedural questions arising therefrom are regulated by the rules of procedure of the various organs of the Council.

The auspicious development and deepening of cooperation of the member-states of the Council with the socialist states represented in the various organs of the Council by observers was stressed in the Communique of the XXXI Session of the Council for Mutual Economic Assistance.

Conclusions

The Council for Mutual Economic Assistance being an international organization of socialist states develops an intensive international activity, conscious as it is of the fact that "international socialist division of labour must take into account world division of labour" (chapter I, para. 3 of the programme of comprehensive socialist economic integration).

Being an inter-state international organization of a new type, based on the principles of sovereign equality of its member-states, and acting in the spirit of socialist internationalism, the Council aims at coordinating, to a certain extent, the activities of its member-states. One of its major tasks is, in this respect, the coordination of the foreign economic policy of its member-states. The Council acts by harmonizing the opinions and interests of the interested member-states in order to arrive at agreed solutions.

The sphere of international contacts of the Council is steadily inereasing. At present the Council maintains fruitful relations with over 60 international organizations (exclusive of organizations established by member-states). Some of these relations have been institutionalized by the conclusion of an agreement on cooperation or by the granting to the Council of an official status (consultative status or observer status). The process of consolidation of the Council's relations with some third states on the basis of agreements on economic, scientific and technical cooperation is progressing, offering clear proof of the widening and deepening of the Council's international relations. This results in an ever wider recognition of the international role played by the Council nad its member-states in the development of the world economy.

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La force obligatoire des normes internationales dans les ordres juridiques internes des États membres du C.A.E.M.*

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1. Observations préliminaires

L'objectif de notre rapport est d'étudier certains problèmes relatifs aux rapports du droit international et du droit national dans les ordres juridiques internes des États membres du Conseil d'Assistance Économique Mutuelle (C.A.E.M.), ceci au point de vue de l'intégration éconobique des pays socialistes.

On peut étudier les rapports entre le droit international et le droit national sur plusieurs plans : sur celui des rapports entre les deux systèmes de droit en question, sur celui du rapport d'une norme internationale concrète et d'une norme concrète de droit interne, sur celui de la force obligatoire des normes internationales dans l'ordre juridique national, et enfin, sur celui des incidences réciproques des deux systèmes sur la formation de leurs règles et principes.

Le problème de la force obligatoire des normes internationales — et nous allons traiter surtout des normes d'orgine coventionnelle — dans l'orde juridique des États nous semble le plus intéressant pour deux raisons. D'abord, à cause de son importance pour le processus d'exécution des normes internationales par les États, et, ensuite, en raison des controverses dans la doctrine et dans la pratique — celle-ci souvent flottante — des États.

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* L'article du professeur H. de Fiumel est un des rapports présentés au cours de la Conférence internationale « Le droit international et le droit interne dans le processus d'intégration économique socialiste » qui s'est tenue à Varsovie du 4 au 6 octobre 1977, sous los auspices de l'Institut de l'État et du Droit de l'Acandémie Polonaise des Sciences, avec la participation des juristes soviétiques, tchécoslovaques bulgares, roumains, polonais et de la R.D.A. Par conséquent, les notes du rapport de M. de Fiumel renvoient parfois aux autres rapports présentés au cours de la Conférence. Les rapports de la Conférence paraîtront prochainement dans un livre imprimé en polonais.

Par contre, nous ne jugeons pas utile d'examiner les rapports du droit international et du droit interne en tant que deux ordres juridiques, à cause notamment du caractère trop théorique de la question, celle-ci étant d'ailleurs assez largement expliquée par certains auteurs [1]. On peut généralement constater que la doctrine socialiste se prononce en faveur d'un dualisme modéré [2]. Les théoriciens reconnaissent en effet que si le droit international et le droit interne sont deux ordres juridiques différents, il existe entre eux des interdépendances et des influences réciproques. Cette opinion pertinente trouve sa consécration dans la pratique. Si la doctrine socialiste reste unanime sur ce point, la situation change en ce qui concerne les attitudes adoptées envers le problème de la force obligatoire des normes internationales dans l'ordre interne. Il est toutefois à souligner que cette question, qui revêt une grande importance pratique, ne dépend pas directement de l'attitude doctrinale adoptée en faveur du monisme ou du dualisme [3].

Bien que la doctrine socialiste connaisse diverses conceptions concernant la force obligatoire du droit international dans l'ordre interne des États [4], les auteurs socialistes sont unanimes à constater que le problème de la force obligatoire du droit international dans l'ordre interne est régi — en principe — non par le droit international mais par les dispositions constitutionnelles et législative du droit interne ; cette conception est d'ailleurs confirmée par la pratique des États [5].

2. Les partisans du concept de transformation

La majorité des auteurs socialistes estime que les règles du droit international — dont surtout les règles conventionnelles — n'ont pas directement de force obligatoire dans l'ordre interne, car le droit international — par sa nature — régit les rapports entre les États en tant que tels. Il en résulte qu'un acte interne de l'État est une condition *sine qua non* de la force obligatoire d'une norme internationale en droit interne. Comme le souligne N. Mironov, il s'agit du changement

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[1] Cf. les rapports de : E. T. USENKO, *Meždunarodnoe i vnutrigosudarstvennoe pravo. Teorija i praktika v SSSR* ; H. J. MÜLLER, *Völkerrecht und interstaatliches Recht — Theorie und Praxis in der DDR ; Sootnošenie vnutrigosudarsvennogo i meždunarodnogo prava v NR Bolgarii — doktrina, zakonodatel'stvo, praktika.*

[2] *Ibid.*

[3] Of N. MIRONOV, *Sovetskoe zakonodatel'stvo i meždunarodnoe pravo*, Moskva 1968, p. 30.

[4] *Ibid.*, p. 36.

[5] *Ibid.*, p. 29.

de destinataire de la norme, car les obligations contractées dans un traité doivent être remplies non par l'État en tant que tel mais par ses organes et par les personnes physiques et morales [6].

Parmi ces actes de l'État, on distingue surtout ceux qui ont pour effet de transformer une règle internationale en règle de droit interne. Selon certains auteurs, il s'agit en l'occurrence d'une manifestation de la souveraineté des États socialistes, tandis que l'applicabilité directe des normes internationales dans l'ordre juridique interne favoriserait la conception moniste et s'opposerait au principe de la souveraineté [7].

Certains de ces auteurs consacrent relativement beaucoup de place à l'examen de la notion de transformation et soulignent que cette question, qui constitue « un des problèmes les plus discuté dans le droit international contemporain » [8], n'a pas été suffisamment étudiée par la doctrine socialiste [9].

Le terme de transformation n'a pas la même signification pour tous les auteurs [10]. Pour les uns, il s'agit de transformer une norme internationale en norme de droit interne avec un changement du contenu de cette norme [11] ; pour les autres, de la transformer sans changement de contenu [12] ; et pour certains encore, de diverses méthodes de conférer aux normes internationales la force obligatoire en droit interne au moyen des actes internes comme l'acte de transformation ou l'acte de publication [13].

Il est évident que les diverses définitions du terme « transformation » contiennent des éléments qui dépassent largement le sens propre de cette notion. Nous pensons notamment à la conception de E. T. Usenko qui accorde une large place au problème de la transformation. Selon E. T. Usenko, la tranformation est « une méthode d'exécution des règles du droit international consistant à édicter par l'État des actes législatifs internes en vue de s'acquitter de ses obligations internationales ou afin d'utiliser sa compétence internationale » [14].

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[6] *Ibid.*, p. 41 ; le rapport de A. KANDA, *Meždunarodnoe pravo v sootnošenii s vnutrigosudarsvennym pravom — mesto dogovorov èkonomičeskogo sotrudničestva v pravovoj sisteme — primenenie norm meždunarodnogo prava v ramkah socialističeskogo pravoporjadka v Čehoslovakii*, p. 1.

[7] Le rapport de E. T. USENKO, p. 15 ; le rapport de H. J. MÜLLER, p. 5.

[8] N. MIRONOV, *op. cit.*, p. 35.

[9] E. T. USENKO, *Formy regulirovanija socialističeskogo meždunarodnogo razdelenija truda*, Moskva 1965, p. 141.

[10] Cf. le rapport de E. T. USENKO, p. 5, et le rapport de H. J. MÜLLER, p. 9.

[11] Le rapport de E. T. USENKO, p. 6.

[12] N. MIRONOV, *op. cit.*, p. 31.

[13] Le rapport de H. J. MÜLLER, p. 10.

[14] E. T. USENKO, *op. cit.*, p. 163, et son rapport, p. 5.

Cette définition commande une très large conception de la transformation et l'accent y est mis sur l'exécution des normes internationales qui, selon l'auteur, nécessite des actes internes qualifiés de transformation. Bien que l'auteur n'affirme pas qu'il pense à la transformation d'une norme internationale en norme de droit interne [15], il souligne, dans un autre passage de son rapport, qu'une norme internationale « ne peut pas avoir la force obligatoire dans l'ordre interne sans être transformée en règle de droit interne » par un acte approprié de l'État ou « sans être incorporée » dans le droit interne ; les termes « transformer » et « incorporer » sont pour E. T. Usenko identiques [16]. Il en résulte, en conclusion, que la norme internationale est transformée en norme de droit interne et que cette tranformation n'équivaut pas la disparition de la valeur juridique internationale de la norme [17].

La conception d'un autre auteur soviétique, I. P. Bliščenko, ressemble à plusieurs égards à celle de E. T. Usenko. En effet, I. P. Bliščenko, qui conteste l'existence d'une transformation quelconque de la norme internationale en norme de droit interne [18], estime néanmoins que le traité possède la force obligatoire sur le territoire de l'État en tant qu'une loi interne [19]. Ce même auteur se prononce contre l'application du terme « transformation » et propose de le remplacer par celui de « publication du traité » [20].

Une difficulté supplémentaire dans l'analyse du sujet apparaît lorsque certains auteurs utilisent des termes différents pour désigner des notions semblables. Nous venons de mentionner le terme « incorporation » chez E. T. Usenko, qui pour M. Mohr signifie l'introduction d'une norme internationale en droit interne sans changer le contenu de cette norme [21]. M. Kemper et D. Maskow [22] distinguent deux techniques d'« incorporation » des normes internationales en droit interne: 1° l'introduction d'une norme internationale en droit interne sans changement du contenu de la norme, qu'ils qualifient de réception (*Rezeption*), et 2° la transformation (*Transformation*) qui consiste à convertir des directives uniformes en divers mécanismes étatiques de gestion (*die Umsetzung einheitlicher Zielstellungen in die unterschiedlichen einzelstaatlichen Leitungsmechanismen*).

[15] E. T. USENKO, *op. cit.*, p. 142.

[16] *Ibid.*, pp. 140 - 141.

[17] *Ibid.*, p. 142.

[18] I. P. BLIŠČENKO, *Meždunarodnoe i vnutrigosudarstvennoe pravo*, Moskva 1960, p. 66.

[19] *Ibid.*, p. 224.

[20] *Ibid.*, p. 66.

[21] Cf. le rapport de H. J. MÜLLER, p. 11.

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

Pour N. Mironov, il est difficile de considérer la réception comme une forme autonome de conférer aux normes internationales la force obligatoire en droit interne, sans l'identifier avec la transformation [23]. Selon lui, la réception en tant qu'introduction d'une norme internationale dans l'ordre interne est impensable sans procéder à quelques changements.

On doit cependant observer que si les théoriciens insistent sur la nécessité de la transformation, ils ne la croient pas absolument indispensable pour toutes les normes internationales. En effet, pour certains auteurs. la transformation n'est indispensable que pour les normes dont les destinataires réels sont les personnes physiques ou morales [24], car les obligations de celles-ci ne peuvent résulter directement d'un traité mais uniquement d'une loi interne [25].

Certains auteurs adoptent une position encore plus nuancée dans ce sens qu'ils n'estiment pas nécessaire de transformer en droit interne des normes internationales relatives à l'intégration économique socialiste [26]. Ils soulignent à cet égard que les normes internationales relatives à l'intégration économique, destinées aux personnes morales (unités économiques) des pays du C.A.E.M. et ayant pour but la réglementation uniforme des rapports mutuels entre les pays du C.A.E.M., ne nécessitent pas la transformation en règles de droit interne [27]. Dans ce cas, il s'agit plutôt des demandes *de lege ferenda* que de l'état réel de la pratique [28]. Toutefois, pour certains autres auteurs, la transformation constitue une condition *sine qua* non de la force obligatoire des normes internationales, y compris celles relatives à l'intégration économique, dans l'ordre interne de l'État [29].

Les partisans de la transformation citent souvent à l'appui de leur conception la pratique constitutionnelle et législative de leurs États. Toutefois, une analyse plus approfondie conduit à la conclusion que, souvent, les exemples de la pratique ne confirment pas la thèse sur la nécessité de la transformation, mais, tout simplement, témoignent de la diversité des méthodes appliquées par les États en vue d'exécuter les accords internationaux régulièrement conclus.

Pour ce qui est de la transformation dite générale (*generelle Transformation*), on cite souvent à l'appui l'art. 8, al 1[er] et l'art. 91 de la

[23] N. MIRONOV, *op. cit.*, pp. 70 - 71.
[24] *Ibid.*, p. 41.
[25] *Ibid.*
[26] Cf. le rapport bulgare, p. 4, et le rapport de H. J. MÜLLER, pp. 4, 6 - 9.
[27] Le rapport de H. J. MÜLLER, pp. 6 - 7.
[28] *Ibid.*, p. 6.
[29] Le rapport bulgare, p. 14.

Constitution de la République Démocratique Allemande. Le premier des articles déclare que les règles (*Regeln*) généralement reconnues du droit international au service de la paix et de la coopération pacifique des peuples ont la force obligatoire (*verbindlich sind*) pour le pouvoir d'État et pour les citoyens [30]. Dans le deuxième cas, l'art. 91 dispose que les normes (*Normen*) généralement reconnues du droit international qui concernent le châtiment des crimes contre la paix, des crimes contre l'humanité et des crimes de guerre, sont directement valables dans l'ordre interne de la R.D.A. (*unmittelbar geltendes Recht sind*) [31]. On remarque en effet que, dans le premier cas, il est question de la force obligatoire des règles du droit international pour le pouvoir d'État et pour les citoyens, tandis que dans l'art. 91 il s'agit des normes « directement valables » dans l'ordre interne.

Dans ce contexte, il convient de poser la question si l'absence du mot « directement » dans l'art. 8, al. 1er est préméditée. On se demande en même temps pourquoi les règles généralement reconnues du droit international lient non seulement les États mais également les individus ; et pourtant, ces règles concernent, en raison de leur nature, uniquement les États en tant que sujets du droit international. Enfin, et ceci paraît le plus important, on doit s'interroger si ces deux articles ont un caractère constitutif ou déclaratif. Si l'on opte pour la dernière solution, in n'y a pas de raison pour considérer les articles en question comme examples d'une transformation quelconque, générale ou spéciale. En conclusion, il semble que les deux articles appellent une interprétation et une étude supplémentaires et plus approfondies.

On remarque cependant que, le plus souvent, les partisans de la théorie de transformation citent à l'appui de leur thèse les cas de la transformation d'une norme internationale concrète. La pratique soviétique en la matière est très largement exposée par N. Mironov [32]. Cet auteur souligne que l'acte de transformation a généralement pour effet soit de compléter le droit interne par des normes jusqu'à présent inexistantes dans ce système, soit de modifier les normes internes en rapport avec les exigences d'un traité [33]. Plusieurs exemples cités par N. Mironov confirment sa thèse. Il nous semble toutefois qu'en l'occurrence on en peut pas parler de transformation des règles conventionnelles en règles de droit interne, mais, tout simplement, du besoin de conformer la législation interne aux obligations internationales

[30] Le rapport de H. J. MÜLLER, p. 11.
[31] *Ibid.*, p. 12.
[32] N. MIRONOV, *op. cit.*, pp. 44 - 57.
[33] *Ibid.*, p. 49.

contractées. En réalité, il s'agit d'introduire dans la législation nationale des normes nouvelles, d'éliminer certaines normes, de désigner les organes responsables pour l'exécution du traité, de préciser les détails du traité etc.[34]. Enfin, N. Mironov ne manque pas de souligner que ni les lois ni les autres actes juridiques soviétiques, n'apportent pas de précisions sur la procédure de transformation[35].

Pour certains auteurs, la ratification constitue une forme de la transformation du traité en droit interne (E. T. Usenko[36]), tandis que d'autres lui refusent ce caractère (N. Mironov[37], K. Skubiszewski[38]). Pour K. Skubiszewski, la ratification n'est pas, dans l'ordre interne, une méthode de légiférer[39].

3. Les adversaires du concept de transformation

Certains auteurs socialistes estiment que la transformation des normes internationales en normes nationales par les actes de droit interne n'est pas une condition *sine qua non* de la force obligatoire des normes internationales en droit interne. Il est assez caractéristique que ces auteurs aboutissent à cette conclusion sur la base de la même pratique législative des États que celle à laquelle font appel les partisans de la transformation.

Parmi les auteurs soviétiques, T. P. Grevcova est d'avis que « les tribunaux et autres organisations soviétiques appliquent directement les dispositions des traités dont l'U.R.S.S. est partie, indépendamment du fait si ces dispositions soient, ou non, introduites dans le droit interne »[40]. V. F. Mešera représente une conception semblable[41].

En Tchécoslovaque, R. Vaniček s'était, il y a un certain temps, opposé à la théorie de la transformation. Selon lui, depuis 1945, la tranformation n'est plus utilisée en Tchécoslovaquie et les traités con-

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[34] Le rapport de H. J. MÜLLER, p. 13.

[35] N. MIRONOV, *op. cit.*, p. 47.

[36] Le rapport de E. T. USENKO, p. 8.

[37] N. MIRONOV, *op. cit.*, p. 42.

[38] Le rapport de K. SKUBISZEWSKI, *Prawo międzyynarodowe w porządku prawnym państwa* [*Le droit international dans l'ordre juridique de l'État*], p. 17.

[39] *Ibid.*

[40] T. P. GREVCOVA, *Meždunarodnyj dogovor v sisteme istočnikov sovetskogo vnutrigosudarsvennogo prava*, «Sovetskij Ežegodnik Meždunarodnogo Prava», (1963), Moskva 1965, p. 173.

[41] V. F. MEŠERA, *O meždunarodnom dogovore kak istočnike sovetskogo prava*, «Pravovedenie», 1963, n° 1, p. 125.

clus par son pays deviennent une partie intégrante de l'ordre juridique interne et ont la force de loi à partir du moment de leur conclusion [42].

Pour ce qui est de la doctrine juridique polonaise, il semble qu'elle penche assez nettement en faveur de la thèse suivant laquelle, pour avoir la force obligatoire en droit interne, les normes internationales n'ont pas besoin d'être transformées en normes de droit interne. Le principal représentant de cette tendance fut S. Rozmaryn, spécialiste du droit constitutionnel. Dans le silence de la Constitution polonaise en matière de place et de force obligatoire des traités dans l'ordre juridique interne, S. Rozmaryn étudia la pratique et aboutit à la conclusion que les traités sont efficaces dans l'ordre juridique interne polonais *proprio vigore*, c'est-à-dire sans être transformés [43]. Seulement dans le cas où le traité concerne une matière qui, dans l'ordre interne, est, ou doit être, réglementée au niveau de loi, son efficacité dans l'ordre interne dépend de sa ratification et de sa publication dans le Journal des Lois (Dziennik Ustaw) [44].

Malgré une concordance générale des vues dans la doctrine polonaise, les opinions de certains auteurs ne sont pas identiques. Ainsi, S. Rozmaryn parlait de « l'efficacité » des traités dans l'ordre interne. C. Berezowski était d'avis que seul le droit interne a la force obligatoire dans l'ordre juridique interne, tandis que le droit international ne peut être qu'« appliqué » dans l'ordre interne [45]. Selon K. Skubiszewski, si le traité lie un État en tant que tel, on doit admettre que ce traité a également la force obligatoire dans l'ordre interne de cet État [46]. Ce même auteur souligne en outre que le traité n'est pas la source du droit polonais et que, sous le régime de la Constitution polonaise, le

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[42] R. VANIČEK, *Le problème de la transformation de traités du point de vue* de l'ordre juridique tchécoslovaque, « Bulletin de droit tchécoslovaque », 1965, n° 3/4, pp. 290 - 291.

[43] S. ROZMARYN, *Ustawa w Polskiej Rzeczypospolitej Ludowej* [*La loi dans le système juridiuqe de la Pologne populaire*], Warszawa 1964, pp. 328 - 329.

[44] *Ibid.*, pp. 334 - 335.

[45] C. BEREZOWSKI, *Wzajemny stosunek prawa międzynarodowego i prawa krajowego* [*Les rapports entre droit international et le droit interne*],«Państwo i Prawo», 1964, n° 8/9, p. 218.

[46] K. SKUBISZEWSKI, *The Validity of Treaties in Polish Municipal Law*, dans: *Rapports polonais présentés au sixième Congrès international de Droit Comparé*, Varsovie 1962, pp. 109 - 123 ; DU MÊME AUTEUR, *Prawo PRL a traktory* [*Le droit de la République Populaire de Pologne et les traités*], «Ruch Prawniczy, Ekonomiczny i Socjologiczny», vol. 34, 1972, n° 3, pp. 1 - 18 ; DU MÊME AUTEUR, *Miejsce traktatów w porządku prawnym PRL* [*La place des traités dans l'ordre juridique de la République Populaire de Pologne*], «Sprawy Międzynarodowe», vol. 26, 1973, n° 1, pp. 80 - 91.

traité n'est pas soumis à une procédure quelconque de transformation en droit interne [47].

J. Jakubowski critique vivement le concept de la transformation des traités en droit interne et estime que le terme même — étant, selon lui, à l'origine d'une confusion générale — devrait disparaître aussi bien de la pratique que de la doctrine. D'après J. Jakubowski, la force obligatoire d'un traité dans l'ordre international justifie suffisamment sa force obligatoire dans l'ordre interne. Tout en ayant la force obligatoire dans l'ordre interne, le traité ne cesse pas de faire partie du droit international [48].

A. Klafkowski définit le traité comme un acte juridique « obligatoire aussi bien dans le droit international que dans l'ordre interne d'un État » [49].

Pour S. Kaźmierczyk, chaque traité a ses origines dans la compétence législative de l'État, qui se manifeste en l'occurrence par un consentement ; il est donc logique que les traités aient la force obligatoire dans l'ordre juridique interne [50].

L'attitude de L. Gelberg diffère légèrement des précédentes. Selon cet auteur, les traités ratifiés par le Conseil de l'État et publiés dans le Journal des Lois dans l'ordre interne la même force obligatoire que les autres actes juridiques publiés dans ce Journal et que, de ce fait, ils font naître des droits et obligations pour les organes d'administration, pour les tribunaux et pour les ressortissants polonais [51]. Selon L. Gelberg, les normes d' un traité sont incorporées dans l'ordre juridique uniforme polonais dès la publication du traité dans le Journal des Lois [52].

L. Gelberg ne partage donc pas l'opinion sur la force obligatoire *proprio vigore* des traités dans l'ordre interne, mais il ne se déclare non plus partisan de la transformation. D'autre part, il n'est pas très clair, dans sa conception, quelle est la force obligatoire, dans l'ordre juridique interne polonais, des traités qui n'ont pas été publiés dans le

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[47] K. SKUBISZEWSKI, *Prawo PRL...*, p. 9.

[48] J. JAKUBOWSKI, *Prawo jednolite w międzynarodowym obrocie gospodarczym* [*Le droit uniforme dans les échanges économiques internationaux*], Warszawa 1972, pp. 49 - 52.

[49] A. KLAFKOWSKI, *Umowa międzynarodowa a ustawa* [*L'accord international et la loi*],« Ruch Prawniczy, Ekonomiczny i Socjologiczny», 1965, n° 4, p. 6.

[50] S. KAŹMIERCZYK, *Umowa międzynarodowa jako źródło prawa wewnętrznego PRL* [*L'accord international comme source du droit interne polonais*], Wrocław 1968, p. 46.

[51] L. GELBERG, *Umowa międzynarodowa jako źródło prawa PRL* [*L'accord international comme source du droit polonais*], «Sprawy Międzynarodowe», 1966, n° 5, pp. 45 - 46.

[52] *Ibid.*, p. 46.

Journal des Lois et qui constituent pourtant la majorité des traités conclus par la Pologne.

La Cour Suprême polonaise a apporté récemment quelques précisions à propos du problème dont nous venons de traiter. En effet, d'après la résolution de la Chambre civile (de la Cour) statuant au complet, la force obligatoire *proprio vigore* — ou plutôt l'application — d'un traité dans l'ordre juridique polonais connaît certaines limites. Selon la Cour, les tribunaux polonais peuvent appliquer les traités dans des domaines régis dans l'ordre interne par les lois seulement à condition que le traité soit ratifié et publié dans le Journal des Lois. Par contre, les traités qui ne concernent pas les matières législatives, c'est-à-dire réservées à la réglementation au niveau des lois, peuvent être appliqués par les tribunaux sans être ratifiés et publiés dans le Journal des Lois [53].

4. Essai de récapitulation

L'analyse de différentes opinions des auteurs socialistes relatives au problème de la transformation nous conduit à deux conclusions. Premièrement, selon ces opinions, la transformation constitue la condition *sine qua non* de la force obligatoire des normes internationales en droit interne. Deuxièmement, il semble que ces opinions constituent le reflet d'une conception doctrinale de caractère général, retenue *a priori*. Selon ces auteurs, les exemples de la pratique interne des États doivent être considérés comme une illustration de leur thèse.

Cette approche du sujet ne nous paraît pas justifiée, car elle consiste à retenir *a priori* la nécessité de la transformation. Et pourtant, dans la réalité, la solution du problème change en fonction des méthodes concrètes — et souvent différentes — adoptées par chaque État pour appliquer les normes internationales dans son ordre interne. D'autre part, poser d'avance une exigence générale de transformation nous paraît d'autant plus deuteux que — comme nous venons de le constater dans les pages précédentes — cette notion est loin d'avoir le même sens pour tous les auteurs. Enfin, les exemples cités par les auteurs à l'appui de leur thèse témoignent le plus souvent que nous ne sommes pas en présence d'un cas réel de transformation.

A notre avis, il est utile d'insister sur le fait qu'il n'existe aucune raison de principe pour ne pas reconnaître la force obligatoire *proprio vigore* des normes internationales dans l'ordre juridique national. On

[53] La résolution de la Chambre civile statuant au complet, du 5 octobre 1974, III CZP 71/73, et le commentaire de K. SKUBISZEWSKI dans «Państwo i Prawo», 1977, n° 8/9, pp. 255 - 265.

doit en même temps souligner que les partisans de la transformation sont également unanimes à constater que le problème de la force obligatoire du traité dans l'ordre interne relève exclusivement de la compétence des États. Si l'on consent à cette opinion, on ne peut pas exclure l'éventualité que l'État puisse reconnaître la force obligatoire des traités dans son ordre interne sans arrêter des mesures spéciales ; par conséquent, il est donc possible qu'une norme internationale ait la force obligatoire *proprio vigore* dans l'ordre juridique national.

Il nous paraît particulièrement important de souligner qu'il n'existe pas de motifs valables pour soutenir la thèse selon laquelle la transformation serait une manifestation de la souveraineté étatique, tandis que le caractère obligatoire d'un traité dans l'ordre interne sans un acte de transformation constituerait une atteinte à la souveraineté. A notre avis, en concluant un traité, l'État donne son consentement souverain d'être lié par les dispositions de ce traité et s'engage à les appliquer (*pacta sunt servanda*). La conclusion régulière d'un traité constitue déjà, à nos yeux, la manifestation de la souveraineté étatique.

Mais quel est le sens exacte de la notion de force obligatoire des traités dans l'ordre juridique national ? Il est possible de dégager deux aspects du problème. D'abord, l'aspect externe, dans ce sens qu'un État a contracté une obligation envers un autre État, lui aussi partie du traité. Mais il existe en même temps un aspect interne dans lequel les dispositions du traité lient l'État dans son ensemble, c'est-à-dire sur toute l'étendue de son territoire et dans l'ensemble de son pouvoir souverain. C'est notamment pour cette dernière raison qu'il nous paraît artificiel de séparer les deux aspects de l'expression de la volonté de l'État qui conclut un traité et s'engage à remplir les obligations qui en découlent [54].

La doctrine n'est pas toujours unanime à définir d'une manière identique et précise la notion de force obligatoire des normes internationales dans l'irde interne des États. Il arrive assez souvent qu'on assimile la force obligatoire d'une norme internationale dans l'ordre interne à l'effet direct de cette norme, dans ce sens qu'elle produit des effets directs pour les personnes physiques et morales. Il nous semble cependant utile de mettre l'accent sur un autre aspect du problème. Or, une norme internationale produit des effets obligatoires dans l'ordre interne des États, parce qu'elle définit les droits

[54] A. A. MESTRE, *Les traités et le droit interne*, « Recueil des cours de l'Académie de Droit International », 1931/IV, pp. 254 - 255 ; P. CHAILLEY, *La nature juridique des traités internationaux selon le droit contemporain*, Paris 1932, p. 279 ; autrement N. MIRONOV, *op. cit.*, p. 41 ; le rapport de A. KANDA, p. 1.

et obligations des personnes physiques et morales — bien que celles-ci ne peuvent pas se prévaloir directement des dispositions d'un traité — et impose aux organes de l'État le devoir de prendre des mesures juridiques pour que l'obligation incombant à l'État en vertu d'une norme internationale puisse se répercuter en faveur des personnes physiques et morales sous forme de droits et obligations. Dans cette optique, c'est déjà le traité même qui détermine les rapports juridiques concrets dans l'ordre interne.

Les accords pluriannuels sur les fournitures réciproques de marchandises, conclus entre les pays membres du C.A.E.M., constituent une bonne illustration du problème. Ces accords imposent aux entreprises nationales du commerce extérieur l'obligation de conclure des contrats de droit civil et les États parties de l'accord s'engagent en même temps à assurer la conclusion de ces contrats[55]. Cet engagement de la part de l'État à assurer la conclusion des contrats par ses entreprises du commerce extérieur implique la nécessité d'arrêter des mesures appropriées dans l'ordre juridique interne et doit être considéré comme une manifestation de la force obligatoire du traité dans l'ordre interne.

Pour éviter des malentendus, il importe cependant de distinguer la force obligatoire des traités dans l'ordre interne et l'exécution des traités par l'État. Cette distinction s'effectue en fonction du contenu de chaque traité. Si les normes d'un traité n'appellent pas des mesures juridiques complémentaires de la part de l'État, le traité peut être exécuté immédiatement. Par contre, des mesures nationales complémentaires sont parfois indispensables à la mise en oeuvre de certains traités, surtout si elles étaient prévues par le traité même ou si elles en découlent logiquement ; dans la pratique, cette nécessité s'avère assez fréquente. Il convient toutefois de souligner que, à notre avis, ces mesures nationales n'ont rien de commun avec la transformation des normes conventionnelles en droit interne et elles ne constituent qu'une étape du processus d'exécution du traité par l'État.

5. La législation polonaise relative au droit international

La législation polonaise, comme celle des autres pays socialistes, contient plusieurs dispositions relatives au droit international.

[55] A cet égard, il nous paraît difficile de partager l'opinion de A. WASILKOWSKI selon lequel les accords internationaux de commerce « ne peuvent pas déterminer les droits et obligations des entités économiques » (*Socjalistyczna integracja gospodarcza. Zarys problematyki prawnej* [*L'intégration économique socialiste. Précis de droit*], Warszawa 1974, p. 92).

Certaines dispositions font dépendre l'application des règles de droit interne du contenu des dispositions conventionnelles. C'est ainsi que l'art. 8 du droit aérien dispose que la législation pénale polonaise sera appliquée aux ressortissants polonais et aux étrangers si l'obligation de poursuite figure dans un traité dont la Pologne est partie.

Il existe également dans la législation polonaise des dispositions qui renvoient au traité pour déterminer le cercle des bénéficiaires d'un droit et pour définir les conditions de son exercice ; p. ex. d'après l'art. 24, al. 1er du droit aérien, le traité reste compétent pour définir les conditions dans lesquelles les aéronefs étrangers jouissent de certaines immunités.

Certains actes législatifs stipulent que des normes appropriées seront édictées dans l'ordre juridique national en vue de l'application par la Pologne des accords internationaux (p. ex. l'art. 15, al. 2 du droit aérien). On fait observer dans la doctrine polonaise que l'établissement de ces normes n'est pas une condition de la force obligatoire des traités dans l'ordre interne, mais que, parfois, il peut s'agir d'introduire dans l'ordre interne les normes exigées par un traité [56].

Certaines lois disposent expressément qu'elles ne portent pas atteinte aux accords internationaux dont la Pologne est partie (p. ex. l'art. 8, al. 2 de la loi sur les transports routiers, l'art. 15, al. 1er du droit aérien). Il est hors de doute que ce denre des dispositions ont uniquement un caractère déclaratoire [57].

Il existe enfin des règles de droit interne prévoyant qu'elles ne trouveront pas d'application au cas où un traité dispose autrement (p. ex. l'art. 1er, al. 2 de la loi sur le droit international privé de 1965, l'art. 1096 du Code de procédure civile). De telles dispositions consacrent ouvertement la supériorité du droit international sur le droit interne en cas de conflit entre les normes des deux systèmes. On fait observer dans la doctrine polonaise que l'absence d'une disposition explicite en cas de conflit n'a pas une grande valeur pratique [58]. En effet, il convient toujours d'appliquer la règle d'interprétation selon lequelle le législateur doit être présumé avoir voulu respecter les obligations internationales de l'État. En cas de conflit, la norme internationale devrait toujours l'emporter sur le droit national, car elle constitue l'expression de la volonté souveraine non seulement de l'État concerné, mais également de la volonté concordante d'au moins un autre État.

[56] Cf. M. ŻYLICZ, *Elementy międzynarodowe w nowym prawie lotniczym* [*Éléments internationaux dans le nouveau droit aérien*], «Państwo i Prawo», 1962, n° 10, p. 57.

[57] *Ibid.*

[58] Cf. L. GELBERG, *op. cit.*, p. 50.

6. Les recommandations du C.A.E.M dans l'ordre interne des États membres

Nous avons traité jusqu'à présent du problème de la force obligatoire dans l'ordre interne des normes internationales, dont surtout celles d'origine conventionnelle. Il convient cependant de rappeler l'importance croissante des actes émanant de nombreuses organisations internationales.

Nous allons aborder la question de la force obligatoire de leurs actes dans le droit interne en prenant pour exemple les recommandations du C.A.E.M. qui jouent un grand rôle dans le processus d'intégration économique des pays socialistes.

Le problème essentiel est de savoir quels sont les effets obligatoires des recommandations du C.A.E.M. dans les ordres juridiques nationaux des États membres. Il s'agira évidemment des recommandations acceptées par les États, confermément à l'art. IV des Statuts du C.A.E.M.

La doctrine des pays socialistes a consacré jusqu'à présent peu de place à l'étude de ce problème. A. Wasilkowski estime que les compétences des organes du C.A.E.M. ne s'étendent pas à la sphère des rapports juridiques internes des États membres et que, pour produire des effets juridiques dans l'ordre interne, les actes du C.A.E.M. ont besoin d'une action positive des autorités nationales [59]. En se référant à l'art. IV, al. 1er des Statuts du C.A.E.M., l'auteur fait observer que l'acceptation d'une recommandation par un État membre constitue l'expression de la volonté dans la sphère internationale, mais elle n'a pas d'effets directs dans l'ordre interne. L'exécution d'une recommandation nécessite en effet des mesures appropriées de la part gouvernement ou d'un autre organe d'État [60]. A. Wasilkowski avoue néanmoins qu'il n'est pas facile, dans la pratique, d'opérer une nette distinction entre l'acceptation d'une recommandation par l'État et la décision relative à son exécution, les deux actes étant souvent adoptés en même temps et par le même organe (en Pologne — le Conseil des Ministres) [61].

J. Sandorski représente une autre conception. Il estime que l'art. IV, al. 1er des Status du C.A.E.M. concerne uniquement la base juridique de l'exécution de la recommandation, mais non de sa transformation en droit interne. Selon J. Sandorski, les recommandations acceptées par les États membres ont la force obligatoire dans l'ordre interne *proprio vigore*, comme c'est le cas des accords commerciaux. Une recommanda-

[59] A. WASILKOWSKI, *op. cit.*, p. 105.
[60] *Ibid.*
[61] Ibid., pp. 105 - 106.

tion acceptée lie donc valablement les organes de l'État et les unités économiques d'État [62].

La position de J. Sandorski nous paraît, en principe, plus convaincante, d'autant plus que les Statuts du C.A.E.M parlent de « l'exécution des recommandations » conformément à la législation interne des États membres. Dans ce contexte, il ne serait pas juste d'identifier la notion d'exécution à celle de force obligatoire. L'exécution d'une recommandation nécessite fréquemment qu'elle soit assortie des mesures nationales appropriées qui sont arrêtées conformément à la législation des États membres. La référence dans les Statuts à la législation interne témoigne de la possibilité de diverses situations juridiques suivant que la législation interne ait prévu, ou non, des dispositions appropriées. En Pologne, par exemple, il n'existe pas de dispositions régissant le problème de la force obligatoire des recommandations du C.A.E.M. dans l'ordre interne. Les textes des résolutions du Conseil des Ministres polonais, adoptés en la matière, ne donnent pas une réponse suffisamment claire et précise pour constater si l'acceptation d'une recommandation lui attribue également la force obligatoire dans l'ordre juridique interne.

La pratique des États membres du C.A.E.M. en matière d'acceptation des recommandations n'est pas homogène et elle ne fournit pas d'éléments suffisamment précis pour pouvoir en tirer quelques conclusions plus générales. On peut seulement rappeler que certains auteurs socialistes, généralement favorables à la transformation du droit international en droit interne, estiment que cette exigence ne devrait pas s'appliquer aux normes internationales — dont surtout les normes uniformes — concernant l'intégration économique des pays socialistes (ou, en général, les rapports entre les États membres du C.A.E.M.) ; il est évident qu'il s'agit en l'occurrence des recommandations du C.A.E.M commt p. ex. les conditions générales de livraison, etc.

Nous avons abordé un seul aspect des rapports entre le droit international et le droit interne dans les pays socialistes. Il nous semble que cet aspect — choisi en raison de son intérêt pratique et de la diversité des conceptions doctrinales — vaut une discussion plus large et plus approfondie.

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[62] J. SANDORSKI, *RWPG. Forma prawna integracji gospodarczej państw socjalistycznych* [*C.A.E.M. Forme juridique de l'intégration économique des États socialistes*], Poznań 1977, p. 128.

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Legal Basis and Principles Governing Cooperation and Coordination of Activities of Organizations of Socialist States

by ZBIGNIEW KLEPACKI

More than half of the basic agreements and statutes of socialist international (interstate) economic organizations authorize these organizations to establish and maintain relations with other international organizations.[1] The character and form of these relations are to be determined by agreements concluded between the parties concerned. As far as the other international organizations are concerned their basic agreements and charters contain no provisions to that effect.[2]

In actual practice, **contacts between socialist international economic organizations** were, up to the end of the 1960s, of a rather sporadic nature, with the exception of the contacts between the specialized organizations and the Council for Mutual Economic Assistance (CMEA) which, slowly but gradually gained in intensity. However, they also were, at that time, rather loose. They boiled down to an irregular exchange of information on matters of matual interest, to a sporadic participation in the meetings and sessions of the other organization and to mutual consultations.

A notable exception was the cooperation between the CMEA and the Organization for Cooperation in Railways (OCR) which signed an agreement, October 16, 1962, providing for a legal basis for their permanent cooperation.

In February 1968, the Executive Committee of the CMEA adopted a decision, later ratified by the XXIV Session of the CMEA in May 1970, on the conclusion by the CMEA of "protocols on the character and forms

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[1] CMEA Statute, Art. XI, Interkhim Agreement, Art. X, Interelectro Agreement, Art. II, para. 2 and Art. XVI, Intersputnik Agreement, Art. 7, ICSTC Statute, Art. 39, OCR Agreement, Art. I, para. 6, IIB Agreement, Art. VII, para. 2, and Art. XI, IBEC Statute, Art. 17. The agreement establishing the OCSSPT limits the cooperation of this organization to socialist international organizations only.

[2] That is in the case of: Intermetal, Agromash, CDB, FWP, Interpodshipnic and JINR.

of cooperation" with socialist international economic organizations aimed at ensuring systematic cooperation between the SMEA and these organizations. The decision led to the signing in the first half of the present decade by the CMEA of protocols on cooperation with almost all socialist international economic organizations and namely with :

— Organization for Cooperation in the Iron and Steel Industry (Intermetal) — July 9, 1979,

— International Bank for Economic Cooperation (IBEC) — July 20, 1970,

— Organization for Cooperation in the Ball-Bearing Industry (Interpodshipnic) — July 27, 1970,

— Central Distribution Board of the United Power Grids (CDB) — January 6, 1971,

— Freight Wagon Pool (FWP) — February 22, 1971,

— Joint Institute for Nuclear Research (JINR) — October 27, 1971,

— International Centre for Scientific and Technical Cooperation (ICSTC) — May 6, 1972,

— International Investment Bank (IIB) — May 6, 1972,

— Organization for Cooperation in the Light Chemical Industry (Interkhim) — May 17, 1972,

— Inter-Governmental Commission for Socialist Countries' Cooperation in Computer Techniques (ICSCCT) — May 26, 1972.[8]

At its 69th session in May 1974 the Executive Committee authorized the CMEA Secretary to sign similar agreements with :

— Society for Coordination of Introduction of Progressive Technologies and of Production Machinery for the Mechanization of the Cultivation Process of Vegetables, Fruits and Vine (Agromash),

— Organization for Telecommunications Satellites (Intersputnik),

— International Organization for Economic, Scientific and Technical Cooperation in the Electrotechnical Industry (Interelectro).

According to press reports these agreements were signed in 1975. Thus, as of the end of 1975, the CMEA had no agreements on cooperation with only three international organizations of socialist states, namely

[8] For texts of agreements between the CMEA and the above mentioned organizations see : with Interpedshipnic, IBEC and Intermetal — "Bjuletten' Ekonomičeskoj Informacii." CMEA Secretariat, 1970, No. 6 (75) ; CDB — *op. cit.*, 1971, No. 1 (58) ; FWP — *op. cit., 1971, No 3 (60)* ; JINR — *op. cit.*, 1971, No. 6 (63) ; IIB, ICSTC, Interkhim — *op. cit.*, 1972, No. 6 (69). Texts of agreements concluded up to 1971, including the agreement between the CMEA and the OCSSPT are also published in *Mnogostronnee ekonomičeskoe sotrudničestvo socialističeskih gosudarstv* edited by P. A. Tokareva, 3nd odition, Moskva 1972. Agreements concluded in 1972 - 1974 are published in the III edition of the same work, Moscow 1976.

with the Organization for Cooperation of the Socialist States on Post and Telecommunications (OCSSPT), the Council for Common Utilization of Containers in International Transport (Council of the CUCIT) and the International Laboratory of Strong Magnetic Fields and Low Temperatures (ILSMFTL). A specific system of cooperation and coordination of the activities of the socialist international economic organizations, in which the leading role is played by the CMEA had thus come into being.

It has to be mentioned that, apart from the above listed agreements concluded by the Secretary of the CMEA on behalf of the organization as a whole, some CMEA organs concluded separate agreements on cooperation witht some of the international organizations of socialist states. Thus, for example, the International Institute of Economic Problems of the World Socialist System signed such agreements with Interkhim, IIB and IBEC.

The **system of cooperation and coordination** of the activities of international organizations of socialist states which merged only a few years ago underwent already a far reaching evolution. At first, it differed substantially from the traditional systems of cooperation and coordination of the activities of specific groups of international organizations established, for example, within the framework of the United Nations system, let alone from the system created by the Organization of American States (OAS) or by the Council of Europe. Thus, in the first two systems the United Nations and the OAS are not only in the practical sense but also from the formal and legal point of view maintaining a position of leadership ; the agreements signed by them with other international organizations contain several provisions which are not based on reciprocity. Thus, organizations which signed agreements on cooperation with the UN or the OAS undertook to perform certain services in favour of the latter, while on the other hand the UN and the OAS keep certain unilateral rights and prerogatives.

In the case of the UN system the UN has the power to : unilateral recognition in the agreements of the statutory competence of the specialized agencies ; adoption of recommendations addressed to them ;[4] ex-

[4] An exception in this regard are the financial specialized organizations (IBRD, IMF, IDA and IFC). Formally, they are entitled to make recommendation to the UN, provided that the UN was consulted beforehand. At the same time, these organizations recognized the right of the UN to make recommendations to them but only on matters pertaining to technical aspects of their programmes, plans and development projects. Cf. C. W. JENKS, *Coordination in International Organizations. An Introductory Survey*, "British Yearbook of International Law," vol. 28, 1951, p. 37 ; W. SHARP, *The Specialized Agencies and the United Nations. Progress Report*, "International Organizations", 1948, No. 2, p. 262.

amination of their administrative budgets. On the other hand, these organizations accept the obligation to: consult the UN on matters pertaining to the recommendations received from the UN; submit reports to the UN on their activities; provide additional reports studies and information when requested to do so; inform the UN on the character and contents of agreements concluded with other organizations.

On the basis of reciprocity the UN and its specialized agencies are authorized to: assist as observers in the work of the other party (in the case of the UN this participation is limited to the meetings of the General Assembly and its main committees, the Economic and Social Council and the Trusteeship Council); request the inclusion of certain problems on the agenda of the organs of the other party (in the case of the UN — on the agenda of the Economic and Social Council, its commissions and on the agenda of the Trusteeship Council; exchange information and documents; consult and cooperate in matters concerning employment (establishment of employment norms for international officials, their rotation, pension rights, settlement of disputes arising from employment contracts) as well as on technical and statistical problems.[5]

Similar solutions have been applied in the system created by the OAS, but its position with respect to the American specialized agencies is much stronger than the position of the UN towards its own specialized agencies.[6]

The system of cooperation and coordination of activities between international organizations created by the Council of Europe differs semewhat from that described above. Formally it is based on provisions respecting the principle of reciprocity. In practice however the Council of Europe enjoys a privileged position.[7]

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[5] For a broader discussion of that subject see A. ABRASZEWSKI, *Koordynacja działalności organizacji międzynarodowych w systemie Narodów Zjednoczonych* [*Coordination of Activities of International Organizations of the UN System*], Warszawa 1973, pp. 84 - 107.

[6] Cf. Chapter XXI (Arts 130 - 136) OAS Charter.

[7] On the one hand, the Committee of Ministers of the Council of Europe concluded with several UN specialized agencies (as far as their activities in Western Europe are concerned) and with a score of West-European organizations agreements on mutual cooperation, which deal with cooperation between their intergovernmental organs and sometimes between their secretariats based on the principle of reciprocity (such cooperation covering mainly an exchange of documents and information, delegation of observers to plenary meetings of these organs and in some agreement the right to place on the agenda of the cooperating organs certain problems). At the same time, pursuant to the provisions of some agreements and as a result of the wishes and pressure exercised by the Consultative Assembly

On the other hand, agreements concluded before the end of 1971 by the CMEA with socialist international economic organizations provide for all rights being mutually granted on the basis of reciprocity. Accordingly, all organizations are bound to act in common in order to avoid duplication of efforts and to coordinate the working plans of their organs. They must inform each other on the intended working plans for the next calendar year. When deciding to embark upon joint studies they undertake to establish jointly a list of problems to be studied in common, to fix the procedure to be followed and the dates of completion of such studies.

They are obligated to cooperate in the preparation of materials concerning problems of mutual interest which have to be studied jointly using, among other things, such methods as: submission of proposals by one organization for consideration by the other organization ; organization of joint meetings of experts ; establishment of joint working groups.

Representatives of a cooperating organization must be invited to assist at the meetings and sessions organized by the other organization. These representatives have the right to speak in a consultative capacity on all matters of common interest. They are also authorized to submit proposals for consideration on such matters.

The organizations are also bound to exchange records of certain meetings and periodic publications as well as to exchange other mutually agreed materials.

As a matter of principle the cooperating organizations are to keep constantly in touch. On the one hand, such contacts are maintained, above all, by the standing commissions and the Secretariat of the CMEA and, on the other hand, by the top or executive organs of administrative organs of the socialist international economic organizations. [8]

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of the Council of Europe several West-European organizations present to the Assembly annual reports on their activities. The Assembly, considering itself to be an organ of parliamentary control (of some sort) of West-European international organizations, examines these reports and adopts appropriate recommendations addressed to these organizations. Cf. *Manuel of the Council of Europe. Structure, Functions and Achievements*, Secretariat of the Council of Europe, London 1970, pp. 80 - 94 ; Z. M. KLEPACKI, *Zachodnioeuropejskie zgromadzenia międzyparlamentarne [Western European Interparliamentary Assemblies]*, Warszawa 1967, pp. 199 - 201.

[8] An exception is the protocol on cooperation between the CMEA and the OCR which stipulates that it is to be implemented, on the one hand, by an appropriate CMEA Standing Commission and, on the other hand, by the OCR executive organ.

It can therefore be said that the position of the CMEA in the system of cooperation and coordination of activities of the international organizations of socialist states does not differ from the position of the other organizations. There is no word in the above metioned agreements about the leading role of the CMEA and formally its rights are — as demonstrated above — the same as the rights of all remaining organizations.

However, in actual practice the CMEA did play from the very outset a key role in the system. This resulted from several objective facts. On the one hand, in was only the CMEA which concluded agreements on cooperations with the remaining international organizations of socialist states, thus becoming the focal point of the whole system. On the other hand, its position derived mainly from its competence in the field of economy and technology which, unlike all other organizations, is not fragmented but all-embracing. The CMEA is, thus, an organization which determines the general frame of economic development of its member-states, which constitute the exclusive membership of the majority of the socialist organizations, while representing the majority in the remaining ones. As a result, these organizations act within general directives formulated by the CMEA.

The **CMEA** has also been given a leading position in the system of cooperation and coordination of activities of the international organizations of socialist states from a formal and legal point of view following the adoption by the XXV Session of the CMEA in 1971 of the Comprehensive Programme for the Further Extension and Improvement of Cooperations and the Development of Socialist Economic Integration of the CMEA Member-States. As far as the problem under consideration is concerned the member-states of the CMEA undertook, among other things, to : extend[9] and ensure the proper functionning of the system of coordination of the activities of the socialist international economic organizations as well as to increase the role of the CMEA in the system ; adopt within the framework of these organizations appropriate steps in order to ensure that the recommendations of the CMEA are taken into consideration in their activities.[10]

As a result, the CMEA concluded in 1972 additional agreements, which took the form of an exchange of letters, to the previously signed

[9] Among other things, they undertook to include in the basic agreements of international organizations newly created by them the necessary provisions providing for the establishment of relations of cooperation between such organizations and the CMEA.

[10] See provisions of alinea 1, 4, 5 and 16 of Chapter 16 of the Comprehensive Programme.

protocols on mutual cooperation with the following organizations : the Fright Wagon Pool,[11] the International Bank for Economic Development,[12] the Organization for Cooperation in the Iron and Steel Industry,[13] the Central Distribution Board of the United Power Grids [14] and the Organization for Cooperation in the Ball-Bearing Industry.[15] These additional agreements took care of the new situation created by the adoption of the Comprehensive Programme. Similarly, the protocols on cooperation signed at the same time by the CMEA with the Iternational Investment Bank, the Organization for Cooperation in the Light Chemical Industry, the International Centre for Scientific and Technical Cooperation and the Inter-Governmental Commission for Socialist Countries' Cooperation in Computer Techniques [16] as well as the protocols signed by the CMEA with Agromash, Interelectro and Intersputnic, while based, in principle, on reciprocity, recognize, none the less, the leading role of the CMEA.

Thus, the above mentioned agreements and protocols, referring to the appropriate provisions of the Comprehensive Programme, stipulate that the international organizations of socialist states act as specialized agencies [17] towards the CMEA in the process of cooperation and coordin-

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[11] May 6, 1972, The text of the agreement in "Bjulleten' Ekonomičeskoj Informacii", CMEA Secretariat, 1972, No. 6 (69), pp. 58 - 59.

[12] May 6, 1972. The text of the Agreement — *op. cit.*, pp. 59 - 60.

[13] May 11, 1972. The text of the Agreement — *op. cit.*, pp. 60 - 61.

[14] May 12, 1972. The text of the Agreement — *op. cit.*, pp. 61 - 62.

[15] May 15, 1972. The text of the Agreement — *op. cit.*, p. 62.

[16] Cf. note 3.

[17] It has to be recalled that in the doctrine of the law of international organizations of socialist states a discussion developed as to how to interpret the concept of "specialized agencies (organizations)" in the system of socialist international organizations, since the Comprehensive Programme, while using the term, fails to define it clearly. Some scholars consider that the concept covers internationan organizations of socialist states which have no universal competence, but competence limited to a specific area of economy or technology, thus being organizations of specialized competences. Taking into consideration the membership of these organizations they distinguish between specialized agencies (organizations) of the CMEA member-states and the specialized organizations of the socialist states. Comp. for example, A. B. ALTŠULER, *Sotrudničestvo socialističeskih gosudarstv (Rasčëty, Kredity, Pravo)*, Moskva 1973, p. 90 ; V. I. MOROZOV, *Meždunarodnye ekonomičeskie organizacii socialističeskih stran*, Moskwa 1968, pp. 26 - 39.

Another group of scholars — and their views are shared by the author of this paper — consider that the contents of the concept is not determined principally by the material competence of the organization but by its legal character and by its special relationship with the CMEA. In their opinion the concept "specialized agencies (organizations)" is a legal and not a technical one. The same thesis

ation of activities, that they undertake to coordinate their activities with those of the CMEA and to take the necessary steps in order to comply with the recommendations of the CMEA and to inform the CMEA on the results of the consideration of such recommendations. On the other hand, on that last question it is said that the organs of the CMEA will consider the problems brought to its attention by these organizations and inform them on the results of its consideration.

Tte socialist international economic organizations which have the status of CMEA specialized agencies preserve, as before, their legal and factual autonomy, function on the basis of their own statutory principles and carry out their activities in accordance with their own working plans. Thus, in fact, the legal situation of these organizations towards the CMEA is close to that of the specialized agencies in the UN system.

The **position of the international financial organizations** (IBEC and IIB), of the Organization for Cooperation in Railways (OCR) and of the Joint Institute for Nuclear Research is somewhat different. In the agreements on cooperation concluded by these organizations with the CMEA they are not referred to as specialized agencies, although the agreement between the CMEA and the IIB was signed after the adoption of the Comprehensive Programme and the agreement between the CMEA and the IBEC was modified as a result of the adoption of the Comprehensive Programme. On the other hand, the agreements on

finds its confirmation in the practice of the UN and the OAS. Therefore, the term "specialized agency (organization)" must be understood as applying to international organizations created and sponsored by, mainly, socialist states (either exclusively CMEA member-states, or CMEA member-states together with other socialist states or also non-socialist states; in theory also exclusively socialist states non-members of the CMEA), created on the basis of CMEA principles or recognizing their validity, endoved with large competence with regard to a specific area of economy or technology, enjoying autonomy of action, having signed agreements on cooperation with the CMEA. Consequently, there are no specialized organizations of CMEA member-states or socialist states but only specialized organizations (agencies) of the CMEA. On the other hand, international organizations of socialist states can be divided in accordance with their material competence into organizations with universal competences in the field of economy and technology and organizations with limited (specialized) competences in these areas. The latter can be divided into industrial, financial, credit, transport, communication, technical, scientific organizations. Applying the criterion of membership, the socialist interstate organizations can be grouped into international organizations of the commonwealth of socialist states (member-states of the CMEA), of socialist states and of socialist and non-socialist states. Cf. for example, P. A. TOKAREVA, *Pravovoj status specializirovany organizacij SÈV*, "Sovetskoe Gosudarstvo i Pravo", 1973, No. 8, p. 128; *Sovet Èkonomičeskoj Vzaimopomošči. Osnovnye pravovye problemy*, Akademija Nauk SSSR, Moskva 1975, pp. 290 - 301.

cooperation with the OCR and the JINR recognize only indirectly the leading role of the CMEA. They do not provide explicitly for the obligation by these organizations to take steps in order to carry out the recommendations of the CMEA, but only for the obligation to consider such recommendations and to inform on the results of such consideration, and this on the basis of reciprocity. The leading role of the CMEA derives, however, from the reference in the preambules of these agreements to, among other provisions, Articles 4, 5 and 6 of chapter 16 of the Comprehensive Programme which stipulate that the parties to the Programme undertake to act in order to ensure that the recommendations of the CMEA are taken into consideration in the activities of the international organizations of the socialist states.

In the case of the OCR and the JINR, their cooperation with the CMEA is, as before, based exclusively on the principle of reciprocity. The possibility of making recommendations addressed to the other party is not as great as in the case or the remaining socialist organizations. Nor is there an obligation to inform each other on the results of the consideration of such recommendations. In the preambules of the agreements on cooperation with the CMEA there are no provisions referring to the guidelines adopted in the Comprehensive Programme. None the less, in these cases also it is the CMEA which is playing the leading role. This is due to the fact that the overwhelming majority of the member-states of the JINR and the OCR suscribed also to the Comprehensive Programme and undertook therefore to act in order to ensure that the recommendations of the CMEA are taken into consideration in the activities of all socialist international organizations.

It seems therefore that the four above mentioned organizations can be treated not only as organizations cooperating with the CMEA but as *de facto* specialized agencies, in the same way as the General Agreement on Tariffs and Trade (GATT) and the International Atomic Energy Agency (IAEA) are considered to be UN specialized agencies, although it can be argued that there is no legal and formal ground for such an assertion.

Thus, before the end of 1975 only three international organizations of socialist states, namely the Organization for Cooperation of the Socialist States on Post and Telecommunication, the Council for Common Utilization of Containers in International Transport and the International Laboratory of Strong Magnetic Fields and Low Temperatures had no status of CMEA specialized agencies, in the light of the definition given in note 17.

The creation of the system of cooperation and coordination of activities of the socialist international organizations has introduced

orderly **conditions** in the functionning of the complicated mechanism of multilateral cooperation and economic integration of socialist states. It incorporated the international economic organizations in cooperation with the CMEA into the process of implementation of the Comprehensive Programme for the Further Extension and Improvement of Cooperation and the Development of Socialist Economic Integration of the CMEA Member-States. This, in turn, led to the strengthening of cooperation between the CMEA and these organizations and enhanced their effectiveness. From year to year this cooperation is widening and deepening.

In the case of almost all organizations, their contacts with the CMEA are regular and lively and steps are taken to make them even more effective. The CMEA Executive Committee decided to consider regularly information presented by the CMEA Secretariat on cooperation of the CMEA with the socialist international organizations. The same problem was also dealt with in a resolution of the CMEA Executive Committee adopted at its session in September 1976.

In actual practice cooperation between the CMEA and the socialist international economic organizations with a specialized agencies status boils down, in the first place, to the following: mutual exchange of information concerning planned activities for the next year and other periods; mutual exchange of records of meetings and conferences as well as mutual exchange of other materials concerning matters of common interest; participation in the meetings of the organs of the other party as well as participation in meetings and conferences organized by the other party and considering problems of common interest. Again and again joint action is taken in order to prepare reports and find solutions of problems interesting both parties. This leads to the expansion of contacts required to carry out such joint undertakings and to the setting up of joint working groups.

Thus, for example, the representatives of the Interpodshipnic Secretariat take part in the sessions of the CMEA Standing Commission on Engineering Industry which consider problems arising from the activities of the ball-bearing industry of the member-states as well as in the sessions of the Section on the Ball-Bearing Industry of that Commission. On the other hand, the representatives of the CMEA Secretariat participate in the meetings of the Interpodshipnic Board. The Secretariat of the CMEA and the Secretariat of Interpodshipnic exchange documents concerning the ball-bearing industry. In 1971 - 1972 the Section on Engineering Industry of the CMEA Secretariat and the Interpodshipnic Secretariat worked out a joint proposal concerning the action to be taken in order to meet the requirements of the machine

industry of member-states in the field of machine tools, forging machinery, instruments over the whole decade of the seventies. The proposal was later adopted by the CMEA Standing Commissions on Engineering Industry. In 1973 the Section on Engineering Industry of the CMEA Secretariat and the Interpodshipnic Secretariat began work on proposals concerning specialization and coordination of production of machine tools, forging machinery and presses for the ball-bearing industry. On the request of the Interpodshipnic Secretariat the Section on Engineering Industry and the Section on Standardization of the CMEA Secretariat assisted in the elaboration of draft recommendations concerning normalization of production in the ball-bearing industry.

As far as cooperation of the CMEA and the IBEC is concerned, IBEC representatives take part in meetings of the CMEA Standing Commission on Financial and Monetary Questions and its organs. The IBEC receives documents from these meetings, statistical material and other information published by the CMEA Secretariat as well as materials of the CMEA Executive Committee and the CMEA Standing Commission on Foreign Trade which may be of itnerest to the Bank. Finally, the CMEA Executive Committee, when receiving the report of the CMEA Standing Commission on Financial and Monetary Questions, is given information about the activities of the IBEC.[18]

As already stated above, the international organizations of socialist states, excluding of course their agreements with the CMEA, did not conclude any agreements on cooperation among themselves. The sole exception is the agreement between the IBEC and the IIB signed July 27, 1971.[19] Their mutual contacts are rather loose and in the case of some of them only of a sporadic nature. They boil down to a sporadic exchange of information on matters of mutual interest, to mutual consultations or to the presence in observer capacity in meetings of the organs of the other organization.

Unlike the UN, some UN specialized agencies, the OAS and the

[18] For a broader discussion of the problem of cooperation of the CMEA with the socialist interstate economic organizations see: N. W. FADIEJEW, *Rada Wzajemnej Pomocy Gospodarczej* [*Council for Mutual Economic Assistance*], Warszawa 1975, pp. 75–79; V. T. MOROZOV, *Meždunarodnye organizacii stran-členov SÉV na službe integracii*, "Ékonomičeskoe sotrudničestvo Stran-Členov SÉV", 1976, No. 1.

[19] For the text of the agreement see "Bjulleten' Ékonomičeskoj Informacii", CMEA Secretariat 1971, No 5 (62). In August 1975 the IIB signed two agreements with Interelectro and Intertextilmash. Their purpose is not to establish permanent forms of cooperation between these organizations but to open credits by the IIB aimed at financing the construction of power equipment and textile machinery.

Council of Europe,[20] **the CMEA has failed, so far, to evolve a system of coordination of the activities of the socialist international non-governmental organizations** referred to in the Comprehensive Programme as international economic organizations. Most likely the need of such a system will grow with the increase in the number of such organizations. Both the Comprehensive Programme and the agreements setting np. these organizations provide the basis for its creation. Under chapters 8 and 16 of the Comprehensive Programme the contracting parties undertook to act in order to develop cooperation and coordination of the activities of all types of socialist international organizations with the CMEA and to see to it that the recommendations of the CMEA are taken into consideration in the work of these organizations. On the other hand, the agreements establishing the socialilst international economic organizations obligate them to maintain contacts with the appropriate organs of the CMEA,[21] while some charters obligate them also to take into consideration the recommendations of the CMEA, and to present information on their activities, if requested to do so by the CMEA organs.[22]

It is difficult to foresee whether such a system will evolve on the basis of agreements concluded between the appropriate organs of the CMEA and the socialist international economic organizations or — as in the case of the UN and the UN specialized agencies — the CMEA will unilaterally grant these organizations the same or various statuses. Judging from present practice in this regard one can say that such a system — at least as far as organizations with the characteristics of international economic associations are concerned — will emerge thanks to agreements concluded between the appropriate organs of the CMEA (and not between the CMEA as such, as is the case with agreements signed with socialist interstate economic organizations) and these organizations. Thus, the charters of the International Economic Association for the Production of Machines for the Textile Industry (Intertextilmash)[23] and the International Economic Association for Cooperation

[20] Cf. L. C. WHITE, *International Non-Governmental Organizations*, New York 1968, pp. 245 - 273; *Non-Governmental Organizations*, "International Conciliation", May 1970, pp. 151 - 154; P. H. ROHN, *Relations between the Council of Europe and Non-Governmental Organizations*, Brussels 1957; *Manuel of the Council of Europe...*, pp. 94 - 99.

[21] Interatomenergo Agreement, Art. 18, Interatominstrument Agreement, Art. 15, Intervolocno Agreement, Art. 17, Intertextilmash Agreement, Art. 17.

[22] Interatomenergo Statute, Art. 2, para. 1, Intertextilmash Statute, Art. 2.

[23] Art. 2.

of Production. Supply of Equipment and Technical Cooperation for the Installation of Nuclear Power Stations (Interatomenergo)[24] stipulate that the cooperation mechanism between them and the appropriate organs of the CMEA will be established by mutual agreement. Several such agreements between the CMEA and the socialist international economic organizations have already been concluded.[25]

According to W. Morozov, these agreements provide for the Secretariat of the CMEA to act as the cooperating agent. **Cooperation** covers an exchange of materials on matters of mutual interest, participation of representatives of the CMEA Secretariat in sessions of organs of international economic organizations, participation of representatives of these organizations in the elaboration by the CMEA Secretariat of problems of mutual interest, presentation by these organizations of reports on their activities if requested to do so by appropriate organs of the CMEA, presentation by organs of the CMEA of recommendations to the international economic organizations which, in turn, ought to be taken in consideration by them.[26]

Finally, it has to be mentioned that all international organizations of the type of international economic associations have been maintaining from the very outset lively contacts with the CMEA, in spite of the absence of formal agreements on cooperation. These contacts cover even a wider area than the contacts maintained by international organizations with consultative status with the UN. This results from the fact that, as a rule, they were all brought into being by direct or indirect inspiration of the CMEA while their activities are to promote the implementation of the Comprehensive Programme for the Further Extension and Improvement of Cooperation and the Development of Socialist Economic Integration by the CMEA Member-States.

It cannot be excluded that the creation of a larger number of socialist international non-govermental organizations will lead towards the establishment of systems (the same as referred to above) of cooperation and coordination of activities evolved by some socialist interstate specialized organizations with the socialist international non-govermental organizations which are acting in the same fields as the former.

One may also mention that the charters of international non-governmental economic organizations allow the conclusion of agreements on cooperation between them.

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[24] Art. 2, para. 1.

[25] According to V. I. MOROZOV, *op. cit.*, p. 92.

[26] *Op. cit.*, pp. 92 - 93.

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The Polish 19th-Century Doctrine of National Liberation War in the 19th Century

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1. Introduction

Polish political thought of the 19th century showed specific and particular features unknown to other European nations. This was so, because the political fortunes of our people deprived of the independence differed radically from that of other peoples in Europe, bearing a greater resemblance to the fate of those peoples overseas which remained under colonial domination. Thus, whereas the evolution of all-European political thought of the 19th century was marked mainly by increased interest in the structure and functioning of the emerging systems of bourgeois democracy and in peaceful international cooperation reflecting the growing interdependence of states in the era of industrial revolution, the contribution of Polish science was in this respect more than modest contrasting sharply with the important achievements of our writers in the second half of the 18th century, especially, in the years preceding the adoption of the May Constitution of 1791. Their minds were occupied above all with the problem of the recovery of national independence and with the liberation of the country from foreign domination. Under the prevailing conditions of relative stability and equilibrium of the European power blocks such an aim could only be achieved through war.

The problem of national liberation war which preoccupied the minds of Polish writers in the 19th century became only in the 20th century the main subject of interest of international policy as a result of the decolonization process. In certain respects Poland, after the partitions of the country, was reduced to the status of a colonial country and — in connection with the continuous attempts to regain independence — can serve as the prototype of a nation struggling to liberate itself from foreign domination of a colonial type.[1]

[1] It is significant that when the Polish state was re-established after World War I the Principal Allied Powers justified their decision on the attribution to

Various political orientations as to the ways and means leading to independence were taking shape after the defeat of the November 1830 Uprising, in the main among the Polish political emigrants in France. The conservatives represented the view that interventions on European courts and diplomatic chancelleries were the proper course of action, which may under favourable circumstances lead to the reconstitution of the Polish State. This however, did not imply a renunciation of the armed struggle for independence. The conservatives liked to refer to their programme as "insurrectionary" or "monarchist-insurrectionary." As far as their social and political programme was concerned they were in favour of a constitutional monarchy carrying out at best gradual social reforms. Their leader was prince Adam Czartoryski and their organization "The Society of the Third of May".

The democratic camp represented a diametrically opposed programme. It refused to rely on sovereign's favours placing its faith in the "victorious struggle of the peoples" against the ruling order. The future Polish State was to be a republic, with its peasants freed from feudal bondage and its classes equal in rights. Its organizational centre was the Polish Democratic Society (1832 - 1861).

The political and legal problems of the national liberation war were, obviously, of greater interest to the democratic camp and found their fullest reflection in the publications of the left wing of the Polish Democratic Society.[7]

Poland of the territories formerly occupied by Prussia by the argument of decolonization. In their note dated June 16, 1919 which was a reply to the "Observations of the German Delegation" they stated, referring to East Prussia, that the territory "has always been recognized by German historians as being not an original German land but a German colony" and they made a distinction between "this country which has been conquerred and wrested from its original inhabitants" and "true Germany." *See Paris Peace Conference 1919*, Washington 1942 - 1947, vol. 6, p. 948.

The Polish successes in obtaining the agreement of the Allied Powers for the reconstitution of the Polish State was considered at that time to be of great significance to other people asking for independence. The President of the Slovak League in the United States of America, Mamatey, commenting on the decision by President Wilson to include a mention on Poland in this message of January 22, 1917, taken under the influence of col. House, stated that col. House rendered a signal service also to the Yugoslaves and Czechoslovaks "for what was promised to the Poles could not be indefinitely with-held from them." See MAMATEY V., *The US and East Central Europe 1914 - 1918*, Princeton 1957, p. 84.

[7] Many opinions contained in writings of the Polish Democratic Society express the position of the various sections. Similarly the great number of unsigned articles indicate that these articles reflect views which are the result of discussion.

One line of scrutiny led the Polish emigre writers to a critical appraisal, from the political and military point of view, of the actual national liberation struggles aimed at arriving at some general conclusions from past experience and establishing some guidelines for future action. These comprehensive and penetrating considerations dealt with the independence struggle of the Greek people, of the Southern Slavs, the Vendean war, the Spanish guerilla, and even the Hussite movement. The subject of particular interest and detailed analysis were the Polish uprisings of 1794 and 1830 - 31. The need of theoretical studies in this field was explained in the following way:

"Over the past decades our thinking was in chains — domestic and foreign. The foreign enemy stifled its development in various ways; the domestic enemy, burdened by heavy sins preferred to keep silent, to hide his past. We were ignorant of our history. Poland was revolting with its hearth. There was no thinking prior to the uprising and the uprising itself paralized its blossoming. We were kept in darkness."[3]

2. The Affranchisement of the Peasants as a "Revolutionary Mean"

One of the final conclusions drawn from a critical analysis of the Polish and foreign uprisings was the thesis of the incapacity of the leaders of these uprisings to transform the struggle for national independence into a people's war. And this led to the following assertion:

"The national liberation war will end in victory only when enlisting the active participation of the broad masses of the Polish people, only when the uprising will be identified with the fundamental interests of the people, when the insurrection will become a social revolution: the social revolution being "not a subordinate but a principal mean of the uprising, restauring to the people its main national strength."[4]

The connection between the national independence struggle and the social revolution is most apparent in the writings of the Polish Democratic Society. Here, the practical conclusions concerning especially legislative acts and state structure appear with greater force and clarity than in the writings of other emigre groups. The declared aim of the Democratic Society was "to transform the question of Polish national independence into a people's question" and "to defeat the enemy by mobilizing all forces which lay dormant in Polish society."

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[3] W. HELTMAN, *Półśrodki — Powstanie 1830 - 1831* [*Half Measures — the Uprising o) 1830 - 1831*], "Pismo TDP," (TDP Journal), vol. 2, 1840.

[4] H. KAMIEŃSKI (nom de plume F. Prawdowski), *O prawdach żywotnych Narodu Polskiego* [*On Vital Truths of the Polish Nation*], Brussels 1844.

Various authors emphasized that "two important and inseparable deeds" must be performed by revolutionary action: "foundations must be laid for social change and national independence restored."[5] They claimed that the principal reason of the ineffectiveness of the Polish uprisings was "the inability to use all national forces in the stsruggle for independence" and the ineptitude of the highest leadership. In their view the elimination of the finest reason would have removed the second.[6] They stated that the objective of the next uprising ought to be not only "the restauration of national independence in order to pass next to the stage of internal reform, or in other words to accomplish a political revolution first as a social revolution later, but to bring about both at the same time."[7] When the various sections of the Democratic Society were asked to respond to the following question: what are, in their view "the internal forces of Polish society seen from the political and social viewpoint" they stated that "revolution and national insurrection are inseparably linked" (the La Rochelle section), that the future revolution must be simultaneously "political and social" (the Toulouse section) and they proposed that an act affranchising the peasants be proclaimed at the start of the uprising together with the general mobilization of the entire people (the Le Havre and London sections).

The central authority of the Polish Democratic Society summing up the discussion on this question declared that it accepts the thesis that "the Polish revolution must be simultaneously social and political" as "the Society's article of faith, based on deep conviction."[8] Simple logic and experience convinced the Society that the force needed to defeat the enemy does not reside in a small group, in a single class, in a privileged caste... but in the working people, able to make sacrifices, oppressed by those at home and those from abroad."[9] The Society's Central Committee stated that "the act of affranchisement must include that part of the peasantry which pays rent in cash or performs villein services for the land it tills: in that way 7 million people today deprived of all property will acquire the status of owners of land, houses and

[5] J. SŁOWICKI, *Środki rewolucyjne. Władza w powstaniu* [*Revolutionary Means. Power in Insurrection*], "Pismo TDP", vol. 1, 1837 - 1939, p. 49.

[6] W. DARASZ, *O głównych przyczynach bezskuteczności dotychczasowych powstań w Polsce* [*On the Main Reasons of the Ineffectiveness of the Uprisings Undertaken in Poland*], "Pismo TDP", vol. 1, 1837 - 1839, p. 49.

[7] *Ibid.*, p. 68.

[8] Towarzystwo Demokratyczne Polskie — Rozbiór kwestii polityczno socjalnych [Polish Democratic Society — Review of Political and Social Problems], referred to later under the initials TDP, Poitiers 1836 - 1841, Problem 2, p. 75.

[9] TDP, 1840, Problem 6, p. 59.

all necessary agricultural implements." The affranchisement act must bear "the characteristics of great clarity, must be unequivocal, unconditional, comprehensive, not open to various interpretations."[10]

In the light of the views expressed by the Polish Democratic Society the affranchisement of the peasantry would take immediate effect: hence the proposal to proclaim the affranchisement act together with "the first call to arms," its enactment to be "the most important, most tangible and surest guarantee that the future uprinsing will serve the interests of the people."[11] However, some authors were claiming that the effectiveness of that revolutionary instrument will depend upon the people being prepared through education. Kamieński held the view that oppression can be explained by the fact that "despotism is educated while the people is ignorant :" "with an educated people despotism looses it strength."[12] That is why the freedom fighters must "stir up a people's war," for "to implant in the peasantry the idea of a people's war is military more important that the acquisition of thousands of weapons."[13]

Another question widely discussed by the Polish Democratic Society as well as by other democratic groupings was that of the usefulness of arising other social classes, apart from the peasantry, and of enlisting the support of socialist movements. In this respect there was no unanimity and the views held were changing. It can, however, be said that, generally, the writers connected with the Democratic Society were underestimating the importance of the trends affecting social developments and were concentrating too much on the "present state" of Poland's economic and social structure, with an almost exclusive emphasis on the problems of the peasantry. Characteristic in this respect are the views of the author of an article entitled *Poland and Revolutionary Europe*, who — after proceeding with a comparative study of Poland and other European countries — arrives at the conclusion that the affranchisement of the peasantry is the only revolutionary act which must be accomplished in Poland. Tis arguments are that "Poland is an exclusively agricultural country with a overwhelming majority of peasants without property: to arise this class through affranchisement is tantamount to applying a revolutionary mean which is not available to industrial nations like France or England where the peasant class is less numerous or mostly affranchised already. In his view the

[10] TDP, 1839, Problem 5, p. 70 ff.

[11] TDP, 1841, Problem 5, p. 83.

[12] H. KAMIEŃSKI, *op. cit.*, p. 49.

[13] H. KAMIEŃSKI (Nom de plume XYZ), *Wojna Ludowa* [*People's War*], Bendlikon, 1866, p. 16 ff.

affranchisement of the peasantry in Poland represents a specific way of revolutionizing the Polish society "corresponding to its specific conditions." Asked whether there are ways to arise the class of craftsmen he replies that: "Such ways exist probably, but it is doubtful whether the class of craftsmen will respond in the same manner as the peasant when approached with the slogan: this land is yours, take it."[14]

The desire to enlist the support of the peasantry for the national liberation struggle led some authors to reject the opinions favouring common land property. Kamieński's arguments are quite characteristic in this respect. While claiming that he does not intend to "deal with the problem of land division or to pass judgment as to whether this would be good or bad for the nation as a whole," he judged such opinions as "theoretical visions [...] totally unpracticable for our uprising." The advisability of introducing common land ownership was, in his view conditions upon population density which may result in a situation "whereby even small land ownership becomes a monopoly opposed to the masses of people who cannot own land." Stating that Poland is an agricultural country and its peasantry can be allocated land he considered that the problem of common land ownership may become relevant when the previous system "will exhaust its benefits, when population growth will call for new solutions ; this however is a matter for the next generations." In concluding, he affirms that "affranchisement is absolutely indispensable for Poland's salvation : this alone suffices to ensure its inevitability [...] the only means of salvation must be the supreme law of the nation."[15]

The journals of the Polish Democratic Society and other democratic periodicals were publishing from time to time articles and news-items emphasizing the revolutionary and uncompromising character of socialist doctrines and their importance for the problem of Polish independence. The periodical "Przyszłość" ["The Future"] views the defeat of the Uprising of 1830-1831 as a result of the lack of support by "social elements" and states that "the social order needs improvement, change," in which the proletariat must play an important part ("the world and the future belongs to the proletariat [...] such is today the aspiration of the European masses").[16] A similar concern about the future is reflected in an article entitled *On socialism*. The author says that the organic link between socialism and democracy has found its expression in the thesis that "democracy in religion is called freedom of conscience,

[14] „Demokrata Polski," vol. 7, 1845, p. 49.
[15] H. KAMIEŃSKI, *O prawdach żywotnych...* [*On Vital Truths...*], pp. 73–75.
[16] "Przyszłość", No. 1, 1834, pp. 4 and 25.

in personal life — individual freedom and in social life — socialism." As an absolute, progressive and general aspiration socialism "cannot be confined to the narrow limits of place and time." Therefore, since "all big, general principles [...] are acquiring manifold individual shapes when applied in practice, in spite of their common origin, and in spite of their common imprint, they differ in accordance with the needs of time and place [...]. The American republic differs from the Swiss or the French republic, although all are ruled by the principle of eligibility and secularity of power."

In the same way "socialism will not be the same in an agricultural country, as compared with a commercial or industrial state, it will not be the same today as compared with its shape in one hundred or two hundred years, although it will always and everywhere remain the reflection of democracy and Christian brotherhood, inseparable from the principle of republica-nism and general elections." That is why socialist doctrines "must not claim the impossible privilege of universality, because the local shape of socialism must be something original, deeply rooted in each nation." [17]

3. The Legal Aspects of National-Liberation War

The first half of the 19th century was of particular importance in the development of opinions concerning the legal aspects of revolutionary struggle and national-liberation wars. Two opposing currents dominated the thinking on this matter in Western Europe. The partisans of the "old order" were intensifying their repression against the growing revolutionary movements and refused to recognize governments created by way of revolution. This tendency is best expressed in the Metternich doctrine formulated in the protocol of the conference of the powers of the Holy Alliance which convened in Troppau in 1820. The protocol stated that *"les Puissances ont exercé un droit incontestable en s'occupant de prendre en commun des mesures de sûreté contre les États dans lesquels le renversement du gouvernement opéré par la révolte ne doit-il être considéré que comme un exemple dangereux"* and that *"elles ne désirent que conserver et maintenir la paix, de délivrer l'Europe de fléau des révolutions les monarques étant résolus de ne point reconnaître les gouvernements formés par une révolte ouverte."*[18]

[17] Article *O socjalizmie* [*On Socialism*] published in a brochure entitled "Co przed nami" [What's ahead] by the TDP in Paris in 1850, pp. 18 - 28.

[18] See F. W. GHILLANY, *Diplomatisches Handbuch*, Nordlingen, 1835, vol. 2, p. 427.

On the other hand, in several west European countries, and especially in England, there was a clear tendency to treat with greater sympathy nations struggling for national independence. This current was supported by liberal public opinion and was also in conformity with the economic interests of the countries of Western Europe, which were aiming at developing profitable commercial relations with the new states and seeking to conclude with them commercial treaties. The first clash occurred as a result of the Greek liberation war and the emancipation struggle of the South American peoples. England and France refused to accede to the Troppau protocol. In the declaration of Prime Minister Canning of 1825 we find a complehensive expose in favour of the thesis that the international order requires that each nation be responsible for its actions. In view of the necessity to choose between the responsibility of the mother-country and the responsibility of the state established as a result of a national-liberation war the choice of the mother-country responsibility is too absurd to be accepted. That is why *"il ne restait pour la Grande Bretagne ou pour tout autre pays ayant des relations avec les provinces espagnoles d'Amerique qu'à reconnaître en temps utile leur existence politique comme États."* [19] The spokesman for the liberal view in the British parliament was Mackintosh, who in 1824 made his famous statement against the principle of non-recognition of new states created as a result of liberation struggles.[20]

Against the background of these two opposing doctrines, one — reactionary representing the Holy Alliance and the other — liberal representing liberal Western European opinion, both reflecting the conflicting interests of the European powers, looms a third doctrine expressing the aspirations of the peoples struggling for their national independence. Its fullest exposition can be found in the Polish émigré writings. The ideas expounded by the Polish emigré authors are among the most original in the whole history of Polish political thought and have no counterpart in the literature of any other nation. While being poles apart from the reactionary legitimist views they are at the same time far removed from the liberal doctrine prevailing at that time in Western Europe and have their roots in the experiences of the Polish uprisings and also, to some extent, in the experiences of the national-liberation struggle of other peoples.

It goes without saying that in their considerations concerning the

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[19] See J. F. WILLIAMS, *La doctrine de la reconnaissance en droit international et ses developpements recents*, "Recueil des Cours de l'ADI," vol. 2, 1933, p. 225.

[20] Speech for the Recognition of the Independent States from June 15, 1824, Sir James MACKINTOSH, *The Miscellaneous Works*, London 1851, p. 747.

legality of revolutionary power they had to reject the legitimist principle adduced by the champions of the old order. In the Polish legal conscience the legitimist power, the power of the foreign invaders was illegal. Both from the legal as well as moral and political points of view the only legal power was the power representing the uprising authority. The legitimist principle was not advocated even by the emigré monarchists, who were either in favour of a "national dynasty" or were willing to offer the Polish throne to a foreign prince in exchange for assistance in restauring national independence. The Polish monarchists preferred to abstain from dealing in their writings with the thorny problem of legitimism and of the legal foundations of revolutionary power. The same applied also to the majority of writers representing the democratic camp: as participants of the 1830 - 1831 Uprising offering up prayers for a "peoples' war" and refugees in France, the country of the 1789 and 1830 revolutions they most probably found it superfluous to search for legal justification of their revolutionary and national-liberation aspirations. However, a more penetrating analysis of the problems of national-liberation wars undertaken by some writers could not avoid the international legal aspect of this problem as well the legal justification of the legitimate character of revolutionary power.

The first aspect was dealt with extensively by Jan Olrych Szaniecki, who was one of the principal champions of the idea of affranchisement in the Polish parliament during the Uprising of 1830 - 1831. In an address delivered in 1835 at the occasion of an anniversary celebration of the Uprising he made a passionate plea against the opinions that national-liberation wars ought to be qualified as rebellion and treason.

"Is there anybody with a knowledge of the law of nations, the law of humanity, the law of God and religion who would dare to assert that our uprising, our national uprising, our noble and legitimate struggle is nothing but rebellion and treason? No, indeed, no nation, no unbiased diplomat would make such an assertion. Such an outrageous statement could come only from the Northern autocrat and the governments associated with him, because they all share the common responsibility for the crime committed on the Polish Nation. Revolution is a horrible and violent instrument, but — unluckily for mankind — the only one available to oppressed against the oppressors."

In his argumentation Szaniecki refers to Grotius and Vattel and as far as the international treaties on Poland's partitions are concerned he considered them as null and void, in accordance with the principle: *si bella causa est injusta, injustos esse omnes ejus actus et si sollennissime suscipiantur.* The partitions of Poland have done great harm

"to the community of European nations and to the entire human race." The occupation of Polish lands "brings no benefits to the occupiers and even less to the country into which the occupied lands have been incorporated." Szaniecki was opposed to the idea of a multinational state, which would in his view be a "conglomerate of peoples hating each other, and whose intercourse would result not in brotherhood but in greater abomination [...] the conqueror considering himself as the master and the conquered harbouring a sentiment of humiliation." [21]

The Manifesto of the Polish Democratic Society stated that the Vienna Treaty concluded without Poland's participation cannot be binding on Poland. It pointed out that the struggle against Poland's oppressors is a protest against the treaty provisions. "The treaties which destroyed our independence were torn up by the Nation in the face of the world by its latest uprising. The treaties of those who perpetrated the crimes against Poland and of their associates cannot be binding on Poland. Poland had not entered into agreements with her assassins and had not ceased to protest with her blood against the conditions imposed on her." [22]

The constitutional legality of revolutionary power was considered in several aspects. As far as the source of revolutionary power is concerned the authors belonging to the Polish Democratic Society were in favour of the thesis that the legality of the revolutionary power cannot rest in the legality of the pre-revolutionary power, that it represents a new legality which derives its force and validity from itself. The author of an article entitled *Legality in Revolutions* defines in the following manner the mutual relation between the old and the new power:

"Two opposing each other legalities cannot exist together. It is therefore natural that one will conquer the other. The struggle between them is necessary, unavoidable; transactions and mutual concession can only be temporary, illusory; alliance and peace — impossible." [23]

Formulating such a principle, the author concludes that the revolution — if it has not to be "an impudent farce" — must destroy the existing legal order and establish a new one. He qualifies as a "crazy and fatal idea" the attempt at founding the new legal order on the ancient one made by the German revolutions and likens these attempts to grafting new seedlings on an old tree ("the revolutionary seedling, however sound and juicy, will wither and waste away, drawing rotten

[21] In the review "Polska" [Poland], Paris 1836, No. 1, p. 27 ff.
[22] TDP, fasc. 1, 1838, *Uwagi do manifestu* [Remarks to the Manifesto], p. 12.
[23] "Demokrata Polski," vol. 12, 1849, p. 29.

moisture of decaying wood"). He saw in the experience of the 1848 revolution in Hungary, Galizia and, above all, Germany, where the slogal of "legal revolution" carried out "by royal permission" was most popular definite proof of counter-revolutionary plots.[24]

Compared with other European nations having their own state organizations the situation of Poland was exceptional and this led to specific consequences as to the legality of power. Only in Poland "Revolution amounts to a Constitution," touching upon "the very core of the Nations being," resulting from the close connection between the revolutionary power and the aspirations and existence of a nation deprived of its independence: "apart from Poland no nation lives a life of a revolutionary existence." The revolution of a national character "as conceived at present by Poland, as desired by Poland over half a century, as indispensable to Poland in order to enable it to recover its place among the Christian Community of Nations of which it has been deprived" cannot be compared with other revolutions which carry only the promise of "relative changes," because they reflect only the aspirations of a part of the nation (carry on their banner "only the watchword and the will of the minority.").[25]

Comparing the views of Polish authors with the arguments of Western writers concerning the legality of revolutionary power one can see that the former try to justify the legality of such power not on the basis of the mere fact of its existence and its harmony with the interests of the people, but above all on the basis of the moral and political right of the nation to national independence viewod in the broader context of historical development. Such a conclusion is all the more in order when one compares the Polish viewpoint with the famous formula contained in Robespierre's speech, when he pointed out that the legality of revolutionary power "is based on the most sacred of all laws, which is the good of the people and on the most undeniable title which is necessity."[26]

Polish scholars were aware of the fact that legal problems concerning revolutionary power in a national-liberation war are something new, unprecedented, historically untested. This was so, because the past revolutions had nothing to do with national wars but were mere contests for power. As stated by the author of an article entitled *On Power in Poland During Revolution and Stable Government*, "prior to the French

[24] *Ibid.*

[25] *Ibid.*, vol. 7, 1845, p. 181.

[26] See J. GODECHOT, *Les institutions de la France sous la Revolution et l'Empire*, Paris 1951, p. 257.

Revolution the division of States, the relations among States, external wars, civil wars, invasions and revolutions, treaties and alliances were only cruel games designed to deceive the people and had nothing to do with the real transformation of Europe," for they were played "among the highest strata of the peoples." Thus, "peoples were not fighting for their independence but for the independence of their oppressors." The sole exception were "some minar, exceptional peoples, without aristocracy sticking to their backs and for that same reason excluded from the company of monarchies." The social and political structure of nations in the past centuries was governed by a legal order described in the following manner:

"Prior to modern times, when social laws among Christian peoples applied to only a small fraction of the people, a small number of rules established by constant repetition over the ages sufficed to preserve the interests of this fraction under all historical circumstances; legislation was nothing but an extension of ancient Roman laws as aplied to that or other privileged minority."

In concluding his remarks the author poses the question of the legality of revolutionary power and replies that this legality is founded "on the power ensuring the passage of the people through three revolutionary stages: insurrection, war and reorganization."[27]

The purposes for which the power in a national-liberation war was called into being are, in the opinion of Polish émigré writers, not only justifying the legitimacy of that power and of its broad competence with which it must be endowed but also determine the time limits of this legitimacy. While under the circumstances of overwhelming military superiority of the invaders the liberation struggle requires the establishment of an insurrectionary government with exceptionally broad powers, the situation must change as soon as the insurrectionary government has fulfilled its mission. Of particular interest are, in this context, the views of the émigré authors based on the distinction between various "revolutionary stages" and between "normal" and "abnormal states" of national existence. The Montpellier section of the Polish Democratic Society claimed that "various types of government will be needed for various stages of our revolution [...] in other words, the revolution is not for the government but the government for the revolution, the revolution must not be subjected to the government, but the government to the revolution."[28] Various authors claim that "dictatorial" revolutionary power as an exceptional form of government

[27] "Demokrata Polski," vol. 6, 1844, p. 5.

[28] TDP, Problem 1, 183, pp. 6 and 10.

imposed by the necessity of struggle "does not offend or oppress the people, but rises its spirit, enhances its energy in action, poses a threat to its overt and hidden enemies" and they adduce historical examples of national-liberation struggles in the course of which the people placed willingly total power in the hands of its leaders.[29] In an abnormal state "the only relevant will is the one with the possibility to manifest itself and since in the political life of nations only what manifests itself matters, each time when a nation is deprived of its will by force all its rights and obligations are taken over by those who first discover in themselves the will to act." The whole question therefore boils down to the way in which the will of the people can manifest itself. There are two such ways: under normal circumstances by delegation and voting and, in contradistinction when the people aim at achieving a normal state, by conspiracy and insurrection. Both ways "derive from one principle and represent only various forms of manifestation of the same sovereignty." Consequently, a conspiracy aimed at restauring a normal state "represents the legitimate rights of the people, carries with it the attribute of the highest majesty, as it enshrines the national will and hence, the national existence."[30] We find in these considerations a full theoretical justification of the claim to recognition of the right of natiomal-liberation movements to represent their peoples and to international legal personality which was so widely discussed from the political and legal points of view only recently in connection with the desintegration of colonial empires.

The distinction between the insurrection as a transitional and exceptional period and the normal state which will set in after victory opening the road to democracy had many partisans. On the one hand, they tried to dispel the fears that power can be missued and degenerate into a despotic rule of permanent features, claiming that there are no reasons to suppose that "the conspiracy will be perverted," for a "conspiracy reflecting personal or factional interests [...] will find no echo in the people and will not stand the test of action". "[...] Insurrectionary dictatorship cannot outlast the reason which led to its establishment."[31] On the other hand, they pointed at the necessity to move into a "normal state" after victory. According to the Poitiers section of the Polish

[29] See article by J. SŁOWICKI, *Środki rewolucyjne — władza w powstaniu* [*Revolutionary Means — Power in Insurrection*], "Pismo TDP", vol. 2, 1840, pp. 158 and 159.

[30] Article *O władzy rewolucyjnej w stanie rewolucyjnym i w stanie normalnym* [*On Power in Poland during Revolution and Stable Government*], "Demokrata Polski," vol. 6, p. 14.

[31] *Ibid.*, p. 14.

Democratic Society the "revolutionary power' will after having achieved the aims of the revolution, call upon the people to elect its own representation, place the governmental authority with which it was temporarily entrusted into the hands of this representation and render to it an account of its activity."[32]

In discussing the problem of government during the insurrection the authors of the democratic camp opposed their own ideas to the traditional concepts of the aristocratic camp arguing that "for us a strong government during the insurrection is a matter of temporary transitional form, while for you it is the hearth of the problem; after liberation we shall destroy it as the most harmful instrument in normal times, while you would like to preserve for ever its rule."[33]

The problem concerning the legal status of revolutionary power, namely the problem as to whether and to what extent the revolutionary power ought to respect the laws and customs of war which developed in the past was a matter of controversy. Some authors stated emphatically that partisan war is all-out struggle waged mercilessly and indiscriminately, hence the insurrectionists have no duty to respect the laws and customs of war, since the law of nations does not apply to them. Some authors of that group made a distinction between the first stage of the struggle and the later stages, especially those following the recognition of the partisans as belligerents. The author of a large manual on partisan war, K. Stolzman considered that "with the outbreak of the insurrection all accepted rules of warfare cease to be applicable and each action becomes not only permissible but is sacred, provided that it leads to our aim," that "rules of war applying between belligerent States which recognize each other cannot be binding upon the insurrectionists." Stolzman goes even as far as to claim that the insurrectionists are not bound by the prohibition to kill prisoners of war. He says that "during the first stage of the insurrection [...] one should refrain from taking prisoners of war killing them mercilessly and without ceremony."

[32] TDP, Problem 1, 1838, p. 24. It is worth recalling that the commander of the uprising in the Poznań area Ludwik Mierosławski issued in 1846 the following instruction to the revolutionary authorities: "The highest and unlimited power is vested in a government of 5 to 7 persons with legislative and executive powers. The government will remain in power for as long as necessary to free Poland from any external and internal aggression and from any counterrevolutionary danger. Having accomplished its task it will hand over its powers to a duly elected parliament" (See, *Akta i czynności sądowe tyczące się procesu Polaków oskarżonych w roku 1847 o zbrodnie stanu* [*Records and Proceedings of the Court in the Case of Poles Accused in 1847 of High Treason*], Berlin 1847

[33] Article entitled *Jeszcze kilka słów o przyszłym powstaniu* [*Another Few Words on the Future Insurrection*], "Demokrata Polski", vol. 8, 1846, p. 113.

He justifies his stand adducing the necessity of war which is "indeed a sad affair contrary to all human principles, but still an unavoidable and necessary game caused by an abnormal state, an extremity justified by the pursuit of higher reasons." In another place the same author tries to explain why "almost all over Europe prisoners of war are being well treated" by the fact that "in a war waged between two oppressors a soldier fighting not for his own cause or for his own country but in somebody else's interest feels little hatred and has no desire for revenge, the sight of the enemy does not fill his heart with anger and bitterness as is the case of a man defending his own home."[84] Similarly, Jełowicki is also against taking prisoners of war and argues that a war of independence "must necessarily develop into a war of extermination," adducing the fact that the Russians "have never shown us any mercy."[85]

These opinions were, however, not considered to have an absolute value, nor were they shared by all authors. Stolzman, when justifying his thesis that laws and customs of war are not binding on partisans claims that the insurrection "which does not enjoy the protection of the law of nations and being outside the law is not bound by its provisions: it begins to be submitted to its rules when the state against which it is directed recognizes it as equal." And when calling for the killing of prisoners of war he states that this applies to the "filrst stage of the uprising."[86] Even then he considers that although the partisans have the "undisputable right" to decide whether to kill te prisoners or to spare their life, a "ensible and far-sighted commander will know best when and under what circumstances to use death or to exchange prisoners in order to gain the most advantages for his action and, hence, for his country."[87]

Kamieński recommended to use the Russians taken prisoners of war in the struggle against the Tzar, saying that "one must explain to them that we are fighting for their liberty as well as for ours," that one must implant in their minds "an abhorrence to tyrany" and "the ideas of a free people." He went as far as to propose the creation of a Russian detachment led by freedom loving and enlightened Russians which would fight in Russian itself. He pointed out also that information about cruelty inflicted upon prisoners of war would spread "inciting

[84] K. STOLZMAN, *Partyzantka, czyli wojna dla ludów powstających najwłaściwsza* [*Partisan Warfare, or the Most Appropriate Form of Struggle for Peoples of Insurrection*], Paris — Leipzig 1844, pp. 2 and 47.

[85] A. JEŁOWICKI, *O powstaniu* [*On the Insurrection*], Paris 1835, pp. 46 - 47.

[86] K. STOLZMAN, *op. cit.*, p. 47.

[87] *Ibid.*, p. 48.

the enemy to despesate resistance thus increasing the military value of its soldiers on the battlefield."[88]

The history of the Uprising of 1863 shows that, as far as circumstances allowed, the soldiers of the insurrection were attaching great weight to the respect of humanitarian customs of war. An instruction for field surgeons issued by the insurrectionary National Government dated April 14, 1863 contained a provisions according to which "wounded enemies shall be treated with the same care as our own soldiers; after receiving first aid they ought to be transported to the next town and be given medical attention. The same instruction provided that a black banned as a distinctive emblem should be hoisted on the carts earmarked for transportation of the wounded.[89] (The Red Cross emblem had been agreed by the States one year later at the Geneva Conference of 1864).

4. The Organization of Supreme and Local Authorities in a National-Liberation War

The problem of reconciling the principle of "people's sovereignty" shared by all democratic groups with the establishment of a strong revolutionary government in a national-liberation uprising, viewed as a mortal struggle against a militarily superior conqueror, a struggle to which one must prepare prior to the outbreak of the insurrection, was a subject of lively discussion among the members of the Polish Democratic Society. There was unanimity against parliamentary rule during the uprising and also against the establishment of collective bodies with large memberships. It was considered that power must

[88] H. KAMIEŃSKI (non de plume XYZ), *op. cit.*, p. 41 ff.

[89] Text of instruction in the collection of documents: *Powstanie styczniowe — Dokumenty Wydziału Wojny [January Uprising — Documents of the War Department]*, Wrocław 1973, p. 25 and 26. In its decree concerning retaliation for crimes committed by the enemy the Central Committee acting as a Provisional National Government admitted a departure from humanitarian customs of warfare in stating that: "in view of the fact that the Moscow aggression by its way of administering summary justice, by its torturing of prisoners of war and defenceless civilians, by its acts of violence, killings and murder of our wounded, by its slaughtering of women and children, by its burning of towns and villages demonstrates no willingness to reciprocate our magnanimity it is therefore ordered to change our attitude and to apply retaliation" (decree of February 18, 1863). *Powstanie styczniowe. Dokumenty Komitetu Centralnego Narodowego i Rządu Narodowego [January Uprising — Documents of the National Central Committee and National Government]*, Wrocław 1968, p. 54.

not be transferred to "a large gathering, to a new convention, which would be lacking one of the most indispensable features: quick and resolute determination and the ability to take prompt action;"[40] for large gatherings "are good for discussion, whereas in revolution and war the time is for action."[41]

On the other hand, nobody favoured the transfer of power to one person — to a dictator. The prevailing opinion was that authority must be vested in a collective body composed of a few persons. It was argued that a government comprising 3 to 7 persons "free of the shortcomings of dictatorship and unburdered by too many people hampering its freedom of action" would be the most appropriate organ to lead the revolution. The negative side of personal dictatorship was "the detrimental and fallocious faith in one person, the identification of the fate of the nation with the fate of the dictator," with "the death of the dictator or his resignation resulting in anarchy."[42] The advantage of a small collective body resides in the fact that "its members can change with better and more talented people getting a chance to serve without these personal changes causing harmful outside effects."[43] The cause of the revolution was considered too important "to be left to one person." because "there is rarely a ready made hero to take the leadership." In arguing against personal dictatorship some were criticizing the tendency to overestimate the role of the individual in the historical process. The author of the article entitled *On Power in Poland during Revolution and Stable Government* expounded the view that "history up to the French Revolution seems to be nothing but a review of biographies [...] the people disappears, abdicates in favour of personal glory [...] the people including those who were writing history of those times, kept in ignorance of state secrets, saw nothing but individual persons, executing the will of the privileged classes." With history so impoverished there is no wonder that "simple-minded persons educated in such an optical illusion yearn for those times and complain stupidly about the lack of great personalities in modern society." The author confesses that he values the history of particular nations "as inversely proportional to the number of great personalities and as directly proportional to the number of great things."[44]

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[40] In the article entitled *Jeszcze kilka słów o władzy w przyszłym powstaniu [Another Few Words on Power in a Future Uprising]*, "Demokrata Polski," vol. 8, 1846, p. 110.

[41] Poitiers Section of the TDP, TDP, 1838, Problem 1, p. 22.

[42] J. SŁOWICKI, *op. cit.*, "Pismo TDP," vol. 2, 1846, p. 165.

[43] Poitiers Section of the TDP, TDP, 1838, Problem 1, p. 22.

[44] "Demokrata Polski," vol. 6, 1847, p. 6.

Some participating in the discussion voiced the apprehension that placing power in the hands of an individual or even a small group of persons may lead to dictatorship. The Poitiers section of the Polish Democratic Society stated that "the spirit of modern times, led by past experience, commands the people to ensure its liberty in its own institutions : mistrust of individuals is now a democratic virtue, a popular virtue [...] the common man is unable to cope with overwhelming power, uncommon men are rare indeed."[45] And when the Chaillot section expressed the view that "people's sovereignty lays in its unmistakable conscience, however, conscience does not create ideas, does not act, does not infuse life and move masses" the Central Committee of the Polish Democratic Society condemned that view accusing the Chaillot section of "being in favour of absolute power" and stated that every despot could subscribe to such a thesis and that "the people has no desire to stand idly by and let the thinking do by others," but that it wants to "act in accordance with the power it has itself elected."[46]

Various proposals put forward by different groups of the Polish Democratic Society concerning the introduction of institutional guaranties "that power will not be missued" were a further proof of the prevailing misgivings that revolutionary power may degenerate into despotic power. Some argued that a special organ be created some sort of a "security guard to watch over the direction of power."[47] Others opposed the establishment of such a "guard over the dictatorship" arguing that "frequent control over the activities of the dictator by such a guard would detract him from his main tasks, would open the way to intrigue, jealousy, personal ambition, thus giving to the guard a supremacy over the dictator"[48] and that "misunderstandings arising not only from the pursuit of private interests, jealousy but even from superfluous and ill-considered zeal could divide these two equal institutions representing the will of the people."[49] They thought it more advisable to take away military matters from the revolutionary power,[50] or to empower a larger number of people ("for example one thousand") to look into the activities of the revolutionary power through a group of commissars,[51] or — in accordance with the theory of division of

[45] TDP, Problem 1, 1838, p. 22.

[46] TDP, *Uwagi do Manifestu TDP* [*Remarks to the Manifesto of the TDP*], 1336, p. 43 ff.

[47] See opinion by J. Garnysz, TDP, Problem 1, 1838, p. 43.

[48] TDP Section in *La Rochelle*, *ibid.*, p. 29.

[49] TDP section in Poitiers, *ibid.*, p. 22.

[50] *Ibid.*

[51] Opinion by Stryjeński from Rennes, Problem 1, 1838, p. 40.

powers — to submit the government to the control of a legislative body, which would call into being a special commission to carry out this task.[52] Finally, dictators likely to missuse power were put on their guard against the wrath of the people ("there will be no shortage of Brutuses in Poland").[53]

The discussion on the nature of revolutionary power was not limited to the form of government in a national-liberation war but covered also the social and political contents of governmental activity. Some authors argued that a close link must exist between the people and its revolutionary power and considered that it is not enough to require that the government emanate from the people but that care must be taken to ensure a definite class character of the government, a definite "political colour." That is why they opposed the concept of a national government, composed of personalities representing opposing views. In these considerations one dicovers an apprehension that the dictatorship of persons may lead to take the edge off the class character of the dictatorship together with some hints as to the necessity to establish a dictatorship of the oppressed class. Quite relevant are in this respect the opinions of the London section of the Polish Democratic Society on the dictatorship of persons and the dictatorship of power. The London section oppossed the situation "in a country free from foreign oppressors where the people, conscious of the natural state of affairs, aims at improving its social status", to the situation "in Poland hampered by the rigors of barbaric despotism," which apart from a foreign yoke had to deal with an "internal enemy who betrays the most sacred cause in the pursuit of his selfish interest." Thus, whereas in free countries the influence of "perfidious persons" can only have limited effects and progress, though slowly, moves always forward," in the future Polish revolution "the objective is not only to get rid of the foreign yoke but also to establish national independence based on democratic principles and that is why no effort must be spared to bar the way to the dictatorship of persons and to preserve the dictatorship of power."[54]

The problem of organization of local government arose much interest among the members of the Polish Democratic Society, as witnessed by the discussion of the question as to "how to organize during the insurrection subordinate authorities." All participants in the discussion expressed their concern over the necessity of preserving the unity of revolutionary power, however, various opinions were expressed as to

[52] Opinion by Osiecki from Chalons sur Marne, Problem 1, 1838, p. 44 ff.
[53] TDP section in Toulouse, 1838, Problem 1, p. 17.
[54] TDP section in London, TDP, 1839, Problem 2, p. 37.

the competence of "subordinate authorities" as well as to the procedure of their establishment. The partisans of centralism pointed out that all administrative authorities "must have their roots in the supreme power, must depend on that power and be responsible to it, and that the very nature of power called upon to lead the future insurrection does not allow elections, and proposed that, like officers in the army commissars be sent out to "exercise unlimited power as emissaries of the people."[55] Still others represented the view that local administration must be based on principles of decentralization and be elected by the people. They argued that "nobody has the right to deprive the people of its power to select its representatives," that well organized communities "do not destroy the unity of power and do not hamper its movement [...] but implement immediately, at least partially, a form of democratic government by the people for the people [...]".[56] The arguments in favour of commune power were to a great extent influenced by theories which were popular at this time in Western Europe and which opposed the commune to the State. Some referred even to the tradition of the ancient Slav peoples who "despite many centuries of slavery maintained some remnants of commune power."[57] Of particular merit are the arguments emphasizing the role of democratic local government as "a means which may convince the broad masses of the people that the cause of the insurrection is their own cause." Thus, the authors of the Polish Democratic Society are expounding a new and original idea whereby local councils are viewed a a "vehicle of the revolution," an idea developed by revolutionary practice of succeeding periods. Communes, considered to be "political families" are supposed to assist the revolution in two ways: "one, as a moral force, second, as an instrument of government." As a result of the activities of democratic local government "the attachment of the people to the new social order will grow" and "public opinion will develop and strengthen, protecting the revolution and ensuring its success; communes are therefore another means, another guarantee of uniting people and revolution into one, of enhancing and multiplying its strength.[58]

As far as the problem of organization of armed forces is concerned

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[55] TDP section in Saint-Étienne and some members of the section in Poitiers. Cf. TDP, Problem 2, 1838, p. 39 ff and p. 47.

[56] TDP section in Strassbourg. TDP, Problem 2, 1838, p. 28. J. PETINETTI, *ibid.*, p. 72 and E. ŻURAWLEWICZ in an article entitled *O gminach w czasie powstania* [*On Communes in Times of Insurrection*], "Pismo TDP," vol. 2, 1840, p. 65.

[57] E. ŻURAWLEWICZ, *op. cit.*, p. 63.

[58] *Ibid.*

the prevailing opinion was that one of the causes of the defeat of the uprisings was the failure to apply the strategy of partisan was ("We were relying exclusively on regular army troops"). In order to prove the effectiveness of partisan warfare the authors referred to the example of guerilla actions in Spain against the French troops among which were some Polish units, where "the Polish soldier, however brave, could claim no major successes, for the people cannot be defeated by a soldier."[59] Those in favour of partisan war considered groups of partisans either as detachments operating together with regular army units,[60] or treated partisan warfare as applicable only to the first stage of the uprising.[61] Only a few military experts were sceptical about partisan warfare.[62]

Several authors viewed partisan warfare not only in military but also in political terms. They considered that the partisan must be a political agitator acting among the people Kamieński called for the organization of "apostolic armed detachments, whose main task would be to educate the people and secondary task to harrasse the enemy." He also advocated the release of partisans for a certain time from military duties in order to make them perform "apostolic" functions.[63] The same authors were aware that no quick results could be expected from partisan war and they called for "patience and perseverance ; the longer it lasted, the greater were the chances of success, for the longer the people was waging it, the better it mastered its methods.[64] The problem as to whether junior military commanders, in particular commanders of partisan units, were to be elected by their subordinates or nominated by their superiors was discussed not only in military terms but considered from the political point of view. Opinions were divided: it was recognized that election ensures confidence in the

[59] "Kraj i Emigracja," No. 1, 1835, p. XXI.

[60] TDP section in Paris. TDP Problem 4 (18) p. 17, and W. CHRZANOWSKI, *Wojna partyzancka...* [*Partisan Warfare...*].

[61] H. KAMIEŃSKI, *O prawdach żywotnych...* [*On Vital Truths...*] p. 163, attached considerable importance to partisan warfare but conceded that such warfare "has only limited objectives and is unable to achieve major and decisive goals... for it is unconceivable that the enemy could be defeated without concentration of insurrectionary forces". However, in his opinion such concentration can take place only during the second stage of the "people's war".

[62] See W. NIESZOKOĆ, *O systemie wojny partyzanckiej wzniesionym wśród emigracji* [*On the System of Partisan Warfare Elaborated by the Emigres*], Paris 1835, p. 9 ff.

[63] J. KAMIEŃSKI, *Wojna ludowa...* [*People's War...*], p. 16 ff.

[64] W. CHRZANOWSKI, *O wojnie partyzanckiej...* [*On Partisan Warfare...*], Paris 1835, p. 74.

commander, but on the other hand it was also pointed out that "electioneering" in military units carries with it many dangers.[65]

5. The Restriction of Civil Rights During a National-Liberation War

The writers of the democratic camp considered that the restriction of civil rights during the uprising was, on the one hand, a necessity arising from the abnormal state in which the nation "fighting for its independence" found itself, and, on the other hand, one of the "revolutionary insutruments" used in order to prevent hostile activity by the enemies of the revolution and to cement the moral unity of the nation. In the discussion on the question as to "the exercise of what rights must be suspended during the insurrection" it was pointed out that the revolutionary power must not permit the publication of material and the existence of organizations "depressing general morale, aiming at destroying the revolution." It was argued that an unlimited freedom to publish "serving both the defenders of the national cause and their enemies" was one of the "impediments of the revolution."[66] It was also proposed to limit property rights, for "it is the duty of the government to use all available resources in the interest of the nation," and because "the revolution is incompatible with unfettered property rights, all the more so in Poland, where the masses are dispossessed and where a handful of usurpers possesses everything."[67]

As far as the press and associations are concerned it was considered that the revolutionary government should not limit its action to restricting measures alone, but that it ought to use these means in order to influence public opinion. The revolutionary government was called upon to give appropriate direction to "publications and extraordinary committees and associations engaged in patriotic propaganda," for these are "the ways through which public consciousness will be translated into political power."[68] It was also advised to adopt different methods of influencing public opinion, namely to promote "the unfettered expansion" of democratic clubs and similar associations whese aim is to educate the public and to prohibit the action of those "who conspire

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[65] See the discussion on the problem of "Principles which must be observed when creating and organizing armed forces in an insurrection, viewed from a political angle" TDP, Problem 4, 1839, p. 30 ff.

[66] TDP section in Niort, TDP, Problem 3, 1839, p. 10.

[67] *Ibid.*, p. 49.

[68] Opinion of four members of the Nimes section, TDP, Problem 2, 1838, p. 65.

against the national cause" preventing them from publishing their material and from establishing their associations.[69]

The opinion that in the abnormal situation when the nation is fighting for its independence it is necessary to apply extraordinary means against the internal enemies of the insurrection met with general approval. Severity against counterrevolutionists was considered to be one of the fundamental features of each revolution, for "the supreme law of the revolution is to destroy those who act against it."

However, the application of terror as a "revolutionary means" was not unanimously and unconditionally approved. On the one hand, it was pointed out that the "weakness" of our previous insurrections consisted in "morderation, mildness, constraint with form." It was tlso argued that while "moderation and mildness are good when society lives under natural conditions, they are harmful in revolutionary action."[70] References were made to the example of the Convention during the French Revolution and to Robespierre's opinion that government in time of peace must be based on virtue and a revolutionary government on virtue and terror. However, utterances about terror were rather presented as a threat against the enemies of revolution and against traitors, and not as a deep conviction about the effectiveness of that means of action. There were numerous voices warning against the possibility of missuse of power an calling for the circumscription of the scope of terror acts.

Thus, the author of the article entitled *On Power in a Poland during Revolution and Stable Government* expresses the view that during an insurrection a government "is by necessity dictatorial, with unlimited power." However, he makes the following reservation, by saying that only when its existence is at stake: "dictatorship applies to the choice of means, while the goal establishes its own control and limits; within that goal the government must act like a Tzar, like the French Convention, like an irresponsible and merciless tyrant; however, outside, that goal ceases not only its power but also its existence." He distinguishes between the changes which the government will consider to be necessary and "the sense of common justice and constitutional rights:" the revolutionary government must not interfere with these, for it has no "sovereign legislative powers;" it ought to take into consideration "only the transitional effectiveness of means of action within the scope and the goals of the insurrection."[71]

The opinion whereby the application of terror could ensure victory

[69] Members of the TDP section in Poitiers, TDP, Problem 3, 1839, p. 21 ff.
[70] J. SŁOWICKI, *Środki rewolucyjne...* [*Revolutionary Means...*], p. 160.
[71] "Demokrata Polski," vol. 6, 1844, p. 17.

is questioned with the argument that "the moving spirit of the struggle for independence must be strong enough before the struggle is undertaken [...] without that terror is useless [...]. Besides, in order to remain in harmony with the spirit of our people, Polish terrorism must be different; let the future insurrectional government keep it in reserve, and when everybody will be aware that the authorities are ready to use it there may be few occasions to do so." Referring to the example of Christianity, which "used terror, and armed force to convert and which sanctified those who proselityzed under its banner" the author concludes with the following statement: "this terrorism which established firmly its foundations does not detract from the greatness of Christianity, as does the Holy Inquisition which meant tyranny."[72]

Some were in favour of "enlightened" terrorism circumscribed by the limits of "unescapable necessity" and applied only when required by the "salvation of the national cause." Terrorism is viewed as the "only remedy" against counterrevolutionary activities and can, thus, be applied not only against individual persons but also against "whole classes, should they represent a counterrevolutionary mass." Consequently, terrorism emerges as "a product of the counterrevolution and as a remedy against it, and not as something necessary by itself."[73]

The attitude of the Central Committee of the Polish Democratic Cociety towards terrorism was, despite the awareness of the necessity of a strong insurrectionary government, marked by reservations and misgivings. It warned against exaggerated faith in the effectiveness of acts of terror, it tried to damp the zeal of those who advocated indiscriminate killing in the name of strong government. In summing up the discussion on the question of organization of insurrectionary government the Central Committee declared that:

"Let us declare to ourselves and to all others that not by the sword of the Angel of Death, not by blood and fire do we want to resurrect Poland: humanity abhors bloodshed, such baptism grants no resurrection. Only kings feed on blood. But let us state also that if the oppressors of the people by clinging to their privileges provoke popular reaction then the blood shed in fratricidal strive will fall nly on their heads."[74]

The prevailing opinion among the members of the Polish Democratic Society was that the Polish insurrection, like all other revolutions,

[72] Article entitled *Teroryzm* [*Terrorism*], "Demokrata Polski," vol. 6, 1844, p. 141.

[73] H. KAMIEŃSKI, *op. cit.*, p. 135 ff.

[74] *TDP, Uwagi do Manifestu* [*Remarks to the Manifesto of the TDP*], 1836, p. 57.

ought to make use of revolutionary tribunals in the struggle against the enemies of the revolution. The La Rochelle section of the Polish Democratic Society stated that the judges presiding over such revolutionary tribunals must pass judgement in accordance with the general interest and that "it is not necessary for them to possess the knowledge of Pandects, Justinian Codes and all laws and precedents." Various sections submitted proposals regarding the composition and mode of establishment of revolutionary tribunals, asking that the procedure before such tribunals be summary and their sentences final, for "quick proceedings are always one of the conditions of good justice necessary in times of revolution."[75] Responding to these opinions the Central Committee of the Polish Democratic Society expressed itself in favour of the establishment of special revolutionary tribunals in times of insurrection with special powers of summary justice.

6. Legal and Political Status of the "Conspiracy"

The point of departure of all considerations over the political organization of the society in times of insurrection war for writers of the émigré democratic camp the "abnormal state" of a nation deprived of its independence. Under such conditions the conspiracy aimed at organizing the liberation struggle was considered to be the political representation of the nation and, consequently, charged with greater functions and endowed with larger competences as compared with political parties, in accordance with the theory and practice of West-European public law. As in other fields, the Polish democratic camp departed in this case consciously from liberal-constitutional patterns developed under a "normal state" of the nation's existence and founded its thinking on an analysis of concrete conditions prevailing in a national-liberation war. It concluded that under such circumstances the democratic character of a conspiracy was not and could not be the result of a formal legal mandate given by the majority of the people but had to rest on the assumption that the conspiracy was fighting for the future of the entire nation and expressed its vital interests.

Thus, the conspiracy rose to the status of national representation; one of the forms of such representation, appropriate for the "normal state" of the nation, was a parliament, the other — appropriate for the insurrection — the conspiracy. The author of the article entitled *On Power in Poland during Revolution and Stable Government* claims that in a way of substitution "in abnormal times sovereignty passes

[75] *Ibid.*, p. 36.

from the people to the conspiracy" and that hence "nothing is more logical than the dictatorial powers of the conspiracy." Consequently "the conspiracy, which is for the insurrection the same thing as a regular parliament for a normal state, exercises power as long as the insurrection lasts, that is to say till the moment when the nation is able to express again freely its will."[76] Thus, since "democracy is the will of all those who can possess it," all real conspiracy "is by definition the expression of democratic will, so that conspiracy and regular parliaments represent various aspects of the same truth." This does not detract from the importance of the insurrectionary government which "cannot be only an agent" of the conspiracy being rather "its inspiration than its obedient servant." The author closes his remarks with the statement that "in a democracy power is being entrusted in two ways: in a normal state by election and in an abnormal state by conspiracy: in both cases democratic power has but only one justification in the duration and existence of causes which led to its establishment." Hence, the dictatorship of the insurrection "cannot survive the insurrection."[77]

The authors of the article entitled *Another Few Words on the Future Insurrection* and *Where Lays the Guarantee of a Strong Power in an Insurrection* justified in a similar manner the legality and democratic character of the conspiracy. They argued that a soncpiracy leading to revolution "will thereby prove in action that it is fulfilling the will of the people." For the enslaved people "has no other organ by which to make known its aspirations but this small group fighting for its liberation and embodying its will." This however, does not mean that the conspiracy claims to represent all classes of the nation: there is no truth in the assertion that "revolutionary might lies in the fact that it generates and brings into the open all forces present within the nation [...] the revolution does not generate them all, but only those which can work for its salvation [...] in our organization only one idea supported by all revolutionary forces and concentrated in the hands of one power can assert itself."[78] A government derived from the conspiracy is "a government for reborn Poland to which every Pole owes allegiance, for it represents national aspirations and offers the best reward for the endured sufferings." Such a government "is the embodiment and synthesis of the wisdom of the conspirators — these first and most genuine representatives of Poland" while being at the same time its most powerful expression," its vanguard with the masses

[76] *Ibid.*, p. 76.

[77] "Demokrata Polski," vol. 6, 1844, p. 14 ff.

[78] "Demokrata Polski," vol. 8, 1846, pp. 109 - 118.

following behind;" "in revolutionary moments" the people identifies itself with the conspiracy, "unless the conspiracy is not democratic."[79]

In summing up the discussion on the question of government in the future insurrection the Cental Committee of the Polish Democratic Society stated that "all sections accept the principle that those who prepare the uprising and will give the signal of its start will at the same time form the nucleus of governmennt; this is a natural and necessary consequence of the present and prospective situation of the nation at the beginning of the struggle."[80]

While entrusting the conspiracy with such important tasks and endowing it with such broad powers the writers of the democratic camp warned against the possibility of the conspiracy being "perverted" not only as a result of the dictator betraying the cause of the revolution but also as a result of the defection of a collective power: "the time of personal usurpations is over in Europe, replaced by the usurpation of systems." The conspiracy will be perverted "when the insurrection will be dissociated from its consequences, when the political revolution will be dissociated from the social revolution."[81]

In the opinion of the émigré democratic camp the role of the organizer of the conspiratorial struggle for national independence should be played by the Polish Democratic Society. In view of the considerable tasks which the Society had to perform before the uprising and during the revolutionary struggle it was considered that it should not limit itself only to "appointing trustworthy persons to positions of power" but that it should also influence public opinion by using such means as publications, partiotic societies, clubs, popular assemblies acting on the basis of the "Democratic Manifesto."[82] The Central Committee of the Polish Democratic Society formulated as its principal task to "consolidate its own ideology so as to be able to give life and direction to the future insurrection."[83] Furthermore it considered that it must "carry the ideology which is to ensure Poland's salvation to the occupied country, propagate and spread it among the people so as to ensure its ultimate triumph." Finally, it stated that "our Society is not a school

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[79] "Demokrata Polski," vol. 10, 1847, p. 23.

[80] TDP, 1839, Problem 1, p. 53.

[81] Article entitled *O władzy w stanie rewolucyjnym i w stanie normalnym Polski* [*On Power in Poland during Revolution and Stable Government*], "Demokrata Polski," vol. 6, 1844, p. 22.

[82] TDP section in Poitiers, 1838, Problem 1, p. 23 ff.

[83] *Zdanie sprawy Centralizacji Towarzystwa Demokratycznego Polskiego za 1838 - 1840* [*Report of the Central Committe of the Polish Democratic Society for the Period of 1838 - 1840*], p. 3.

for philosophers, but a political body working for the resurrection of a democratic Poland."[84]

Some considerations by authors of the democratic camp went beyond the problems of power in an insurrection and included ideas connected with the nature of power in a democratic society. These ideas were not only opposed to the conservative and anti-democratic concepts but they differed also from the liberal-democratic ideologies of Western Europe. The Polish émigré writers of the democratic camp treated their subject with due account of Europe's history. Thus, in the 18th century Europe was dominated by despotism, no wonder therefore that "everything was done to undermine the moral weight of power" and that nobody cared to ask what "decent government" was. Under the influence of the doctrine on the division of powers and of British patterns a compromise system of power took shape, a system representing "an anarchic combination of most contradictory elements." While demonstrating full understanding for the position of parliamentary opposition in Western Europe which, for fear that conservative governments may missuse power, try to limit the competence of state power, these writers pointed at the possibility of a different model of relationships between state and society in countries where the lack of confidence in government had not the historical justification as it did in Western Europe and where the was "decent democratic government" representing "the sum of society's wisdom and aspirations, its supreme will :" such a government "can move forward boldly and without hesitation [...] it will bring into motion all mainsprings, it will engage all vital forces in the interest of general welfare." In conclusion they stated that the alternative to "a government corresponding to the progressive aspirations of modern society" was "on the hand a blind and ruthless despotism, and on the other hand, social standstill and anarchy erected into a system."[85]

7. Concluding Remarks

The political and legal ideas of the Polish authors of the middle of the 19th century concerning the problem of Poland's liberation by armed insurrection represent a logically coherent and intellectually stimulating complex of opinions and concepts of the highest originality when viewed against the background of contemporary European political

[84] TDP, *Uwagi do Manifestu* [*Remarks to the Manifesto of the TDP*], 1838, p. 37.

[85] Article entitled *Władza* [*Power*], "Demokrata Polski," vol. 9, 1847, p. 183 ff.

thinking. The point of departure of all these considerations was the analysis of the Polish uprisings which ended in failure, as well as the experience of uprisings and national-liberation struggles of other European peoples, and their underlying idea — the stubborn refusal of defeat, the conviction that "we lost not because of a lack of force but because we did not know how to use it," that "the people can do everything, but does not know everything." The originality of these ideas had their source in the particular situation of the Polish people, deprived of its independence and subjected to a double oppression: national oppression by the foreign invaders and social oppression by the privileged class, whose incapacity to provide leadership to the nation was so patently demonstrated by the failures of the insurrections. The Polish people was many millions strong and had a long-standing state tradition; its situation was in sharp contrast with that of the majority of European peoples organized in nation-states. It was more akin to the status of colonial peoples, with that essential difference that the Polish people had a very highly developed national conscience and a determined will to regain independence — features which the colonial peoples developed much later, by the middle of the 20th century. It is therefore no accident that Polish political thinking was well ahead of European developments in this field and tackled problems which were to acquire particular weight later at the period of desintegration of colonial empires.

In the development of Polish political thinking the doctrine of national-liberation war marked a departure from the problems which represented the mainstream of contemporary European political thinking, such as human rights, religious freedom, parliament, constitutional monarchy, and which remained in the centre of attention of Polish political writers of the 18th century. There is a certain resemblance between the Polish doctrine of national-liberation war and the Polish doctrine of just war developed in the 15th century.[86] At that time Polish political thought, confronted by the political concepts of the Crusades as represented by the Teutonic Order, was opposed to the idea of converting by force pagan peoples and, inspired by the universalist Christian philosophy, searched for elements of a new international system embracing Christians and non-Christians, Catholics and schimatics. The more it departed from the mainstream of European thought, the more it came closer to the ideas which were

[86] Cf. L. EHRLICH, *Polski wykład prawa wojny XV wieku* [*The Polish Concept of the Law of War of the 15th century*], Warszawa 1955; R. BIERZANEK, *Les conceptions de la paix chez les auteurs polonais de la fin du Moyen Age et de la Renaissance*, "Receuil de la Societe Jean Bodin." Brussels, vol. 15, p. 197.

to dominate the scene over the next centuries. Similarly, in the 19th century the ideas developed by Polish authors on national-liberation wars were at variance with the dominant European liberal-democratic concepts on political systems as well as with the tendencies to consolidate the international order in complete disregard of the rights of weaker nations, so strong at the time of the Holy Alliance. The Polish 19th century doctrine is, by its contents close to the modern ideas of the right of peoples to national self-determination and of their right to its implementation by armed struggle, to the modern ideas regarding the legal status of national-liberation organizations and their right to represent the nation as well as to the concepts concerning the political organization of a people fighting for its national independence.

It may be asked whether and to what extent the Polish doctrine of national-liberation war did influence contemporary and later thinking. It seems that writings of a military nature concerning partisan warfare met with greater appreciation than writings dealing with political and legal matters. This can be seen from bibliographical references and from translations into foreign languages, beginning with the translation into German of the work by General Chrzanowski on the eve of the Revolution of 1848 [87] and ending with the translation into French of parts of a book by Stolzman by the French Maquis during World War II.[88] Furthermore, if one points out quite rightly the similarities between the system of people's war "not learned in textbooks but waged in accordance with the conditions arising from the actual political and social situation," and the "experiences of the partisan war in China and Yugoslavia during the last war" on the one hand, and the teachings on the subject by the Polish authors of the 19th century on the other,[89] it is easily possible to discover such similarities when

[87] *Über den Parteigaenger-Krieg*, Berlin 1846.

[88] The translation was published in 1943 under the title *L'insurrection est un art*, mentioned by L. PRZEMSKI, *Zagadnienie wojny partyzanckiej w przeddzień Wiosny Ludów [The Problem of Partisan Warfare on the Eve of the Spring of Nations]*, vol. 1, p. 391 ff.

[89] *Ibid.*, p. 407. "When reading today about the experience of partisan warfare in Northern China or Yugoslavia we have the impression of something already seen, already heard of." This applies in particular to the definition of the tasks of a partisan given by one of the Chinese leaders, which recalls vividly the opinions of Polish authors of the 19th century; namely, that the partisan must be not only a soldier but also a political agitator explaining to the peasants the aims of the liberation war. In another place of same author writes: (see introduction to K. B. STOLZMAN, *Partyzantka [Partisan Warfare]*, and H. H. KAMIEŃSKI, *Wojna Ludowa [People's War]*, Warszawa 1949, p. XXIV: "Whoever after studying the history of the creation of the Chinese People's Army reads the book by Kamienski gains at first the impression that the "People's War" of our compatriote was known in China."

considering political problems connected with the conduct of national-liberation wars. In particular, such ideas implemented in the course of national-liberation wars of the last decades as the combination of liberation struggle with social revolution, the promotion of a "people's war" and the political preparation of the population to it, the takeover of the leadership in the national-liberation war by a political organization based on conspirational forms of action, the application of means and institutional forms aimed at uniting the efforts of the whole nation in the struggle against a powerful enemy, the use of the regular liberation army and of partisan units in the struggle, with the latter being charged not only with military but also political functions, the importance of political effects brought about by a long partisan war in the overall process of national-liberation struggle, are very close to the basic tenets of the Polish 19th century doctrine.

In the history of European thought the 18th and first half of the 19th century are usually presented as a period dominated by rationalism, by a critical attitude towards traditional ideas and feudal structures, by the development of the idea of human rights, civil and political and finally by the development of utopian socialism: true enough, European thought of that period reflected a historical process which included such events and trends as the French Revolution, the struggle of the bourgeoisie against the system of absolute monarchy, the development of parliamentary democracy, the beginnings of the industrial revolution and of the exploitation of the working class. However, in actual political practice of that period there were features differentiating it, in a negative sense, from other periods of European history. In the first place these years were marked by a cynical and contemptuous attitude towards the rights of small and weak nations, reflected in a relentless quest for colonial conquest in the creation of spheres of influence on the basis of a most arbitrary interpretation of the principle of "balance of power," in the partitions of Poland, in the establishment of the Holy Alliance with its aim of imposing their will on weaker nations and hampering social and political progress. Viewed against the background of the mainstream of European political thought of that period the Polish doctrine of national-liberation war belonged, together with the so-called national school represented mainly by Italian scholars P. S. Mancini and other calling for the unification of Italy and independence for other subjected European peoples, to a separate group of ideas expressing the interests of peoples fighting for their national independence. However, the Polish doctrine differs radically from that of the national school because it combines national liberation with social revolution and because it does not limit itself

to the general call for the creation of nation-states but concentrates on the consideration of methods enabling weaker nations to achieve independence by a pepole's war based on the use of national forces, which "is the historical justification and ultimate escape of a people injured in contravention of all divine laws and a means of correcting the twisted course of human acts."[90]

The scientific interest for the ideas and opinions of the Polish 19th century authors was hitherto marked by a rather narrow approach. It concentrated mainly on the philosophical and social aspects and treated only in a fragmentary way the various political and legal concepts. As of today, the Polish doctrine of national-liberation war has not yet become the subject of a systematic and comprehensive study as did the political doctrines of the 16th century or of the period of Enlightenment. In particular no studies were undertaken on the extent of the influence of the ideas of the French Revolution and of carbonarist societies in Italy and France on the Polish authors as well as on the impact of the Polish doctrine on the political and legal concepts of the later revolutionary and national-liberation movements, from the Paris Commune up to modern times. Probably this is partly due to the fact that the Polish doctrine of national-liberation war was, In Europe of the 19th century, an isolated phenomenon and that the accession to independence of several European nations after World War I followed a different pattern. One can only express the hope that interest of scholars in problems of national-liberation war will be stimulated once the presentation of historical processes lose its Eurocentric features.

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[90] See V. N. GIAP, *To Arm the Revolutionary Masses to Build the People's Army*, Hanoi 1975, pp. 41, 154 - 160, 183 - 184, 225 and 231 ; V. N. GIAP, *La guerre de liberation nationale au Vietnam*, Hanoi 1970, pp. 25 - 26, 37 ; MAO TSE TUNG, *Dzieła [Selected Works]*, Warszawa 1954 - 1958, vol. 1, pp. 224 - 226, vol. 2, p. 159 ff ; J. BROZ-TITO, *The Struggle of the Peoples of Occupied Yugoslavia* (in Russian), Moskva 1944, p. 43 ff ; H. M. CHRISTMAN, *The Essential Tito*, New York 1970, pp. 4 - 9, 52, 176 ; *Selected Works of Ernesto Guevara*, Cambridge Mass., 1970, p. 88 ff 180 ff.

[91] K. KAMIEŃSKI, *Wojna ludowa...* [*People's War...*], p. 79.

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On the Sources of International Law — Towards a Conception of Adopted Law

by JAN KOLASA

International lawyers, following in the wake of general theory of law, divide the **sources of public international law** into sources in the material and formal sense. Turning closer their attention to only formal sources they divide the whole complex of norms of public international law into treaty rules and customary rules.

Such a criterion of division is not based on the contents or on the scope of obligation, nor is it derived from a mutual precedence or subordination of these two groups of legal rules. It simply has its source in a different process of creation and in a related to this process different form of manifestation of the will of states in the creation of treaty rules on the one hand and customary rules on the other. The division is therefore based on a purely formal factor, which could even be described as a procedural one.

Of great assistance in this respect can be the Polish terminology introduced by Ludwik Ehrlich, who calls treaty rules "stipulated" (or "contractual") rules and customary rules — "ascertained" rules (rules ascertained by a judicial organ).[1] These terms reflect adequately the essence of formal sources of international law.

Stipulated (treaty) law includes legal rules which have come into being as a result of: (1) expressly agreed will of two or more states, and (2) a manifestation of their will in a specific form, namely in the form of an international treaty.[2] These two elements represent the core of the stipulation of international treaties and the stipulation of treaties is nothing but the creation of new legal rules. The successful

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1 L. EHRLICH, *Prawo międzynarodowe* [*International Law*], IV ed., Warszawa 1958, p. 21. Ascertaining by a judicial organ amounts to proving the existence of a customary rule. Cf. K. WOLFKE, *Custom in Present International Law*, Wrocław 1964, p. 116.

2 The concept of an international treaty should not be restricted to a written treaty only. There can be also oral agreements.

completion of the negotiating process is tantamount to the creation of new rights and obligations between the parties concerned.

On the other hand, the process of formation of rules of ascertained (customary) law embodies the two following basic elements : (1) formation of international customs and (2) recognition or acceptance by states of such customs as binding legal rules.

A custom is the result of state practice. The initial and final stages of that process are, generally, vedy difficult to trace. For, the characteristic feature of a custom is that it emerges unconsciously and undergoes constant evolution as the direct outcome of state intercourse.

However, only a recognition by states of a custom as a binding rule constitites the final act of formation of a norm of international customary law. The act of recognition which transforms a custom into a norm of customary law reflects, of course, the will of states to apply such a new rule in their mutual relations. However, in contrast to the process of creation of a treaty rule which is accompanied by negotiations aimed at formulating a new legal rule and reflects the expressed will of states in the form of an international treaty, the process of emergence of a custom represents no deliberate action by states. The part played by intentional acts of states in the formation of a custom cannot be ascertained with certainty and the recognition of a well established practice as a binding rule of law takes the form of a tacit consent. The recognition by states of a new binding customary rule of law can therefere only be presumed. Hence the term of ascertained law so adequately resumes the nature of these legal rules, for, (1) first, the custom must get established by way of practice and (2) second, it is necessary to ascertain, by all available means, taking into account all possible evidences and circumstances which states accept the new rule as binding and to what extent.

With the emergence of intergovernmental organizations on the international arena the law-making process gained in richness and variety. First, international organizations moved in as subject separate from states and as active participants in the creation of both kinds of rules of treaty law (they possess ius tractatuum) and rules of customary law. They introduced into the traditional process of law-making on the international arena certain new elements and important specific features.[8]

[8] There is quite an extensive literature on the subject. See for example J. W. SCHNEIDER, *Treaty-Making Power of International Organizations*, Geneva 1959 ; B. KASME, *La capacité de l'organisation des Nations Unies de conclure des traités*, Paris 1960 ; K. ZEMANEK, *Das Vertragsrecht des Internationales Organisationen*, Vien 1957 ; R. HIGGINS, *The Development of International Law through the Political Organs of the United Nations*, London 1963 ; K. WOLFKE, *Practice*

However, this contribution, though very meaningful in its form and its contents, is not original enough to provide a sufficient basis for the law-making process of international organizations to stand apart from the traditional forms of creation of rules of international law by treaty or custom. As a matter of fact, from the point of view of sources of international law in their formal sense, nothing emerged of particular interest and originality. True enough, we are dealing with new subjects of international relations which differ from states. However, the way in which they create legal rules remains, in principle, similar to that of states : it is the creation of treaty rules by the conclusion of treaties and the creation of customary rules by way of practice (custom) and their recognition as binding legal norms.

The role of international organizations in the creation of rules of international law is not limited to their participation in the traditional law-making process. International organizations have initiated an entirely new, separate way of creating rules of international law which can, by no means, be contained within the confines of the two traditional processes.

The whole process started rather long ago, and progressed slowly and almost imperceptibly. As early as in the second half of the 19th century international organizations started to enact their own legal rules on their structure, functioning and procedures. As their number increased and the scope of their activities widened this law-making practice became more frequent with the enacted legal rules covering a steadily increasing area. Today they encompass an extremely rich and varied, in their form and content, complex of legal norms which continue to broaden gaining in scope and importance. These norms are called internal law of international organizations. They constitute the part of *corpus iuris gentium*,[4] in its broadest sense.

The way these legal rules are created is not covered by the traditional concept of sources of international law. We are dealing in this case with an entirely new law-creating process on the international arena. These rules are, generally, adopted by a vote of the collective organs of international organizations. They are binding all member-states, without ratification or any other form of recognition. This feature reflects the difference of these norms and their specific nature as a new source of

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of International Organizations and Customary Law, "The Polish Yearbook of International Law," vol. 1, 1966/67, pp. 183 - 194.

[4] See on the same subject, for example, K. SKUBISZEWSKI, *Uchwały prawotwórcze organizacji międzynarodowych — przegląd zagadnień i analiza wstępna* [*Law-Making Resolutions of International Organizations — Survey of Problems and Preliminary Analysis*, Poznań 1965, pp. 25 - 30 ; W. MORAWIECKI, *Prawo wew-*

international law standing apart from the two traditional sources. They are not created by way of a treaty which enters into force on the basis of a jointly expressed will of all parties concerned, nor do they reflect customary norms. They result from decisions taken by collective organs of international organizations, adopted on their behalf or on behalf of the organization as a whole, and this, as a rule, by simple majority vote of members present and voting.

States participating in the vote are expressing their individual will, however, the final effect which takes the form of decision is, generally, based on a simple majority and considered to reflect the will of that given organ or even of the entire organization, depending on the concrete situation. A majority vote of member-states is in this case tantamount to the will of the organization and cannot be identified with the will of particular states taking part in the vote.[5] All the more so, that not all member-states are present at every meeting and that not all member--states do participate in the vote. Furthermore, in organs of limited membership, such as councils or committees, only a tiny portion of those belonging to the organization can take part in the process of adopting resolutions.[6]

It must also be added that the authority to create internal law is not necessarily contained in the charter of the organization or in any other legal act. It seems from the so-called implied powers of international organizations[7]. It can be derived even from the general norms of customary law, which have their origin in the practice of international conferences.[8]

In view of this specific nature of creating legal norms belonging to internal law of international organizations by way of decisions of

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nętrzne organizacji międzynarodowych [*Internal Law of International Organizations*], "Państwo i Prawo," 1969 No 1(275), pp. 36 - 46 ; P. CAHIER, *Le droit interne des organisations internationales*, "Revue Générale de Droit International Public," vol. 34, 1963, No. 3, pp. 563 - 602 ; L. FOCSANEANU, *Le droit interne de l'Organisation des Nations Unies*, "Annuaire Français de Droit International," vol. 3, 1957, pp. 228 - 230 ; *Kurs meždunarodnogo prawa*, vol I - VI, Moskva 1967 - 73 ; vol. 1, pp. 188 - 189 ; P. I. LUKIN, *Istočniki meždunarodnogo prawa*, Moskva 1960, pp. 116 - 118 ; J. KOLASA, *La notion de droit interne des organisations internationales*, "The Polish Yearbook of International Law," vol. 3, 1970, pp. 95 - 110.

[5] This applies even to decisions adopted by unanimous vote. See for example K. SKUBISZEWSKI, *op. cit.*, p. 143.

[6] See on that subject for example J. KOLASA, *Głosowanie w powszechnych organizacjach międzynarodowych — Wybrane zagadnienia prawne* [*Voting in Universal International Organizations — Some Legal Problems*], Wrocław 1973, pp. 33 - 60.

[7] See for example K. SKUBISZEWSKI, *op. cit.*, pp. 26 - 27 or *Kurs meždunarodnogo prava*, vol. 1, p. 189.

collective organs, it must be stated that we are confronted with a **new** formal source of international law in the shape of resolutions. It would therefore seem proper to specify its nature by calling it "resolution law" or adopted law, in the same way as we distinguish treaty law as brought into being by treaty. And applying the terminology introduced by L. Ehrlich one could add to stipulated (contractual) and ascertained law the term "adopted law."

However, the so-called internal law of international organizations does not consist exclusively of rules adopted by collective organs. True enough they represent its fundamental substratum, but it includes also treaty rules,[9] customary rules[10] and also various regulations and rules adopted by non collective organs, like for example by the chairmen of various organs (their rulings) or by the general-secretaries of these organizations. The internal law of an organization does not represent a system of uniform norms from the point of view of formal sources of international law. Therefore, contrary to what is sometimes done in theory of law, it cannot be opposed, en bloc, to the two traditional sources of international law, namely to treaty law and to customary law.

On the other hand, the new process of creating law by virtue of majority vote is not limited to the creation of internal law of international organizations. By way of resolutions adopted by organs of international organizations various other norms of international law come into being, which either create entirely new or modify or invalidate former rights and obligations of member-states deriving directly from treaties or customs. It must, however, be stressed from the very outset that this kind of law-making activity of international organizations concerns, so far, a rather narrow range of problems. Furthermore, in this case voting can take various forms (for example a unanimous vote may be required, or a qualified majority) and the process of law-making by way of resolution may be supplemented by different additional conditions and requirements of a procedural nature.

This paper cannot deal with all methods of law-making by way of resolutions adopted by international organizations. Problems arising from the law-making activities of regional international organizations, such as, for example, the Common Market, have been left untouched, for they would require special treatment. Our considerations are limited

[8] J. KOLASA, *La notion de droit...*, pp. 101 - 105.

[9] Many rules of a procedural nature can ben found in the constitutional acts of international organizations.

[10] In the first place these are norms arising from the practice of various organs or from cooperation of various organs and organizations.

to universal intergovernmental organizations. But have also certain problems have been omitted, for example, the problem of treaties concluded by states and subsequently modified following resolutions of international organizations, or the complex problem of the legal character of many resolutions passed by intergovernmental organizations and especially by the United Nations. In these fields it is possible to find interesting examples of law-making processes taking place in the framework of intergovernmental organizations. However, the consideration of these problems would involve a broad legal analysis of a great number of cases which are still of a rather controversial nature. This paper does not aim at clarifying complicated and controversial questions, nor does it intend to throw light on the entire process of law-making by international organizations in all its aspects. We tried to present the characteristics of the resolutions as a new source of international law and keeping this in mind we thought it advisible to confine the discussion to such law-making phenomena which ceased to be a matter of controversy. These include certain law-making processes taking place in the World Health Organization (WHO) and in the International Civil Aviation Organization (ICAO).

Account must be taken, in the first place, of the important regulative functions of the WHO. Thus, Article 21 of the WHO Constitution authorizes the Health Assembly to adopt various international regulations concerning, broadly speaking, pharmaceutical, sanitary and medical regulations and binding all member-states. So far, the Health Assembly has adopted two comprehensive Regulations, namely Regulations No. 1 [11] dealing with nomenclature of diseases and death causes, including the gathering and publication of statistical data, adopted August 24, 1948 (UN Treaty Series, vol. 66, p. 25) and Regulations No. 2 [12] dealing with quarantine and other measures aiming at preventing the dissemination of diseases, adopted on May 25, 1951 (UN Treaty Series, vol. 175, p. 215).

These two Regulations have been universally recognized in theory of international law and in practice as one of the most important sources of international sanitary law. They superseded a dozen or so earlier conventions introducing order in a complex and obscure legal situation on the international arena. They went into force in lieu of former multilateral treaties.[13]

These Regulations came into being by way of a resolution of the

[11] The Nomenclature Regulations in 1948, Supplementary Regulations in 1949.

[12] The International Sanitary Regulations in 1951. They were later amended and supplemented many times.

[13] See K. SKUBISZEWSKI, *op. cit.*, p. 74.

plenary organ of the World Health Organization whose adoption required a simple majority vote.[14] In practice they are binding all member-states on the basis of their simple adoption without the requirement that they be recognized in whatever form by member-states or formally ratified by them, with one important reservation, however. Article 22 of the WHO Constitution states that :

"Regulations adopted pursuant to Article 21 shall come into force for all Members after due notice has been given of their adoption by the Health Assembly except for such Members as may notify the Director General of rejection or reservation within the period stated in the notice."

These Regulations have therefore no binding force in relation to such member-states of the Organization who reject them in whole or in part and make their intention known in the appropriate form and in the appropriate time. Thus, the system of contracting-out applied in modern international law finds here its place.

The activity of the World Health Organization described above is being considered by scholars, despite the reservations contained in Article 22, as a law-making activity.[15]

A similar authority is vested in the World Meteorological Congress representing the plenary organ of the World Meteorological Organization.[16] Somewhat different is the law-making authority of the International Civil Aviation Organization (ICAO). Article 90 (together with Article 54/1) of the ICAO Convention authorizes the ICAO Council, which is an organ with limited membership, to adopt, by a vote of two-thirds of the Council "International Standards and Recommended Practices" in the form of annexes to the Convention which are part of the constitutional law of ICAO.

The adopted text of such "standards" and "practices" contained in the appropriate annex to the Convention is submitted to all member-states and becomes effective within theree months after submission or at the end of a period fixed by the Council. It enters into force unless the majority of member-states register their disapproval with the

[14] Art. 60, para. b of the Constitution.

[15] See for example *Kurs meždunarodnogo prava*, vol. 1, pp. 189 - 190 ; K. SKUBISZEWSKI, *op. cit.*, pp. 74 - 78 ; W. MORAWIECKI, *Funkcje organizacji międzynarodowych [Functions of International Organizations]*, Warszawa 1971, pp. 189 - 191 ; E. YEMIN, *Legislative Powers in the United Nations and Specialized Agencies*, Leyden 1969, p. 179 ; D. W. BOWETT, *The Law of International Organizations*, London 1963 ; I. DETTER, *Law-Making by International Organizations*, Stockholm 1965, p. 140 ; Ch. M. ALEXANDROWICZ, *The Law-Making Functions of the Specialized Agencies of the United Nations*, Sydney 1973, pp. 40 - 47.

[16] See for example K. SKUBISZEWSKI, *op. cit.*, pp. 78 - 83.

Council before the end of the theree months period or before the expiration of the period fixed by the Council. (Art. 90, para. a, b).

A lack of dissent can, thus, be considered in this case as a tacit approval of the member-states of the entry into force of the annex to the Convention adopted by the Council.[17] However, it has to be remembered that the ICAO Council is an organ of limited membership. Consequently, only a tiny part of the Organization's member can take part directly in the law-making process. In any case, pursuant to Article 90 of the ICAO Convention, the annulment of a binding decision adopted by the Council requires express disapproval of at least half of the members of the Organization manifested prior to the expiration of a prescribed period. Such a legal construction cannot be identified with the tacit approval of all parties engaged in the conclusion of an international treaty. In the case of ICAO the dissenting voice of 50 per cent of all member-states is sufficient to bring about the annulation of a Council decision. *Vice versa*, dissent will remain without effect if expressed by less than half of the Organization's membership. Such a solution seems to be far removed from the principle of active or passive unanimity and differs totally from the acceptance of obligations in the form of treaty norms.

Apart from the right to voice their disapproval with regard to the entry into force of the whole annex, individual members of the ICAO can, within a period specified in the Convention or fixed by the Council, register their dissent with regard to the acceptance as binding to themselves of certain provisions of the annex or even of the entire annex (Art. 38 of the Convention). Thus, apart from the possibility to voice disapproval towards the entire decision of the Council, a member-state has also the option to contract-out. The difference being that whereas a disapproval registered by the majority of the member-states of the Organization prevents the entry into force of the annex, individual reservations or dissents have only such effects that the annex is not binding with regard to those states which submitted them.

Article 37 of the ICAO Convention mentions in eleven point and only *exempli gratia* the problems which the Council is authorized to regulate in the form of annexes to the Convention. Generally speaking, they cover all problems concerning safety, regularity and efficiency of air navigation. The Council exercises a broad law-making authority in all technical matters concerning international air navigation. So far, it has adopted already more than a dozen of such annexes.

The practice of the ICAO member-states demonstrates that there was

[17] *Ibid.*, p. 67 - 68.

no single case of rejection of an annex adopted by the Council following a disapproval of the majority. Reservations registered by individual states with regard to specific provisions were exceptional and did not concern fundamental problems. [18]

The question which arises now is whether the possibility to register effective dissent with regard to the entry into force of a law-making decision by a majority of the Organization's member-states and the system of contracting-out does not reduce their sense to a contractual obligation characteristic of an international treaty. True enough, there are such opinions, [19] but one can hardly agree with them. For, there is a basic difference between a treaty system and a system based on adopted resolutions. In a treaty system a state accepts obligations because it concludes a treaty or acceeds to it (contracting-in), thereby taking part as subject in the international law-making process. On the other hand, in the system of adopted law, the law is passed by another subject, an organization, while the member-states can only, thanks to a special procedure, refuse to be bound by its provisions.[20]

Thus, the adoption of Regulations by the Health Assembly as well as the adoption of annexes to the ICAO Convention are considered by scholars and practice as an expression of law-making activity of international organizations.[21]

Generally speaking, it can be said that the above quated examples prove that: (1) at least some international organizations are vested, in a limited field, with the authority to create legal norms binding directly their member-states; (2) such authority is contained in specific provisions of their constitutional acts; (3) new legal norms are created in way of resolutions adopted by a simple or qualified majority of votes cast by the plenary organ or an organ with limited membership; (4) individual member-states enjoy the right to contract out; (5) in the ICAO the dissent of the majority of member-states results in the annulation of the law-making decision.

In the light of all these considerations we may now explain the character of that new source of international law and its relations to the two traditional sources, the treaty and the custom:

1. First, it must be emphasized once again very strongly that a decision by an international organization creating a new norm of international law is not covered by, the traditional concept of sources of international

[18] *Ibid.*, pp. 69 - 70.

[19] See, for example, E. I. TUNKIN, *Zagadnienia teorii prawa międzynarodowego [Problems of Theory of International Law]*, Warszawa 1964, p. 165.

[20] K. SKUBISZEWSKI, *op. cit.*, pp. 69 - 70.

[21] *Ibid.*, pp. 63 - 72; W. MORAWIECKI, *Funkcje...* [*Functions...*], pp. 184 - 189.

law.[22] On the other hand, the accepted criterion of division of formal sources into treaty law and customary law allows to apply it in order to distinguish adopted law as deriving from a distinct formal source, which is a resolution adopted by an organization ; — the criteria being : a) the process of creation of a legal norm and b) its final form. We must therefore consider :

— state negotiations, manifestation of the explicit will of all states in the form of a treaty, the treaty as a source of law;

— state practice, followed by the recognition of it by states in the form of presumed acceptance as constituting a norm of international law, the custom (practice) becoming the source of law ;

— drafting of new norms of law by international organizations, followed by the adoption of a resolution by the appropriate organ by the prescribed majority, the resolution being a formal source of law.

In a treaty and in the case of customary law we are facing a direct expression of the will of a state (explicit or presumed) to accept new legal norms. On the other hand, a resolution is based on voting, i.e. on the declared will by individual states members of a given organ, but in the last resort the will of the majority of those voting represents the will of the organization as a whole which is a distinct subject of international law, separate from its member-states.

2. The process of creation of treaty law or customary law involves the cooperation of at least two subjects. On the other hand, a resolution represents the expression of will and the result of action taken by one subject of international law — the international organization (multilateral or bilateral and now unilateral legislative action).

3. The subjective scope of validity :

a) In principle, treaty and customary norms are binding only such states which have accepted them in an explicit or presumed manner. On the other band, adopted norms obligate, as a rule, all member-states of an organization irrespective of the individual stand they had taken when casting their vote. It is the will of the organization which is of decisive importance, even in case of a decision taken by an organ with limited membership.

b) As distinct from treaty and customary law, the subjective scope of validity of an adopted law is sometimes made dependent on the matter which it is intended to regulate:

(i) As far as functioning and structure are concerned, the so-called internal law of international organizations is binding directly all

[22] In Polish literature this was emphasized, in particular, by. K. SKUBISZEWSKI, *op. cit.*, pp. 144 - 150.

states and there is practically no way of escaping its validity. The procedure does not provide for the possibility of registering dissent or reservations or the possibility to contract-out. However, strictly speaking such legal norms are not addressed directly to states as such. They concern organs of an organizations and, of course, states, but in the latter case only indirectly, in so far as these states are members of the organs concerned or of the organization. Quite often however, norms of internal law of international organizations are also a source of various important rights and obligations of member-states ;

(ii) As far as other problems are concerned individual member-states can abrogate or modify the extent of validity of a specific decision with regard to themselves applying the principle of contracting-out. In some cases the majority of member-states can even voice its opposition and thereby prevent the entry into force of a decision in its entirety.

4. The control over the application and proper functioning of adopted law, as well as its interpretation or possible change belong to the subject which created it, i.e. to the international organization.

There is still another problem of a more general nature which merits attention. The question arises as to whether the emergence of a new source, distinct from the traditional sources of international law, does not affect the principle of state sovereignty.

First, it must be stated that nothing prevents states (without encroachment upon their sovereignty) from expressing their agreement with the creation of norms of international law in a way differing from the traditional treaty or custom.[23]. They are entitled to make their will known in various forms and various manners: this can include a direct and explicit expression of will, a direct tacit agreement, an indirect explicit agreement or an indirect tacit agreement. All this can result in the creation of treaty law, customary law and of other kinds of legal norms. Among those possible other kinds of rules of international law growing importance must be attached to the law adopted by international organizations.

Many scholars detect in the law-making activities of international organizations, if not yet a ready and complete, at least an incipient system of a *sui generis* supra-national legislation. However, such a view is not supported by actual practice, in any case by the practice of organizations with universal membership.

From the point of view of the problem of state sovereignty the con-

[23] In Soviet literature this has been stressed lately strongly by S. A. MALININ, *Pravotvorčeskaja dejatelnost' meždugosudarstvennyh organizacij i naučno-tehničeskaja revoljucija*, "Pravovodenie," 1977, No. 3, (Leningrad) p. 131.

ception of adopted law as a new source of international law can be compared to the conception of the international personality of international ororganizations. Thus for example, the recognition of the international personality of international organizations does not encroach upon the essence of state sovereignty; similarly, the endowment of international organizations with certain, expressly determined, law-making powers, is not by itself leading to the violation of the sovereignty of states as the sole and unique full-fledged subjects and creators of international law. An organization's decision as a source of international law is at least as distinct from the two basic sources of international law (treaty and custom) as the international personality of international organizations differs from the international personality of states.

In short, everything taking place in universal international organizations is in principle the expression of will of sovereign states, expressed directly or indirectly. Consequently:

a) The law-making authority of an organization must, with the exception relating to the creation of its internal law, be explicitly recognized in its charter or in another equivalent constitutional act. Its existence cannot be presumed.

b) Only a law-making act which is fully and without any shadow of doubt covered by the constitutional authority of the organization can claim validity. Consequently, an act inconsistent with the constitutional provisions or with the procedural rules of the organization will not be valid.

c) Member-states can, if they wish to do so, register their reservations with regard to the entry into force of a decision already adopted as far as its application towards all of them is concerned (for example, as in the case of the ICAO, when opposed by a specified majority of member-states). Furthemore, by registering individual dissenting voices or reservations they can contract-out from the whole or part of such a decision.

d) Member-states confer themselves in a treaty form to certain organizations specific law-making powers, specifying strictly their nature, character and scope. So far these cover only the right to create legal norms of a rather technical and procedural nature. States are also entitled to withdraw or change these prerogatives at any time.

e) Finally, a state can withdraw from an organization if it concludes that the activities of the organization are incompatible with its sovereignty.

The concept of adopted law must therefore be linked with all features which sets it apart from the two basic sources of international law. A resolution can be an autonomous source of international law, but not in

the same sense as a treaty or custom, which are the direct result of the activity of states as subjects of international law. For the international organization is totally dependent on the will of its members which are sovereign states.

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The Functions and Legal Status of Organs Representing State in Its Relations with International Organizations

by MIECZYSŁAW PASZKOWSKI

In multilateral international relations, just as in bilateral relations, state acts through the intermediary of its organs. Next to internal organs, which perform a variety of functions connected with state's membership in international organizations, there exist special organs empowered to act on state's behalf in international organizations and toward those organizations. These organs can be divided into three categories: 1) permanent missions at international organizations; 2) delegations appointed to attend sessions; 3) *ad hoc* missions called upon to act toward an organization or in its forum.

The **statute provisions** concerning the purposes of an organization, its structure and methods of operation, simultaneously define the legal status of states' representatives, and especially their situation with respect to the organization, the host state as well as to other states.

The United Nations Charter provides that the delegates of the member states are entitled to privileges and immunities indispensable for independent performance of their functions connected with the organization. This rule is contained in the broader context of the provisions concerning the legal status of the organization itself, its privileges and immunities and the privileges and immunities of its functionaries (Arts. 104 and 105 of the Charter). Analogous provisions can be found in the statutes of other international organizations. It is obvious, however, that a statute is not the right place to settle detailed questions relating to the tasks and legal status of state representatives. This end is served by other acts, and especially by special bi- and multilateral agreements. [1]

1 The regulations — internal and international — concerning the legal status of international organizations belonging to the United Nations system and of representatives of states performing their functions in connection with the activity of those organizations have been published by the UN Secretariat in the collection Legislative Texts and Treaty Provisions Concerning the Legal Status, Privileges and Immunities of International Organizations (ST/LEG/SER.B/11). In 1975 a new,

Permanent missions of states at international organizations — just like the organizations themselves — are a relatively new institution. In 1920, Poland, as one of the first countries, established its permanent mission at the League of Nations in Geneva. Poland's example was shortly followed by other states, and this led to a rapid extension of the practice of setting up permanent missions at the League of Nations. When the United Nations was founded, there was already no doubt that permanent missions could play an important part in the exercise of the rights and the fulfilment of the obligations resulting from states' membership in that organization. Today the number of permanent missions as well as their role and the character of their tasks indicate that the permanent mission is already a well-established institution. Permanent missions satisfy essential practical requirements arising in the process of states' cooperation within international organizations.

The activities of permanent missions are highly diversified. They are determined in large measure by the scope and character of the tasks of every organization, by its powers and methods of action. Enumeration of all possible activities would practically be an unfeasible task. Nevertheless, one can attempt to systemize those actions according to some general functions.

The principal functions of permanent missions have been set forth in Article 6 of the Vienna Convention on the Representation of States in Their Relations with International Organizations. They consist, *inter alia*, in :

a) ensuring the representation of the sending State to the Organization ;

b) maintaining liaison between the sending State and the Organization ;

c) negotiating with and within the Organization ;

d) ascertaining activities in the Organization and reporting thereon to the Government of the sending State ;

e) ensuring the participation of the sending State in the activities of the Organization ;

f) protecting the interests of the sending State in relation to the Organization ;

g) promoting the realization of the purposes and principles of the Organization by cooperating with and within the Organization.

Ensuring the representation of the sending state to the organization

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general Vienna Convention on the Representation of States in Their Relations with International Organizations was adopted under the UN auspices (Doc. A/Conf.67/16). The basis for adopting the Convention was a draft prepared by the International Law Commission.

has been listed in the first place by no coincidence. Regardless of the content of the function of representation as such, one can assume that a representative character is the basic feature permeating all functions of the permanent mission. Without this trait, the permanent mission would not have a title to carry out, in an official capacity, any actions toward the organization or in the organization on behalf of the sending State.

The **permanent representative** is a spokesman for his government toward or in the organization. He expresses the standpoint of the sending State on matters the Organization is concerned with. Permanent missions are used by states for conveying to international organizations various official documents, notifications, replies to questionnaires. They are the most frequent channel for submitting items to be included in the agenda of the sessions of various bodies. Permanent missions notify the organization of the composition of the delegations appointed to attend sessions. The organization does not have to check the authenticity or reliability of information coming from permanent missions. The very fact that its has been supplied by the permanent representative is evidence of its authenticity. Naturally, this applies to information conveyed to international organizations in an official capacity. Personal views expressed by members of permanent missions can also provide helpful suggestions. While speaking about actions falling under the notion of the function of representation, however, we mean all, actions of an official character.

The Vienna Convention lists as second a function which consists in maintaining liaison between the sending State and the Organization. Of course, some elements of this function overlap those of the function of representation. In this case, however, emphasis rests, not on the capacity in which the mission operates, but on one of the basic lines of activity of every mission.

Although the chief form of international organizations' activity are periodical sessions of their organs, it must be remembered that they are not the only form. The activity of international organizations possesses a continuous character. The periods between the sessions of the principal organs are filled with meetings of auxiliary bodies: committees, working groups. Added to this should be projects conducted on behalf of international organizations by individual experts. Finally, intensive work is going on practically all the time in the secretariats of organizations. Secretariats collect in advance the data necessary to draft programmes of actięity and budgest for definite periods of time. The take up actions indispensable for the implementation of previously adopted resolutions. The also coordinate preparatory work

for the sessions of various organs. Next to technical activities connected with the servicing of the session (translations, distribution of documents, preparation of the place of meetings), the secretariat usually draws up a provisional agenda (in accordance with respective provisions of the rules of procedure or the decisions of previous sessions). The secretariat very often initiates consultations on filling the posts during the session. Naturally, initiative on such matters may originate from other sources, e.g. one of the permanent missions. However, the results of such preliminary consultations always converge in the secretariat. Thanks to preliminary accords on the organization of the session, decisions on these questions during the session take less time, which makes it possible to proceed more promptly to discussion on the substantive items of the agenda.

The above description of the main lines of activities continuously pursued by international organizations demonstrates clearly enough the existence of objective premises justifying the need for maintaining constant liaison between those organizations and their member states. This function is performed precisely by permanent missions. Maintaining liaison between the sending State and the Organization is also indispensable for the smooth fulfilment by the permanent mission of its other functions, and particularly a function consisting in conducting negotiations with the organization and within the organization.

Conducting negotiations is a classical function of diplomacy. The 1961 Vienna Convention on Diplomatic Relations lists among the tasks of the diplomatic mission "conducting negotiations with the government of the receiving State." Negotiations may concern various problems of interest to two or more parties. They serve to clarify views, adjust standpoints, lay down rules and norms of conduct. Negotiations may lead to the adoption by the parties concerned of agreed solutions in the form of international agreements, joint declarations, etc. In other cases, they may be only a stage in the preparation and adoption of agreements. Failure of negotiations may prove that, at a given moment, the conditions are not yet ripe for the parties to reach understanding. It may also mean that one or all of the parties are seeking to delay the negotiations for various reasons, hoping that more auspicious conditions will arise in the future for settling the matters under negotiations. Statesmen, publicists and lawyers often stress that the very fact of conducting negotiations is a highly positive phenomenon. For there is no better way than negotiations for settling issues arising in international relations. Negotiations are also an indispensable, and perhaps the most important, element of the process of states' cooperation within international organizations.

Bilateral negotiations between states offer much more chances for singling out problems of common interest, which may be the subject of negotiations. In multilateral diplomacy, however, and especially in the forum of international organizations with general purposes, negotiations possess a much more complex character. The number of interested states is greater there, and various problems related to one another are involved. Revealing aims and working out acceptable solutions requires long talks and many meetings, both formal and informal. The manner of conducting negotiations and making decisions is subject to respective provisions in the statute of every organization and in the regulations of its individual organs.

The practice of multilateral diplomacy is often referred to as "consultations." It appears, however, that the authors of the Vienna Convention on the Representation of States in Their Relations with International Organizations were right to use the term "negotiations" in the provisions defining the functions of permanent representatives. This term has a definite meaning in diplomacy. The authors of the Convention did not intend to regulate informal consultations. For the value of such consultations, which is generally appreciated, consists, *inter alia*, in that they remain informal.

The Convention mentions **two categories of negotiations**: with the Organization and within the Organization. A typical example of the problems which are resolved by way of negotiations between the organization and one or more states are questions partaining to the organizations' legal status. These matters must be settled, above all, in the host state as well as in all states where the organization has its permanent offices, or where it intends to hold a session of one of its organs or convene an international conference.

In effect of the steady expansion of the so-called operational functions performed by international organizations, more and more problems have to be resolved by way of direct contacts between the organization and individual states. Operational functions consist in the assumption by the organization in the territories of various states, with respect to individual states or with the participation of states, of definite tasks, such as peace-keeping operations, implementation of technical assistance programmes, joint research projects, etc.

In case of problems of importance, the results of negotiations take on the form of an agreement between the organization and the state concerned. Minor issues are settled on a summary basis, orally or through exchange of correspondence.

Naturally, negotiations with international organizations may be conducted by delegations specially appointed for the purpose, and not

by permanent missions. They may also be held by the organization's envoys in the capitals of interested states. However, permanent misions are in a situation which enables them to play the leading role in such negotiations. Permanent representatives best know the conditions, rules of conduct and possibilities of individual organizations. Therefore, the governments of the sending states not only avail themselves of the information and advice provided by their permanent representatives, but also entrust them with the conducting of negotiations with the organization.

Negotiations between the organization and individual states never possess a purely bilateral character. For they are always held within the framework of broader cooperation. Thus they are also an element of multilateral diplomacy.

The other type of negotiations are negotiations conducted within the organization. If we were to apply a quantitative measure, it would turn out that negotations within the organization always take much more time and effort. These negotiations are contained in the main line of activity of every organization. Even projects which, in the final phase, require agreement between the organization and the state or states concerned, first must pass through the stage of negotiations within the organization. For general decisions on every matter (laying down of principles, granting of mandates to take up definite actions, defining of conditions of activity) are always made by the competent organs of respective organizations. Negotiations within the organization may encompass — depending on the stage and degree of advancement of various questions — problems which only are to be included in the agenda, problems already on the agenda of a given organ which are to be debated or already are being debated, and problems resulting from previously made decisions. It is easy to notice that the problems involved here determine the organization's *raison d'être*. The essential difference between those problems and matters which may be the subject of negotiations with the organization consists in that the matters negotiated within the organization cannot be the subject of negotiations between the organization as such and every state separately. The matters negotiated within the organization are of interest to all member states and the organization as a whole. In this case, the role of the organization consists in that it provides a forum for negotiations. The problems under negotiations are examined within the organization in accordance with the accepted rules and principles.

The concentration at the UN headquarters and the headquarters of other organizations of a large number of permanent representatives has substantially contributed toward enriching and **widening the forms of**

diplomatic activity. The International Law Commission as well as international-legal literature have often cited the opinion expressed in the Introduction to the Report of the UN Secretary General of the organization's activity, submitted to the General Assembly in 1959.[2] According to this opinion, the presence and activity of permanent representatives has contributed essentially new elements to diplomacy. Thanks to the existence of permanent missions, negotiations within international organizations have taken on the character of permanent negotiations. The negotiating process is no longer limited to the periods of sessions or formal meetings.

Almost every issue, before it comes under discussion in any of the organs, is preliminarily debated at informal meetings. The staff of permanent missions, thanks to their frequent contacts with the organizations' secretariat and with members of other missions, usually have the fullest information on current tendencies and the chances for success of various motions or proposals. The information and directions provided by the permanent representative are especially valuable for the delegates who come from their home countries solely to attend the session of a given organ. For such delegates do not have the possibilities to constantly follow the developments concerning individual issues and the evolution of the stances of various states. For these reasons, permanent representatives always play a very essential role in negotiations conducted within the organization. This role is not confined solely to presenting th standpoint of the sending State toward the Organization and within the Organization. Permanent missions are in a situation which enables them to obtain information, exchange views, adjust standpoints, solicit support. They can easily establish contacts with and obtain information on the postures of those states with which the Sending State does not maintain diplomatic relations.

To sum up the remarks on the function which consists in conducting negotiations with the Organization and within the Organization, it is worth stressing that, in accordance with Article 6 of the Vienna Convention, permanent missions have general powers to conduct such negotiations. Of course, these powers should be viewed in the context of other requirements and norms applicable to the methods and subject of negotiations. Participation in that part of negotiations which consists

[2] The Secretary General then expressed the following view: "The permanent representation at Headquarters of all Member nations, and the growing diplomatic contribution of permanent delegations autside the public meetings — often in close contact with the Secretariat — may well come to be regarded as the most important "common law" development which has taken place so far within the constitutional framework of the Charter. It is to be hoped that it will continue and increase in strength" (Doc. A/4132/Add.1).

in attending the debates of a given organ must proceed in keeping with the respective rules of that organ's internal regulations as well as established practices. When negotiations encompass actions connected with the conclusion of an agreement between the Sending State and the Organization, Article 12 of the Vienna Convention on the Representation of States in Their Relations with International Organizations must be taken into account. In accordance with this article, the head of permanent mission, by virtue of his functions and without having to produce full powers, is considered as representing his state for the purpose of adopting the text of a treaty between that state and the Organization. The head of permanent mission is not, however, considered by virtue of his functions as representing his state for the purpose of signing a treaty, or signing a treaty ad referendum, between that state and the Organization unless it appears from the practice of the Organization, or from other circumstances, that the intention of the parties was to dispense with full powers. As a rule, authorization is not required for concluding agreements in a simplified form, e.g. by exchanging notes. The provisions of the mentioned article concern solely agreements concluded between the organization and the sending state. As regards other agreements and other actions connected with the conclusion of agreements, the general norms of the law of treaties are applicable. It is worth noting here that Article 6 of the Vienna Convention on the Law of Treaties of 1969 contains a provision relative to cases of the adoption of the text of an agreement within an international organization. According to this provision, representatives accredited by states to an international conference or an international organization or one of its organs, are considered as representing their state for the purpose of adopting the text of a treaty in that conference, organization or organ.

Profound knowledge of the activity of an international organization is a perquisite of the right **definition of state's posture** on matters under discussion in the forum of that organization. Therefore, ascertaining the activity of international organizations and reporting thereon to the sending State is one of the basic tasks of every permanent representative. This is also a classical function of accredited diplomatic missions in bilateral relations between states. The Vienna Convention on Diplomatic Relations of 1961, among the factions of diplomatic missions, explicitly mentions ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the government of the sending State. In case of permanent missions at international organizations, this relates, of course, to the conditions prevailing in the organization, including all questions the organization

is concerned with as well as problems connected with the functioning of the organization. The wording of this task in the Vienna Convention on the Representation of States in Their Relations with International Organizations does not contain the reservation that ascertaining the activity of the organization should be effected by lawful means. In this case, such a reservation would be unnecessary. For the principal sources of information on the activity of every organization are, by their very nature, intended for the use of interested states. Naturally, there are also data which can be classified as secret or confidential (e.g. the course of a secret vote). However, such data do not, and cannot, have the decisive significance in examining substantive issues in the forum of international organizations. On substantive matters, every member-state should be provided with full access to information.

The **sources** wherefrom **information** on the activity of international organizations can be obtained are highly diversified : official documents, news coming from the secretariat, contacts with other representatives, news coming from the journalistic circles. All these sources are easily accessible though not all of them are equally reliable. To get a fuller picture, the information sent in by permanent missions must be supplemented in state capitals with information originating from other sources, and especially from other missions, bilateral consultations or meetings of intersted states. An accurate appraisal of the activity taking place in international organizations requires sound knowledge of the general aims and assumptions of one's own state. It is necessary to realize one's own interests as well as the motives other states are guided by. There is need for good knowledge of the problems international organizations are concerned with and of the methods of work applied by them. Only an appraisal carried out on the above principles guarantees its reliability and can be fruitfully utilized. Therefore, one can say without exaggeration that the most important thing is appraisal of the available information.

The information coming from permanent representatives serves, above all, to obtain a faithful picture of the activity of international organizations. Especially valuable is clarification of such elements of this picture as the posture of the organization as such, and especially of its secretariat, the motives and intentions of other states, the political, financial, economic, prestige or propaganda implications of a given project. For these elements are essential for defining state's attitude towards matters international organizations concern themselves with. Thus permanent missions have vast possibilities for contributing toward the right formulation of the policies of their states on those problems. Correct definition of one's own stance, good preparation for partici-

pation in the work of the organization, ability to make proper use of the results achieved, appropriate coordination of one's own policy with the policies of other states — these are the basic factors which determine the possibility for deriving more or less measurable benefits from membership in international organizations.

The above remarks show, as it seems, sufficiently clearly the significance of the function of the permanent mission, which consists in ascertaining the activity conducted in international organizations and reporting thereon to the sending State. This was the chief task of the first permanent missions. Also today, this task occupies a central place among the functions entrusted to permanent missions.

The next function of the permanent mission, listed in the Vienna Convention on the Representation of States in Their Relations with International Organizations, is to ensure the **participation of the sending state in the activity of the organization.** The member state takes part in the work of an international organization chiefly through the intermediary of delegations sent to the sessions of its various organs. The head of permanent mission and members of its diplomatic staff are, as a rule, included in such delegations. It should be borne in mind, however, that the question of participation in the sessions of individual organs is settled by the rule of procedure of those organs. The organization should be notified of the composition of a delegation separately. The very fact that a person is the permanent representative is not a sufficient title for participation in a session. Besides, it can be assumed that all the functions of the permanent mission boil down to ensuring the participation of the sending State in the organization's activity.

As regards the last two **functions of permanent missions** listed in the Vienna Covention, namely, protection of the interests of the sending State and development of cooperation within the framework of the organization, it is worth noting that concern for national interests is the primary task of every state organ. In this case, however, the interests of individual states are being realized within the broader context of multilateral cooperation. Every partner makes his own contribution to this cooperation. Each partner, irrespective of the differences in individual strivings and temporary goals, has the grounds to expect that the general resultant of these strivings and goals will be favourable. After all, this is the principal *raison d'être* of international organizations. Without a certain minimum of agreement between members states as to the aims and methods of activity of international organizations, cooperation within those organizations could not develop at all.

The Vienna Convention on the Representation of States in Their

Relations with International Organizations lists among the chief functions of permanent missions supporting the realization of the organization's purposes and principles through cooperation with the organization and within the organization. Cooperation with the organization and within the organization is a factor which binds various functions of permanent missions in a single whol. Subordination of all functions to this general aim is a logical consequence of the assumption by states of rights and obligations resulting from membership in international organizations.

Of course, the functions of permanent missions intertwine with the tasks of delegations attending the sessions of individual organs of international organizations.

The Vienna Convention on the Representation of States in Their Relations with International Organizations does not contain provisions defining the functions of delegations. A general list of such functions would not be useful in this case. For the functions of delegations are dependent on the functions of a given organ or the aims of the conference a delegation is attending. The very character of the delegation indicates that it is called upon to take part in a session or conference on behalf of the sending State. The sending State defines, with a varying degree of precision, the tasks of its delegation (instructions). The delegation acts within a definite general framework. In the fulfilment of its functions, it may avail itself of various means and possibilities available in multilateral diplomacy (speeches, proposals, voting). The most important right of the delegation is the possibility to present the standpoint of its state and participation in decision-making.

The **forms of representation of states** in their relations with international organizations, listed in the Vienna Convention of 1975 (permanent mission, permanent observer mission, delegation, observer delegation), do not exhaust all possibilities. For states may enter into contact with the organization not only through the intermediary of their permanent representative or delegation attending a session. When the nature of an issue requires this, state may send to the organization an *ad hoc* mission for the purpose of establishing contacts, presenting its standpoint or conducting negotiations. Such cases are not infrequent in practice.

This is the content of the main functions and tasks of the organs representing state in its relations with international organizations. The very fact that permanent missions and delegations are established by state and act on state's behalf permits to rightly determine the character of the tasks they fulfil. Analysis of the content of those tasks demonstrates that they are, in their essence, identical with the tasks of

diplomatic missions in general, and thus also the tasks of missions set up in bilateral relations between states. In both cases, an organ of the sending state is involved, called into being for the purpose of carrying out, on behalf of the sending State as a subject of public international law, definite tasks in the field of international relations.

The **similarity** between permanent missions of states at international organizations and diplomatic misions established in bilateral relations between states was perceived already long ago. In a memorandum worked out in 1958, the UN Secretariat's Legal Counsel pointed out that the functions performed by permanent missions at international organizations also possess a diplomatic character. Moreover, he said that permanent missions fulfil their functions in a manner similar to the methods applied by diplomatic missions. The procedure of setting up permanent missions and their internal organization is modelled after the procedure of establishment and the organization of diplomatic missions.[3] Scientific literature has so far focused its attention on the differences revealed by a comparison of these two forms of state's representation, i.e. the representation of states in their bilateral relations and the representation of states in their relations with international organizations. The authors of a recently published collective work on permanent missions emphasize that state's representation to an international organization is entirely different from the representation of a sovereign state to another sovereign state.[4] As regards functions, however, they state unhesitatingly that states' permanent representatives o international organizations are diplomatic representatives with general competence and that their missions could be compared to diplomatic missions established in relations between states.[5]

The above arguments and conclusions testify to the identity of the essence of state's representation irrespective of whether we have to do with representation to other states individually or representation in the forum of international organizations. To reveal such identity is in itself an extremely interesting task, especially from a theoretical point of view. In this case, however, drawing theoretically correct conclusions or generalizations is not the only thing that matters. Good knowledge of the essence of permanent missions and delegations, and especially of their functions and tasks, is indispensable for the proper presentation of further remarks on the status of those organs.

[3] See *Yearbook of the International Law Commission*, 1967, vol. 2, p. 165.

[4] M. VIRALLY, P. GERBET, J. SALMON, *Les missions permanentes auprès des organisations internationales*, Bruxelles 1971, vol. 1, p. 236.

[5] *Ibid.*, p. 267. See also B. GANYUSHKIN, Diplomatičeskoe pravo meždunarodnich organizatsiy, Moskva 1972, p. 62.

At this point, however, we must make the reservation that demonstrating the identity of the essence of the various forms of state's representation is not designed to conceal the differences existing between them.

Differences between state's permanent missions at international organizations and diplomatic missions set up in bilateral relations are perceivable in many aspects. Nonetheless, analysis of the functions of permanent missions permits to arrive at one more conclusion. As already emphasized, state's representation to an international organization is entirely different from state's representation to other states.[6] One should never forget about the difference between state and an international organization. Sovereign states are original subjects of international law, while international organizations possess a derivative character. International organizations are a form of cooperation of states and are established of their own will. True, the International Court of Justice, in an advisory opinion of April 11, 1949, concerning compensation for losses sustained in the UN service, reached the conclusion that the UN performs functions and enjoys rights which can be explained solely on the basis of its having the character of an entity under international law.[7] The Court said, however, that this conclusion does not mean that the UN is a state, for it certainly is not, or that its legal status, rights and obligations are the same as the legal status, rights and obligations of state. Thus even recognition of international organizations as subject under international law does not mean placing them on equal footing with states. There is always a qualitative difference between state and an international organization. Failure to realize this difference would inevitably lead to erroneous conclusions. It should not be assumed in advance, however, that the differences between state and an international organization automatically entail dissimilarity of the very essence of state's representation to international organizations and its representation to other states. The differences between a permanent mission at an international organization and an embassy manifest themselves, above all, in the content of the functions performed by them and in the methods of operation. They result primarily from the dissimilarity of the environment in which these functions are fulfilled. The essence of state's representation in the field of relations regulated by international law is, however, always the same.

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[6] *Les missions permanentes..., op. cit.*

[7] *International Court of Justice. Reports of Judgements, Advisory Opinions and Orders 1949*, p. 174.

Permanent missions at international organizations and delegations belong to a category of state organs which discnarge their functions outside the home country. The special character of these organs justifies the need for ensuring to them adequate actual and legal conditions indispensable for independent implementation of their tasks.

The need for ensuring a privileged position to diplomatic missions has been substantiated in a variety of manners.

Chronologically speaking, the **concept of exterritoriality** was the earliest one. This conception corresponded, to a certain degree, to the reality at a time when the seats of diplomatic missions, along with the adjacent area, were considered as part of a foreign territory. This was the so-called right of quarter. Today the institution of the right of quarter is a thing of the past. If, in spite of this, the term "exterritoriality" still can be come across, it should be conceived as the whole of the norms pertaining to the special legal status of foreign diplomatic missions in the territory of the host state. In the light of the contemporary concepts and norms of international law, such a term is little adequate.

Meanwhile, two other concepts have retained topical importance, namely, the concept of representation and the functional concept.

The **concept of representation** assumes as its starting point the fact that state organs acting in the field of international relations regulated by international law, represent sovereign states. For this reason, they cannot be subjected to the laws and jurisdiction of the host state — the receiving state or the state of the seat — since this would contradict the principle of sovereign equality of states. Subjecting foreign missions to the law and jurisdiction of the host state would make them dependent on the will of that state. In such a situation, foreign misssions would not have the conditions indispensable for the proper fulfilment of their functions. Hence the necessity to surround foreign state representatives with special legal protection in order to make them feel secure and independent in their activity. The arguments in support of the concept of representation can be further enriched by citing the demands of international courtesy, or principles sometimes designated by the Latin term *comitas gentium*. Since the missions in question represent states, or sovereign entities under international law, other entities appearing in international relations should treat these missions according to appropriate forms and with due respect for the dignity of the sending State. These forms find their expression, *inter alia*, in the principles of the diplomatic protocol. Naturally, failure to comply with the forms of international courtesy does not mean infringement of the legal norms in force. Nonetheless, depending on the concrete situation, infringement of such forms may be considered as a serious transgression and may

entail definite consequences, such as similar measures applied toward representatives of the state which has committed a transgression.

The second of the mentioned conceptions — the functional concept — proceeds from the assumption that the necessity to ensure special legal protection to some categories of persons results from the fact that those persons have been entrusted with the fulfilment of definite functions in international relations. To enable those persons to discharge their functions independently, they have been granted the necessary privileges and immunities.

On the one hand, the functional theory has a slightly narrower scope than the theory of representation. Namely, it justifies the necessity of granting only such privileges and immunities which are indispensable for the performance of definite functions. On the other hand, however, this theory represents a somewhat wider point of view, since it aims at substantiating the privileged situation of various entities, and thus not only states and their representatives but also international organizations and their officials. The functional theory relates the granting of privileges and immunities and the scope and nature of these privileges and immunities to the character of the functions performed.

The functional concept has been used as the point of departure for laying down norms concerning the privileges and immunities of international organizations and their functionaries as well as experts carrying out definite projects on behalf of international organizations. In this case, the differentation of privileges and immunities is based on objective premises. One shortcoming of the functional concept is that it does not eliminate many of the difficulties that may arise in practice. Differences of opinion on whether or not a given privilege or immunity is indispensable for the proper fulfilment of a definite function, may arise, and actually arise, even when all parties concerned accept the functional theory. Hence, in defining privileges and immunities on the basis of the functional theory, the most important thing is to reach consensus as to the scope of the various privileges and immunities with respect to each category of individuals who are to enjoy them. The point is, however, that it is difficult to find objective criteria of division of state representatives into various categories. For this reason, the functional theory has proved to be of little use in the codification of the law determining the legal status of state representatives, including persons representing states in their relations with international organizations.

The **norms of diplomatic law** concerning permanent diplomatic missions (embassies, legations) have been codified in the afore-mentioned Vienna Convention on Diplomatic Relations of 1961. These norms have

been shaped in the course of centuries-old practice and tradition. They possess a uniform character. The size or importance of states maintaining diplomatic relations with each other today is of no consequence for the status of their diplomatic missions. The uniform character of those norms is doubtless an expression of the principle of sovereign equality of states.

In the codification of other branches of diplomatic law, and particularly norms concerning special missions in bilateral relations between states, the question arose where to seek analogies, what principles and models should be referred to, what general assumptions should be adopted in defining the status of state representatives in relations other than bilateral relations maintained through the intermediary of permanent diplomatic missions.[8] The International Law Commission considered various possibilities and hypotheses. It also examined, *inter alia*, the possibility to adopt the functional theory as the basis for determining the privileges and immunities of special missions. However, the functions performed by such missions are highly variegated, which impedes or wholly prevents the elaboration of uniform norms on this basis. Besides, it turned out that differentiation of the scope of privileges and immunities depending on weight of the functions performed, is practically unfeasible. For there exist no objective criteria which would make possible a uniform appraisal of the significance of various functions.

Similar questions arose in the International Law Commission during the work aimed at codifying norms governing states' representation in their relations with international organizations. This time, giving answers to the arising questions proved to be easier. The Commission had already accumulated experience resulting from its own work and from the previous conferences on the codification and progressive development of international law. Analysis of the essence of permanent missions of performed by them, led the Commission to conclude that similarities helpful in defining the status of those missions should be sought in the norms of traditional diplomatic law, expressed in the Vienna Convention on Diplomatic Relations of 1961.[9] This conclusion was confirmed by the already established practice. As regards **delegations attending sessions,** in view of their temporary character, the Commission sought models for settling their legal status primarily in the Convention on Special

[8] For more on this subject, see M. PASZKOWSKI, *The Law on Special Missions*, "Polish Yearbook of International Law," 1974.

[9] For the text, see UNTS, vol. 500, p. 95.

Missions.[10] In this case, too, the Commission proceeded from the assumption that delegations possess a representative character, i.e. act on behalf of sovereign states in the domain of relations governed by international law, which justifies granting to them, *mutatis mutandis*, diplomatic privileges and immunities.

It seems worth stressing that attempts at opposing the functional concept to the concept of representation with respect to states' permanent missions and delegations have no justification. For the range of their official activities includes no other functions than functions resulting from their character of organs representing state. Thus the ties between the character of an organ and its functions are indissoluble. The character of the functions stems from the representative character of the permanent mission or delegation. This makes possible right comprehension of the expression "privileges and immunities indispensable for the independent performance of functions."

The **granting of the diplomatic status** to permanent missions of states at international organizations and to delegations sent by states to attend sessions of those organization's organs obviously does not mean that absolutely all principles and norms of traditional diplomatic law are applicable in this case.

In the relations between states and international organizations, the principle of reciprocity does not apply. Appointment by state of members of its permanent mission or delegation does not require the consent of the organization. There is no room here for recognizing the head of mission or delegation as *persona non grata*. However, certain requirements as to the composition of permanent missions and delegations may be set forth in respective legal acts, and particularly in the statutes and regulations of individual organizations.

Permanent missions and delegations carry out their functions and tasks in connection with the organization's activity. Nonetheless, the very fact of their stay in the territory of the host state gives rise to many situations demanding appropriate solutions. Permanent missions and delegations as well as the organization and its functionaries enjoy a privileged position in the territory of the host state. Therefore, the host state assumes many significant obligations.

On the other hand, it should be remembered that privileges and immunities are not designed to benefit individual persons but to provide them with the indispensable conditions for the independent fulfilment of their functions as representatives of states. The accorded status

[10] The text of the Convention is to be found in the General Assembly resolution 2530 (XXIV).

must not be abused. Particularly, interference in the domestic matters of the host state is prohibited.

Thus the establishment of a permanent mission and the sending of a delegation produces a variety of relations between participants in mutilateral diplomacy, and especially in the triangle: the sending state — the organization — the host state. Consequently, various practical problems arise, and there exists the possibility of disputes.

During the work on the codification of the norms governing the representation of states in their relations with international organizations, the International Law Commission also examined measures which may be applied to settle disputes that may arise in the relations between one or more sending states and the host state. The Commission proposed two stages of procedure: 1) negotiations between the states directly concerned; 2) conciliatory procedure before a special body. The Commission proceeded from the assumption that these methods reflect the broadest possible scope of agreement attainable on this issue between governments and between the members of the Commission itself. The proposals of the Commission, with some amendments, have been retained in the final text of the Convention.

The **provisions** of the Vienna Convention on the Representation of States in Their Relations with International Organizations do not possess a binding force as yet. Besides, the Convention does not aim at replacing the existing agreements on these matters, nor does it exclude the possibility of concluding such agreements in the future. It can be supposed, however, that, in view of the Convention's character of a legal codification, its provisions will often serve as useful guidelines in solving many issues that may arise in practice. For this is a document which covers the whole of the problems connected with the representation of states in international organizations of a universal character, in the organs of those organizations and at international conferences convened by them. It introduces uniform principles and fills the gaps existing in this field.

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The Concept of Force in the United Nations Charter

by ANDRZEJ JACEWICZ

The fundamental characteristic feature of modern international law is the functioning of the **norm** prohibiting the use or threat of the use of force in international relations. This principle is the cornerstone of peaceful coexistence. Its respect is, in fact, a precondition of the existence of the present international legal order.

The **prohibition of the threat and use of force** is the result of the progressive development of the law of nations which took place after the October Revolution. Classical international law not only legalized war but recognized the right to wage war as an attribute of state sovereignty. Even the Covenant of the League of Nations signed in 1919 allowed, under certain circumstances, the legal resort to armed aggression.

The situation changed only with the signing in Paris in 1928 of the General Treaty for the Renunciation of War (the so-called Briand-Kellogg Pact) which stated in Article I :

"The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another."[1]

It may be noted, in passing, that the Briand-Kellogg Pact signed in the inter-war period by 63 states representing at that time almost the entire international community, provided later the main legal basis of the indictment and sentence in the Nuremberg and Tokyo trials as far as crimes against the peace were concerned.

The Charter of the United Nations signed in 1945 marked yet another step in the direction towards the prohibition of the use of force. Its Article 2/4 provides that :

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[1] "Dziennik Ustaw Rzeczypospolitej Polskiej" [Official Journal of the Polish Republic], 1920, item 200.

" All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

It has to be added that, while the above mentioned provision of the Charter refers to members of the United Nations the obligation to refrain from the threat or use of force applies not only to them. In corroboration of such interpretation one adduces most frequently Article 2/6 of the United Nations Charter,[2] which states that the Organization will ensure that states which are not members conduct their affairs in accord with the principles set forth in Article 2 "so far as may be necessary for the maintenance of international peace and security." Moreover, it is being pointed out that the principle obligating states to refrain from the threat or use of force was confirmed in a series of subsequent international treaties and declarations adhered to by both member-states and non-member-states of the United Nations. It seems that one can speak, at present, about the existence of a customary norm similar to that of Article 2/4 of the United Nations Charter, binding states which, for various reasons, remain outside the United Nations.[3] It is worth noting that the universal character of this principle is explicitly stressed in several important international documents. One may quote as an example the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations adopted in 1970 by the General Assembly of the United Nations, which dealing with the norm under discussion refers to "all states" adding that

"threat or use of force constitutes a violation of international law and the Charter of the United Nations (...)".[4]

The Vienna Convention on the Law of Treaties, i.e. a Convention worked out with the participation of non-member-states of the United Nations, uses the formula

[2] See, for example: H. KELSEN, *General International Law and the Law of the United Nations*, in: *The United Nations Ten Years' Progress. Collection of Essays*, The Hague 1956, p. 11 and ff.; D. W. BOWETT, *Self-Defence in International Law*, New York 1958, pp. 152 - 153; J. SYMONIDES, *Terytorium państwowe w świetle zasady efektywności* [*State Territory in the Light of the Principle of Effectiveness*], Toruń 1971, pp. 168 - 169; R. BIERZANEK, *Załatwianie sporów międzynarodowych 1945 - 1973. Studium prawno-polityczne* [*The Settlement of International Conflicts 1945 - 1973. A Study of Legal and Political Aspects*], Warszawa 1974, p. 38.

[3] Cf. J. SYMONIDES, *op. cit.*, p. 168; K. SKUBISZEWSKI, in: *Manual of Public International Law*, London-Melbourne-Toronto 1968, p. 745.

[4] *Zbiór dokumentów* [*Collection of Documents*], 1970, p. 1652.

"the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations."[5]

The United Nations Charter prohibits the recourse not to "war" but to the "threat or use of force." However, what has to be understood by "force?" Does the Charter of the United Nations apply the term "force" only in the meaning of armed force, aiming at avoiding ambiguities and controversies, arising, in the pasts, from the equivocal definition of war, or does the prohibition contained in Article 2/4 cover also non-military forms of force, such as for example economic or political pressure? It goes without saying that the contents given to the word "force" will determine the objective scope of the norm under review, which canthus be substantially narrowed or widened.

The Charter of the United Nations represents a multilateral international treaty and its interpretation must be governed by the principles set forth in the Vienna Convention on the Law of Treaties of 1969. The considerations which follow are based on the principles of interpretation contained in Articles 31 - 33 of this Convention. The general division into textual, practical and historical interpretation was applied. In view of the specific nature of the United Nations Charter which formulates, *expressis verbis*, the objectives of the treaty and contains a set of fundamental principles of international law, we made use, within the framework of the first interpretation, together with traditional methods of logical and literal interpretation also of teleological and systematic interpretation.

I. The Text of the United Nations Charter

When interpreting an international treaty it is accepted that the terms have been used in their usual sense. However a review of the dictionaries will reveal that in the authentic languages of the Charter of the United Nations the word "force" which can be defined broadly as steered power, is given a general meaning as well as a military and sometimes a larger physical one.[6] Accordingly, it seems that opinions

[5] The Vienna Convention on the Law of Treaties has been translated into Polish and edited with an introduction and notes by S. E. NAHLIK — *Konwencja wiedeńska o prawie umów międzynarodowych*, Warszawa 1971, p. 81.

[6] *Webster's Dictionary of Synonyms: A Dictionary of Discriminated Synonyms with Antonyms and Analogous and Contrasted Words*, Springfield 1951, p. 358; *Dictionnaire de la langue française*, vol. 3, Paris 1958, p. 1726; S. J. OŻEGOV, *Slovar' russkogo jazyka*, Moskva 1960, pp. 706 - 707; *Diccionario Enciclopedico Abreviado*, vol. 2, Madrid 1933, p. 225.

professed sometimes that the term "force" in its usual meaning is synonymous with military or physical force [7] or covers exclusively the concept of force in general [8] are totally unwarranted. As rightly pointed out by N. Bentwich and A. Martin — "unfortunately 'force' itself is a flexible term." [9]

A grammatical analysis of the terms of Article 2/4 of the Charter provides no basis to ascertain what kind of force the drafters of the Charter had in mind. The terms "against the territorial integrity or political independence" and "in any other manner inconsistent with the Purposes of the United Nations" are clearly subordinated to the terms "threat or use of force."[10]

For the purpose of **interpretation** it is necessary to take into consideration not only a specific provision of a treaty but also its text as a whole.

Among those favouring a broad definition of the concept of force many stress the fact, that the Charter using the term "force" in Article 2/4 applied in several other provisions the term "armed force" or similar formulae.[11] Attention is drawn at this occasion to the Pream-

[7] See statement by the delegate of Australia, UN Doc. A/AC.119/SR.17; in bibliography: D. W. BOWETT, *op. cit.*, p. 148; L. M. GOODRICH, E. HAMBRO, *Charter of the United Nations. Commentary and Documents*, 2nd ed., Boston 1949, p. 104; L. OPPENHEIM, *International Law. A Treatise*, 7th ed., vol. 2, 1963, p. 153.

[8] J. ŻOUREK, *La Charte des Nations Unies interdit-elle le recours à la force en général ou seulement à la force armée ?* in: *Mélanges offerts a Henri Rolin. Problèmes de droit des gens*, Paris 1964, p. 532; idem: *L'interdiction de l'emploi de la force en droit international*, Leiden-Genève 1974, p. 73; I. DIACONU, P. ILIESCU, D. NEGREA, V. PACURETU, *Renunciation to the Use and Threat of Force — A Fundamental Principle of International Law*, "Revue roumaine d'études internationales," 1973, No. 2–3, pp. 188, 191.

[9] N. BENTWICH, A. MARTIN, *A Commentary on the Charter of the United Nations*, London 1951, p. 13.

[10] Cf. R. HIGGINS, *The Legal Limits to the Use of Force by Sovereign States: United Nations Practice*, "BYBIL," 1961, p. 278; R. M. DERPA, *Das Gewaltverbot der Satzung der Vereinten Nationen und die Anwendung nichtmilitärischer Gewalt*, Bad Homburg 1970, p. 33.

[11] See statements by delegates of: Indonesia, UN Doc. A/C.6/SR.785; India, UN Doc. A/AC.119/SR.3; Nigeria, *ibid.*, SR.7; Burma, *ibid.*, SR.9; Lebanon. UN Doc. A/AC.125/SR.26; Czechoslovakia, *ibid.*; in bibliography: J. SYMONIDES, *Zasada powstrzymania się przez państwo w stosunkach międzynarodowych od uciekania się do groźby lub stosowania siły* [*The Principle of Refraining by a State in International Relations from the Resort to Threat or Use of Force*], „Zeszyty Naukowe Uniwersytetu Mikołaja Kopernika w Toruniu," 1969, No 37, p. 79; G. MENCER, *K zásadě nevměšování* [*On the Principle of Non-Interference*], "Studie z mezinárodniho práva," 1964, p. 5. M. POTOCNÝ, *Kodifikace zákazu siły w mezistátnich vztazich* [*Codification of the Prohibition of Force in Interstate Relations*], "Casopis pro mezinárodni právo," 1968, p. 302; M. POTOCNÝ, S. MYSLIL, *Legal*

ble to the Charter of the United Nations and to its Articles 41, 42, 43. 46, 47, 51 and, sometimes, to Article 44. It is suggested that, since the Charter distinguishes between "force" and "armed force," it has to be recognized that the founders of the United Nations admitted thereby a broader conceptual scope of the first term.

This apparently convincing explanation is, however, not entirely warranted. Excluding Article 51, which deals not with "armed force" but with "armed attack," thus reducing its effectiveness as an argument in this case, one should in this type of logical operation refuse to take into consideration also these terms which concern armed forces and not armed force. For example, four of the above mentioned articles, namely Articles 42, 43, 44 and 47 use such terms as : "air, sea, or land forces," "armed forces" or "forces." In other words, we are dealing with armed force in a very concrete sense. It does not seem that the abstract concept of armed force, understood as military might or potential would differ in substance from its concrete sense, identified with armed forces. Nonetheless, these concepts are not synonymous at all. Deduction *a contrario* with respect to the term "force" in Article 2/4 is therefore impossible. For, from the strictly theoretical point of view the latter can be tantamount to armed force understood in the abstract sense. Identical doubts with respect to the Preamble and Articles 41 and 46 of the United Nations Charter arise from the Russian text, which uses the term "armed forces."

Those in favour of a narrow interpretation of the term "force" in the Charter adduce in their argumentation the fact that this term appears not only in Article 2/4 but in Article 44 and, undoubtedly, in the meaning of armed force.[12] Article 44 states :

Principles of Peaceful Co-existence, Prague 1968, p. 104 ; K. OBRADOVIĆ, *Zabrana pretnje ili upotrebe sile, [The Probilition of the Threat or Use of Force]*, in : *Kodifikacija principa mirolubive i aktivne koegzistencije [Codification of the Principle of Peaceful and Active Co-existence]*, Beograd 1969, p. 72 ; G. HARASZTI, *Nekotorye zamečanija po povodu nedejstvitel'nosti meždunarodnogo dogovora* "Annales Universitatis Scientiarum Budapestinensis de Rolando Eötvös nominatae" Sectio Iuridica, 1974, p. 70 ; J. ŽOUREK, *La Charte...*, p. 518 ; idem ; L'interdiction..., p. 74 ; I. DIACONU, P. ILIESCU, D. NEGREA, V. PACURETU, *op. cit.*, p. 187.

[12] See statements by delegates of : Argentina, UN Doc. A/AC.119/SR.3, UN Doc. A/AC.125/SR.26 ; Australia, UN Doc. A/AC.119/SR.10 and 17 ; Venezuela, *ibid.*, SR.16 ; United Kingdom, UN Doc. A/AC.125/SR.25, UN Doc. A/AC.6/SR.930 and 1092, UN Doc. A/CONF.39/C.1/SR.50 ; United States, UN Doc. A/AC.125/SR.62 ; in bibliography : H. WEHBERG, *L'interdiction du recours à la force. Le principe et les problèmes qui se posent*, "RCADI", 1951, vol. I, p. 68 ; G. DAHM, *Das Verbot der Gewaltanwendung nach Art. 2/4 der UNO-Charta und die Selbsthilfe genenüber Völkerrechtverletzungen, die keinen bewaffneten Angriff enthalten*, "Jahrbuch für

"When the Security Council has decided to use force it shall, before calling upon a Member not represented on it to provide armed forces in fulfilment of the obligations assumed under Article 43, invite that Member, if the Member so desires, to participate in the decisions of the Security Council concerning the employment of contingents of that Member's armed forces."

It is being pointed out that the words "to use force" appear twice in the Charter: in Article 2/4 and in Article 44. And since in the latter they concern armed force there is no sufficient reason to attach to them a different meaning in Article 2/4.

Opinions differ as to whether it can be presumed that the application of the same terms in various parts of a treaty presupposed also that the same meaning was given to it. It is considered that the meaning "can, but may not be necessarily identical or analogus".[13] The fact that the term "force" was used in Article 44 can be interpreted in two ways; either that the founders of the United Nations identified "force" with "armed force," or that because of the context they thought it superfluous to stress the military nature of "force" which seemed obvious to them. For, both the context of Article 44 and the provision of Article 43, of which Article 44 is a follow-up, leave no doubts that what is meant is force in the military sense. In the light of such an interpretation it can be said that the word "force" was applied in Article 44 for reasons of drafting. J. Żourek writes: "[...] *le mot 'armée' a été omis dans le premier membre de phrase de l'article en question tout simplement pour éviter la répétition, l'expression 'forces armées' se trouvant utilisée dans le second membre de phrase encore deux fois.*" [14] In this connection one may quote the rule of deduction applied in the process of interpretation referred to by L. Ehrlich: "There is a presumption, which can, of course, be annulled if proved to be wrong, that each word must have such a meaning attached to at, that if omitted the meaning of the provision changes, no matter how slightly".[15] As far as Article 44 is concerned it seems that it would be of no importance whether we left the word "armed" or omitted it; the sense of the term "force" and of the Article in question would remain the same. The context of Article 2/4 is, however, different.

The second most frequently advanced argument in favour of a narrow

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Internationales Recht," 1962, p. 49; S. M. SCHWEBEL, *Aggression, Intervention and Self-Defence in Modern International Law*, "RCADI," 1972, vol. II, p. 449.

[13] L. EHRLICH, *Interpretacja traktatów* [*The Interpretation of Treaties*], Warszawa 1957, p. 154, See also G. HARASZTI, *Some Fundamental Problems of the Law of Treaties*, Budapest 1973, p. 108.

[14] J. ŻOUREK, *La Charte...*, p. 519.

[15] L. EHRLICH, *op. cit.*, p. 166.

intepretation of the word "force" in Article 2/4 based on the application of logical interpretation, is paragraph 7 of the Preamble to the Charter of the United Nations.[16] Since it is said there that "the Peoples of the United Nations" are determined "to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest," the principle of refraining from the threat or use of force by the member-states of the United Nations could be viewed as a logical outcome of the idea embodied in the Preamble. It is being pointed out that the authors of the Charter demonstrated thereby their intention to limit the concept of force in Article 2/4 to armed force.

Is this reasoning conclusively convincing? It seems that it would be essential to demontrate that the specific aims and principles set forth in the Preamble to the Charter have their corresponding aims and principles formulated in Chapter I of the Charter. However, even a summary **comparison** will reveal clearly that the provisions of the Preamble

"refer to objects which are regulated in a more-detailed or in a different way, or are not mentioned at all in other parts of the Charter."[17]

From the point of view of language and style the Preamble was drafted, in the first place, so as to find a way "to the hearts of men."[18] There can be no doubt that the supreme motive which led to the creation of the United Nations was the desire to prevent the outbreak of another war. With that in mind it was intended to endow the United Nations with the monopoly of the use of armed force. The emphasis placed on this idea in the Preamble to the Charter leaves no shadow of doubt as to the desire to draw particular attention to it. It can therefore be

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[16] See statements of delegates of: United States, UN Doc.A/C.6/SR.808, UN Doc.A/AC.119/SR.3; United Kingdom, UN Doc.A/AC.125/SR.25 and 102, UN Doc.A/CONF.39/C.1/SR.50; Argentina, UN Doc. A/AC.125/SR.26; in bibliography: L. OPPENHEIM, *op. cit.*, p. 153; G. DAHM, *op. cit.*, p. 49; H. WEHBERG, *op. cit.*, p. 68; A. von VERDROSS, *Idées directrices de l'Organisation des Nations Unies*, "RCADI," 1953, vol. II, p. 13; M. AKEHURST, *A Modern Introduction to International Law*, 2nd ed., London 1971, pp. 170-171; J. L. KUNZ, *Sanctions in International Law*, "AJIL," 1960, p. 332; J. L. BRIERLY, *The Law of Nations. An Introduction to the International Law of Peace*, 6th ed., Oxford 1963, p. 415; C. H. M. WALDOCK, *The Regulation of the Use of Force by Individual States in International Law*, "RCADI", 1952, vol. II, p. 492; M. SØRENSEN, *Principes de droit international public, ibid.*, 1960, vol. 3, p. 236.

[17] H. KELSEN, *The Law of the United Nations. A. Critical Analysis of Its Fundamental Problems*, London 1950, p. 10.

[18] *Documents of the United Nations Conference on International Organization, San Francisco, 1945*, London-New York 1945, vol. 6, p. 357.

stated that in the principle formulated in Article 2/4 it was intended, above all, to prohibit the threat or use of military force. On the other hand, the use of a different terminology in the Preamble and in Charter I of the Charter in conjunction with the non-exhaustive character of the postulates listed in the Preamble rises doubts as to whether the wording of paragraph 7 of the Preamble constitutes a convincing enough argument in favour of a narrow interpretation of the concept of force in Article 2/4.

In the discussion concerning the scope of the term "force" those in favour of both a narrow and wide interpretation of the term refer also to the wording of Article 41 of the Charter. This article reads as follows :

"The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."

In view of the fact that, as can be seen from the wording of Article 41, the Charter does not limit the measures left to the disposal of the Security Council to armed force alone, attempts are being made to use this as an argument in favour of a broad definition of the term "force" in Article 2/4 of the Charter. It is stated that

"the force which the Security Council could employ through the various 'measures' it was authorized to take could be either armed force or the economic and other measures provided for in Article 41. It seemed clear from that the Charter — and that included Article 2/4 — did not seek to make a sharp distinction between armed and other force."[19]

The reasoning just quoted does not seem very convincing. From the formal point of view the Charter of the United Nations is not defining the measures left at the disposal of the Security Council as "force."

The argumentation of those in favour of a narrow interpretation of the concept of force based on Article 41 is as follows :

"Article 41 cited among "measures not involving the use of armed force' such

[19] Statement by the delegate of the USSR, UN Doc. A/AC.119/SR.14 ; Cf. also statements by delegates of: Madagascar, UN Doc. A/AC.125/SR.19 ; Tanzania, UN Doc. A/C.6/SR.934 ; in bibliography : D. B. LEVIN, *Ponjatie sily po Ustavu OON*, "Sovetskoe gosudarstvo i pravo", 1968, No. pp. 70, 72 ; Ju. Ja. MIHEEV *Primenenie prinuditel'nych mer po ustavu OON*, Moskva 1967, p. 31 ; G. V. ŠARMAZANASVILI, *Princip nenapadenija w meždunarodnom prave*, Moskva 1958, pp. 38 - 39 ; I. DIACONU and others, *op. cit.*, p. 190.

measures as 'complete or partial interruption of economic relations.' Now, if such severe measures were classified as measures not involving the use of armed force, it was difficult to see how lesser methods of economic pressure could be categorized as violations of the prohibition on the threat or use of force"[20]

From this reasoning one can only conclude that such measures as, for example, severance of economic relations are not covered by the concept of the use of armed force. However nothing justifies the deduction that the term "force" in Article 2/4 cannot cover a broader meaning than armed force.

From the analyses following the path of logical interpretation it can be concluded that none of the above presented hypotheses is convincing enough to determine the meaning of the term "force" in Article 2/4 of the United Nations Charter in a sense favouring its narrow or broad interpretation.

Each treaty has a purpose for the attainment of which it was concluded. And this purpose must be taken into account in the process of interpretation. The **importance of teleological interpretation** is all the more greater in the case of the United Nations Charter which, as can be seen from its logical interpretation uses language which, from the point of view of terminology and drafting leaves much to be desired. It must be pointed out that though the reference to the aims of the Charter is common among those favouring a narrow interpretation of the term "force," [21] it is characteristic, in the first place, of the arguments of those adhering to the broad understanding of the term. It results from the wording of Article 2 of the Charter that the principles contained therein will be adhered to "in pursuit of the Purposes stated in Article 1." These included: the maintenance of international peace and security through the prevention or removal of threats to the peace, suppression of acts of aggression and other breaches of the peace, adjustment or settlement by peaceful means of international disputes or situations which might lead to a breach of the peace; development of friendly relations among nations based on respect of the principle of equal rights and self-determination of peoples and the application of other appropriate measures aimed at strengthening universal peace; achievement of international cooperation in solving international problems of an economic, social, cultural or humanitarian nature, promotion of human rights and fundamental freedoms for all; the establishment of the Organization as a centre of harmonizing the activities of nations in order to achieve the above mentioned common goals.

[20] Statement by the delegate of the United Kingdom, UN Doc. A/AC.119/SR.5; also statement by the delegate of France, *ibid.*, SR. 17.

[21] See statements by the delegates of: Argentina, *ibid.*, SR.3; France, *ibid.*, SR.6; Australia, *ibid.*, SR.17.

The principle of Article 2/4 represents a norm formulated in a negative way. Its application cannot, *per se*, ensure the development of friendly relations and cooperation among states. Of course, the violation of the principle prohibiting the threat or use of force excludes the possibility of implementation of these objectives of the United Nations. However, who could deny that by violating the prohibition contained in Article 2/4 one violated, in the first place international peace and security. The supposition that peace and security in the United Nations Charter were considered by its authors as an antithesis of the use or threat of force suggests a universally held conviction about the strict interdependence between Article 2/4 and the principle of peaceful settlement of disputes contained in Article 2/3. As pointed out by G. I. Tunkin, "these two principles represent two sides of the same coin. When prohibiting the use of force by states in their relations with other states and, consequently, the use of force for the settlement of disputes with other states, we leave open only peaceful ways of disputes settlement.[22] On the other hand, the principle of peaceful settlement of disputes means that it is prohibited to use force to settle them."[23] These views have been fully accepted by the doctrine of international law[24] and found their reflection in the official statements

[22] See statements by delegates of: Czechoslovakia, *ibid.*, SR.8; Burma, *ibid.*, SR 9, UN Doc. A/AC.6/SR.891; Ghana, UN Doc. A/AC.119/SR.10; Romania, *ibid.*, SR.16; Yugoslavia, *ibid.*, SR.21; Poland, UN Doc. A/AC.125/SR.23; Syria, *ibid.*, SR.24, UN Doc. A/C.6/SR.884 and 935; Greece, *ibid.*, SR.1181. In biliography: J. SYMONIDES, *Zasada...* [*The Principle...*], p. 80; J. ŽOUREK, *La Charte...*, pp. 519, 531; D. B. LEVIN, *op. cit.*, p. 69; M. POTOCNÝ, *op. cit.*, p. 303; M. POTOCNÝ, S. MYSLIL, *op. cit.*, pp. 99, 114, 115; I. DIACONU and others, *op. cit.*, p. 188; Ju. Ja. MIHEEV, *op. cit.*, p. 30; G. HARASZTI, *Nekotorye...*, p. 70; K. OBRADOVIĆ, *op. cit.*, p. 72; G. V. SARMAZANAŚVILI, *op. cit.*, pp. 40–41; V. KOPAL, *Povinnost vystříhat se hrozby silou a použití síly v mezinárodních vztazích* [*The Obligation to Refrain from the Threat or Use of Force in international Relations*], "Casopis pro mezinárodní právo," 1963, p. 196; T. KNOTHE, *Stosowanie środków przymusu w ramach systemów regionalnych w świetle Karty NZ* [*The Application of Coercive Measures within the Framework of Regional Systems in the Light of the United Nations Charter*], "Państwo i Prawo", 1971, No. 7, p. 123; V. KUZNECOV, *Meždunarodnaja bezopasnost' i neprimnenie sily*, "Meždunarodnaja žizn" 1976, No. 3, p.86.

[23] G. I. TUNKIN, *Zagadnienia teorii prawa międzynarodowego* [*Problems of Theory of International Law*], Warszawa 1964, p. 43.

[24] See, for example: N. BENTWICH, A. MARTIN, *op. cit.*, p. 13; M. POTOČNÝ, S. MYSLIL, *op. cit.*, p. 142; C. H. M. WALDOCK, *op. cit.*, p. 456; G. V. ŚARMAZANAŚVILI, *op. cit.*, p. 49; R. M. DERPA, *op. cit.*, p. 67; L. M. GOODRICH, E. HAMBRO, A. P. SIMONS, *Charter of the United Nations: Commentary and Documents*, 3rd and rev. ed., New York-London 1969, p. 41.

of representatives of many states.[25] They are also corroborated in the preparatory work which preceded the adoption of the final draft of the Charter.[26]

The question which arises now is whether the term "peace" used in the Charter as an antithesis of the use of force implies only the absence of armed force in international relations, or — as stated by B. Rychłowski and J. Symonides — it represents a "state of affairs in which there is neither hot or cold wars, i.e. a situation in which states refrain from using not only military might but also economic or political pressure, maintain normal relations, resolve their conflicts on the basis of legal norms and not by broadly conceived force."[27] Which of these two alternatives is in conformity with the Charter?

The Charter provides no definition of the term "peace." It seems however that it contains an indication as to how one ought to understand the identical term of "peaceful means." G. B. Zotiades writes : "[...] the obligation of the members listed in Article 2/3 'to cettle their international disputes by peaceful means" leave no doubt that the Charter prohibits force of and kind, physical or moral. This is further demonstrated by the fact that the 'peaceful means' for the adjustment or settlement of international disputes cannot certainly include the threat or use of non-physical force, since they are defined in Article 33 of the Charter to include 'negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangement, or other peaceful means of their own choice'." [28] And although this list of means of peaceful settlement of disputes is not exhaustive, it can be treated "as examples of what is meant by 'peaceful means'." [29] Were we to approach the enumeration by the authors of the Charter in such a way, it wouuld seem that it could, in fact, be recognized as an argument in favour of excluding the element of non military force from the concept of peaceful means of conflict solution. For none of the means listed in Article 33/1 has, in itself, an element of application of coercion.

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[25] See, for example, Reports of the Special Committee on Principles of International Law concerning Friendly Relations and Cooperation among States, UN Doc. A/5746, para. 139 and UN Doc.A/6230, para. 163.

[26] *Documents...*, pp. 399 and 458.

[27] B. RYCHŁOWSKI, J. SYMONIDES, *Bezpieczeństwo i współpraca europejska a koncepcja pokojowego współistnienia [European Security and Cooperation and the Concept of Peaceful Coexistence]*, "Sprawy Międzynarodowe", 1975, No. 9, p. 19.

[28] G. B. ZOTIADES, *Intervention by Treaty Right: Its Legality in Present Day International Law*, "Annuaire de l'Association des auditeurs et anciens audteurs de l'Académie de droit international de la Haye," 1964, p. 162.

[29] C. H. M. WALDOCK, *op. cit.*, p. 489.

The **concept of peace** can also be defined by way of eliminating situations which are its negation. It results from the wording of Article 1/1 that peace can be violated either by way of aggression or by other its breaches. And although the term "aggression" has its definition which narrows its meaning exclusively to the use of armed force,[30] this does not prejudge the issue of the scope of "other breaches of the peace." The intentions on this score of the authors of the United Nations Charter are clearly visible in the preparatory works. The report of F. Zeineddine, chairman of Sub-Committee I/1/A of the San Francisco Conference to Committee I/1 of the Conference concerning the draft of Article 1/1 of the Charter states : "A suggestion was made to consider 'other breaches of the peace' coming after 'aggression' as superfluous. But the subcommittee held that there may be breaches of the peace other than those qualified by present connotation as aggression and the subcommittee decided to keep 'other breaches of the peace' as an all-inclusive term which implies the use of any means of coercion or undue external influence, which through exertion or threat to security of a state, amounts to a breach of the peace."[31]

Apart from the above arguments it has to be stressed, last but not least, that only "peace and security" understood as the absence of the use or threat to use any form of force can serve as the real foundation for the implementation of the other objectives of the Charter such as the development of friendly relations and comprehensive cooperation among states. The latter would plainly justify such an interpretation of "peace and security" and its use as an argument in favour of a broader understanding of the term "force" in Article 2/4 of the United Nations Charter.

Besides teleological interpretation, accepted methods of interpreting treaty provisions include also their consideration in the light of other appropriate norms of international law. Such an interpretation, which can be described as systematic, is, in the case of the United Nations Charter part of the interpretation of its text. In 1945 the Charter codified and developed the main principles of international law. It must be presumed that its authors aimed at creating a system of principles constituting a coherent and logical whole.

Among the principles of international law formulated by the United Nations Charter attention must be drawn, besides the already mentioned principle of peaceful settlement of disputes, to two other paramount ones, and namely to the principle of sovereign equality of states and to the principle of equal rights and self-determination of peoples.

[30] Resolution 3314(XXIX), quotod below, p. 152.

[31] *Documents...*, p. 703.

In San Francisco the term "sovereign equality" was explained in the following way : "1) that states are juridically equal ; 2) that they enjoy the rights inherent in their full sovereignty ; 3) that the personality of the state is respected, as well as its territorial integrity and political independence ; 4) that the state should, under international order, comply faithfully with its international duties and obligations." [32] The same comment was, with only slight amendments repeated in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations of 1970. The sole complement is contained in the statement that "Each State has the right freely to choose and develop its political, social, economic and cultural systems."[33] Without entering into a detailed analysis of the above quoted components of the principle of sovereign equality, it has to be stated that their implementation can in no case be reconciled with the application in international relations of pressure of a military or any other kind.

A similar conclusion can be drawn from the analysis of the contents of the **principle of equal rights and self-determination of peoples.** For it is obvious that the acceptance of the principle 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"[34] is incompatible with the application towards them of pressure in any form whatsoever.

Considering the fact that the sole principle formulated in a negative way and concerning the conduct of states is in the United Nations Charter the prohibition to resort to the threat or the use of force, it seems that the term "force" in Article 2/4 ought to be interpreted as embracing both military and other means of pressure. A contrary assumption would lead us to the conclusion that there is a legal gap in the system of the Charter's principles. Of course, there are sometimes situations when a treaty offers no possibility to eliminate certain logical contradiction emerging between its particular provisions. A case in point was the Covenant of the League of Nations which, on the one hand, guaranteed in Article 10 the territorial integrity and political independence of the member-states against external aggression and, on the other hand, provided in certain cases for the legal resort to aggressive war. However, if in the case of the United Nations Charter

[32] *Ibid.*, pp. 717 - 718. Cf. also *ibid.*, pp. 398, 457, 230, 246.

[33] *Zbiór Dokumentów* [*Collection of Documents*], 1970, p. 1660.

[34] Resolution 1514(XV), *ibid.*, 1960, pp. 1894 - 1895. The quoted provision can be found in an identical or very similar wording in several subsequent resolutions of the General Assembly, e.g. in resolutions 2200(XXI), 2625(XXV).

a broad interpretation of an ambiguous term makes it possible to eliminate a virtual contradiction in the system of its norms, an opposite interpretation would represent an action contrary to the principle of good faith.

II. The Practice of Interpretation of the United Nations Charter

An element which in the process of **interpretation of an international treaty** must be taken into consideration in the same degree as the context is the actual interpretation by the parties, pursuant to the principle: *eius est interpretari, cuius est condere*. As far as the interpretation of the Charter is concerned the prove lies, in the first place, in the resolutions of the General Assembly. This results from the fact that in the General Assembly all member-states are represented. The interpretation as expressed in a resolution of the highest body of the Organization, adopted unanimously or with a few dissenting voices, represents the authentic interpretation of the Charter. It has to be pointed out that those supporting a narrow [35] as well as those favouring a broad definition of the term "force" [36] refer to concrete resolutions as proof of the acceptance by the United Nations of a specific understanding of this term. One mentions, on the one hand resolutions 376(V), 378(V) and 380(V) and, on the other hand, resolutions 290(IV), 380(V), 2131(XX), 2160(XXI), 2625(XXV), 2936(XXVII), 3171(XXVIII), 3314(XXIX) as well as the Declaration on the Prohibition of Military, Political, or Economic Coercion in the Conclusion of Treaties, adopted by the Vienna Conference of 1969.

[35] See statement by the delegate of the United States, UN Doc.A/C.6/SR.808, UN Doc. A/AC.119/SR.3; in bibliography: R. M. DERPA, *op. cit.*, p. 130.

[36] See statements by delegates of: Columbia, UN Doc. A/C.6/SR.929; Uruguay, *ibid.*, SR.932 and 997; India UN Doc. A/AC.125/SR.64 and 88; Poland, *ibid.*; Romania, *ibid.*, SR.66, UN Doc. A/C.6/SR.976, UN Doc. A/CONF.39/C.1/SR.50; Ghana, UN Doc. A/AC.125/SR.88; Mongolia, UN Doc. A/CONF.39/C.1/SR.49; Pakistan, *ibid.*, SR.51, UN Doc. A/C.6/SR.1179; the USSR, UN Doc. A/AC.125/SR.101; in bibliography: J. ŽOUREK, *L'interdiction...*, pp. 75, 76, 77; M. POTOČNÝ, *op. cit.*, p. 302; V. KUZNECOV, *op. cit.*, p. 87; D. B. LEVIN, *op. cit.*, p. 70; K. OBRADOVIĆ, *op. cit.*, p. 78; I. DIACONU and others, *op. cit.*, pp. 191, 192; T. KNOTHE op. cit., p. 124; J. SYMONIDES, *Zasada...* [*The Principle...*], pp. 77, 82; *idem*, *Terytorium państwowe...* [*State Territory...*], p. 94; Ju. Ja. MIHEEV, *op. cit.*, pp. 31, 32; A. GÓRBIEL, *Kodyfikacja zasad pokojowej koegzystencji* [*The Codification of the Principles of Peaceful Coexistence*], in: *Prace z Nauk Społecznych* [*Papers on Social Sciences*], 1975, p. 37; V. I. KUZNECOV, R. A. TUZMUHAMEDOV, N. A. UŠAKOV, *Ot Dekreta o Mire k deklaracii mira*, Moskva 1972, p. 22; L. NIKITIN, *O poniatii "sila" v sovremennom mezdunarodnom prave*, "Meždunarodnaja žizn'", 1971. No. 1,

However, a review of the resolutions listed above must lead to the conclusion that, in fact, neither of them resolves unequivocally the question of the scope of the term "force." There is no resolution which limits, beyond any shadow of doubt, the meaning of the concept of force to armed force. On the other hand, there is no resolution which recognizes, *expressis verbis*, the use of non-military pressure as the application of force. When condemning the use of various forms of coercion the resolutions are not implying that they are covered by the concept of the threat or use of force ; on the other hand, when applying the terminology of Article 2/4 of the United Nations Charter the resolutions fail to provide an unequivocal interpretation of the term "force."

Thus, for example, resolution 2160(XXI) — Strict Observance of the Prohibition of the Threat or Use of Force in International Relations, and of the Right of Peoples to Self-Determination [87] — states in paragraph 1/a the following :

"States shall strictly observe, in their international relations, the prohibition of the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations. Accordingly, armed attack by one State against another or the use of force in any other form contrary to the Charter of the United Nations constitutes a violation of international law giving rise to international responsibility."

This resolution is probably the most often adduced proof justifying the opinion that the General Assembly had definitely expressed itself as favouring a broad understanding of the word "force." It must, however, be pointed out that such a conclusion would have been warranted only if "armed attack" and "use of armed force" were to be considered as synonymous. In fact, one could visualize acts implying the use of armed force not covered by the concept of armed attack. Hence, it cannot be definitely excluded that the reference to the use of force in any other manner concerns the use of armed force in a way differing from that of armed attack.

The same absence of unequivocal position can be seen in resolution 2936(XXVII) — Non Use of Force in International Relations and Perma-

pp. 98, 99 ; S. MYSLIL, *Zakaz agrese a jiného použití síly a hrozby silou v posledních návzích států* [*The Prohibition of Aggression and Other Use of Force and of Threat of Force in Recent Proposals of States*], "Časopis pro mezinárodní právo", 1969, p. 170 ; J. J. PAUST, A. P. BLAUSTEIN, *The Arab Oil Weapon — A Threat to International Peace*, "AJIL," 1974, p. 417, 421 ; D. DONSKOJ, E. SKAKUNOV, *Opredelenie agressii — pobeda diplomatii mira*, "Sovetskoe gosudarstvo i pravo," 1976, No. 7, p. 14 ; V. I. MENŽINSKIJ, *Ustav OON i princip neprimenenija sily*, "Sovetskij ežegodnik meždunarodnogo prava," 1973, p. 90.

[87] Text : UN Doc. A/6316, p. 4.

nent Prohibition of the Use of Nuclear Weapons,[88] in the preamble of which the General Assembly states, among other things that

"noting with concern that the use of force in various forms is still occurring in violation of the Charter"

it states in paragraph 1 that it

"Solemnly declares, on behalf of the States Members of the Organization, their renunciation of the use or threat of force in all its forms and manifestations, in accordance with the Charter of the United Nations [...]."

And although this resolution is often quoted as proof of the acceptance by the United Nations of a broad definition of force, it has to be recalled that from the strictly theoretical point of view the term "force" may mean either force in general or armed force. Hence, one can hardly exclude the possibility than the wording "in all its forms and manifestations" concerns exclusively the threat or use of armed force.

The same applies also, for example, to resolution 3314(XXIX) — Definition of Aggression.[89] The definition contained in the annex to the resolution states in Article 1 :

"Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition."

This formula repeats almost literally the wording of Article 2/4 of the United Nations Charter. However it refers not to "force" but to "armed force." The resolution makes use simultaneously of the term "force." In paragraph 3 of the resolution the General Assembly

"calls upon all States to refrain from all acts of aggression and other uses of force contrary to the Charter of the United Nations and the Declaration of Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations ;"

in paragraph 5 of the preamble to the Definition it stresses that

"aggression is the most serious and dangerous form of the illegal use of force [...]."

Substituting the term "aggression" by the words "the use of armed force by a State" in accordance with the above quoted Article 1 of the Definition it could be a matter of conjecture whether the General Assembly, when calling upon all States to refrain from all acts of

[88] Text: *Zbiór Dokumentów* [*Collection of Documents*], 1972, p. 2045 ff.
[89] Text: *ibid.*, 1974, p. 1397 *ff.*

aggression (or the use of armed force), or when stressing that aggression (or the use of armed force) is the most serious and dangerous form of illegal use of force did not cover by the term "force" both armed force and non armed means of pressure. Otherwise, we would be led to the conclusion that use of armed force is a form of the use of armed force. On the other hand, such a reasoning could not be sustained if we consider Article 2 of the Definition of Aggression. Article 2 states that in spite of the use by a state of armed force

"the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justifien in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity."

In other words, not all acts involving the use of armed force are acts of aggression. From a theoretical point of view, the expression "use of force" in paragraph 3 of the above mentioned resolution or in paragraph 5 of the preamble to the Definition of Aggression could be narrowed down to acts of use of armed force other than aggression.

It seems that it would be advisable to make an attempt to find out what were actually the **opinions represented by the states,** as set forth in the records of the discussions which were held in the various organs of the United Nations on the definition of the term "force." This question was dealt with more or less substantially by the United Nations at various occasions, among others, in connection with the work on the definition of aggression ; in the 1960s it became a matter of direct and long term interest in connection with the codification of the principles international law concerning friendly relations and cooperation among states as well as with the codification of the law of treaties. The limited scope of this paper precludes a detailed presentation of that discussion. It must, however, be pointed out that out of 94 states, whose opinions on the maatter were presented in the United Nations, 79 or 85 per cent were in favour of a broad interpretation of the term "force". Obviously, if we had the opportunity to learn the opinions of all states these proportions could change, however, it is highly likely that the majority would be even greater.

It has to be pointed out that the conception of a broad interpretation of the term "force" is not new ; it was, in fact, represented on various occasions since the very inception of the United Nations. It may be noted that in the 1950s it was defended, among other states, also by Poland in connection with the work on the definition of aggression.[40] Latter, the increase in the number of its partisans was caused, on the

[40] UN Doc. A/AC.66/SR.7 and UN Doc. A/ C.6/SR.407.

one hand, by the massive influx in the UN over the 60 of new member-states liberated from colonial bondage[41] and, on the other hand, by the abandonment by several states of the narrow interpretation of the term "force." Excluding a few Latin American states[42] it can be said that those in favour of a narrow interpretation represent, at present, only a score of the most highly developed capitalist states. And they prevent an universal acceptance by the international community of a broad definition of force.

III. Preparatory Work Preceding the Adoption of the Charter

The study of the interpretation practice of the United Nations Charter by the member-states exhausts the lists of basic means which must be taken into consideration in the process of interpreting an international treaty. The Vienna Convention on the Law of Treaties permits the recourse to historical interpretation only in order to confirm the meaning which is deduced from the application of the basis means or when the interpretation relying on them gives rise to ambiguities or leads to unmistakenly absurd or irrational results. And though the teleological and systematic interpretation of the United Nations Charter would normally lead to the acceptance of a **broad definition of force**, such a definition could be accepted in a binding form only by all signatories without exception. As recalled above, a group of United Nations members makes it impossible to adopt such an interpretative resolution. The favoured argument of the partisans of a narrow interpretation of force

[41] This group numbering 47 countries did adopt as early as 1964 *expressis verbis* a broad meaning of the term "force" in the Programme of Peace and International Cooperation accepted at the II Conference of Heads of States and Governments of Non-Alligned Countries held in Cairo. See *Zbiór Dokumentów* [*Collection of Documents*], 1964, pp. 1499 and 1504.

[42] It seems that the reasons of their attitude on that matter differs clearly from the motives which prompt the developed capitalist states to persist in their narrow definition of force. While the latter make no special effort to conceal their reluctance to accept a prohibition of non-military pressure, for the Latin American states the acceptance of a broad definition of force is technically an inferior method of stressing its illegality. Such a conclusion seems warranted by the statement of the delegate of Mexico in 1964 in the Special Committee dealing with the codification of principles of peaceful coexistence in which he said the following : "In any case, the essential point was that some forms of economic and political pressure were illegal and prohibited acts. The problem confronting the Committee was purely technical: to determine whether such acts were forms of intervention or whether they should come under the prohibition in Article 2/4. That would make no difference, however, to the extent of their illegality," UN Doc. A/AC.119/SR.9.

is their reference to the preparatory work which preceded the adoption of the Charter.[43] They maintain that a broad interpretation of force contradicts the intention of the founders of the United Nations, as expressed by the San Francisco Conference. Since such proof is adminissible [44] it is worth while to examine whether it is, in fact, based on irrefutable evidence.

The **conference in San Francisco** accepted as a basis for discussion the draft of the Charter worked out by the four big powers during their closed meetings in Dumbarton Oaks in 1944. In Chapter II entitled "Principles" the draft included a paragraph 4 concerning the prohibition of the use of force which had the following wording:

"All members of the Organization shall refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the Organization."[45]

Prior to the start and during the United Nations Conference on International Organization which lasted from April 25 to June 26, 1945 a series of amendments related directly and indirectly to the principle of the non-application of force were presented. Their common feature in most cases was the tendency to eliminate legally and *expressis*

[43] See statements by delegates of: United Kindom, UN Doc. A/C.6/SR.805 and 1092, UN Doc. A/AC.119/SR.5 and 16, UN Doc. A/AC.125/SR.25, UN Doc. A/CONF.39/C.1/SR.50; United States, UN Doc. A/AC.6/SR.808, UN Doc. A/AC.119/ /SR.3, UN Doc. A/AC.125/SR.62 and 114; Argentina UN Doc. A/AC.119/SR.3, UN Doc. A/AC.125/SR.26 and 114; France, UN Doc. A/AC.119/SR.6, UN Doc. A/C.6/SR.1077; Mexico, UN Doc. A/AC.119/SR.9, UN Doc. A/C.6/SR.1095; Australia, UN Doc. A/AC.119/SR.17, UN Doc. A/AC.125/SR.24 and 66, UN Doc. A/CONF.39/ /C.1/SR.50; Japan, UN Doc. A/AC.125/SR.88, UN Doc. A/C.6/SR.1092, Taiwan, UN Doc. A/C.6/SR.875; Chile, Doc. A/CONF.39/C.1/SR.50, See also written proposal submitted by the United Kingdom, UN Doc. A/AC.119/L.8, Commentary. In bibliography: L. M. GOODRICH, E. HAMBRO, *op. cit.*, p. 104; H. WEHBERG, *op. cit.*, p. 68; D. B. BOWETT, *op. cit.*, p. 148; C. H. M. WALDOCK, *op. cit.*, p. 492; A. von VERDROSS, *op. cit.*, p. 13; J. L. KUNZ, *op. cit.*, p. 340; G. DAHM, *op. cit.*, p. 49; M. AKEHURST, *op. cit.*, p. 171; S. M. SCHWEBEL, op. cit., p. 449; M. SØRENSEN, *op. cit.*, p. 236.

[44] Those in favour of a broad definition of force reject often the possibility of using the preparatory work in the process of interpretation of the provisions of the United Nations Charter, stressing the fact that the majority of the present member-states of the Organization did not participate in the San Francisco Conference. See statements of delegates of: Pakistan, UN Doc. A/C.6/SR.816; Nigeria, UN Doc. A/AC.119/SR.7; Ghama, *ibid.*, SR.10; Romania. UN Doc. A/C.6/ /SR.887, UN Doc. A/AC.125/SR.66. However, the Vienna Convention on the Law of Treaties does not provide for such a limitation of the use of the preparatory works. See also remarks by POLLUX, *The Interpretation of the Charter*, "BYBIL," 1946, p. 72.

[45] *Documents...*, vol. 3, p. 3.

verbis from international relations broadly conceived coercion.[46] All were "read and rejected" by the Drafting Subcommittee I/1/A.[47] The states which presented these rejected amendments had the right to reintroduce them in Committee I/1. Only Brazil took advantage of this opportunity. The draft amendment offered in Committee by Brazil read as follows:

"All members of the Organization shall refrain in their international relations from the threat or use of force and from the threat or use of economic measures in any manner inconsistent with the purposes of the Organization."[48]

After discussion the Committee rejected the amendment by 26 votes to 2.[49] The record of the eleventh meeting of the Committee which discussed that problem treats the whole matter so briefly that it is difficult to ascertain what were the motives which led its members to adopt such a negative decision. It noted only the opinion of the Belgian delegate who "recalled that the subcommittee had given the point about 'economic measures' careful consideration and for good reasons decided against."[50]

On the basis of the rejection by Committee I/1 of the Brazilian amendment one draws the conclusion about the narrow meaning of the word "force" in Article 2/4 of the United Nations Charter. The typical reasoning runs as follows: "An express proposal had been made at San Francisco by the Brazilian delegation to add to Article 2/4 the words 'and the threat or use of economic measures'. The very fact that Brazil had felt obliged to suggest such an amendment indicated the sense in which the term 'force' was undestood. The fact that Brazil's amendment had been rejected was conclusive evidence of the intent of the drafters to limit the use of the word 'force' to armed force."[51]

This reasoning does not seem to be fully convincing. In itself, the rejection of the Brazilian amendment as well as the rejection of several other amendments provides no evidence of the intent to narrow the interpretation of the prohibition to use force. The practice of international conferences indicates clearly that quite often a failure to adopt

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[46] For a review of these proposals see A. JACEWICZ, *Znaczenie terminu "siła" w art. 2 pkt 4 Karty Narodów Zjednoczonych w świetle jej travaux préparatoires* [*The Meaning of the Term "Force" in Article 2/4 of the United Nations Charter in the Light of the Preparatory Works*], "Acta Universitatis Nicolai Copernici," 1975, No. 69, p. 106 ff.

[47] *Documents...*, vol. 6, p. 720.

[48] *Ibid.*, vol. 3, pp. 252 - 253.

[49] *Ibid.*, vol. 6, p. 335.

[50] *Ibid.*, p. 334.

[51] Statement by the delegate of the United States, UN Doc. A/AC.125/SR.62.

a specific proposal does not mean that one rejects the ideas contained therein.[52]

It has to be borne in mind that the rule of the Conference of San Francisco was to use rather general formulae. In his Report to Committee I/1 the Rapporteur of the Drafting Subcommittee stated the following:

"General terms do sometimes mean more than other terms, which though tending to be more ample and precise, lead in fact by further enumeration of things to leave unmentioned elements of the substance."[53]

The result of the voting on the Brazilian amendment is also quite meaningful. Whereas previously several delegations had manifested a desire to include in the Charter a prohibition of any means of coercion, only one delegation supported Brazil during the voting. It is therefore quite probable that the final general terms "threat or use of force" could have appeared to many states as more comprehensive than the Brazilian proposal, the adoption of which would have in fact not only narrowed *a contrario* the meaning of the word "force" to armed force but also narrowed the objective scope of the entire principle, excluding from it, for example, political pressure. This is all the more plausible that in some proposals submitted in San Francisco we encounter *expressis verbis* a broad understanding of the word "force."[54] One may also notice that in international practice of the inter-war period the term "force" appeared in its broader meaning. Thus, for example, Article 11 of the Convention on Rights and Duties of States signed by the American states in Montevideo in 1933 stated that:

"The contracting States definitely establish as the rule of their conduct the precise obligation not to recognize territorial acquisitions or special advantages which have been obtained by force whether this consists in the employment of arms, in threatening diplomatic representations, or in any other effective coercive measure."[55]

Attention is also drawn to the fact[56] that in spite of the rejection

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[52] Cf. statement by the delegate of Czechoslovakia, UN Doc. A/AC.119/SR.8; in bibliography: J. SYMONIDES, *Terytorium państwowe...* [*State Territory...*], p. 94; J. ŻOUREK, *La Charte...*, p. 520; I. DIACONU and others, *op. cit.*, pp. 190 – 191.

[53] *Documents...*, vol. 6, p. 700.

[54] See A. JACEWICZ, *op. cit.*, pp. 106 - 107.

[55] *Zbiór Dokumentów* [*Collection of Documents*], 1934, p. 251.

[56] See statement by the delegate of India, UN Doc. A/AC.119/SR.3; in bibliography: M. S. McDOUGAL, F. P. FELICIANO, *Legal Regulation of Resort to International coercion: Aggession and Self-Defence in Policy Perspective*, "Yale Law Journal," 1958 - 1959, p. 1060; R. HIGGINS, *op. cit.*, p. 278; T. KNOTHE *op. cit.*, p. 123.

in Committee I/1 of the Brazilian amendment there is a paragraph in the Report of F. Zeineddine, Rapporteur for Commission I in which one can read the following:

"The Committee wishes to state, [...] that the unilateral use of force or similar coercive measures is not authorized or admitted."[57]

R. M. Derpa points out that this sentence contains a *contradictio in adiecto*, for on the one hand the terms "similar coercive measures" are placed alongside the term "force" while on the other hand they seem to be covered by the all-embracing word "force."[58] Perhaps this is only an apparent contradiction arising principally from poor drafting. The quoted paragraph is but only a comment to the text of the principle prohibiting the threat or use of force and it cannot be excluded that the intention was to indicate that the term "force" must be interpreted in the Charter in its broader and not narrower sense. In spite of its ambiguity the quoted paragraph lends additional strength to the argument which questions the propriety of adducing the preparatory work as a basis for the rejection of the broad definition of force.

* * *

There are no legal obstacles preventing the acceptance of the broad definition of force in the United Nations Charter. However, in their practical dealings statesmen are led, above all, by political considerations. Undoubtedly, the developed capitalist states succeeded in keeping over many years the monopoly over the possibility to use effectively non-military preesure, in particular in their relations with the developing states. That explains why the postulate concerning the recognition of a broad definition of force as well as the attempts to outlaw under other headings the resort to non-military coercion were meeting with their downright refusal. The Arab oil embargo of a couple of years ago proved drastically that the resort to economic pressure is no more a privilege reserved exclusively for highly industrialized states. It is also quite significant that the arguments of bourgeois legal experts who questioned the legality of the use of the oil weapon referred to the broad definition of force in the United Nations Charter.[59] Are we to conclude that this will be followed by an evolution of the official stand of those states which were previously in favour of a narrow inter-

[57] *Documents...*, vol. 6, p. 400. Cf. also *ibid.*, p. 459.

[58] R. M. DERPA, *op. cit.*, p. 124.

[59] See J. J. PAUST, A. P. BLAUSTEIN, *op. cit.*, p. 417.

pretation of the concept of force? No definite answer can be offered to this question.[60]

At the XXXI session of the General Assembly of the United Nations the Soviet Union took the initiative in proposing the conclusion of a world-wide treaty on the non-use of force in international relations. Undoubtedly, the Soviet proposal which was greated with great interest and support will give rise to a renewed lively discussion on the subject of the concept of force. Perhaps it will then be possible to induce the opponents of a broad definition of force to, at least, partially change their mind. It behoves to guard on this subject a moderate optimism.

[60] In some scholarly studies the opinion is being expressed that a definition of force encompassing economic coercion had been accepted in the Final Act of the Conference on Security and Cooperation in Europe. See J. SYMONIDES, *Deklaracja zasad stosunków międzypaństwowych KBWE [Declaration of Principles of Interstate Relations of the CSCE]*, "Sprawy Międzynarodowe", 1975, No. 10, p. 31 ; V. KUZNECOV, *op. cit.*, p. 87.

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The Influence of the Nuremberg Judgement on the Practice of the Allied Courts in Germany

by ADAM BASAK

Introductory Remarks

There is hardly any need to dwell upon the importance of the judgement of the International Military Tribunal in Nuremberg. It suffices to recall that the underlaying legal principles of that judgement together with the provisions of the Charter of IMT constitutes the foundation upon which the principles of responsibility of individuals for crimes against international law were laid down [1] as well as the starting point of further work aimed at codifying international criminal law.[2] Theoretical as well as practical reasons explain why the legal theses of the judgement of the IMT arise still so much interest in science. All the more so as — according to A. Klafkowski, "from the point of view of the study of its influence on the gradual development and codification of international law much remains still to be done."[3]

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[1] In the form of so-called Nuremberg Principles elaborated by the International Law Commission upon recommendation of the UN General Assembly. Cf. papers by A. KLAFKOWSKI [*Zasady norymberskie a kodyfikacja prawa międzynarodowego — Nuremberg Principles and Codification of International Law*] and R. BIERZANEK [*Znaczenie wyroku Międzynarodowego Trybunału Wojskowego w Norymberdze dla rozwoju prawa międzynarodowego — The Importance of the Judgement of the International Military Tribunal in Nuremberg for the Development of International Law*] at the scientific session devoted to the 30th anniversary of the Judgement of the International Military Tribunal in Nuremberg, Warsaw, November 22, 1976. Main Commission for the Investigation of Nazi Crimes in Poland, mimeographed materials, Warszawa 1976.

[2] Cf. on this matter: *A Treaties on International Criminal Law*, vol. 1: *Crimes and Punishment*, comp. and ed. by Cherif Bassiouni (and) Ved P. Nanda, Springfield 1973.

[3] A. KLAFKOWSKI, *Ściganie zbrodniarzy wojennych w Niemieckiej Republice Federalnej w świetle prawa międzynarodowego* [*The Prosecution of War Criminals in the Federal Republic of Germany in the Light of International Law*], Poznań 1968, p. 70.

It seems that the same reasons militate in favour of paying much more attention to the practice of other tribunals which dealt with Nazi crimes. This applies to the tribunals which, pursuant to the Moscow Declaration [4] acted in various countries, as well as to tribunals set up by the occupation powers in Germany. We are inclined to adopt this view as we are convinced that the practice of these tribunals reflected the state of the world's legal consciousness in no lesser a degree than the Nuremberg Judgement. We share also the opinion, often expressed in literature, that each application of a law, especially of a law as new as the Nuremberg Law,[5] signifies at the same time its further development.[6]

However, so far research was concentrated almost exclusively on the Nuremberg Judgement,[7] while the practice of other tribunals met with much lesser interest.[8] Also, the very essential problem of

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[4] Declaration of the Ministers of Foreign Affairs of Three Powers of October 30, 1943. It stated the principle that Nazi criminals would "be sent back to the countries in which their abominable deeds were done in order that they (could) be judged and punished according to the laws of these liberated countries".

[5] The author understands the term "Nuremberg law" in a sense approaching the definition given in the *Encyklopedia prawa międzynarodowego i stosunków międzynarodowych* [*Encyclopedia of International Law and International Relations*], Warszawa 1976, entry "Norymberskie prawo" ["Nuremberg Law"], pp. 218 - 219, i.e. as a set of acts of international and internal laws enacted in order to bring to justice the nazi war criminals. (Cf. also the definition given by Professor Klafkowski — KLAFKOWSKI, *op. cit.*, pp. 61 - 62). Under basic acts of Nuremberg Law the author understands: 1) The London Agreement on the prosecution and punishment of the major war criminals of the European Axis of August 8, 1945 together with the annexed Charter of the International Military Tribunal and 2) The Law No. 10 of the Allied Control Council for Germany of December 20, 1945.

[6] K. WOLFKE, *Custom in Present International Law*, Wrocław 1964, pp. 71 - 72.

[7] "From the scientific point of view all legal aspects of the Nuremberg judgement have already been examined" — writes A. Klafkowski, who supposes that 'the number of works published on the subject "exceeded most probably many thousands". KLAFKOWSKI, *op. cit.*, pp. 69 - 70.

[8] In Poland the subject has been studied by: T. CYPRIAN and J. SAWICKI, *Nieznana Norymberga* [*Unknown Nuremberg*], Warszawa 1965, T. CYPRIAN, *Wehrmacht — zbrodnia i kara* [*Wehrmacht — Crime and Punishment*], Warszawa 1970. Cf. also A. BASAK, *Odpowiedzialność za deportacje i stosowanie pracy przymusowej w wyrokach trybunałów norymberskich, Studia nad faszyzmem i zbrodniami hitlerowskimi* [*Responsibility for Deportations and Application of Forced Labour in the Judgements of the Nuremberg Tribunals, A Study on Fascism and Nazi Crimes*], ed. K. Joncy, vol. 2, Wrocław 1975, pp. 217 - 254. Among works by foreign authors one mentions most often: *Die Rechtsprechung der Nürnberger Militartribunale. Sammlung der Rechtsthesen der Urteile und gesonderten Urteils begründungen der dreizehn Nürnberger Prozesse*, ed. by K. Heinze

the impact of the judgement of the IMT on the attitude of these tribunals was dealt with in legal literature rather incidentally, more from the point of view of the final result of the proceeding than in order to ascertain the degree in which the principles and opinions concerning the law in force, as formulated in the judgement of the IMT, had found their reflection in general practice.[9]

It seems that the study of this question may be of particular interest in the case of the tribunals set up by the Big Powers, signatories of the Charter of the IMT, considering that its principles, in the same way as the principles formulated in the judgement of the IMT, represented a synthesis of opinions corresponding to the very different legal systems and doctrines of those Powers. As is well konwn, the tribunals of the Big Powers varied considerably as to their organization, composition and also formal basis of judgements. For, in spite of Law No. 10 of the Allied Control Council passed, among other things, "in order to establish a uniform legal basis in Germany" for the prosecution and punishment of the Nazi war criminals,[10] the British tribunals were acting on these matters on the basis of a separate legal act.[11] Also they were not composed of professional jurists, contrary to the tribunals of the remaining powers.[12] In turn, the French tribunals had an international composition,[13] while the American and Soviet ones were

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and K. Schilling, Göttingen 1952 which contains selected passages from the verdicts. Cf. also J. A. APPLEMAN, *Military Tribunals and International Law*, Indianopolis 1954.

[9] T. CYPRIAN and J. SAWICKI have applied such a method — see above note No. 8.

[10] It admitted however (in Art. III, p. 2) the jurisdiction of already existing courts acting on the basis of internal law of various powers.

[11] The Royal Warrant dated 14th June 1945. *Law Reports of Trials of War Criminals. Selected and prepared by the United Nations War Crimes Commission*, vol. 1, London 1947, Annex I: *British Law Concerning Trials of War Criminals by Military Courts*, pp. 105 - 110 (later referred to as British Law).

[12] *Ibid.*, p. 106. Art. II point "b" of Ordinance No. 7 of the Military Government of the United States Zone of Germany provided that all members and alternatives of Military Government Courts must be lawyers of a standing specified in the text. Cf. *Law Reports...*, vol. 3, London 1948, Annex III: *United States Law and Practice Concerning Trials of War Criminals...*, p. 117 (later referred to as US Law). Professional lawyers were also part of Soviet tribunals. Cf. *Todeslager Sachsenhausen. Ein Dokumentarbericht vom Sachsenhausen-Prozess. Zusammengestellt vom...* Fritz Sigl, Berlin 1948 (referred to late as Sachsenhausen Prozess). In the case of the French tribunal whose activities are covered by this paper its president was, as a rule, a professional lawyer. Cf. *Law Reports...*, vol. 3, London 1948, Annex II: *French Law Concerning Trials of War Criminals...*, p. 94.

[13] Cf. for example the composition of the French tribunal in the Röchling case and other cases — Archives of the Main Commission for the Investigation

composed exclusively of USA and USSR nationals.[14] Each one followed its own rules of procedure and code.[15]

In this paper we tried to study the influence (1) of the factual determinations of the International Military Tribunal and, above all, (2) of the legal views of the Tribunal in such matters as: a) the foundations of jurisdiction and b) the interpretation of existing law, which aroused the biggest interest in the practice of the allied courts. The basic sources are to be found, in the first place, in the verdicts of the six American military tribunals which conducted in Nuremberg 12 famous trials from 1946 to 1949.[16] French practice is represented by several verdicts of the tribunal which sat in Rastatt,[17] and Soviet and British practice by single verdicts of military

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of Nazi Crimes in Poland, Tribunal Général du Gouvernement Militaire pour la Zone Française d'Occupation en Allemagne, verdict of the Court of Appeal, call number 30 (later referred to as Röchling) column. Cf. also a study by the American observer at the French tribunal in Rastatt, J. MARCU, Jr. *War Crimes Trials in the French Zone*, Part 1. *Historical Background of War Crimes Legislation in the French Zone, ibid.*, call number 37, (referred to later as J. Marcu) column 10.

[14] Cf. materials listed in notes 16 and 18. However, Art. II, point "c" of the Ordinance No. 7 admitted the possibility to set up in the American Zone a tribunal with an international composition.

[15] Pursuant to Art. III, point 2 of the Law No. 10 each Commander of an Occupation Zone had to fix the rules of procedure for the tribunals provided for by the Law.

[16] The full documentation of these trials is to be found in the archives of the Main Commission for the Investigation of Nazi Crimes in Poland under the call number ATW [Amerykańskie Trybunały Wojskowe — American Military Tribunals, I - XII] later as: ATW II, IV, X). Many verdicts have been published in print in German: *Fall 3. Das Urteil im Juristenprozess...*, Berlin 1969; *Fall 5. Anklageplädoyer, ausgewählte Dokumente, Urteil des Flick-Prozesses...*, Berlin 1965; *Fall 6. Ausgewählte Dokumente und Urteil des IG-Farben-Prozesses...*, Berlin 1970; *Fall 7. Das Urteil im Geiselmordprozess...*, Berlin 1965; *Fall 12. Das Urteil gegen das Oberkommando der Wehrmacht...*, Berlin 1961 (later as Fall 3, 5, 6, 7 and 12). Two verdicts (Medical case) and (*Eiensatzgruppen* case) have been published in Polish in the Bulletin of the Main Commission... The first in vol. 20 of 1970 and the second much earlier, in vol. 14 of 1963 (referred to later as Bulletin XX and Bulletin XIV).

[17] The appeal trial of the Saar industrialist Röchling and others, November 23, 1948 to January 25, 1949, Röchling, columns 1 - 10 and 1 - 46, and trials No. 53 (1947), 36, 45 (1948) against the staff of the concentration camps of Würtenberg, Leonberg and Porta — J. MARCU, Part 2: *"Examples od Judgements rendered under Law No. 10"*, J. MARCU, columns 54 - 112. See also trial against the staff of the concentration camps group of Natzweiler-Struthof — Archive of the Main Commission... — "Proces 50 zbrodniarzy hitlerowskich z obozu Natzweiler-Struthof — Trial Against 50 Nazi Criminals from the Natzweiler-Stuthof Camp", call number 45 (later referred to as Natzweiler-Stuthof).

tribunals sitting respectively in Berlin[18] and Hamburg.[19] It has to be pointed out that, as a rule, the verdicts of the American Tribunals are accompanied by an extensive legal motivation, while the ?erdicts of the French and Soviet tribunals are rather short in the expose of motifs.[20] In turn, the verdicts of the British tribunals contain no motivation at all and the reasons which led to the sentence or acquittal can only be deduced indirectly on the basis of the so-called "summing up" presented to the jury by the so-called Judge Advocate.[21]

1. The Factual Determinations of the International Military Tribunal

It has to be emphasized that the basic acts of Nuremberg Law put the IMT in certain respects in a privileged position vis-a-vis other tribunals. Thus, for example, Article 10 of the Charter stated that the verdict of the IMT will be binding for "national military or occupation courts" on matters concerning recognition of a group or organization as criminal with the effect that the criminal character of such group or organization "is considered proved and shall not be questioned." Accordingly, Control Council Law No. 10 included, apart from the three categories of crimes covered by the Charter of the IMT and defined in similar language, an additional one, namely: "Membership in categories of a criminal group or organization declared criminal by the International Military Tribunal."[22]

Ordinance No. 7 of the Military Government of the United States Zone of Germany concerning the organization and authority of some military tribunals went even further. In Article X of that Ordinance it was stated that

[18] The trial against the staff of the Sachsenhausen concentration camp before the military tribunal of the Group of the USSR Occupation Forces in Germany, October 23 — November 1, 1947, in Berlin. The verdict and other materials in: Sachsenhausen Prozess.

[19] The trial against M. Wielen and 17 others accused of the murder of 50 airmen escaped from the prisoners-of-war camp in Żagań before a British military tribunal in Hamburg (Curio-Haus), July 1 — September 3 1947. Archive of the Main Commission microfilmed documents call number M-543 and M-544 (later referred to as Żagań).

[20] For example: the judgement in the Medical case — 305 pages, in the *Einsatzgruppen* case — 187 pages, in the Krupp case — 256 pages, while in the Sachsenhausen case only 18 pages and in the Röchling case — 46 pages.

[21] "The duties of the Judge Advocate... consist mainly in advising the Court on matters of substantive and procedural law. He must also... sum up the evidence before the Court deliberates on its findings..." — British Law, p. 107.

[22] Quoted after US Law, p. 116.

"The determination of the International Military Tribunal [...] that invasions, aggressive acts, aggressive wars, crimes, atrocities or inhumane acts were planned or occurred"

will be binding for these tribunals and that the statements of the IMT

"constitute proof of the facts stated, in the absence of substantial new evidence to the contrary."[23]

The provisions of Article X were adduced and quoted many times in the verdicts of the American tribunals, as the factual determination of the IMT were often the motive of the reference to its judgement.[24] True enough, the American Tribunal No. 4 (Flick case), while not questioning the binding character of this provision, stated that it will not apply it to the detriment of the defendants.[25] However, as a rule, there were no such reservations and Tribunal No. 2 (*Einsatzgruppen* case) stated explicitly that the determinations of the IMT became *res iudicata* and can not be modified.[26] A similar stand was adopted by the French Court of Appeal (Röchling case) which stated that the determination in the judgement of the IMT that the wars waged by Germany were in their conception and conduct of a criminal nature could not be questioned.[27]

The Soviet nad British tribunals did not refer to the judgement of the IMT. It can however, be assumed that the stand of the Soviet jurisprudence found its reflection in the statements of the counsels for the defense, who were Soviet lawyers.[28] As a matter of fact, they often referred to the determinations of the IMT as constituting proof and stressed its high authority.[29] Also materials from the trial before the British tribunal prove that it accepted the arguments drawn from the decisions of the IMT.[30] One may add that these decisions were adduced on many occasions also by the American prosecutors office[31] as well as, in almost all examined trials, by the German counsels for the defense, who on the one hand referred to the high authority of

[23] *Ibid.*, pp. 118 - 119.

[24] Cf. ATW II, vol. 9, column 2525 and Fall 3, p. 114, Fall 6, p. 259, Fall 7, p. 108 and ATW X, vol. 58 column 13623.

[25] Fall 5, p. 316.

[26] Bulletin XIV, pp. 50 - 51 and 63.

[27] Röchling, column 6.

[28] In all examined cases the defence councels before the tribunals of the Western Powers were German.

[29] Sachsenhausen Prozess, pp. 142, 144 - 145, 159 and 194 - 195.

[30] See below p. 173.

[31] Cf. for example Fall 5, p. 26, 33, 35 ff.

the IMT,[32] while on the other hand sometimes were attempting to discredit its determinations.[33]

The factual determinations of the International Military Tribunal, often in the form very large quotations from its judgement,[34] occupied, as a rule, an important place in the majority of the courts under consideration.[35] These determinations were treated by them as sufficient proof of criminal practice in the policy of the Third Reich. Accordingly they served sometimes as a basis in the determination of individual guilt in a given case.[36] Most often they served as a point of departure of further more detailed investigations of the factual state, which confirmed and developed the determinations of the IMT.[37] This occurred especially when the indictment in a given case was based to a great extent on the same evidence as that introduced before the Nuremberg Tribunal and when the defendants, as stated by the American Tribunal No. 5 (High Command case) "were only one or two steps below Göring, Keitel, Jodl, Dönitz and Raeder."[38] As a result, especially the verdicts

[32] Cf. for example, the argument of Dr Servatius, the defence councel of K. Brandt in the Medical case. — ATW I, Ldn 21, column 3. Cf. also the exposition of Dr Adler, the defence councel of M. Wielen in the Żagań case .— Żagań, M-544, part XVI, column 35.

[33] For example the defence council of E. Milch, Dr F. Bergold. — ATW II, vol. 9, column 2394 - 2395. At the Krupp trial the defence argued for the non-application by the tribunal of the provision of Art. X of the Ordinance No. 7. — ATW X, vol. 56, column 1341.

[34] Cf. for example, extensive quotations in the judgement in the High Command case. — Fall 12, pp. 45, 63 - 67, 68 - 73.

[35] For example, Tribunal No. 2 (Pohl case) stated that it founded its verdict on the findings of the IMT. — ATW IV, Pp. 33, columns 7964. Cf. ATW II, vol. 9 columns 2521 - 2525 and Bulletin XIV, pp. 50 - 51 and 90 - 92. Tribunal No. 3 (Jurists case) stated: *"Diese Zitate aus dem IMT-Urteil werden genügen, um die Rechtswidrigkeit und Grausamkeit des ganzen NN-Planes oder Vorhabens aufzuzeigen"*. — Fall 3, p. 175; also pp. 196, 211 - 212. Cf. Fall 6, pp. 226, 259 - 261; ATW X, vol. 58 columns 13720 - 13721 and Fall 12, pp. 63 - 73, and also Röchling, columns 6 and 13 - 31 and the opinions of the Soviet defence councils - Sachsenhausen. Prozess, pp. 142 - 144 and others.

[36] For example, Tribunal No. 2 (Milch case), after quoting extensively from the judgement of the IMT, stated that what remained to be done is to ascertain whether the defendant knew that in the aviation industry under his command forced labour of foreign workers and prisoners-of-war was used. It further recognized the authenticity of a document questioned by the defence, indicating that the IMT qualified that document as "Correct and trustworthy". — ATW II, vol. 9 columns 2525 and 2534.

[37] Cf. for example, data concerning forced labour in the verdict of the Krupp case, going far beyond the findings of the IMT. — ATW X, vol. 58, columns 13719 - 13740.

[38] Fall 12, p. 45.

of the American tribunals, while remaining within the general framework of the factual determinations of the IMT, enlarged and complemented them considerably, thus contributing to the deepening of the vision of the criminal policies of the Hitler Reich.

In one case only (Medical case) did the American tribunal refuse to recognize the determinations of the Nuremberg judgement as sufficient proof.[39] Another tribunal (the Flick case) expressed the view that many theses of the IMT contained in the chapter: "Plundering of Public and Private Property" are not relevant in this case, although the content of the chapter was strictly related to the charges brought against the defendants. It added that the term "systematic plundering" used by the IMT is of no "great help" in the legal qualification of the charge.[40]

However, as a rule, the reference to the IMT was accompanied by the opinions stressing the weight attached by the courts to its determinations. The French tribunal defined the judgement of the IMT as *"la base jurisprudentielle en la matière."*[41] In the verdicts of the American tribunals one can encounter such expressions as "carefully and thoroughly considered verdict"[42] containing facts "scrupulously established"[43] or established "beyond any shadow of doubt" as well as statements to the effect that it is not possible to judge "against such irrefutable facts determined by the *highest authority*" (emph. — *A.B.*).[44] Taking also into account the statements of the Soviet councils for the defence, in which such words as "historical judgement," "fundamental theses of the Nuremberg judgement" or "first verdict of history"[45] can be found, it would appear that the conclusion that in the judicial practice of at least three Big Powers the factual determinations of the IMT judgement have been treated with the highest regard is fully justified.

2. The Legal Views of the International Military Tribunal

It seems that from the point of view of the problem studied in this paper it is much more interesting and even important to examine the

[39] Bulletin XX, p. 112.
[40] Fall 5, pp. 329 - 330.
[41] Röchling, column 6.
[42] Bulletin XIV, p. 51.
[43] ATW IV, Pp. 33, column 7962.
[44] Fall 6, pp. 226 and 261.
[45] Sachsenhausen Prozess, pp. 142, 144 and 194.

influence exercised on the practice of the tribunals set up by the Big Powers to prosecute Nazi war criminals by the legal views of the International Military Tribunal. It has to be pointed out that contrary to the factual determinations there was no provision in the fundamental international acts, which could make those views binding, at least with regard to some tribunals. True enough, the common legal basis, namely Charter, Law No. 10 and other sources of international law, upon which all tribunals under review are founding their verdicts,[46] dictated from the very outset a certain identity of views. This however, did not exclude the possibility of applying differing legal solutions, which could lead as a result to various practical decisions. All the more so, that the tribunals were faced with unprecedented tasks calling for initiatives in the determination of the existence of legal rules in a degree hitherto unparalleled in the penal practice of courts.

a) **The Foundations of Jurisdiction.** Jurisdictional questions seem to be a particularly good example to examine the influence of the legal views of the IMT on the practice of other tribunals. In all examined cases the tribunals recognized that they have a sufficient basis to pronounce a verdict. Sometimes this was taking the form of a simple reference to the Law No. 10.[47] More frequently the tribunals attempted to establish their jurisdiction on a broader platform, referring to other, earlier sources of international law, or even to some specific rules and principles, and developing also the appropriate theses of the Nuremberg Tribunal.[48] For, as stated by the American Tribunal No. 3 (Jurists case), although the Law No. 10 constituted a sufficient basis to pronounce a verdict, it would not be appropriate to apply it as the proper law mechanically.[49]

The same Tribunal No. 3 developed later in a detailed way the thesis of the IMT on the competence of the Big Powers to bring the Nazi war criminals to justice. It referred to the opinions of many authors representing the Anglo-Saxon legal doctrine which recognized explicitly

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[46] In the case of British Tribunals the legal basis was however narrower. It was limited to pass judgment on violations of the laws and usages of war, while the jurisdiction of the tribunals of other Powers included also crimes against peace and crimes against humanity. — British Law, p. 105.

[47] Cf. for example, Bulletin XX, p. 47, ATW II, vol. 9, column 2533, Sachsenhausen Prozess, pp. 200 and 214 - 215, Fall 5, p. 316; Natzweiler-Struthof, column 1

[48] Cf. Fall 3, pp. 114 - 124, Fall 6, pp. 218 - 226, Fall 7, pp. 81 - 89, Fall 12, pp. 36 - 48, Röchling, columns 1 - 6. Tribunal No. 2 (*Einsatzgruppen case*) repeated only in its argument the appropriate excerpt of the IMT considerations. — Bulletin XIV, p. 47.

[49] Fall 3, p. 118.

such competence and which, in its view, found also clearly its confirmation in the judgement of the IMT.[50] Later, Tribunal No. 3 referred to the "significant" theses of the IMT on the futility of conquest as long as there is an armed force struggling for the liberation of the occupied country and, refuting the allegation of the defence, it stated that after the unconditional surrender of Germany that country was not, in the legal sense, an occupied country and, therefore the rules of the Hague could not be applied to it so that nothing stood in the way of establishing the supreme authority of the Big Powers as well as of the prosecution by them of the Nazi war criminals.[51]

The question of jurisdiction occupied also an important place in the legal considerations of Tribunal No. 5 (High Command case). The tribunal quoted *in toto* the chapter "The Law of the Charter" from the judgement of the IMT and stressed as a self-evident fact the "big importance of the judgement, in any case, for the solution of the legal questions in the case submitted to us."[52] It formulated also the conclusion that the considerations of the IMT in the above mentioned chapter and, in particular, the thesis that the Charter was an expression of international law which was binding at the very moment of its adoption, apply also fully to the Law No. 10 which was qualified by it as complementing the Charter.[53] Furthermore, in order to substantiate the rightness of the IMT judgement in the point in question, the American Tribunal No. 5 referred to Grotius as well as to the case of the prosecution and condemnation at the end of the 15th century of a German knight for deeds corresponding to the concept of crimes against humanity, while conceding that these arguments are of academic value only.[54]

Also in the statements of other tribunals we find references and expressions of acceptance of this fundamental legal thesis of the International Military Tribunal. These statements do, however, reflect certain characteristic differences of view, which are not devoid of practical consequences. Thus, for example, Tribunal No. 2 (*Einsatzgruppen* case) arrived at the conclusion that the Law No. 10 confirmed its jurisdiction in this case because "not only is it in accord with the Law of Nations,

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[50] *Ibid.*, p. 116.

[51] *Ibid.*, pp. 116 - 117.

[52] Fall 12, p. 45.

[53] It may also be mentioned that other tribunals took a different view of the relation between the Charter and Law No. 10. For example Tribunal No. 3 (Jurists case) treated the Charter as integral part of the Law No. 10, pursuant to the provision of its Art. I. — Fall 3, p. 113.

[54] Fall 12, p. 44.

but constitutes an important contribution to written international law."[55] On the other hand, other verdicts of American tribunals stressed the rather exclusively declaratory character of the Law No. 10 ; Tribunal No. 4 (Flick case) expressed its view on the matter in an extreme form stating that the Law No. 10 was obligatory only in so far as it constituted the codification of an already existing law.[56] Tribunal No. 6 (IG-Farben case) formulated the same idea in a somewhat toned down manner, stating that the Law No. 10 could not serve as a basis to condemn people for acts which were not punishable under the law in force when the IMT judgement was passed. At the same time, it emphasized : "that well-considered judgment" was "basic and persuasive precedent as to all matters determined therein."[57]

This difference of view in the opinions of various courts was not in conflict with the general stand of the International Military Tribunal but reflected their attitude towards the principle of *nullum crimen sine lege*. The thesis of the IMT that this principle cannot restrict the sovereignty of states was accepted *expressis verbis* by the American Tribunal No. 3 (Jurists case) and by the French Court of Appeal (Röchling case).[58] The first stated that the question of the application of that principle in international law has found in the judgement of the IMT an accurate interpretation. It went even farther and recognized that the principle *nullum crimen sine lege* could not stand in the way of prosecuting also war crimes and crimes against humanity.[59] As it is well known, the Nuremberg Tribunal was concerned with that question only in so far as it referred to crimes against peace. Its considerations supported by many examples reflecting the views of doctrine, Tribunal No. 3 concluded by saying that the principle *nullum crimen sine lege* as understood and applied in a proper manner can not present any legal or moral obstacle in the way of prosecuting war criminals.[60] Tribunal No. 2 (*Einsatzgruppen* case) followed a somewhat different path but arrived at the same conclusion.[61]

On the other hand, Tribunal No. 5 (Hostage case) and to some extent also Tribunal No. 4 (Flick case),[62] while avoiding any overt polemics with the IMT excluded explicitely the possibility of violating

[55] Bulletin XIV, p. 54. Cf. ATW X, vol. 58, call number 13637.
[56] Fall 5, p. 340.
[57] Fall 6, p. 186.
[58] Fall 3, pp. 127 - 131, Röchling, column 7.
[59] Fall 3, p. 128.
[60] *Ibid.*, p. 131.
[61] Bulletin XIV, pp. 52 - 54.
[62] Such a conclusion results from the general considerations of that tribunal.

this principle and punishing "by the victorious powers" for acts which when committed had not been "contrary to the law."[63] Such an approach, important from the point of view of the further assertions of that tribunal,[64] does not mean it excluded *ipso facto* the possibility of punishing deeds forbidden by the law for the sole reason that at the time of their commitment there was no court able to pass judgement or because there was no rule in international law specifying the level of punishment. Thus the line of reasoning of Tribunal No. 5 on this point was in accord with the thesis of the IMT, to which it referred. It expressed however the view that the decision of the IMT, as a reflection of the exercise of power rises "certain doubts" as it exceeded existing international law, while remaining within its confines as a reflection of the application of law.[65]

b) **The Interpretation of Existing Law.** The interpretation of Article 8 of the Charter (action pursuant to order) contained in the judgement of the Nuremberg Tribunal as well as the important thesis of the Tribunal concerning responsibility of individuals for crimes against international law met with general acceptance in the practice of the tribunals. The considerations of various tribunals on that subject complemented the arguments of the IMT [66] and, to some extent, developed the thesis itself. According to Tribunal No. 4 (Flick case) the thesis of the IMT referred only to state officials, while it ought to have included also private persons. for example, industrialists.[67] However, as a rule, the views and decisions of the IMT led in the practice of other tribunals to solutions restricting rather than broadening the formal scope of responsibility.

As an example of such solutions one may quote the quite frequent dismissal of the charge of crime against the peace. As stated by Tribunal No. 6 (IG-Farben case) the IMT was demonstrating in this respect "great caution" and

> "made findings of guilty [...] only where the evidence of both knowledge and active participation" [of the defendant in the planning and waging of an aggressive war] "was conclusive."[68]

Furthermore, as stressed by the same tribunal, the IMT ruled that the participation in the remilitarization of pre-war Germany was not

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[63] Fall 7, p. 86.
[64] Cf. below, pp. 174 - 175.
[65] Fall 7, pp. 86 - 88.
[66] Cf. Fall 6, p. 212, Fall 7, p. 81, Bulletin XIV, p. 54, Röchling, column 6.
[67] Fall 5, pp. 317 - 318.
[68] Fall 6, p. 190, Fall 12, pp. 55 - 62.

a punishable offence.[69] This was also adduced by the French Court of Appeal, which ruled that since the IMT pronounced Speer not guilty of crimes against the peace, the same must apply also with regard to Röchling.[70]

Another example, of greater substantive relevance, is that related to the question of conspiracy. The charge of participation in conspiracy was persistently brought against the defendants by the American prosecution which was basing its contention on Article I of the Ordinance No. 7. Since the defence was equally adamant in the rejection of this charge, the Tribunals No. 1, 2 and 3 adopted in a joint session a uniform interpretation of the law in force, stating that

"neither the Charter of the International Military Tribunal nor Law No. 10 [...] defined the conspiracy to commit war crimes and crimes against humanity as a separate and independent crime."[71]

It seems that the same reasoning was followed by the British Tribunal, which ruled against the prosecution[72] and ruled in favour of the defence[73] which was insisting on a decision in conformity with the Nuremberg Tribunal.[74] The adoption of such a ruling was suggested to the Tribunal by the Judge Advocate.[75] When hearing the motion of the defence he stated that "we naturally would pay great attention to any matter that the Nuremberg Court decided if it was relevant to what we are doing here." He added however, that "we really have nothing to do with this International Charter [...] and our powers and our duties are obtained from the Royal Warrant."[76]

The majority of tribunals did follow in practice the opinion of the IMT, according to which the war crimes committed by the III Reich were at the same time crimes against humanity,[77] Tribunal No. 2 (Milch

[69] Fall 6, p. 200.

[70] Röchling, column 13.

[71] Żagań M-544, part. XVII, column 18. Fall 3, p. 111. Cf. Bulletin XX, p. 48 - 49, Fall 6, p. 174, ATW X, vol. 58, column 13621.

[72] Żagań M-543, part I column 4.

[73] *Ibid.*, M-544, part. XVII, columns 2 - 3.

[74] *Ibid.*, part. XVI, columns 16 - 17, cf, part XV column 51.

[75] *Ibid.*, part XVI, column 4.

[76] *Ibid.*, column 18. The question of conspiracy does not appear in the proceedings before the Soviet tribunal, nor does it appear in the proceedings before the French tribunal.

[77] Cf. Bulletin XX, p. 73, 95, 99; Fall 7, pp. 78 - 80 and 126; Bulletin XIV, p. 49, ATW X, vol. 58, column 13689; Fall 12, pp. 63 - 67; Sachsenhausen Prozess, p. 213, Natzweiler-Struthof, columns 11 - 12. The French Court of Appeal acted in a different manner, sentencing Röchling and others for war crimes but not for crimes against humanity. — Röchling, column 13.

case) went even so far as to state that this qualification constitutes the "legally binding interpretation of Law No. 10."[78]

However, in some verdicts we encounter attempts to define strictly and exactly the contents of both concepts and the considerations of the Tribunal No. 3 (Jurists case) which gave a precise interpretation of the relevant provisions of the Charter, of the Law No. 10 and of the Judgement of the IMT, represent no doubt an essential development of the Nuremberg Law.[79]

The same applies to a great extent also to the considerations of other tribunals, mainly American ones, which gave in their verdicts an analysis of binding international law, especially the Hague rules, from the point of view of the legal qualification of the various forms of criminal activity of the defendants. Starting from the general legal theses of the IMT the tribunals filled them with specific substance taken from the cases under consideration and sometimes developed them further. This took place, most often, in connection with the arguments advanced by the defense in particular that of necessity. And although as far as the latter argument is concerned the decisions of some tribunals differed quite considerably sometimes from those of the IMT,[80] they were not contracting its basic legal stand. With one exception, however, which concerned the admissibility of taking hostages and application of collective reprisals against the civilian population and, indirectly, also the status of members of the resistance movement.

Both the basic acts of the Nuremberg Law and the judgement of the IMT qualified explicitely the killing of hostages as a war crime.[81] A different stand on the matter was taken, above all, by Tribunal No. 5, especially in its first verdict in the Hostage case and subsequently in the High Command case. Starting from the assumption that neither the Hague Regulations of 1907 nor any other international treaties regulated the problem of hostages (which, in the view of the tribunal was closely connected with the problem of reprisals), it ruled that it cannot be bound in this respect by the Law No. 10.[82] And basing itself on the

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[78] ATW II, vol. 9, column 2533.

[79] Fall 3, pp. 124 - 127. Cf. also Fall 5, pp. 340 - 342 and Fall 6, p. 174 and also Bulletin XIV, pp. 93 - 96.

[80] Cf. for example Fall 5, pp. 326 - 328 and ATW X, vol. 58, columns 13782 - 13800.

[81] Charter of IMT in art. 6, p. "b", Law No. 10 in Art. II p. 2, "b". The IMT Judgement deals with the hostages question in the chapter "War Crimes and Crimes Against Humanity" ("The Murder and Persecution of the Civilian Population") and also in the part concerning Keitel.

[82] Cf. above, p. 171 - 172.

rules of customary law it arrived at the conclusion that in some, strictly defined limits the law admits the killing of hostages.[83]

It has to be pointed out that earlier a similar view was adopted, without broader legal motivation, by Tribunal No. 1 (Medical case) and supported to some extent later by Tribunal No. 2 (*Einsatzgruppen* case).[84] This was, however, overlocked in the comments to their verdicts. On the other hand, the theses of Tribunal No. 5, which could in no case be construed to mean that the crimes of the Hitler Wehrmacht were treated leniently,[85] gave rise to much criticism in science and public opinion.[86] Soon enough it became clear that they were divorced from the actual tendencies in the development of international law. The Geneva Convention Relative to the Protection of Civilian Persons in Time of War signed in 1949 prohibited both the taking of hostages (Art. 34) and the application of collective reprisals (Art. 33).

Two other legal theses of Tribunal No. 5, which though not contradicting directly the letter of the IMT judgement were none the less in conflict with its spirit, met also with grave objections. The first alledged that combatants' rights could be enjoyed only by such partisan units which meet certain conditions strictly defined in the Hague Regulations.[87] The same opinion was expressed by Tribunal No. 2 (*Einsatzgruppen* case).[88] The second contended that the illegal character of occupation resulting from an aggressive i.e. criminal war, did not free the members of the resistance movement in the occupied country from the obligation to respect the formal rules of martial law towards the occupant. According to Tribunal No. 5 some partisan units in Yugoslavia and Greece failed to do so.[89] True enough, one could have hardly imagined that in the war which so many European nations waged

[83] Fall 7, pp. 96 - 105 and Fall 12, p. 104.

[84] Bulletin XX, p. 102 and Bulletin XIV, pp. 88 - 89.

[85] This is borne out by excerpts from the motives of the verdict and by the sentences passed: twice life imprisonment, twice 20 year sentences, and also sentences of 15, 12, 10 and 7 years imprisonment. — Fall 7, p. 104 - 105 and 175 - 176.

[86] Cf. T. CYPRIAN, J. SAWICKI, *Nieznana... [Unknown...]*, p. 234 - 235 and T. CYPRIAN, *Wehrmacht...*, pp. 320 - 324. Cf. also Memorandum of the Association of Yugoslav Lawyers (Fall 7, pp. 182 - 194) and E. STANISŁAWSKA, *Ściganie i karanie hitlerowskich zbrodniarzy wojennych w Niemczech na łamach prasy polskiej w latach 1945 - 1949 [The Prosecution and Trials of Nazi War Criminals in Germany in the Polish Press of 1945 - 1949]*, Wrocław 1976 (typescript of an M.A. thesis presented at the Philosophical and Historical Faculty of the Wrocław University).

[87] Fall 7, pp. 91 - 96 and Fall 12, pp. 105 - 108.

[88] Bulletin XIV, p. 87.

[89] Fall 7, pp. 92, 95 - 96.

against the Hitler occupation, the partisans would be able to carry weapons openly or to wear a permanent distinctive mark recognizable from afar.[90] However, the fact that the Geneva Convention Relative to the Treatment of Prisoners of War signed in 1949 did not abolish these requirements, weakens considerably the objections voiced against that tribunal.[91]

Finally, it has to be pointed out that the American tribunals did, as a rule, apply the legal determinations of the IMT (most often by quoting the appropriate excerpts of its judgement) as a guiding principle in the determination of the question of responsibility for membership in a criminal organization.[92] Tribunal No. 2, commenting as it were upon this matter, stated that in the legal sense the judgement of the IMT determined beyond any shadow of doubt that a person who after September 1, 1939 was a member of criminal organization or maintained with such an organization a relationship which was recognized as criminal by that judgement, must be declared guilty.[93] The Soviet tribunal, too, was sentencing those accused of membership in criminal organizations without, however, referring to the judgement of the Nuremberg Tribunal.[94] In the verdicts of the French tribunal we find only a general formula concerning sentences for crimes specified in Article II of the Law No. 10 without a mention that it concerns also membership in a criminal organization, although in the case of the majority of those sentenced by this tribunal such guilt was established.[95] As far as the British Tribunal was concerned it maintained in this respect also its distinct feature, although with one single exception all the defendants in the Żagań case were members of the Gestapo.[96]

Conclusions

The review of the activities of the tribunals set up by the Big

[90] The remaining conditions — "are commanded by a person responsible for his subordinates" and "respect in their actions the laws and customs of war" — were fully met.

[91] T. CYPRIAN, *Wehrmacht...*, p. 324.

[92] Bulletin XX, pp. 55 - 56 and 132 - 133; Fall 3, pp. 170 - 173; ATW IV, Pp. 33, columns 8028 - 8029, Fall 5, pp. 343 - 344.

[93] Bulletin XIV, pp. 90 - 92.

[94] Sachsenhausen Prozess, pp. 211 - 214.

[95] Cf. verdict of the French tribunal in Rastatt no. 53/1948. — J. Marcu, part II, columns 37, 55 - 56.

[96] The prosecution made no such demand. Cf. the Final Address of the Prosecutor, col. Halse. — Żagań, M 544, part. XVI, column 70.

Powers reveal that the influence of the judgement of the International Military Tribunal was clearly visible, though not in the same degree, in all cases and its authority was undisputable. This was most evident, above all, in the activity of the American tribunals, which referred very often to the factual and legal determinations of that Tribunal. The same tendency, though in a very limited degree, could be discovered in the practice of the French courts. On the other hand, the Soviet and British tribunals did not refer to the judgement of the IMT, while the Soviet councels for the defence did so.

The factual determinations of the IMT concerning various aspects of the criminal activity and policy of the III Reich quoted and referred to in the verdicts of, mostly, American tribunals, constituted sometimes the direct basis upon which the individual guilt of the defendant was founded. Most often however, they served as the point of departure for further, more detailed determinations confirming and complementing the determinations of the IMT, which, all the same, were not above criticism.

As far as the legal opinions of the IMT were concerned, they were generally accepted in the reviewed verdicts, although this acceptance was not always formulated *expressis verbis*. This applied, in particular, to the thesis that the provisions of the Charter and, consequently, those of the Law No. 10 were only a reflection of already binding international law. In all cases reviewed in this paper the tribunals ruled that they have the basis to pass a judgement. In several cases the legal motifs represented a development and extension of the theses of the International Military Tribunal.

There were however, also some rather subtle but tangible and interesting differences. They concerned mainly the relation to the principle *nullum crimen sine lege*, which was recognized by some American tribunals as absolutely binding, in opposition to the well-known thesis of the IMT. Consequently, these tribunals interpreted their authority in a narrower sense than the Nuremberg Tribunal. This led, in one case, an American tribunal to a decision which was in clear contradiction to the judgement of the IMT. As a rule, however, these differences found no reflection in the final decisions of the tribunals. They could also be reconciled with the generally accepted legal opinions of the IMT.

In contrast with the American tribunals whose verdicts were accompanied by a broad legal motivation, the tribunals of the other Big Powers restricted themselves to a simple application to established facts of the law recognized as binding. Such a method limited the usefulness of their verdicts from the point of view of the subject of

this study. None the less when used in a large number of cases it can serve as a useful source to ascertain in what degree the judicial practice of various states reflected the uniform perception not only of the principles formulated in the judgement of the IMT but also of the Nuremberg Law in general.

It seems that this essay confirms the usefulness of studies concerning the application of the Nuremberg Law in the judicial practice of the Big Powers and in the judicial practice of other United Nations as well. This is justified not only on scientific grounds but also by practical reasons connected with the codification activities mentioned above. Such studies may result in a substantial broadening and diversification of the catalogue of criminal deeds which were mentioned only in an indicative sense in the acts of the Nuremberg Law. They may also, while investigating the way followed by various tribunals in order to arrive at a legal qualification of these deeds, contribute to a more precise determination of the contents and scope of the norms of the Nuremberg Law. Finally, in favour of such studies militates the necessity to draw up a final balance sheet of an action which was undertaken 30 years ago and which approaches to its finish, parhaps more as a result of the action of the laws of biology than of those of men.

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The Rocket Weaponry and the Naval Armed Conflicts

by ZBIGNIEW ROTOCKI

Two bursts of missile rockets ("Styx") launched from the deck of Egyptian missile cruiser in the Port Said area on October 21, 1967 were sufficient to sink the Israeli destroyer "Eilat". The action definitely started a new era as far as the rearmament of the world's war fleets is concerned.[1] So, the Jom Kippur war, that took place only six years later in October 1973, was the first one, where both sides used — exclusively — missile armed ships.[2] The tactical and technical sevolution started during World War II by Germans applying V1 and V2 rockets that could be compared only with the changes introduced by employment of submarines in World War I or the naval air force in World War II, caused mass missible armaments of all war ships and submarines of today.[3] This weapon will revolutionize undoubtly naval operations, especially in the line with sea battle tactics.

The missile along with guns and torpedoes become the most important arms of the navy, pushing out their predecessors into background.[4] All war ships starting from T.P. boats to atomic submarines and gigantic

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[1] See D.P.O'CONNELL, *International Law and Contemporary Naval Operations*, "BYIL", 1970, pp. 27 – 33, and W. JABLONSKY, *Die Seekriegfuhrung im vierten Nahostkrieg*, "Marine Rundschau", November 1974, Heft II, p. 659, n. 2.

[2] See J. MARRIOTT, *Missiles in Peacetime*, "Navy International", May 1974, p. 13 — "Because of the missile madness, which has affected not only the Royal Navy, but many other navies as well [...]", and Ch. J. ELIOT, *Ship-to-Ship Missiles*, "U.S. Naval Institute Proceedings", November 1972, p. 108 — "It was not until 1970 that Great Britain faced up to the fact that the ship-to-ship missile was becoming just as essential to warfare as the gun had been for three or four centuries."

[3] See, Ch. L. ELIOT, *op. cit.*, p. 108, similarly *Sea power a Survey of the Royal Navy*, "Economist," March 3, 1973, p. 17, and J. R. HILL, *The Lonely Long-Distance Maritime Missile*, "Navy International," May 1973, p. 14 states that the guided missile seems to be particularly appropriate to a style of conflict which is increasing attention, that is limited war at sea."

[4] See, H. LINKA, G. MAZUR, *Broń rakietowa w marynarce wojennej [Naval Missiles]*, Gdynia 1973, p. 3.

aircraft carriers, being built now, are equipped with missiles. It is so, mainly because the rocket warfare has a number of technical, operational and tactical advantages over any artillery, torpedoes and even an airforce, such as: a) practically unlimited range, b) they can be guided during the flight to the target, c) it is difficult to combat them due to their high speed and the altitude of the flight, d) high striking efficiency (larger explosive load or nuclear warhead), e) simple launching pad's structure and small weight create a higher degree of maneuverability, f) possibility of using missiles at random, independently from weather conditions. The rocket appearance in a fleet's armament points, once again, to necessity of introducing certain legal limitations, as far as application of this destructive weapon is concerned. Unfortunately, it is not so easy as the scope of law binding in respect to a sea-war is at the present time very difficult, if not impossible, to establish.

The sea-war law is virtually a customary law composed of various, quite often controversial and undefined, regulations developed in previous periods of history. The unratified London Declaration of 1909, prescinding from the fact that it was signed 66 years ago, when not only rockets, but even an operational airforce did not exist and in spite of a few references to it, during the initial stage of World War I, it was not really conformed to in both world wars.[5] Sea-war regulations were violated more often than not, and so many references were made regarding reprisals and counter-reprisals, that finally no one paid any attention to them. That fact was commented on by the West German author Scheuner, who cynically said : "Reprisals became an exit from the inadequate state of law."[6] Hence Baxter is right when he writes that it is difficult to authenticate where is the classical sea-war to-day, as to many factors clouded its outlines and faded its colours away, almost to the point of complete disappearance.[7] Apart from that it is difficult to give unequivocal answers in the view of appearance and development of new weapons, that, in this 20th century, acquire the conclusive significance in naval operations. In view of these facts, some affirmative voices from one side say that "the new arms require

[5] See, R. R. BAXTER, *The Law of War* in : M. BOS, *The Present State of International Law*, December 1973, p. 119.

[6] See, U. SCHEUNER, *Seekriegsrecht*, in : STRUPP-SCHLOCHAUER, "Wörterbuch des Völkerrechts," vol 3, Berlin 1962, p. 235.

[7] R. R. BAXTER, *op. cit.*, p. 119, also cited after D. P. O'CONNELL, *International Law...*, p. 51 the opinion expressed in "Ministerstvo Oborony SSSR — Voenno-Morskoj meždunarodnopravovoj spravočnik", 1966, sec. III, chapter 2, p. 10 "in present conditions, along with atomic submarines armored with missiles and other submarines [...] provisions of international law have virtually become obsolete".

not only now operational thinking, but also a new martial law.[8] The followers of the new technology conformance to old regulations state: "the change of armament neither creates any new international standards nor change the old ones".[9] In connection with an enormous destructive power of nuclear warfare some interesting point of views (represented in Poland by Professor Skubiszewski) should be considered. In his opinion, unremovable discrepancy exists between the modern-war technology (or other multiple means of harming the enemy) and the principles the martial law is based on.[10] Apart from the considerations whether the modern war technique went too far to be accomodated in the frames of legal regulations, or not, the firm stand should be taken that the international martial law is a consuetudinary law that used to bechanged and developed, in many cases, by a practice of sea powers and not every innovation was valid. Each new practice was tested from the point of view of its acceptance by existaing standards, without breaking basic rules and privileged rights and without violating purposes, that particular law is supposed to serve upon. In other words, the rights of accepting the use of missiles within the framework of sea law should be resolved upon an ascertainment whether their application would not violate the basic principles that law was based on. Namely, if civilians could be distinguished from frighters and neutral trade[11] could be protected. Nuclear warfare is not banned up to now by any binding form of the international law, on the condition that the missile warheads would not carry any banned cargo, such as : poisonous gases, pathogenic germs, radioactive materials, ect.[12]

[8] See A.v.d. HEYDTE, *Völkerrecht*, vol. 2, Berlin 1960, p. 334. Similarly C. J. COLOMBOS, *The International Law of the Sea*, 4th ed., London 1961, p. 763, U. SCHEUNER, *Seekriegsrecht...*, p. 229, H. MEYROWITZ, *Le Principle de l'Égalité des Belligérants devant le Droit de la Guerre*, Paris 1970, pp. 243 - 244 — *"Une 'règle' ou 'principe' qui ne soient pas practicables ne peuvent prétendre à la qualité de règle de droit"*. Also earlier H. A. SMITH, *The Crisis in the Law of Nations*, London 1947, p. 62 — "there again, the law can do nothing but adjust itself to the facts".

[9] See K. ZEMANEK, *Sperrgebiet*, "in : STRUPP-SCHLOCHAUER, "Wörterbuch des Völkerrechts," vol. 3, Berlin 1962, p. 287 and H. A. SMITH, *The Law and Custom of the Sea*, London 1948, p. 77.

[10] See K. SKUBISZEWSKI, *Prawo wojny i neutralności w świetle współczesnym [The Contemporary Law of War and Neutrality]*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny," 1967, No. 1, p. 123.

[11] See O'CONNELL, *The Legality of Naval Cruise Missiles*, "AJIL," vol. 66, October 1972, p. 785 and U. SCHEUNER, *Seekriegsrecht...*, p. 235 and 236.

[12] See E. SPETZLER, *Luftkrieg und Menschlichtkeit*, Gottingen 1956, p. 331, n. 664. Similarly J. M. SPAIGHT, *Air Power and War Rights*, 3rd. ed., London 1947, p. 214 and H. A. SMITH, *The Crisis...*, *op. cit.*, p. 72 and J. L. KUNZ, *Atombombe und Völkerrecht*, "ÖZöR", 1950, p. 421.

Missiles [13]

a) A General Tactical Characteristics of the Rocket

There is a certain basic division of the rocket weaponry from the point of view of its military application depending upon: 1) trajectory characteristics, 2) starting and target position, 3) operational task performance. Applying the criterion of trajectory characteristics we recognize the following missiles:[14] ballistic missiles, reving along the ballistic curve in the passive sector of flight trajectory. The guided missiles fitted with steering devices in accordance with a programmed system of remote control or in conformity with a self-guiding system and, finally, unguided missiles having no possibility to change their flight trajectories without a change of external nature. The sea missiles looked at from the point of view considering the "starting point and target position" criterion, represent one of ten following types :

1. water to earth, 2. water to water, 3. water to deep water, 4. water to air, 5. water to space,	Missiles fitted on surface ships
6. deep water to earth, 7. deep water to water, 8. deep water to deep water, 9. deep water to air, 10. deep water to space.	Missiles fitted on submarines

As far as the operational task performance is concerned the missiles can be described as follows: tactical (range up to 150 km), operational (range from 150 to 1000 km), strategical — medium range (1000 to 5000 km), strategical — long range (5000 to over 10 000 km).[15]

b) Missiles' Guidance Systems

Regardless of other missiles advantages (speed, warhead's striking power, etc.) the most important factor that determines weapon's value

[13] See T. BURAKOWSKI, A. SALA, *Rakiety bojowe [Missiles]*, Warszawa 1973, pp. 561 - 618, H. LINKA, G. MAZUR, *Broń rakietowa w marynarce wojennej [Naval Missiles]*, Gdynia 1973, pp. 129 - 194, *Jane's Fighting Ships 1973/4*, ed by J. Moore, pp. 608 - 637; and R. T. PRETTY, *World Naval Missiles*, "Navy International," May 1973, pp. 17 - 21.

[14] See, H. LINKA, G. MAZUR, *Broń rakietowa... [Naval Missiles...]*, pp. 10 - 12.

[15] The NATO classification distinguishes only tactical and strategic missiles whereas D. P. O'OCONNELL, *The Legality...*, p. 786 distinguishes fathermore "short range systems" and "long range systems" within tactical missiles.

is its accuracy, therefore a quality of its guiding system. The guiding system should lead a missile directly into the moving target, regardless of evasive maneouvres that the target might perform during the missile's flight. A wrongly programmed missile with automatic guiding control or skillfally generated, by an opponent, radio-electric interferences will result in overshooting the mark. Such an astray missile might be a threat to non-combatants or neutral ships. To realize the immensity of such a danger, the missiles' guiding systems and the means of anti-missile defence should be carefully checked. The guidance systems are divided into four categories : a) self-governing, b) remote-controlled, c) self-adoptive, d) mixed. In the self-governing guiding system, all directional signals are worked out by the apparatus mounted on the missile and information from the target or the command post are not transmitted to it. In comparison with the other systems, the self-governing one is very unresponsive to radio interference, as there is no connection with an external control. This guidance system is mainly used on "water to earth" ballistic missiles designed for striking stationary targets. The missiles are programmed as a rule and their position-finding measurements in the space are carried out by force of inertia methods, put sometimes the astronavigational or other methods are employed. This system is not very accurate and gives quite a large margin of errors. The oldest remote control system was the so called "control by guiding beam" where a projectile flew in a beam of electromagnetic waves, pointed at the target or ahead of it. The main disadvantage of this system was the fact that the accuracy was inversely proportional to the distance of the missile from the guidance station and above all the receptivity to enemy radio interference was rather high. The radio-control system is quite analogous. Orders are transmitted to the missile from a ship or a plane by means of radio waves. In that case, the missile and the target have to be observed simultaneously by the operator with optical collimator. This procedure requires determining and nullifying errors by operating the lever of the said instrument. That method can only be used at fairly good visibility and its range is extremely small. With a distance increase the accuracy drops down due to a low eye efficiency. To increase shooting accuracy the television control system is employed. The next system is a TV remote control one which is composed of a TV camera with lenses, a TV transmitter mounted on the missile and a TV receiving set mounted on the plane. The TV control permits to put the missile on the right way from a control point, placed beyond the optical visibility from the target. The operator can see on the TV screen all objects within the range of missile's TV screen. He could pick up at random the most important

visible objects (a ship in the convoy for example). The effectiveness of TV control depends on the distance the camera can observe the target from and the range of missile's transmitter. Disadvantages of this system are as follows : dependence upon weather and lighting conditions and the enemy's radio interference possibilities. The further remote control developments wont for two reasons, in the direction of war-head control, firstly because of motive target, secondly because surface ships can be easily picked up from the surroundings background. Remote control systems are : a) passive (using energy reflected from the target), b) half-active (using energy reflected from the target, but directed there by external energy source placed away from the approaching missile), c) active (using energy reflected from the target — while the source of energy is placed on the missile). Thus the guiding beam control was replaced by the half-active control, whose principle is to reflect electromagnetic waves from a detected target, by a strong radio transmitter placed on the carrier. The electromagnetic waves reflected from the target are used to control the missile by directing its receiving antenna towards the source of reflected signals. Operating at large distance and when the target changes rapidly its position, changing its radio-reflection surface accordingly, the radio transmitter's waves are being cut off intermittendly. Another disadvantage is impossibility to determine distances to the chosen or traced target as the time elapses, between transmitter's impulse and the moment of its reception by the missile's receiver, connot be measured. Apart from that it could be very dangerous for a missile firing at a ship (using either guiding beam or half active control system) to transmit energy from its radio-bearing station for a longer period of time as that could facilitate an enemy missile attack. Those factors led to the development of the so called "active radio-bearing control." Its characteristics is that all elements are placed directly on the missile. That gives assurance of the right target detection and missile's direction. As the missile's radar range is not so great, the rocket is controlled by it in the last stage of flight. That is also performed in order to eliminate the enemy's radio interference. So, to bring the missile as close as possible to the target, before the radio-bearing station is engaged, the inertial navigation control system is used in this section of a missile's trajectory.[16] Missiles that do not have their own source of radioelectromagnetic waves belong to the next group and they are called "passive self-controlled." That is, e.g. the passive way of directing itself towards an infra-red radiation

[16] However in C. J. ELIOT'S opinion, *op. cit.*, p. 110 — "Intertial navigation systems are immune from jamming, but the missile is kept in level, usually low trajectory, flight by radio altimeter and it might be possible to jam this."

source itself. In order to direct such a missile towards a target emanating heat, we provide it with a thermal nose-cone with a target coordinator made after the fashion of thermal direction finder, which after target's detection determines continuously its position and gives respective orders to the control devices. These nose-cones work much better at night than during the day and this is the main shortcoming of the system. The operational range is also limited by natural perturbations, such as background of the sky, clouds, water surfaces etc. There is no possibility to apply artificial interferences like the use of infra-red spot lights and target maneuvers to cause aiming errors. Another passive way of directing itself is the radio bearing system. The nose-cone of a missile intercepts signals sent out by enemy ships (mainly its radio-bearing stations) and directs itself to it. The opponent's wave lenght has to be known for that purpose, naturally, and that is not so easy, as the modern radar transmitters have automatic wave lenght changing devices built in. Apart from that, an opponent could maintain the radar silence, but at the morden sea battle site it is practically unattainable. All those central systems can be applied when a missile-firing ship and the target are within radar range. The radar horizon is 40 - 80 km and depends on the height of ship's antenna. Missiles could be used beyond the radar's range horizon, providing the exact target position can be established, to enable their self-controlling nose-cones to reach target's vicinity. Target position can be established by using : aircraft, radar or sonar monitoring, observer's reports and satellites. In case of "water to water" missiles all those self-guiding systems could be applied, but the most popular is "the active" one. It is very unwise, however, from tactical and constructional point of view to use system exclusively, so every type of rockets has a certain defined composition of guiding systems. Two basic missile self-guiding systems exist at the moment : 1) the guiding beam with self-control, 2) programmed self-governing system with self-guiding devices. The last one is better and much more efficient. The target defence takes from of camouflaging its characteristics, hiding them from the ship's radio bearing observation and from the missile's self-guiding system.[17] To avoid automatic changing from the radio-bearing active guiding to the passive one and bringing the enemy's missile to own target by own interfering waves — the so-called "passive interference" is used. The passive interference consists in creating a multiple of false targets in the form of tinfoil ribbons or other reflecting materials, which make such a wide echo area between

[17] See D. P. O'CONNELL, *The Legality...*, p. 792 and Ch. LATOUR, *The Defence Against Missiles*, "Navy International," June 1973, p. 9.

the ship and the missile that its radar transmitter is completely confused and the reflection of radio-bearing target surface does not appear on its screen. The missile's accuracy is lowered by the fact that the guiding device, mounted on it works in unfavourable conditions, like : strong vibrations, high temperature and pressure changes. Everything that we have said about missiles' guiding systems and defences against them, points to the danger they represent to war and neutral ships.

Assuming that for tactical and financial reasons no one will attack battle ships with missiles (it is quite possible in case of convoys) or fire them towards a zone where the enemy's war ships are mixed with neutral merchant ones, the danger that missiles are carrying for the navigation is extremely serious. That will result from the following circumstances : firstly — fighting sides might not know about the presence of neutral ships in vast areas of modern sea war operations, secondly — a wrong missile setting at firing or a warhead's defect could cause the bitting of an inappropriate target. The second case can be more common since the missile in the last stage of its flight will only recognize dimensions of a target, going into direction of the largest light or heat emitter, discovered by its thermal indicator. In case of deceiving missile's self-guiding system by one of above mentioned methods, an accidental hit of a neutral ship might occur. In that respect, the most hazardous are missile attacks on ports, where neutral ships could be present. Besides, not only missiles alone, but also their falling attachments could cause a great deal of damage on crowded with fishing fleets sea areas. What is then the probability of delivering a missile to a target or missing it? The first one is very high, theoretically 90 to 95 per cent, but practically it is about 20 per cent, lower, and with application of opponent's "passive and active interferences", still lower.[18] O'Connell presumes: "The number of missile misshits is very high."[19] Therefore, a threat to non-military objects is also very high. All these facts force us to look closer at the

[18] See Z. MISZEWSKI, *Morskie rakiety taktyczne [Tactical Naval Missiles]*, "Wojskowy Przegląd Techniczny," 1974, No. 5, p. 19 and Ch. LATOUR, *op. cit.*, p. 10 — "If only one missile is approaching there is perhaps a fifty-fifty chance of success, but, if more than one has been launched by the enemy the chances of avoiding a direct hit are remote[...]", similarly T. BURAKOWSKI, A. SALA, *Rakiety — broń XX wieku* [Missiles — Arms of the 20th Century], Warszawa 1966, 2nd ed., p. 29 — "Probability of hitting the target by any guided jet rocket amounts, on the average, to over 50 per cent, that is every second rocket hits the target."

[19] D. P. O'CONNELL, *International Law...*, p. 63.

problem resulting from application of rocketry by modrem fleets from the international sea-martial law's point of view.

III. Legal International Problems. During a Peace Time

a) The Rocket Armament and the Freedom of Vessel Passage Across Territorial Waters

1. Let us avoid the controversial question whether the law of passage across territorial waters exists or if it is based on previously issued authorization or notofication.[20] In any case, there is no doubt, that Section 14 of Geneva Convention of 1958, on the Territorial Sea and Contiguous Zone says :

"Passage across territorial waters is harmless as long as it does not threat the order or safety of littoral state".

Section 17 says :

"Foreign ships taking advantage of harmless passage across territorial waters shall accept the law and regulations of the littoral state".

In pursuance of that idea and in conformity with the sovereign authority on territorial waters, the law of littoral state regulates in detail harmless ship passing conditions.[21] For example, the Minister of National Defence Decree, dated March 29, 1957 (*Dziennik Ustaw — Journal of Laws* — No. 19, item 96 on conditions of foreign war ships' residing within internal waters demands that the units of foreign navy, after receiving permission, conform to the following limitations : 1) Foreign submarines should remain emerged [...] 4) No military exercises are permitted. Bulgaria does not allow foreign submarines to travel across her territorial waters in the submerged state or to use any radio-bearing devices.[22] Romania applies similar restrictions.[23] All those regulations are meant to protect a littoral country against any attack from the passing ship and especially from a submarine which could launch a surprise attack. A rocket ship unit

[20] See E. RUŁKO, "Prawo nieszkodliwego przepływu" [The Right of Innocent Passage], Warszawa 1963 (doctor, pp. 227 - 297, A. KOSHKISH, *The Right of Innocent Passage*, Geneva 1954, pp. 119 and 156, also J. COLOMBES, *The International Law of the Sea*, 4th ed., London 1961, pp. 114 - 116.

[21] See W. MORAWIECKI, *Międzynarodowy ustrój cieśnin bałtyckich* [International Regime of the Baltic Straits], "Sprawy Międzynarodowe", 1958, No. 8, p. 34.

[22] See — *Ukaz za teritorialnite a vtrešnite vodi na Narodnata Republika Bulgarija*, in : "Izviestja na Prezydiuma Narodnoto Sbranija," No. 85, October 23, 1951.

[23] *Ibid.*, p. 294, n. 181 in : "Bulletinul Oficial al Marii Adunari Nationale a Republicii Populare Romine," No. 3, January 28, 1956.

on territorial waters represents extreme danger for its long range possibilities and power of destruction (nuclear warhead). In connection with restrictions against submarines in territorial waters, more rigid restrictions should be adopted in relation to missile-equipped ships. It should be an absolute ban on passing such ships across territorial waters, or at least limiting their crossing or stay time. During such a crossing all missiles should be removed from launchers and placed in a storage. Dispositions of that nature should be accepted as legal and cognizable by the coastal state.

2. A quite different legal situation exists in straits, as Section 16 of Geneva Convention on the Territorial Sea and Contiguous Zone of 1958 says :

"The harmless passage of foreign ships used for the international navigation through the straits connecting two parts of an open sea or connecting an open sea with a territorial sea of any country should not be challenged." [24]

The question arises when are we dealing with a case of harmless passage of missile-carrying ship and when its armament could be defined as harmless to any adjacent country? The International Court of Justice's verdict passed in the case of the Corfu Channel gives us an answer to a certain extent. The Court, considering the case of British ships forcing their way through that strait on August 10, 1946 by order of British Admiralty, came to the conclusion that the armament was in normal peaceful position with guns unloaded. In the light of this statement, the Court could not accept Albania's accusation that position of British guns was incompatible with the rules of "harmless passage". Hereafter, the Court stated that the commander-in-chief of British Mediterranean Fleet sent the telegramme to Admiralty on October 26 reporting : "The strait was crossed at full alert to return the fire in case of an attack." The International Court of Justice decided, however, that those precautions were justifiable, as on a previous occasion British ships were shot at by Albanian batteries. According to the Court's report

"all four ships sailed one by one, through that narrow strait, close to Albanian shores, at the time of high political tension in this area. The purpose of this action was not only to feel the pulse of Albanian intensions, but also to

[24] Earlier, also The International Court of Justice — in the Corfu Channel case — said that it was universally accepted and compliant with international custom that, in peacetime, states have the right to send their ships through straits used in international navigation between two parts of high seas without seeking permission of the coastal state provided the passage be innocent, in : "ICJ Reports," 1948, pp. 28 - 29.

demonstrate the power in order to keep back Albanians from repeated shooting at passing ships".

Finally, the International Court of Justice said :

"Taking into consideration all circumstances of this case, the action taken by British authorities could not be described as the infringement of Albanian sovereignty.[25]

The Court's adjudication points out clearly that "harmless passage" takes place when ship's armament is not at the instant readiness (unloaded guns) and that at the time of political tension the ship may be ready for action, within the framework of self-defence. As far as we are concerned, the following question comes into view. When a ship carrier is passing through the strait, should its missiles be in their launching chutes or containers, ready to be fired, or should they be in the storage. O'Connell, the author thoroughly discussing these problems is trying to find some solution of the dillema to answer the following question : "Will the ship find itself in an unfavourable defence position by losing precious seconds, required for loading its missiles into launching chutes". In case of a negative answer, says O'Connell, the missiles should be stored like heavy guns' ammunition.[26] Such point of view does not seem to be quite right. The answer to that question will not depend on crew's technical efficiency, but on the general, political and military situation and also on the decision the littoral country might make. The said country in time of political tension could issue certain measures to reinforce its safety, particularly in that part of a strait which represents its territorial waters. (Even outside territorial water, like example the contiguous zone of military purposes). As a result of such measures, the passage of missile carrying ships could be stopped. That might happen when a littoral country itself is in the state of war.[27] On the other hand, the country that would like to run its ships shrough such a situation should do that only when it is absolutely necessary to reach the permanent stationary base or to get to the one of the seas surrounding its own territory. That should be done without awaking suspicions of the littoral country's observers that the rockets might be used. A

[25] See "ICJ Reports," 1949, p. 4 and D. P. O'CONNELL, *International Law...*, p. 65.

[26] See, D. P. O'CONNELL, *International Law...*, p. 66 however, *ibid.* he is of opinion that "To the naval mind the Court's emphasis on the normal stowage of the armament is a legal quibble, since the delay to load, lay and fire a gun is much less than to load, ready and fire a missile."

[27] See *A Seperate Opinion of Judge Krylov pertaining to the Corfu Channel*, in : "ICJ Reports," 1949, p. 74.

difference between missiles in launching chutes and in a storage is not so much important (considering time needed, in either case, to fire them) as psychological feeling of greater danger with a view to missiles ready to be fired. That last event could mean the willingness to deliver a leading rocket blow, which might cause far-reaching consequences. Beside, such a demonstration could mean an approach from the political position of power and a desire of exerting pressure with the aid of the navy.[28] Talking about the analogical situation during a peace time, there are no reasons why the missiles of passing through a strait ship should be stored away (unless the ship has a special legal status). Missiles belong to the same category as heavy guns or torpedoes and they are classified as a standard equipment of the fleet. In other words, if it is sufficient for navy guns to take normal, peaceful position on the ship, so the missiles could remain in their launching chutes in their normal position, like the International Court of Justice once said: "Their position was in accordance with the principles of harmless passage". After all, the authomatic missiles loading from storage is being adopted at the moment, e.g. the "Seadart" system and, in the nearest future that fact will become a rule, eliminating the above problem completely.

3. The matter finds its repercussion at the passage of outsiders into the Black Sea. According to the Montreux Convention of 1936, the only authorized ships to do that are ships of the Black Sea countries, (Sec. 11) but others are excluded. To determine what the Convention meant by war ships, we read in Annex II[29] as follows: a) Surface war ships other than aircraft carriers, auxiliary units and battle ships, b) whose displacement does not exceed 10,000 tons and their guns' calibre does not exceed 203 mm, c) surface war ships other than aifcraft carriers, whose displacement does not exceed 8,000 tons but their guns' calibre is over 203 mm. The rocket rearmament with increased possibilities regarding ranges and destructive power, caused that the might of old battle ships and heavy cruisers can be easily replaced by much smaller, displacement wise units armed with missiles. In connection with that

[28] See *A Seperate Opinion of Judge Azevedo pertaining to the Corfu Channel*, in: "Dissenting Opinion," "ICJ Reports," 1949, p. 109 — "In this case there was a naval demonstration which would not be admissible even as reprisals", similarly Judge Krylov, *ibid.*, p. 75 and A. KOSHKIISH, *op. cit.*, pp. 132-134. Also The ICJ over the same subject, in "ICJ Reports," 1949, p. 35 — "The Court can only regard the alleged right of intervention the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law."

[29] See "League of Nations Treaty Series," vol. 1973, p. 213.

fact, an application of political pressure on Turkey, to tsop foreign destroyers and missile-carrying ships from entering the Black Sea, seems to be justified. The event from December 1968 could serve as an example. Two destroyers of 6th American Fleet, the armament's calibre less than 203 mm. entered the Black Sea through the straits. The Soviet Union's Government protested to the Turkish Gorernment against that action. The protest was founded in argument that "Dyers" was armed in torpedo-missiles "Asroc," with conventional or nuclear warheads (to fight down submarines). The Turkish Government, taking as the basis the exact interpretation of the text rejected the protest of the Soviet Union.[80] That formal stand does not seem to be reasonable. The military and technical changes that had taken place, duce to the rocket rearmament, should be taken into consideration. A destroyer or rocket frigate, considering the range and destructive power of their missiles (especially with atomic warheads) could not be compared with an old-fashioned heavy cruiser even with guns larger than 203 calibre and they represent much greater danger to fleets and costal regions of the Black Sea countries.

b) The Rocket Armament and Self-Defence Rights

The most complicated problem arises when you try to take advantage of rocket armament for actions within the framework of self-defence. It should be mentioned that we are talking about activities during peaceful time and not like O'Connoll explains "during the limited war or political tension". The international law recognizes only two states — state of war peace. All intermediary creations darken actual state of affairs and make an excuse for aggresssion easier. So the problem of using rockets in peace time as means of self-defence will turn around the supported by Western Countries doctrine which deals with the "preventive action" or the so called "fight for the first salvo." That situation is quite clearly pronounced in statements of Hill and Marriott, two British sea-affairs specialists[81] and in the US Naval Institute Proceedings, in the course of discussion raised by the sinking of "Eilat."[82] In that discussion the practical value of "the most effective

[80] See "The Times," October 10, 1968, p. 1, cited in D. P. O'CONNELL, *International Law.*, pp. 66 - 67.

[81] See J. R. HILL, *op. cit.*, p. 14 and J. MARRIOT, *Naval Missiles*, "International Defence Review," 1969, p. 247 — "A missile firing ship undoubtly constitues an enormous hazard to warship, and the best defence against it is to sink it before it can fire its missiles."

[82] See *The Aftermath of the Eilat*, "U.S. Naval Institute Proceedings," vol. 95. 1969, p. 61.

defence is offence"-doctrine was underlined, meaning the elimination of foreign ship in connection with its ability to use rockets instead of waiting for her offensive action. To make such a preventive action more officient a longer range (than opponent's) missiles have to be used and as far as air forces are concerned, distant observation points will be established to extend striking possibilities up to 300 km. D.P. O'Connell contemplaiting this problem in detail, states that, on the other hand, their main function will be establishing "what is an armed attack in the light of that Section 51". According to O'Connell awaiting the opponent's attack will result in losing all chances of defence. The side launching the first blow will get such an advantage over the other side that it could not be possible to compensate. Therefore, to apply wisely Section 51, says O'Connell, the definition "armed attack" has to be adequatly changed to provide facilities for consideration of the weapon's quality. In some cases "an armed attack" might be not actual rocket firing, but "the switch-on" of radio-bearing station, in order to guide the missiles into the target. In such a case, the prompt decision has to be made, whether "an armed attack" took place or not. According to the author: "In case of a 15-mile range missile the officer has only 75 seconds to make such a decision."[33] The determination of that sort is reasonably easy when missiles are with guiding-beam control and radar observation system are used, but when the intertia self-guiding system is applied the determination of "an armed attack" is impossible for lack of electromagnetic waves. O'Connell supposes that if the sea doctrine will go into the direction of demanding destruction of a potentially hostile ship, before such ship would be able to fire its missiles the concept of "hostile act." that used to be the basis of the self-defence law, should be changed.[34] That attitude does not seem to be right like the whole theory of preventive missile attack. The only justification for attacking a foreign ship during a peace time is (in conformity with Section 51) an anticipatory armed attack on its part.[35] A presumption of hostile intensions, based on doubtful electronic calculations is not enough. Accepting actions of that kind would facilitate acts of violence (under the cover of self-defence), lead to anarchy and would unleash a full-scale war.[36]

[33] See D. P. O'CONNEL, *International Law...*, p. 24.

[34] See *ibid.*, p. 64.

[35] See K. SKUBISZEWSKI, *Uprawnienia państw do samoobrony [The Right of States to Self-Defence]*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny," 1962, No. 4. p. 111 — "Firstly, a UN member may not act in individual self-defence unless attacked". Similarly *ibid.*, p. 112.

[36] See *ibid.*, p. 110 — "Preventive self-defence may lead to abuses or mistakes

Professor K. Skubiszewski is right, therefore, saying: "The treaty rejects preventive self-defence and, any nation, member of the United Nations can act only after becoming the victim of aggression.[37]

Legal International Problems in Naval Warfare

a) Local War (Limited area of Hostilities, Weaponry and Targets)

Limited naval warfare usually begins with the proclamation of hostility area. Contrary to classical blocade, such areas need not be firmly closed.[38] Probability of danger to third countries' ships is decisive in setting the boundaries for the area of operations. It can be found in The US Law of Naval Warfare, Section 503/d/7/2 that

"the country in war can proclaim special restrictions to aircraft and vessels of neutral states to come close and enter such area. Acting against these restrictions, aircrafts run the risk of being shelled".

Such areas were proclaimed in local wars after 1945; in Korea, in the Indo-Pakistani war in 1971 and in the Jom Kippur war. In this last war, Syria proclaimed as hostilities zone the area lying south of 33° latitude and east of 34° eastern longitude, and Egypt proclaimed the areas Mediterranean Sea lying south of 33° northern latitude and east of 23.5° eastern longitude as well as the Red Sea south of 21° northern latitude — as operation areas. The People's Republic of Yemen, on her part, proclaimed the Bay of Bab-el-Mandeb as operation area.

Such area is legal,[39] provided that it actually is a warfare activities zone and its establishment serves not only the countries in war but also the safety of neutral countries. Let us now discuss the situation of ships in missile war. The most endangered are the neutral ships which happen to be locked at ports of the countries in war with each other, inside the warfare area. And so, in December 1971 India's missile ships launched an attack on ships anchored in Pakistani harbours damaging the British "Hermettan" at Karachi.[40] In the Middle East

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and thus multiplies cases which may result in a war, not excluding a total one."

[37] See *ibid.*, p. 112. A similar statement by idem, p. 112 n. 7, KUNZ, *Beckett and Bramson and also J. Brownlie*, International Law and the Use of Force by States, Oxford 1963, p. 367, U. SCHEUNER, "Kollektive Selbstverteidigung", in: STRUPP-SCHLOCHAUER, "Wörtebuch des Völkerrechts," vol. 2, London 1961, p. 240 and L. OPPENHEIM, *International Law*, vol. 2, London 1958, p. 156.

[38] See R. SCHENK, *Seekrieg und Völkerrecht*, Berlin 1958, p. 112.

[39] See K. ZEMANEK, *Sperrgebiet...*, p. 286.

[40] See *Jane's Fighting Ships 1973/4*, p. 634 and J. R. HILL, *op. cit.*, p. 14.

War, between October, 10 - 11 1973, the Greek freigther "Timentavros" got a torpedo hit, and the Japanese freighter "Yamashiro Maru"[41] caught fire when Israeli and Syrian missile ships clasred at the moorage off the Latakii port. During an Israeli cutters' torpedo attack on the petroleum harbour Tartus the Soviet freighter "Ilja Wechnikov" was hit by a torpedo and set on fire. It seems that in order to avoid such incidents at ports and on leaving endangered areas, netural ships should be given some reasonable period of time to escape from the area, following the proclamation of it as closed. In any case, when a neutral ship lying at port or in the roadstead or going out of the warfare area gets damaged by a missile, the question of indemnities arises. On the other hand, a neutral ship entering such waters notwithstanding the proclamation of warfare area exposes herself to danger and damage as may result from accidental missile shots, fractions of missiles or their carrier segments.

b) Global War

In global war hostilities on the water, problem No. 1 is the right to sink enemy and neutral ships regardless whether it be conventional or missile wepons. In theory, enemy ships should be taken over and directed to a port after search. Exceptionally however, they can be sunk but it has not been stipulated in what conditions such action shall be justified. The question has been broadly treated and, practically, the seizure means sinking at high seas unless the victor has the possibilities to lead the seized ship to his own port.[42] In contemporary wars, ships of militant nations do not follow the customs or respective agreements. Ships, state — or privately owned alike fall under martial administration, are being armed with guns, planes, missiles presumably in the future,[43] go in convoys, conform to blackout, go zig zag and monitor enemy ships. Hence, it is generally believed, the opponent has the right to sink them at sight and such was the practice in the last two wars. Thus, shelling individual ships of the enemy (if advantageous to the other side) and, first of all, launching attacks on convoys with the use of cruisers, destroyers and missile

[41] See W. JABLONSKY, *op. cit.*, p. 663.

[42] See U. S. Law and Naval Warfare-1955, sec. 503/b/2 permits to destroy the enemy ship in case of military necessity, when she cannot be sent away or steered o a harbour.

[43] See H. LINKA, G. MAZUR, *Broń rakietowa* [*Naval Missiles*], p. 30 — "US experts anticipate stowage of Polaris missiles aboard merchant vessels. These can be easily hidden among numerous vessels on the Atlantic and the Mediterranean. Such vessels will carry missiles in the aft section in launchers placed on deck level."

frigates would be a regular practice in which missiles would find application which would not be against the international maritime law concerning enemy ships. It has been customarily accepted (London Declaration of 1908, Art. 48) that a neutral ship may not be destroyed by the seizing one with the exception when the way to the port turns out unsafe for the ship or inconvenient in military sense. Although it has not been precisley termed what is "unsafe for the ship" but in the light of rarity of such actions it must be "exceptional necessity" as worded by Article 51 of London Declaration. Recently, the Law of Naval Warfare of 1955, in Section 503/6 declares that

"thought it is not entirely forbidden to destroy neutral ships seized the responsibility for such act is much greater than to do so with a seized enemy ship".

In practice, however, the question of deliberate use of missiles against neutral ship will show similar aspects to those connected with the use of submarines against those ships, thus remaining within the problem whether it is legal or illegal to sink them at sight, without visiting them first, on basis of warfare area proclamation where neutral ships will be dealt with just like enemy ships. Such practice, although illegal, but operational in both world wars as reprisal and counter-reprisal, would inevitably be used in a global war. In such situation, missiles would kill sea trade in large scale along with submarine torpedoes and bombs dropped from planes.

Besides, in the operations during such war it is quite likely that operation areas will be vast surface since, to avoid losses from nuclear missile attacks, the ships of any operation unit will be arranged in special lines and groupings, scattered over 10 - 20 thousand nautical square mile areas. There would be no place for neutral ships and, missiles would be used without limit.

In other situations, the only danger to neutral ships (perhaps to the ships of the country involved in the war but unarmed and going outside convoys) would come from target-missing missiles, which situation deserves a few lines.

Tactical missiles launched from a ship or flying plane show high accuracy to hit the target therefore they are little threat to naval-warfare-law-protected ships. With non-guided missiles it looks worse since : a) misinterpretation of the target ship, b) the ship may change her position while the missile is on its course, c) the self-guiding missile may misinterpret the target while the use of under-water missiles would mark the beginning of unlimited sub-water warfare.[44]

Summing up, such application of missiles, especially in dense

[44] See, D. P. O'CONNELL, *Legality of Cruise*, p. 793.

navigation areas may bring great danger to neutral trade. Assuming that restraint from missile attacks nearby a neutral ship may be applicable it would be necessary "to see" accurately with electronic devices over big water areas in order not to hit such ship. The greatest danger comes from a missing missile when its eletronic monitoring system gest confused by special jamming system or it becomes directed to a false target. In such case, erratic missile may react to any signal which would be albe to work on the missile's self-guiding system.

The viewpoint presented by O'Connell seems to lack evidence to prove that the danger of badly-aimed missiles is smaller with technologically advanced navies than with the navies of small and poor countries.[45] The percentage of target misses due to operator's faul will not vary substantially from navy to navy as it is only the highly trained personnel who are in charge of such equipment in any navy. It seems irrational to divide nations into more and less technically minded. Destroying "Eilat" by an Egyptian cutter may serve as illustration.

Missiles have become the principal weapon of submarines. Armed with tactical, operational or strategic missiles, submarines have many uses. As strategic craft they can destroy thermonuclear weapons, important regions and industrial plants, administration and governmental centres situated in enemy's hinterland. Operational missiles are anticipated to immobilise surface transport, obstruct enemy's supplies by sea, bringig destruction to convoys in places where they are formed; eventually, tactical short-range missiles can be employed to destroy enemy's surface and submerged craft.

Launching deep-water to earth strategic missiles must be estimated in terms of terrestrial warfare in which their attacks must be limited to military installations, provided that non-military objects situated near the target may remain unaffected.[46]

Any other use of a missile of this kind is illegal as it would not take into consideration the special status of civilians and would violate the rules of preservation of neutralized zones, historical monuments, places of warship, hospitals, etc.

Fighting submarines and surface ships by deep-water to water missiles consists in listening in and a use of thus collected information for automatic guidance of a missile to the target, which in the last stage of the flight should direct itself towards the target. Theoretically, one ought to adopt the viewpoint that the submarine launching a missile

[45] *Ibid*, p. 794.

[46] See E. SPETZEL, *op. cit.*, p. 326, A. VERDROSS, *Volkerrecht*, Vienna 1959, p. 397 and H. KRUSE, "Geschosse", Strup-Schlochauer, "Wörterbuch des Völkerrechts," vol. 1, Berlin 1960, p. 675.

attack, herself not being exposed to any big danger from the enemy's armoured ships or going in a convoy, should behave like a surface ship. In practice, however, in the light of war-engaged countries' behaviour such requirement seems unlikely to be fulfilled in modern wars. Admitting that submarines will keep on sinking enemy ships at night it is necessary to advocate that neutral ships may be spared and in this connection the use of deep-water to water missiles should be dramatically limited since the possibility of mistaking acivilian object for a military one is very great.

In conclusion it is necessary to emphasize that missiles as weapon are legal as long as they are used within the martial law and their warheads do not contain forbidden loads as gases, bacteriae. It should be made a firm requirement that the use of missiles in peaceful time in the name of self-defence may not justify any aggression, and in time of war, may not create excessive danger to neutral trade or set the elementary principle of martial law at defiance in that civilians ought to be distinguished from military men.

It can be assumed that the threat to neutral ships from short-range missiles is fairly little due to the fact that they are guided during their entire flight, thus the use of those missiles should not violate the rules of sea martial law. Nnguided tactical missiles, on the other hand, as well as operation ones — radio or radar-controlled in the initial stage of flight with ultra-red or passive electromagnetic radiations as target finders are liable to go astray and miss the target because their self-directing heads can be fooled through interference of direction beam or T.V. picture. In result, the missile can hit a cargo ship when its radio-location contrast will attract the missile.

In O'Connell's opinion, the question of missiles, again, puts forward the problem of underwater warfare, in a different form this time. The missile is a legal weapon if its target-striking ability equals 100 per cent on a short range and is acceptible if it complies with the following conditions: a) that the presence of a neutral ship near the target can be ascertained, b) that the missile be guided towards the target by airplanes or helicopters and, c) the missile's guiding system be capable to tell a cergo ship from a war ship by the kind of beat or radar wave they emit or reflect. As such level of precision has not been reached yet, in O'Connell's opinion, the launching of missiles beyond the radar horizon seems illegal.[47] Hill [48] criticizes O'Connell's conclusions calling

[47] See D. P. O'CONNELL, *International Law...*, p. 83 - 84, *ibid.*, p. 83 — "In times of limited war, any employment of missiles which could endanger international shipping is to be avoided as a violation of the freedom of the seas".

[48] See J. R. HILL, *op. cit.*, p. 14.

them "layman's conclusions." He says that there will always be countries ready for everything. However, he admits that laws are a reflection of standpoints of most nations and it often has binding power.

What to say about missiles in sea warfare, eventually?

First, missiles will be undoubtly used in any future hostilities in which neutral ships, although illegally, but will be attacked since the opponent will treat them alike with war ships, as in both last world wars. Deliberate attacks on neutral ships is out of question in tactical and financial terms. The only real threat to them would be erratic missiles, their poor target-finding systems, falls of warhead carrying segments over fishing and cargo boats.

To avoid the like dangers, as in the underwater operations, operation areas should be declared in high seas.[49] Such areas, of about 10 - 30 thousand square kilometers, should be announced and they might cover movable circles (zones) based on the task forces engaged inside them and, they would effectively extend to the borders of submarines' range. Precedents have been set to this effect in time of peace by declaring closed areas connected with missile experiments carried out in the Pacific. And so, from November 25 to December 3, 1974 the Soviet tests put areas 800 km south of the Midway island out of commercial navigation, unopposed.

On the other hand, it is possible to think and set, in advance, some zones (sanctuaries) restricted to sea warfare with the big powers' consent.[50]

The existence of the proposed areas would limit the threat to neutral ships to a reasonable extent. Obviously, in case a ship were accidentally domaged in such sanctuary the government of ship owners' should have the rigt to claim for full indemnities.

It is unlikely that arbitrary legal restrictions pertaining to missile sea warfare be accepted because of clearly seen reluctance of particular nations to tightem the existing or make new martial laws.

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[49] See R. SCHENK, *op. cit.*, p. 103, U. SCHEUNER, *op. cit.*, p. 235 and D. P. O'CONNELL, "*The Legality...*, p. 794.

[50] See however, B. T. FELD, C. W. RATHJENS, *Anti-submarine Warfare and the Sea-based Deterrent, Opportunities for Arms Control?*, "Survival," November-December 1973, p. 271, who are afraid that areas would become "preferred operating area for the missile launching submarine forces of the other super power."

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Pactes des droits de l'homme de l'O.N.U. et le droit international privé

par JERZY JAKUBOWSKI

1. Observations préliminaires

Les philosophes, les sociologues et les juristes manifestent depuis longtemps leur inérêt pour la diversité et les transformations du droit. Tout en voulant donner une explication de ces phénomènes, ils expriment en même temps leurs opinions.

Montaigne constatait notamment dans ses *Essais* : « Il n'est rien subject à plus continuelle agitation que les loix [...] Quelle bonté est-ce que je voyais hyer en crédit, et demain plus, et que le traict d'une rivière faict crime ? Quelle vérité que ces montaignes bornent, qui est mensonge au monde qui se tient au-delà »[1]. Pascal faisait allusion aux idées de Montaigne en écrivant : « Pourquoi me tuez-vous à votre avantage ? Je n'ai point d'armes. — Et quoi, ne demeurez-vous pas de l'autre côté de l'eau ? Mon ami, si vous demeuriez de ce côté de l'eau, je serais un assassin, et cela serait injuste de vous tuer de la sorte. Mais puisque vous demeurez de l'autre côté, je suis un brave et cela est juste »[2]. Et concluait : « Plaisante justice qu'une rivière borne. Vérité au-deçà des Pyrénées, erreur au-delà »[3].

L'attitude de la doctrine envers ce phénomène changeait selon les écoles de la pensée juridique et politique. D'un côté, une pleine aprobation pour la diversité du droit ; de l'autre, les partisans de l'unification totale du droit à l'échelle mondiale. La première de ces extrémités se développa surtout en Allemagne (école historique et son fameux *Volksgeist).* Le grand civiliste français de la première moitié du XIX[e] siècle, Beugnet, fut du même avis lorsqu'il avouait : « Messieurs, je n'enseigne pas le droit civil, je ne connais que le Code Napoléon ». S. A. Bazard,

[1] M. de MONTAIGNE, *Essais,* nouv. éd. conforme au texte de l'exemplaire de Bordeaux, Paris 1952, livre second, p. 287.

[2] B. PASCAL, *Pensées,* dans: *Oeuvres complètes,* établies par J. Chevalier, Paris 1954, n° 233(23), p. 1151.

[3] *Ibid.,* n° 230(69), p. 1149.

élève de Saint-Simon, représenta l'autre extrémité lorsqu'il estimait que tous les peuples du monde devraient former un énorme atelier et travailler selon les règles de droit communes à tous.

Les sciences humaines et sociales contemporaines se montrent assez modérées en matière de conceptions unitaristes et pluralistes du droit. La conception marxiste dans ce domaine est également nuancée. En effet, tout en reconnaissant que la diversité du droit est le corollaire du développement social et économique inégal des sociétés humaines, des différences de régime social et économique ainsi que de la tradition historique de chaque peuple, les marxistes ne nient pas l'existence de certaines valeurs juridiques communes [4].

Si, par le passé, les juristes des pays socialistes ne reconnaissaient pas l'existence des valeurs juridiques communes aux États à régimes sociaux différents, la doctrine juridique marxiste contemporaine ne conteste plus certaines valeurs communes [5].

Quand on évoque les principes juridiques communs, on pense surtout aux règles et principes du droit international public. Nous allons toutefois traiter d'un autre aspect de la question, à savoir celui des principes de droit universellement reconnus, vus à travers le prisme du droit international privé, c'est-à-dire des rapports internationaux entre les personnes physiques et morales, et non entre les États.

Il existe en droit international privé plusieurs principes communs à tous les peuples. Il s'agira en l'occurence des principes communs résultant de l'unification du droit ainsi que des solutions convergentes de nombreux systèmes juridiques. On peut citer à cet égard la reconnaissance universelle de la personnalité juridique des personnes

[4] Cf. notamment M. FRITZHAND, *O elementarnych normach moralnych [A propos des normes morales élémentaires]*, « Myśl Filozoficzna », 1956, nº 1, p. 7 (reproduit aussi dans le volume centenant les études du MÊME AUTEUR, *W kręgu etyki marksistowskiej [Dans le cercle de l'éthique marxiste]*, Warszawa 1966, pp. 62 - 97) ; H. JANKOWSKI, *Prawo a moralność [Le droit et la morale]*, Warszawa 1968, pp. 175 et s. ; cf. également M. OSSOWSKA, *Socjologia moralności [Sociologie de la morale]*, Warszawa 1963, pp. 115 - 119.

[5] Cf. J. JAKUBOWSKI, *Z problematyki metodologicznej badań prawno-porównawczych [De la méthodologie en droit comparé]*, « Państwo i Prawo », 1963, nº 7, p. 78 ; S. ROZMARYN, *Z teorii badań i prac prawno-porównawczych [A propos de la théorie des recherches en droit comparé]*, « Państwo i Prawo », 1966, nº 3, pp. 408 - 410 ; G. HERCZEGH, *The General Principles of Law and the International Order*, Budapest 1968, p. 95 ; G. I. TUNKIN, *Teorija meždunarodnogo prava*, Moskva 1970, p. 230 ; G. EÖRSI, *Convergence in Civil Law*, dans : *A Socialist Approach to Comparative Law*, Leyden - Budapest 1977, pp. 81 et s. ; détails du problème chez J. JAKUBOWSKI, *Prawo jednolite w międzynarodowym obrocie gospodarczym. Problemy stosowania [Le droit uniforme dans les échanges internationaux. Problèmes d'application]*, Warszawa 1972, pp. 98 et s.

physiques et morales étrangères ou l'application de la *lex rei sitae* aux droits réels sur les biens immobiliers. Cette convergence de solutions est également caractéristique de nombreuses institutions du commerce international.

Pourtant, ce sont les Pactes internationaux des droits de l'homme (le Pacte international relatif aux droits civils et politiques, ci-après pacte politique, et le Pacte international relatif aux droits économiques, sociaux et culturels, ci-après pacte économique), adoptés en 1966 par l'Assemblée Générale de l'O.N.U. — ratifiés, en 1977, par la Pologne —, qui jouent un rôle primordial dans la détermination des valeurs communes. Ceci non seulement à cause de leur grande portée et complexité, mais également parce qu'ils constituent un catalogue des principes et valeurs reconnus formant un cadre juridique commun et suprême de l'existence humaine.

Nous allons tenter dans cet article de porter un jugement sur l'incidence des Pactes pour le droit international privé et sur l'influence de leurs dispositions sur les institutions du droit international privé. Il s'agit d'une première approche du problème qui, à n'en pas douter, appelle des études plus profondes et détaillées.

2. L'importance des Pactes des droits de l'homme pour le droit international privé

On soulignait souvent dans la théorie du droit international privé son caractère trop technique. Cette opinion a trouvé un juste reflet dans le titre de l'article de K. Zweigert *Zur Armut des IPR an sozialen Werten [De la pauvreté du droit international pivé en valeurs sociales]* [6].

Plusieurs raisons sont à l'origine de cet état de choses. L'une d'entre elles, et non la moindre, est qu'à l'époque de la formation, au XIX^e^ siècle et durant la première moitié du XX^e^, du droit international privé moderne, celui-ci était considéré uniquement comme un ensemble des règles de conflit des lois, annexé au droit civil national et privé de ce fait d'un plus large « souffle » international. A l'époque de la formation des États nationaux — précédés des monarchies absolues —, qui a vu se développer les grandes codifications du droit, aussi bien les règles de conflit que le droit autonome de commerce *(lex mercatoria)* furent entièrement « nationalisés ». Ce processus a eu pour effet que la réglementation des rapports internationaux des personnes physiques

[6] « Rables Zeitschrift für ausländisches und internationales Privatrecht », 1973, n° 3, p. 439.

et morales est devenue purement accessoire aux systèmes nationaux de droit civil. Le caractère nettement formel de cet ensemble des règles techniques de compétence contribua, par la force de choses, à un appauvrissement des questions axiologiques et celles de principe en droit international privé. Il convient toutefois de souligner que les grands esprits de notre discipline ne se contentaient pas uniquement de l'étude des problèmes techniques, mais recherchaient un plus large contexte des conflits de lois. Ainsi, F. C. von Savigny réflechissait au rôle de ce droit au sein de la « communauté des peuples », tandis que J. Story ne se contentait pas de l'étude des « conflits de lois » *(conflict of laws)*, mais cherchait des fondements d'un droit véritablement international qui puisse régir les rapports internationaux des personnes physiques et morales; c'est d'ailleurs Story qui utilisa le premier le terme « droit international privé » *(private international law)*. Enfin, P. S. Mancini recherchait les fondements du droit international privé dans la nationalité en tant que corollaire de la notion d'État national (cf. sa conférence prononcée à Milan, en 1851, « Della nazionalità come fondamento del diritto delle genti »).

D'autre part, le caractère formel et technique du droit international privé fut la conséquence de la domination, dans la science juridique du XIX^{e} siècle, du positivisme qui avait rompu avec les conceptions universalistes du droit naturel du Siècle des Lumières au profit de la conception selon laquelle le droit n'était qu'un corollaire de l'existence des États nationaux.

Il faut enfin tenir compte du fait que les rapports internationaux entre les personnes physiques et morales furent, au XIX^{e} siècle, d'une ampleur plutôt réduite et que, par conséquent, il n'existait pas de pression suffisamment forte pour faire aboutir une vaste réglementation internationale et pour rechercher des valeurs communes à plusieurs systèmes juridiques. Ce n'est que vers les années quatre-vingt du XIX^{e} siècle que le processus d'internationalisation du droit prit une plus large dimension internationale, surtout en matière de brevets et de droit d'auteur.

Depuis la fin de la Deuxième Guerre mondiale, nous sommes les témoins du développement d'une forte tendance à l'internationalisation de la vie et de la naissance d'une communauté internationale personnifiée par l'Organisation des Nations Unies. Nous assistons en même temps au déclin du positivisme juridique. Tous ces facteurs contribuent à transformer le droit international privé. Les changements se traduisent non seulement par l'élargissement de la portée et par la modification de la fonction de cette discipline, mais également par la recherche de ses fondements sociaux et axiologiques[7]. Un rôle de

tout premier plan dans l'établissement de ces fondements incombe aux Pactes des droits de l'homme de l'O.N.U.[8]. Les États socialistes, y compris la Pologne, ont apporté une importante contribution à la rédaction des Pactes[9].

A côté de la Déclaration universelle des droits de l'homme de 1948 et de l'Acte final de la Conférence sur la Sécurité et la Coopération en Europe de 1975, les Pactes constituent le fondement axiologique du droit international privé contemporain. Nous allons traiter de ce problème dans les pages suivantes.

3. Les Pactes des droits de l'homme et la condition des étrangers

Bien que les dispositions du préambule (le même pour le pacte politique et pour le pacte économique) ne soient pas les règles de droit au sens strict, elles possèdent une grande importance pour la recherche des motifs et des directives d'interprétation. On insistera surtout sur deux passages du préambule, selon lesquels « la reconnaissance de la dignité inhérente à tous les membres de la famille humaine et de leurs droits égaux et inaliénables constitue le fondement de la liberté, de la justice et de la paix dans le monde », car « ces droits découlent de la dignité inhérente à la personne humaine ». Il est également souligné dans le préambule que « la Charte des Nations Unies impose aux États l'obligation de promouvoir le respect universel et effectif des droits et des libertés de l'homme ». Ces passages revêtent une importance particulière pour la condition des étrangers.

Une directive concrète pour le droit des étrangers figure dans l'art. 2 du pacte politique dont l'al. 1er stipule que les États parties du pacte s'engagent à respecter et à garantir à tous les individus se trouvant sur leur territoire et relevant de leur compétence les droits reconnus dans le pacte, sans distinction aucune notamment de race, de couleur, de sexe, de langue, de religion, d'opinion politique ou de toute autre opinion, d'origine nationale ou sociale, de fortune, de

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[7] J. JAKUBOWSKI, *Współczesne tendencje w międzynarodowym prawie prywatnym*, « Państwo i Prawo », 1975, n° 12, pp. 33 - 44 ; 1976, n° 1, pp. 31 - 39 (traduction française dans « Polish Yearbook of International Law », vol. VIII).

[8] Plus de détails sur les Pactes des droits de l'homme chez Z. RESICH, *Ochrona praw człowieka w prawie międzynarodowym* [*La protection des droits de l'homme en droit international*], Warszawa 1973 ; J. SYMONIDES, *Międzynarodowa ochrona praw człowieka* [*La protection internationale des droits de l'homme*], *Warszawa 1977*.

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

naissance ou de toute autre situation. Cette disposition concerne directement le droit des étrangers, car elle se rapporte aussi bien aux apatrides résidant sur le territoire de l'un des États parties du pacte politique qu'aux ressortissants des États tiers. Le principe énoncé par cette disposition est déjà appliqué en droit polonais dans lequel l'art. 8 de la loi sur le droit international privé de 1965 [10] dispose que « les étrangers peuvent avoir en Pologne les mêmes droits et les mêmes devoirs que les ressortissants polonais, à moins que la loi n'en dispose autrement ». De pareilles dispositions figurent dans d'autres lois polonaises et notamment dans l'art. 6, pt 4 de la loi sur les droits d'auteur de 1952 [11] et dans l'art. 4 de la loi sur les brevets d'invention de 1972 [12]; les articles en question font dépendre la jouissance par les étrangers et les nationaux des droits égaux de la réciprocité (formelle) de la part des États dont ces étrangers sont ressortissants. La Pologne fait également partie de plusieurs conventions internationales relatives aux droits égaux des étrangers et des nationaux, comme p. ex. la Convention de Paris concernant la protection de la propriété industrielle (version révisée de Stockholm de 1967).

L'article 16 du pacte politique, selon lequel « chacun a droit à la reconnaissance en tous lieux de sa personnalité juridique », concerne également la condition des étrangers. L'article 8 du Code civil polonais de 1964 [13] déclare : « Tout homme, dès sa naissance, a la capacité juridique ».

L'article 23, al. 2 du pacte politique reconnaît le droit de se marier et de fonder une famille aux hommes et femmes ayant atteint l'âge nubile. La Pologne est également partie de la Convention de l'O.N.U. concernant le consentement au mariage, l'âge minimum du mariage et l'enregistrement des mariages de 1962 [14].

D'après l'art. 24, al. 1er du pacte politique, « tout enfant, sans discrimination aucune fondée sur la race, la couleur, le sexe, la langue, la religion, l'origine nationale ou sociale, la fortune ou la naissance, a droit, de la part de la société et de l'État, aux mesures de protection qu'exige sa condition de mineur ». Cette question est réglée dans l'art. 79 de la Constitution polonaise.

On doit également mentionner l'art. 14, al. 1er du pacte politique, selon lequel tous sont égaux devant les tribunaux et les cours de justice, et toute personne a droit à ce que sa cause soit entendue

[10] Dziennik Ustaw [Journal des Lois — abrév. J. des L.], 1965, n° 46, texte 290.
[11] J. des L., 1952, n° 34, texte 234.
[12] J. des L., 1972, n° 43, texte 272.
[13] J. des L., 1964, n° 16, texte 93.
[14] J. des L., 1965, n° 9, texte 53.

équitablement et publiquement par un tribunal compétent, indépendant et impartial, établi par la loi, y compris en matière de droit civil. Cette disposition du pacte énonce le principe de l'accès des étrangers aux tribunaux, mais elle n'abroge pas les principes du droit national en matière de compétence internationale des tribunaux.

Pour ce qui est du pacte économique, on doit remarquer que l'art. 3 dudit pacte oblige les États parties à assurer le droit égal qu'ont l'homme et la femme au bénéfice de tous droits économiques, sociaux et culturels qui figurent dans le pacte en question.

4. Les Pactes des droits de l'homme et les règles de conflit de lois

Les dispositions énoncées par le préambule des Pactes ainsi que leurs dispositions concrètes revêtent une énorme importance pour la solution des conflits de lois en droit international privé.

Les articles concernant l'égalité en droit des hommes et des femmes (art. 3 du pacte politique, art. 3 du pacte économique) ont une grande importance, car ils imposent l'application du principe de l'égalité des sexes dans la solution des conflits de lois. La loi polonaise sur le droit international privé de 1965 obéit à ce principe et elle ne privilégie aucun des sexes. Conformément à l'art. 14 de la loi en question, la faculté de contracter un mariage dépend pour chaque partie de sa loi nationale. Selon l'art. 17 de la loi, les rapports personnels et patrimoniaux entre époux sont soumis à la loi nationale commune, et dans le cas de l'inexistence de la loi nationale commune — à la loi de État où ils possèdent leur domicile, et pour le cas où les époux n'auraient pas de domicile dans le même État — à la loi polonaise. De pareils principes sont énoncés dans l'art. 18 de la loi relatif à la loi applicable au divorce.

Les règles de conflit devraient également s'inspirer de la disposition de l'art. 23, al. 3 du pacte politique selon lequel nul mariage ne peut être conclu sans le libre et plein consentement des futurs époux. Ce principe a déjà trouvé son application dans l'art. 1er, al. 1er du Code de famille et de tutelle polonais de 1964[15]. Il figure en outre dans la Convention de 1962, déjà mentionnée, sur le consentement au mariage, l'âge minimum de mariage et l'enregistrement des mariages.

L'article 24 du pacte politique, mentionné plus haut, entraîne également des conséquences pour les règles de conflit de lois. Les règles de conflit polonaises qui accordent la priorité au bien et aux intérêts de

[15] J. des L., 1964, nº 9, texte 59.

l'enfant prévoient, par conséquent, l'application de la loi de l'enfant dans presque tous les cas (art. 19, 20 et 23 de la loi de 1965). On peut cependant étudier *de lege ferenda* s'il ne serait pas utile d'appliquer alternativement la loi de l'enfant et la loi du domicile de l'enfant selon que l'une ou l'autre pourvoit mieux aux intérêts de l'enfant.

5. Les Pactes des droits de l'homme et l'ordre public

Comme nous l'avons déjà souligné, l'importance des Pactes des droits de l'homme découle notamment du fait qu'ils sont un fondement axiologique des points de rattachement dans plusieurs cas. Mais en dehors de cet aspect, on doit mettre en relief le rôle des Pactes dans un domaine qui n'est pas directement lié à la solution des conflits de lois au sens strict du terme. Il s'agit de l'incidence des Pactes pour l'application de la clause de l'ordre public.

La désignation de la loi applicable par une règle de conflit s'effectue sans tenir compte du contenu des règles substantielles. Toutefois, il peut s'avérer qu'il faudrait appliquer une règle substantielle inacceptable pour l'État du siège du tribunal. Dans ce cas, la clause de l'ordre public permet au tribunal d'écarter la loi étrangère, en vue de protéger l'ordre juridique national devant l'intrusion des règles contraires à ses principes de base [16].

La clause de l'ordre public est fondée sur les valeurs juridiques suprêmes et sur les principes généraux du droit de la *lex fori*. Étant donné les différences en matière de principales valeurs des systèmes juridiques nationaux, l'ordre public a plutôt pour but de protéger l'ordre juridique interne et non d'unifier, à l'échelle mondiale, les valeurs juridiques suprêmes et les principes de base.

Les documents internationaux déjà mentionnés, comme la Déclaration universelle des droits de l'homme de 1948, les Pactes des droits de l'homme de 1966 ainsi que l'Acte final de la Conférence sur la Sécurité et la Coopération en Europe de 1975, peuvent être considérés, à l'échelle mondiale, comme un ensemble des valeurs et principes fondamentaux qui revêtent une grande importance pour l'application de la clause de l'ordre public.

L'article 2 du pacte politique oblige les États parties de reconnaître les mêmes droits à tous les individus se trouvant sur leur territoire

[16] Cf. l'étude mnographique de M. SOŚNIAK, *Klauzula porządku publicznego w prawie międzynarodowym prywatnym [La clause de l'ordre public en droit international privé]*, Warszawa 1961.

et relevant de leur compétence, sans distinction aucune notamment de race, de couleur, de sexe, de langue, de religion, d'opinion politique ou de toute autre opinion, d'origine nationale ou sociale, de fortune, de naissance ou de toute autre situation. D'autre part, l'art. 3 du pacte politique et l'art. 3 du pacte économique proclament l'égalité des sexes.

Les principes en question revêtent une grande importance pour l'application de la clause de l'ordre public. En effet, certaines dispositions des Pactes constituent une base conventionnelle internationale permettant d'écarter les règles substantielles étrangères contraires a leur contenu. Dans la pratique du droit international privé, il s'agira p. ex. de l'éviction des règles substantielles discriminant les femmes mariées ou les enfants naturels, ainsi que des dispositions discriminatoires à base raciste, comme p. ex. l'interdiction des mariages mixtes. La polygamie est également contraire au principe de l'égalité ainsi qu'à celui de la dignité humaine dont parle le préambule des Pactes [17].

L'article 23, al. 2 du pacte politique reconnaît le droit de se marier et de fonder une famille à l'homme et à la femme à partir de l'âge nubile. L'appel à l'ordre public serait donc pleinement justifié si la loi étrangère interdisait, à certains individus, de contracter le mariage, p. ex. à ceux qui ont prononcé des voeux monastiques.

Conformément à l'art. 23, al. 3 du pacte politique, nul mariage ne peut être conclu sans le libre et plein consentement des futurs époux. Ce principe figure dans le texte de la Convention de New York de 1962 sur le consentement au mariage, l'âge minimum de mariage et l'enregistrement des mariages. Les dispositions de cette Convention peuvent également servir de base pour faire appel à l'ordre public [18].

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[17] Il n'existe pas de doute que pour le cas de la conclusion d'un mariage, il est nécessaire d'écarter la norme étrangère autorisant la polygamie. Toutefois il faut garder beaucoup de prudence dans les cas où l'on ne veut pas reconnaître le mariage d'un homme marié à plusieurs femmes, contracté sous le régime juridique autorisant la polygamie.

[18] Cf. H. TRAMMER, *Czy wada oświadczenia woli nupturienta jest przyczyną nieważności małżeństwa? [Le vice du consentement est-il la cause de la nullité du mariage?]*, « Nowe Prawo », 1966, nº 1, pp. 55 et s.

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Recognition and Enforcement of Foreign Court Judgements in the Polish People's Republic

by JERZY JODŁOWSKI

I. Introductory Remarks

The admissibility of the recognition of foreign court judgements as a general institution was introduced in the Polish legal system in 1962. Previously, the Code of Civil Procedure (C.C.P.) of 1932 admitted the enforcement in the Polish territory of foreign court judgements only when an international agreement so stipulated (Art. 535). The Supreme Court [1] assumed that this principle also applies to the recognition of foreign judgements in cases not involving property, and particularly in cacec relating to status. This standpoint was sharply criticized by a majority of theorists.[2] The demands of international legal relations, particularly in the domain of family relations, justified the admissibility of the recognition of foreign court judgements also in the absence of an international agreement, the more so as in the first period after

[1] Supreme Court resolution of May 29, 1937, "Zbiór orzeczeń Sądu Najwyższego", 1937, item 383. Such a standpoint was adopted by the Supreme Court also in the postwar period, in a resolution of Jan. 18, 1959, "Zbiór orzeczeń Sądu Najwyższego", 1959, item 64.

[2] M. ALLERHAND, *Uznanie w Polsce orzeczenia rozwodowego sądu zagranicznego* [*Recognition in Poland of a Foreign Court's Divorce Decree*], "Polski Proces Cywilny", 1938, Nos. 1/2 and ff; M. LISIEWSKI, *Uznanie w Polsce orzeczeń zagranicznych* [*Recognition of Foreign Judgements in Poland*], "Polski Proces Cywilny," 1938, Nos. 7/8, pp. 193 ff; S. SZER, *O uznaniu zagranicznych wyroków rozwodowych* [*On Recognition of Foreign Divorce Decrees*], "Państwo i Prawo," 1948, No. 2, p. 15; K. LIPIŃSKI, *Uznanie zagranicznych orzeczeń sądowych* [*Recognition of Foreign Court Judgements*], "Nowe Prawo", 1957, No. 11, p. 55; E. WIERZBOWSKI, *Skuteczność zagranicznych wyroków rozwodowych w Polsce* [*Effectiveness of Foreign Divorce Decrees in Poland*], "Biuletyn Ministerstwa Sprawiedliwości," 1957, No. 6, p. 18; A view concordant with the Supreme Court's stance was represented by: F. ZOLL, *Prawo pyrwatne międzynarodowe i międzydzielnicowe* [*Private International and Interregional Law*], Kraków 1936, p. 36; K. STEFKO, *Zur Frage der Anerkennung deutscher Ehescheidungsurteile in Polen*, "Zeitschrift für osteropäische Recht," 1936, p. 377; B. DOBRZAŃSKI, *Jeszcze o uznaniu zagranicznych wyroków w sprawach rozwodowych* [*More Remarks*

World War II Poland concluded only a few such agreements,[3] while almost all the prewar agreements had lost their validity.

The Law of February 15, 1962,[4] introduced in the C.C.P. provisions on the recognition of foreign court judgements. These provisions admitted the recognition of the effectiveness in Poland, on conditions laid down in the Law, of foreign court judgements which need not be executed, leaving unchanged the principle that the enforcement of foreign court judgements is possible only when an international agreement so provides.[5]

In 1964, following a codification of civil procedure, all the provisions concerning international civil procedure were collected in Part III of the new C.C.P.[6]. That part of the Code includes the provisions on the recognition of foreign court judgements introduced by the Law of 1962 as well as the provisions of the old C.C.P. on the enforcement of foreign judgements (Book III, Part III, Arts. 1145 - 1152). In the new Code, these provisions remained principally unaltered aside from some editorial changes.

The system of recognition and enforcement of foreign court judgements, adopted in the Polish law in 1962, is based on the distinction between judgements enforceable by way of execution and those which are not.[7] Judgements belonging to the latter group can be recognized in Poland irrespective of the existence of an international agreement, providing they fulfil the conditions set in Articles 1145 and 1146 of the C.C.P. That group includes constitutive judgements and judgements

on Recognition of Foreign Judgments in Divorce Cases], "Nowe Prawo," 1959, No. 3, pp. 268 ff.

[3] Until the entry into force of the Law of Feb. 15, 1962, Poland had concluded bilateral agreements on legal assistance in family and civil cases with: Czechoslovakia, of Feb. 21, 1949, replaced by the agreement of July 4, 1961; the GDR, of Feb. 1, 1957; the USSR, of Dec. 28, 1957; Hungary, of. Feb. 6, 1959; Yugoslavia, of March 6, 1960; Bulgaria, of Dec. 4, 1961; Rumania, of Jan. 25, 1962. After 1962, agreements were concluded with: Austria, of. Dec. 11, 1963; France, of April 5, 1967; Mongolia, of Sept. 14, 1971. As regards multilateral agreements providing for the recognition of foreign court judgements, Poland is a party of the Bern agreements on railway transport.

[4] Law of Feb. 15, 1962, changing the procedure in civil cases, "Dziennik Ustaw," No. 10, item 46.

[5] The system of recognition of foreign judgments according to the 1962 Law was discussed by the author in: *Nowe przepisy k.p.c. z zakresu międzynarodowego postępowania cywilnego [New Provisions of the Code of Civil Procedure concerning International Civil Procedure]*, Warszawa 1962, and: "Nowe Prawo," 1962, Nos. 4, 5 and 6.

[6] Law of Nov. 17, "Dziennik Ustaw," No. 43, item 296.

[7] See J. JODŁOWSKI, *La reconnaissance de l'exécution et décisions éntrangeres en Pologne*, "Journal du droit international," 1966, No. 3, pp. 539 ff.

establishing the existence or non-existence of a legal relationship or right, and thus particularly judgements relating to status. Judgements enforceable by way of execution can be enforced only when an international agreement so stipulates (Art. 1150, para. 1, of the C.C.P.). An exception are judgements adjudicating alimony, which are subject to execution in Poland also in the absence of an appropriate international agreement, on condition of reciprocity.[8]

A second characteristic feature of the Polish legal system in the domain under discussion is that the effectiveness of a foreign court judgement in the territory of Poland is dependent upon the recognition of that judgement, or ascertainment of its enforceability, by the Polish court (Art. 1145, para. 1, Art. 1150, para, 1, of the C.C.P.). The Polish court passes a decision following special proceedings. The decision is of a constitutive character. Excluded from this procedure are only foreign judgements not related to property and concerning foreign citizens, passed by a court competent under the foreign law. But even these judgements have to be recognized by the Polish court if they are to serve as a basis for contracting marriage in Poland, or for an entry in the mortgage register or any other public register in Poland.

The recognition of foreign judgements on the strength of the C.C.P. provisions, i.e. when it is not regulated by an international agreement, depends on the existence of reciprocity. This is the general and fundamental condition.

Other conditions of the recognition of foreign judgements are listed in Article 1146, paragraph 1, of the C.C.P. According to this article, a foreign judgement can be recognized as effective in Poland when:

1. The judgement is final according to the law of the state in which it has been rendered ;

2. The case does not fall — according to the Polish law or an international agreement — within the exclusive jurisdiction of the Polish courts or the courts of a third state ;

3. The party was not deprived of the possibility of defence, and in case of the lack of capacity to be a party in a lawsuit — of due representation ;

4. The case has not been validly adjudicated by a Polish court, or it had not been instituted before a Polish court competent to adjudge it, before the judgement of the foreign court has become final ;

5. The judgement is not inconsistent with the fundamental principles of legal order in Poland ;

[8] See W. SKIERKOWSKA, *Międzynarodowe postępowanie cywilne w sprawach alimentacyjnych [International Civil Procedure in Alimony Cases]*, Warszawa 1972, pp. 132 ff.

6. In passing the judgement in a case in which the Polish law should have been applied, this law was actually applied, unless the foreign law applied in the case does not substantially differ from the Polish law.

The international agreements concluded by Poland,[9] and particularly the bilateral agreements on legal assistance, provide for their own regime of the recognition of judgements and only in some cases refer to the internal regulations of the contracting parties. Most of these agreements, namely, the agreements on legal assistance with Czechoslovakia, the GDR, Romania, Hungary and Mongolia, provide for mutual recognition of court judgements *de plano*, without the necessity to conduct court proceedings. Also recognized *de plano* are the judgements of the USSR courts in marital cases and the judgements of the French courts in the field of the family law. Whereas the court judgements originating in Austria, Bulgaria, Yugoslavia as well as in the USSR, in other than marital cases, and in France, when they have to be entered in a public register, are subject to recognition by the Polish court. The enforcement of judgements in cases involving property, including judgements originating in all the above-mentioned states, always require the determining of enforceability and granting of *exequatur* by the Polish court.

International agreements set the conditions which foreign judgements must fulfil to be recognized or enforced. As a rule, the conditions of recognition are limited and less severe than the conditions provided for in Article 1146 of the C.C.P. All agreements set the condition that the judgement be passed by a court competent under the agreement and that the case be not previously adjudged in the recognizing state. Some agreements set also other conditions for recognition. The conditions of enforcement of judgements are more stringent.

In practice, the question has arisen whether, in case an international agreement does not provide for some of the conditions of recognition of a foreign judgements specified in the C.C.P., only the conditions provided for in the agreement come into play, or whether the additional conditions listed in Article 1146, paragraph 1, of the C.C.P. should also be fulfilled. In other words, this is a question of the relationship of an international agreement to the general rules of the internal law in the domain of recognition of foreign judgements. The Supreme Court, in its decision of December 7, 1973,[10] ruled that, as regards the recognition and enforcement of judgements by the courts

[9] See footnote 3.

[10] Decision of Dec. 7, 1973, II CZ 181/73, "Państwo i Prawo," 1976, No. 12, p. 165.

of a state with which Poland is bound by an international agreement (in this particular case — Czechoslovakia), the provisions of Articles 1146 and 1150 of the C.C.P. do not come into play. Instead, according to Article 1096 of the C.C.P., the provisions of the agreement concerning the conditions of recognition and enforcement of judgements are applicable.

The Supreme Court recognized that the reservation, contained in Article 1096, that the provisions of Part III of the C.C.P. shall not bze applied "when an international agreement provides otherwise" should be understood in this way : when an international agreement introduces a definite set of conditions, the fulfilment whereof determines the enforceability of a foreign court judgment, these and only these conditions play the decisive role. In this way, the application of the set of conditions laid down in the C.C.P. is, to some extent, excluded. The above interpretation stems from the principle of priority of the conventional law over the internal law (Art. 1096 of the C.C.P.).

Since the entry into force of the Law of February 15, 1962, and also since the entry into force of a majority of the bilateral agreements on legal assistance concluded by Poland, the Supreme Court has delivered many decisions concerning the recognition of foreign court judgments. Although, out of many cases brought before the courts of first instance, only a small part reached the Supreme Court, the Supreme Court has nevertheless had and opportunity to take a stand on almost all the essential aspects of this problem and to offer interpretations of many provisions of both the C.C.P. and international agreements regulating the recognition and enforcement of foreign court judgements.

Presented below are the major questions in this field, in the light of the Supreme Court's decisions.

II. Conditions of Recognition

a) Reciprocity

The principle of reciprocity, though sometimes questioned in the western doctrine,[11] is regarded by the socialist doctrine as justified and

[11] H. BATIFFOL, P. LAGARDE, *Droit international privé*, Paris 1971, vol. 2, No. 728, p. 443; T. SÜSS, *Die Anerkennung ausländischer Urteile*, in : *Festgabe für L. Rosenberg*, 1949, p. 238 ; F. A. RIAD : *La valeur internationale des jugements en droit comparé*, Paris 1955, pp. 19 ff. H. SMIT, *Some Observations on the Roles of International Law and Reciprocity*, "Netherlands International Law Review," 1962, No. 2, pp. 147 ff.

necessary in an era of the existence of states with different systems.[12] It constitutes a safety valve, as it were, to prevent possible discrimination on in political grounds of the legislation and court decisions of states with different systems.

Obviously, the principle of reciprocity as a condition for the recognition of a foreign judgement comes into play only with respect to judgments passed by the courts of a state with which Poland is not bound by an international bilateral or multilateral agreement which would provide for the possibility and set the conditions for the recognition of judgements passed by the courts of the contracting states.

The condition of reciprocity, put to the fore of all conditions in the C.C.P., is treated also in the Supreme Court's rulings as the fundamental condition. Unless reciprocity was established in the proceedings before the court of first instance, the Supreme Court *ex officio* examines this matter,[13] and in case it ascertains the lack of reciprocity, it refuses the petition for the recognition of a foreign judgment without examining other premises, even if the lack of such premises or obstacles to the recognition of the judgement were cited during the proceedings.[14]

In the light of the Supreme Court's decisions, reciprocity as to the recognition of judgments in the category of cases in which a given judgement belongs is a sufficient premise for its recognition. This standpoint corresponds with the view adopted in the doctrine, which assumes that reciprocity can be limited to judgements of a certain type and must not necessarily exist with respect to all judgements of the Polish courts in civil cases.[15] In practice, this applies most frequently to foreign judgements in divorce cases, and the Supreme Court contents itself with the ascertainment that Polish divorce decrees are recognized in a given state.[16]

[12] A. L. LUNC, *Meždunarodnoe častnoe pravo*, III ed., 1973, pp. 355 ff.; R. BYSTRICKY, *La nouvelle loi tchécoslovaque sur le droit international privé*, "Bulletin de droit tchécoslovaque," 1963, No. 4, p. 234; L. RECZEI, *International Privatrecht*, Budapest 1960; I. SZASZY, *International Civil Procedure*, Budapest 1967, pp. 185 ff. J. JODŁOWSKI, *La reconnaissance...*, p. 252.

[13] Supreme Court decision of Oct. 11, 1969, I CR 240/68, "Państwo i Prawo," 1972, No. 2, p. 161, with a gloss by J. JODŁOWSKI.

[14] Supreme Court decision of April 15, 1971, I CR 143/71 (unpublished).

[15] H. TRAMER, *Zarys problematyki międzynarodowego procesu cywilnego państw kapitalistycznych [An Outline of the Problems of International Civil Procedure in Capitalist States]*, Warszawa 1956, p. 88; J. JODŁOWSKI, *Nowe przepisy...*, p. 27 and *La reconnaissance...*, p. 553.

[16] Particularly the cited decisions: of Oct. 11, 1969, I CR 240/68 and of April 15, 1971, I CR 143/71, and the decisions: of March 8, 1972 I CR 4/72, "Orzecznictwo Sądu Najwyższego seria cywilna" (hereinafter referred to as OSNC) 1972, no. 9, item 166; of Feb. 17, 1972, I CR 67/72 [unpublished].

Moreover, the Supreme Court's rulings indicate that formal reciprocity is sufficient, and material reciprocity is not necessary. Thus it is enough to establish that Polish divorce decrees are in principle recognized in a given foreign state, while the conditions of recognition must not necessarily be the same as in the Polish law.[17] When, for example, a given foreign system does not content itself with establishing that the case does not fall within the exclusive jurisdiction of the courts of that state and makes the recognition of a foreign judgement dependent on the requirement that it come from a competent court, this is no obstacle to recognizing in Poland the judgement of a court of that state, providing it meets all other conditions of recognition.[18] The ascertainment of reciprocity takes place, as a rule, in a manner provided for in Article 1143, paragraphs 1 and 2, of the C.C.P., i.e. on the basis of information furnished by the Ministry of Justice, requested by the Supreme Court *ex officio*.[19] Sometimes, however, reciprocity is established in another way, e.g. on the basis of a certificate from the foreign court which has passed the judgement, stating that the judgement in a similar case passed in Poland would be recognized in that state.[20]

As far as federal states go, in which many procedural systems regulating the recognition of foreign judgements are in force (especially in the United States), the Supreme Court rightly stresses the necessity of ascertaining the existence of reciprocity in each individual state. Thus reciprocity with respect to the recognition of divorce decrees has

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[17] The Supreme Court's opinion on this matter is concordant with the viewpoint adopted in literature. Cf. H. TRAMER, *op. cit.*, p. 88; J. JODŁOWSKI, *Nowe przepisy...* and *La reconnaissance...*, p. 553; W. SIEDLECKI, *Kilka uwag w związku z uznawaniem w Polsce zagranicznych orzeczeń sądowych w sprawach cywilnych [Several Remarks in Connection with the Recognition in Poland of Foreign Court Judgments in Civil Cases]*, in : *Księga pamiątkowa ku czci K. Przybyłowskiego [A Memorial Book to K. Przybyłowski]*, Kraków 1961, p. 272; E. WIERZBOWSKI, *Międzynarodowy obrót prawny w sprawach cywilnych [International Legal Intercourse in Civil Cases]*, Warszawa 1971, p. 299.

[18] The cited decision of Feb. 17, 1972, I CR 67/72.

[19] The cited decisions Oct. 11, 1969, I CR 240/68 and of April 15, 1971 I CR 143/71.

[20] E.g. in the case which the cited decision of Feb. 17, 1972, I CR 67/72 concerns, reciprocity as to the judgments passed in the state of Connecticut was established on the basis of a letter from the Superior Court of New Haven County to the effect that the courts of that state recognize a final divorce decree originating in Poland.

been found to exist in the states of Illinois,[21] Connecticut[22] and Alabama.[23] Whereas in a case concerning the recognition of a divorce decree passed in the Mexican state of Chilhuahua, the total absence of reciprocity as regards divorce decrees in relations with Mexico was established.[24]

b) Jurisdiction

Examination of the jurisdiction of the court which has handed down a judgement is a generally accepted practice in the recognition of foreign judgements. However, the scope and manner of examination of this competence varies from one legal system to another. In the majority of the systems, the recognizing court is bound to ascertain whether the court which has passed the judgement was competent to hear the case from the viewpoint of international competence (and sometimes also local competence). Examination of this competence gives rise to the question, controversial in both the doctrine[25] and jurisprudence, according to what criteria the jurisdiction of the court which has passed a judgement should be evaluated: whether on the basis of the connecting factor adopted in the law of the state in which the judgement to be enforced originates, or whether on the basis of the connecting factor adopted in the law of the recognizing state. As it is known, the latter way of examining jurisdiction, described as intermediary jurisdiction, is most often applied.

The Polish system does not go so far and does not require examination of the jurisdiction of the court which has handed down a judgement that is to be recognized in Poland. Nor does it require ascertaining the positive existence of jurisdiction in each particular case. Article 1146, paragraph 1, point 2, of the C.C.P. contents itself with examination of jurisdiction from a negative angle, i.e. establishing whether the foreign court has not ruled in a case which, according to the Polish law or an international agreement Poland has concluded, is reserved for the exclusive jurisdiction of the Polish courts or the courts of a third state. Such a formulation of this condition of recognition of

[21] The cited decisions of Oct. 11, 1969, I CR 240/68 and of March 8, 1972, I CR 4/72 as well as of Feb. 6, 1975, II CR 849/74, OSNC 1976, No. 1, item 11.

[22] Decisions of Feb. 17, 1972, I CR 67/72 (unpublished).

[23] Decision of Jan. 15, 1968, III CRN 414/72 (unpublished).

[24] Decision of April 15, 1971, I CR 143/71 (unpublished).

[25] Cf. D. HOLLEAUX, *Compétence de juge étranger et reconnaissance des jugements*, Paris 1970, who most broadly reviews the solutions in this field adopted in various systems and presents all the controversial aspects of the question of evaluation of the competence of a foreign court.

a foreign judgment stems from the assumption that, as regards the jurisdiction of the court which has rendered the judgment, the most essential thing is whether that court has not violated the national jurisdiction of the recognizing state, i.e. whether it has not ruled in a case which is reserved for the national jurisdiction of the courts of the recognizing state. For it is unimportant from the viewpoint of the recognizing state whether the court which has passed the judgment was otherwise competent. Besides, it must be stressed that, from the viewpoint of the regulations binding on the court which has passed the judgment, its competence is, as a rule, justified, and this, in principle, ought to suffice, it is not necessary that the jurisdiction of the court which has delivered the judgement be justified also in the light of the regulations of the recognizing state. When the jurisdiction of the court which has passed the judgment cannot be justified on the basis of the principles generally adopted and respected in international relations and must be evaluated as "exorbitant jurisdiction." the application of the public order clause may possibly come into play.

The question of jurisdiction as a premise of the recognition of foreign court judgement has on many occasions been the subject of deliberations and explanations by the Supreme Court. This question would arise in cases involving the recognition of a judgement from a state with which Poland is bound by an international agreement on legal assistance, which specifies the conditions for the mutual recognition of judgments (among them, the condition of the competence of the court, in keeping with the provisions of the agreement,[26] as well as the recognition of a judgement from a state with which such an agreement has not been signed and, in effect, the general provisions of the C.C.P. on the recognition of foreign judgements come into play.

As regards the first group of cases, the Supreme Court has explained that, whenever an international agreement provides for the competence of the courts of one party only, this competence possesses an exclusive character. For example, when an agreement stipulates that, in a divorce case, when the spouses have the same citizenship but are residing in different states, the case is within the jurisdiction of the court of the state whose citizens they are,[27] then this jurisdiction should be treated

[26] Particularly Art. 53, alinea b) of the Polish-Soviet Agreement; Art. 51 of the Poland-GDR Agreement; Art. 55, alinea 1, of the Polish-Bulgarian Agreement; Art. 45, alinea b), of the Polish-Czechoslovak Agreement; Art. 60, alinea 1, of the Polish-Yugoslav Agreement; Art. 57, alinea 1, of the Polish-Hungarian Agreement of March 6, 1958; Art. 52, alinea b), of the Polish-Rumanian Agreement; Art. 19, alinea b), of the Polish-French Agreement; Art. 48, alinea 1, of the Polish-Austrian Agreement.

[27] Such a provision is contained, *inter alia*, in Art. 30, alinea 1, of the Polish-

as exclusive. This thesis is doubtless right and results from the function of the provisions of bilateral agreements on legal assistance determining the competence of the courts of the contracting states. The aim of such provisions is to draw a dividing line between the national jurisdiction of the parties and eliminate possible jurisdictional conflicts. Thus these provisions must define jurisdiction in a univocal manner, in effect whereof it assumes the character of exclusive jurisdiction. Only when the concrete provision of a bilateral agreement admits, in a definite situation, the competence of the courts of either one state or the other, jurisdiction possesses a facultative character.[28]

Assuming this thesis as the point of departure, the Supreme Court refused to ascertain the enforceability in the Polish territory of the judgement of the Soviet court adjudicating from a Polish citizens residing in Poland alimony for his children having the Polish citizenship but residing in the USSR territory, since, according to Articles 31, alinea 2, and 33, of the Polish-Soviet Agreement of December 28, 1957, on legal assistance, cases involving parents and their children residing in different states, are under the jurisdiction of the courts of the state whose citizen the child is, and thus in this particular case — the Polish courts.[29]

A similar decision was delivered by the Supreme Court in a case concerning the establishment of the enforceability in Poland of a judgment of the GDR court adjudicating alimony from a Polish citizen residing in Poland for his illegitimate child residing in the GDR, on the grounds that the case, according to Article 29 of the Polish-GDR Agreement of February 1, 1957, on legal assistance, was amenable to

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Soviet Agreement; Art. 24, alinea 1, of the Polish-Bulgarian Agreement; Art. 14, alinea 1, of the Polish-Czechoslovak Agreement; Art. 33, alinea 1, of the Polish-Hungarian Agreement.

[28] E.g. according to Art. 30, alinea 1, of the Polish-Soviet Agreement, if the spouses have the same citizenship but are residing in the territory of the other party to the Agreement, the courts of both states are competent in a divorce case.

[29] Supreme Court decision of Aug. 23, 1966, II CZ 191/66, "Państwo i Prawo," 1968, No. 4/5, p. 811, with a gloss by J. JODŁOWSKI. Also in the case III CZ 118/68 (OSNC 1969, No. 5, item 95 and "Państwo i Prawo," 1969, No. 12, p. 1104 with a gloss by T. ERECIŃSKI), the Supreme Court, in its decision of June 26, 1968, overruled a decision of the court of first instance recognizing a Soviet court judgement adjudicating alimony from a Polish citizen residing in Poland for a child staying with the grandparents in the USSR, ordering to establish the child's citizenship and the fact whether the parent's intention is that the child stay there permanently or whether it is only a temporary sojourn. For these circumstances determine whether the Polish or the Soviet court is competent in the case.

the exclusive jurisdiction of the Polish court (Art. 29 provides that, in alimony cases, the exclusive jurisdiction belongs to the court of the place of residence of the person obliged to pay alimony).[30]

It must be emphasized in this connection that, in keeping with this standpoint, the Supreme Court[31] reversed a judgement of the Polish court affiliating to a Polish citizen a child having the GDR citizenship and residing in that country and adjudging alimony, considering that, in conformity with Article 28 of the mentioned Agreement on legal assistance, cases of this type are amenable to the jurisdiction of the courts of the state whose citizen the child is — in this case, the GDR.[32]

As regards the exclusive jurisdiction of the Polish courts as a negative premise of the recognition of a foreign judgement in the light of the general provisions of the Polish internal law, i.e. the C.C.P., this question most frequently arises in cases concerning foreign divorce decrees. According to Article 1100, paragraph 1, of the C.C.P., marital cases are reserved for the jurisdiction of the Polish courts when at least one of the spouses is a Polish citizen. When both parties are residing in Poland, the jurisdiction has an exclusive character (Art. 1100, para. 2), and in other cases it is facultative.

It sometimes happens that, when one of the spouses goes abroad and stays there for a certain period of time, he or she files a divorce suit against the other spouse living in Poland, and next one of the spouses seeks the recognition of the divorce decree. The possibility to recognize such a judgement depends, *inter alia*, on determining whether the plaintiff was permanently living abroad, or whether he was only staying there, while his or her legal place of residence was in Poland.

The Supreme Court, in a decision of March 8, 1972,[33] reversed

[30] Decision of May 29, 1974, III CRN 360/73, "Orzecznictwo Sądów Polskich i Komisji Arbitrażowych" (hereinafter referred to as OSPiKA) 1975, No. 2, item 38.

[31] Decision of May 5, 1971, III CRN 82/70, OSPiKA 1973, No. 3, item 47, with a gloss by J. JODŁOWSKI.

[32] It should be added that this widely criticized provision has been changed, recently. Formerly, another court was competent in a case involving the establishment of the paternity of a child and another in a case concerning alimony for an illegitimate child, which necessitated the filing of two lawsuits in the territories of two states. An additional protocol to the Poland-GDR Convention of Feb. 1, 1957, on legal assistance in family, civil and penal cases, signed on April 18, 1975, and effective as of April 2, 1976 "Dziennik Ustaw," 1976, No. 14, item 81), abrogated Art. 28 and changed Art. 28 of the Convention. The new Art. 28 provides that competent in cases involving the relations between parents and children are the courts of the state whose citizen the child is or in the territory of which the child is residing.

[33] Decision of March 8, 1972, I CR 4/1972, OSNC 1973, No. 9, item 166.

a judgement of the court of first instance recognizing a judgement of the U.S. court on the dissolution of the marriage of Polish citizens in a situation when the husband (defendant) was residing in Poland, while the wife (plaintiff) had been staying for some time in the United States. The Supreme Court based its decision on the fact that the lower court had not sufficiently ascertained whether the plaintiff was staying in the United States with the intention to remain there, i.e. whether she took up permanent residence there, or whether she was staying there only temporarity, having her legal place of residence in Poland. In the latter case, the Polish court would have exclusive competence to hear the case, in accordance with Article 1100, paragraph 2, of the C.C.P. Thus the Supreme Court ordered the lower court to clarify this circumstance.

It should be added that, also in determining the direct jurisdiction of the Polish courts in divorce suits filled in Poland, the Supreme Court in several cases reversed the judgements of the courts of first instance, or decisions dismissing an action in the absence of jurisdiction, ordering to find out whether the party staying abroad had its permanent place of residence there, of whether it had retained its abode in Poland. This question became especially conspicuous in the context of the application of the Polish-French Convention of April 5, 1967, on the applicable law, jurisdiction and recognition of judgement in family cases, regulating the competence of the courts in divorce cases.[34]

Although the positive ascertainment of the jurisdiction of the foreign court is not, in the light of Article 1146, paragraph 1, alinea 2, a condition for the recognition of a foreign judgement, nevertheless — as already emphasized — in some cases the question of this jurisdiction and its foundations may be subject to control and evaluation from the angle of the public order clause. In a ruling of January 8, 1976,[35] The Supreme Court upheld the decision of the court of first instance denying a petition for the recognition of a judgement passed by the court in the Mexican state of Chihuahua and decreeing the divorce of a couple of U.S. citizens residing in the United States. The Court proceeded from the assumption that the decree was incompatible with the legal order in Poland, perceiving incompatibility, *inter alia*, in the fact that the competence of the Mexican court was based on a tempo-

[34] Decisions of: May 20, 1973, III CZP 62/72, "Nowe Prawo," 1974, No. 4, p. 526; of April 18, 1975, III CRN 404/74, "Państwo i Prawo," 1975, No. 10, p. 159; Nov. 25, 1975, III CRN 53/75, "Nowe Prawo," 1976, No. 6, p. 975 — with glosses by J. JODŁOWSKI.

[35] Decision of Jan. 8, 1976, I CR 909/75 (unpublished).

rary, one-day stay of the plaintiff in the seat of the Mexican court, where he had gone especially for this purpose. The Supreme Court remarked that the regulations which base the jurisdiction of the courts on such foundations are clearly aimed at facilitating divorces and sanction so-called "migratory" divorces.

c) Possibility of Defence of Rights

One of the most important conditions of the recognition of foreign judgements is the requirement that, in the proceedings before the foreign court, the other party be not deprived of the possibility to defend its rights. This general condition is provided for in Article 1146, paragraph 1, point 3, of the C.C.P. as weel as in all the bilateral agreements Poland has concluded on legal assistance in civil and family cases as a condition of either the recognition or only enforcement of the judgements of the other state, though the provisions of these agreements formulate it in a variety of manners. The question of examining this condition has often arisen in cases heard by the Supreme Court, concerning either the recognition or establishment of the enforceability of foreign judgements, since in such cases one of the parties frequently takes exception to the fact that it did not have the possibility to defend its rights in the proceedings before the foreign court, and particularly that it had not been notified of the suit.

Especially noteworthy are two rulings of the Supreme Court. One of them concerns evaluation of the possibility of defending rights in the light of the general provision of Article 1146, paragraph 1, point 3, of the C.C.P.,[36] and the other — the possibility to participate in the proceedings in the light of Aritcle 45 of the Polish - Czechoslovak Agreement on Legal Assistance.[37]

In the first case, which involved the recognition in Poland of a judgment of the U.S. court (in the state of Illinois) decreeing a divorce, the defendant, resident in Poland, raised the objection that he had not been notified of the suit and learnt about the case only from his wife's petiton for the recognition of the judgement.

The basic question which arises in examining the condition of the possibility to defend rights is the question whether examination of this condition should be carried out by the Polish court in the light of the Polish law or the law of the state in which the judgement

[36] Decision on Feb. 6, 1975, II CR 849/74, OSNC 1976, No. 1, item 11.

[37] Decision of Dec. 7, 1973, II CZ 181/73, "Państwo i Prawo," 1976, No. 12, p. 165.

originates. The Supreme Court, in a decision of February 6, 1975,[38] adopted the standpoint, consistent with the view earlier expressed in the doctrine,[39] that the Polish court should base its findings as to whether a party was not deprived of the possibility to defend its rights on the respective provisions of the law of the state in which the judgement was passed, though assessment of the fact whether the party was or was not deprived of the possibility of defence is entirely up to the Polish court, which is not bound in this respect by the stand of the court which has handed down the judgement.

Especially important is the examination of the condition of the possibility to defend rights in the proceedings before the foreign court which passed a judgement in default. In such a case, it is important to establish whether examining the case and passing the judgement were justified despite the absence of the defendant. In order to base the examination of this question on a proper foundation, Article 1147, paragraph 2, of the C.C.P. provides for the requirement of enclosing to the petition for the recognition of a foreign judgement a certificate to the effect that the defendant was duly notified of the suit. In the case in question, the defendant, resident in Poland, did not take part in the proceedings before the U.S. court. The Supreme Court, in the cited ruling, recognized that a judgement passed without the participation of the defendant should be regarded as an in default judgement,[40] even though it was not termed so by the foreign court, and thus the requirement of enclosing the certificate referred to in Article 1147, paragraph 2, comes into play here.

The mention to be found in the content of the judgement of the U.S. court that the defendant has been duly notified of the lawsuit by announcement, in accordance with the regulations applicable in such cases, was recognized by the Supreme Court as insufficient. The petitioner should present evidence as to the circumstances which led the U.S. judge to assume that the defendant had been duly notified.

As can be seen, the Supreme Court recognized that the manner of notifying the defendant of the lawsuit, though consistent with the

[38] See footnote 36.

[39] J. JODŁOWSKI, *Nowe przepisy...*, p. 33 and *La reconnaissance...*, p. 558 ; H. TRAMER, *op. cit.*, p. 85 ; E. WIERZBOWSKI, *op. cit.*, p. 301.

[40] Supreme Court decision of March 8, 1972, I CR 4/72, OSNC 1972, No. 9, item 166. This viewpoint implies that the legal qualification of the notion of in default judgement is subject to the regulations of the state in which proceedings concerning the recognition of a foreign judgement are under way. In the light of the Polish Law, however, an in default judgement is every judgement passed in the absence of the defendant or when the defendant, who has appeared in court, is not taking part in the hearing (Art. 339, para. 1, of the C.C.P.).

legal procudure of the state in which the suit been filed, did not actually guarantee to the defendant the possibility to protect his rights and thus does not fulfil the condition in question. This applies particularly to the delivery of a substitutive notice by posting an announcement (in the courthouse, or in the town hall, or in a newspaper), if the defendant, especially one residing abroad, was not served a write of summons. The Supreme Court's standpoint, which should be regarded as a right one, corresponds with the tendency, prevailing in the jurisprudence of many countries,[41] toward treating the condition of the possibility of defence of rights, not from the viewpoint of the formal compliance with the legal procedure of the state in which a judgement has been passed, but from the angle of control of the party's real possibilities for defence in a lawsuit. It should be noted that in case of the application of procedural regulations providing for simplified substitutive forms of notifying a party and not respecting the principle that a definite amount of time must elapse between a notice and a hearing, the public order clause may also come into play.[42]

The other case concerned the ascertainment of the enforceability in Poland of the Czechoslovak court's judgment adjucating alimony from a Polish citizen residing in Poland for a child residing in Czechoslovakia. The defendant did not deny that he had taken part in the proceedings, had a court-appointed counsel and instituted an appeal from the judgement of the court of first instance, but he raised the objection that he was deprived of the possibility of substantive defence, since he was unable to appear in the Czechoslovak court in person.

The Supreme Court, in its ruling in this case of December 7, 1973,[43] offered an interpretation of Article 45, letter c, of the Polish-Czechoslovak Agreement, according to which judgements in property cases shall be enforced

"unless the dobter was deprived of the possibility to participate in the proceedings."

[41] This tendency has been particularly conspicuous in French jurisprudence. See decisions: Cass. civ. I, Oct. 4, 1967, "Journal Clunet," 1974, No. 1, p. 103, with a gloss by B. GOLDMAN; Trib. gr. inst. Nanterre, July 10, 1973, "Journal Clunet," 1974, No. 3, p. 622, with a gloos by A. HUET.

[42] E.g. in the case concerning the recognition of a divorce decree passed in the Mexican state of Chihuahua, the Supreme Court, in its decision of Jan. 8, 1976, I CR 909/75, recognized that judgement as incompatible with the Polish legal order because, among other reasons, the procedure of that state, which admits examination of the case on the next day after filling a divorce suit and contents itself with notifying the defendant by posting an announcement, does not ensure the due participation of the defendant in the proceedings.

[43] See footnote 37.

The Supreme Court assumed — as it did in the previously cited decision — that appraisal of whether the debtor was not deprived of the possibility to take part in the proceedings should be carried out on the basis of *legis fori*, i.e., in the case in question — on the basis of the Czechoslovak law, since procedural problems are involved here. The Supreme Court pointed out, however, that

"control from this angles is limited to the question of fundamental conformity with the principle of contradictoriness."

In evaluating the fulfilment of the condition provided for in Article 45 of the Agreement,

"the question is not some general, omnifarious control of conformity with the provisions of the procedural law of the state whose court has passed the judgment. The object of interest of the recognizing court is only a certain aspect of the realization of the principle of contradictoriness, and especially the duty to hear the other side."

The Supreme Court said that deprivation of the possibility of defence would have taken place in case of such glaring defects as the lack of notification of the suit, or obstacles to making explanations raised by court organs. However, the fact that a party could not, despite its intention — appear in person before the foreign court cannot be recognized as deprivation of the possibility to participate in the proceedings. The fact that a party has been sued, or has to file a suit, before a foreign court cannot hamper the conduct of the suit and thus the defence of rights. But this alone does not yet mean deprivation of the possibilities for defence. Also excluded should be such hindrances as e.g. the examination of a party by way of legal assistance.

As it results from the above, the Supreme Court assumes that deprivation of a party of the possibility to take part in the proceedings, and thus of the possibility of defence, comes into play when the principle *audiatur et altera pars* has been violated. This thesis, though put forward on the occasion of the interpretation of Article 45 of the Polish - Czechoslovak Agreement, possesses significant importance also for the right interpretation of Article 1146, paragraph 1, point 3, of the C.C.P.

d) Non-Contradiction with the Polish Legal Order

The public order clause, which in every legal system may exclude the recognition of a foreign judgement, is reflected in the Polish Law in Article 1146, paragraph 1, point 5, of the C.C.P., according to which a foreign judgement can be recognized in Poland providing it is not

inconsistent with "the basic principles of the legal order in the Polish People's Republic."

The Supreme Court's decisions do not display a tendency towards an excessive application of this clause in recognizing foreign judgements. On the contrary, the instances of refusal of the recognition of foreign judgements on the grounds of their incompatibility with the Polish legal order were very rare. The interpretation of the mentioned provision, adopted in the to-date, not very numerous decisions of the Supreme Court, proceeds along the line laid down in the doctrine, which attaches considerable weight to the public order clause. The Polish doctrine has unanimously adopted the view that by "the fundamental principles of the legal order in the Polish People's Republic" are meant not only the basic principles of Poland's socio-political system, or the constitutional principles, but also the main principles governing various fields of law: civil, family, labour and also procedural law.[44] On the other hand, however, the wording of Article 1146, paragraph 1, point 5, of the C.C.P. (just as the wording of Article 6 of the Law on private international law) must not be construed as a requirement that foreign decisions be entirely consistent with all the applicable provisions of the Polish law, and even with the provisions of *iuris cogentis*.[45]

The viewpoint is shared by the Supreme Court, which on two occasions,[46] has expressed the opinion that the lack in a foreign divorce decree of a decision concerning custody of the children and the extent to which each party must contribute to the maintenance and upbringing of the child cannot justify recognizing the foreign judgment as inconsistent with the Polish legal order, even though, according to Article 58 of the Family and Guardianship Code, every divorce decree should contain a decision on this matter. The Supreme Court pointed out that the latter provision, despite its indisputable weight and importance, cannot be regarded as a fundamental principle of the

[44] Cf. M. SOŚNIAK, *Klauzula porządku publicznego w prawie międzynarodowym prywatnym [Public Order Clause in Private International Law]*, Warszawa 1961 p. 177; J. JODŁOWSKI, *Nowe przepisy...*, p. 36 and *La reconnaissance...*, p. 561; E. WIERZBOWSKI, *op. cit.*, p. 302.

[45] W. LUDWICZAK, *Międzynarodowe prawo prywatne [Private International Law]*, II ed., Warszawa 1971, p. 81; M. SOŚNIAK, B. WALASZEK, *Międzynarodowe prawo prywatne [Private International Law]*, II ed., Warszawa 1973, p. 123; J. JODŁOWSKI, gloss to the Supreme Court decision of Oct. 11, 1969, I CR 240/68, "Państwo i Prawo," 1972, No. 2, p. 170.

[46] Decisions of: Oct. 11, 1969, I CR 240/68, "Państwo i Prawo," 1972, No. 2, p. 161 ; of March 8, 1972, I CR 4/72, OSNC 1972, No. 9, item 166.

family law. The fundamental principle is the protection of the interests of minor children, and the provision of Article 58 of the Family and Guardianship Code constitutes only one of the instrumental guarantees of this principle.

In another ruling,[47] the Supreme Court recognized that the fundamental principles of the legal order include the principle that a child is entitled to alimony from the parents, while the manner of determining and adjudging alimony cannot be classified among such principles. Thus the fact that a foreign court adjudged alimony from a child's father residing in Poland, fixing, instead of a definite sum of money, a percentage of the debtor's earnings, which is more troublesome for the latter, cannot justify the view that this manner is inconsistent with the fundamental principles of the Polish family law.

The question of the incompatibility of a foreign judgment with the Polish legal order was especially conspicuous in the already mentioned case concerning the recognition of a divorce decree passed by the court of the Mexican state of Chihuahua. The Supreme Court approved the decision of the court of first instance, which refused to recognize the decree, expressing the view that incompatible with the fundamental principle of the Polish legal order is

"a judgement based on regulations clearly aimed at decreeing prompt and facilitated divorces at the unilateral request of a citizen of a foreign state and on the basis of his brief, even one-day stay in a locality in the court district — regulations which do not guarantee the due participation of the defendant and provide for a divorce decree's becoming final within 24 hours. Such a judgement is disrespectful to the institution of marriage and the family, and respect for this institution is one of the fundamental principles of the Polish legal order and is protected by the Constitution of the Polish People's Republic".[48]

e) Application of the Polish Law

The condition that a foreign court apply the Polish law[49] when this law should be applied, is not rigorously treated by law and

[47] Supreme Court decision of June 26, 1968, III CZ 118/69, OSNC 1969, No. 5, item 95. Also decision of July 9, 1973, I CZ 51/73, "Nowe Prawo." 1976, No. 1, p. 173, with a gloss by T. ERECIŃSKI.

[48] Decision of Jan. 8, 1976, I CR 909/76 (unpublished).

[49] It is generally regarded in literature that the question whether, in a given case, the Polish law should be applied ought to be resolved on the basis of the Polish regulations concerning the conflict of laws. See J. JODŁOWSKI, *Nowe przepisy...*, p. 37 and *La reconnaissance...*, p. 562; H. TRAMER, *Z problematyki wpływu wzajemnego przepisów k.p.c. o uznaniu orzeczeń sądów zagranicznych i przepisów ustawy o prawie prywatnym międzynarodowym [On the Problems of the Mutual Influence of Code of Civil Procedure Provisions on the Recognition of Foreign Court Judgements and the Provisions of the Law on International*

jurisprudence. Article 1146, paragraph 1, point 6, of the C.C.P. even offers a basis for relinquishing this demand, if

"the foreign law applied in a case does not essentially differ from the Polish law."

Of decisive importance is, therefore, the establishing of the fact whether the result at which the foreign court has arrived by applying its own law (or the law of another foreign state) is the same as the one which would have been arrived at in case the Polish law had been applied. The Supreme Court, in its decisions, has followed this line.

For example, in a case concerning the recognition of the U.S. court's judgment decreeing the divorce of Polish citizens, the Supreme Court stated that, in accordance with Article 18 of the Law of November 12, 1965, on private international law, the Polish Law should have been applied. But although the U.S. court has not applied it, there are no obstacles to recognizing its judgement, since, on the basis of the circumstances of the case (the plaintiff was separated from the defendant 20 years before the judgement and raised a new family, and the parties had no children), it can be assumed that the divorce would also have been decreed by the Polish court. The Supreme Court said that it results therefrom that the foreign law applied in the case does not essentially differ from the Polish law.[50]

Also the provisions of the bilateral agreements concluded by Poland, as a rule, contain the condition of the application of appropriate law. For example, Article 53 of the Polish - Soviet Agreement on Legal Assistance provides that a judgement is subject to recognition, *inter alia*, when

"in a case in which the law of the other party should have been applied, this law was actually applied, unless the law, applied in the case, of the party whose court has passed the judgement essentially differs from the law of the other party."

The Supreme Court recognized that it results *a contrario* from the cited article that, if the Soviet court has applied its law as applicable in the case under the provisions of the mentioned Agreement, the judgement must be recognized without examining the content of that law.[51]

Private Law], "Nowe Prawo," 1967, No. 6. p. 719; W. SKIERKOWSKA, *op. cit.*, p. 161; J. JODŁOWSKI, *Kilka kwestii z teorii międzynarodowego postępowania cywilnego* [*Some Questions Concerning the Theory International Civil Procedure*], "Państwo i Prawo," 1974, No. 2, p. 106.

[50] Decision of June 18, 1975, III CR 300/75 (unpublished).

[51] Decision of April 26, 1968, II CZ 118/68, OSNC, No. 5, item 95.

It should be noted, however, that this thesis cannot be extended beyond the cases covered by an international agreement containing provisions of this kind, such as the Polish - Soviet Agreement, and cannot be used in interpreting Article 1146, paragraph 1, point 6, of the C.C.P., since the public order clause may always come into play. According to the Polish private international law the recognition of a foreign judgement will not be possible, even if appropriate law has been applied, when this law should be recognized as inconsistent with the fundamental principles of the Polish legal order.

III. Judgements Subject to Recognition and Enforcement

1. According to Article 1145, paragraph 1, of the C.C.P., subject to recognition by the Polish court are

"foreign court judgements, not enforceable by way of execution, in civil cases subject to legal process in Poland,"

and according to Article 1150, paragraph 1,

"foreign court judgements in civil cases subject to legal process in Poland, enforceable by way of execution,"

serve as executory deeds (i.e. may obtain *exequatur*),

"providing their enforceability is stipulated in an international agreement."

Despite the general wording of the provision of Article 1145, one should not conclude therefrom that all foreign court judgments are subject to recognition. Doubtless, this provision applies only to judgements deciding the essence of the matter, and thus judgements and substantive non-contentious decisions.[52] For it results from the essence and aim of the institution of recognition of foreign court judgements that recognition may concern only such a judgement which produces effects in the material-legal domain, establishes or shapes legal relations, while it would be aimless to recognize foreign court decisions of a predeterminative, incidental character, judgements whose significance is confined to the proceedings and which have no legal effects outside the proceedings.

Moreover, according to Article 1146, paragraph 1, point 1, of the C.C.P., subject to recognition is only a final judgement or another decision as to the merits of a case. The question arises in this connec-

[52] J. JODŁOWSKI, *Nowe przepisy...*, p. 20 and *La reconnaissance...*, p. 549; W. SIEDLECKI, *Kilka uwag...*, p. 269 ; E. WIERZBOWSKI, *op. cit.*, p. 293.

tion, what sort of finality *(res iudicata)* is meant here and what regulations should be applied to determine whether a foreign judgement has become final. The Supreme Court, in conformity with the opinion adopted in literature,[53] assumed that the mentioned provision refers to formal finality *(res iudicata)* and means that only judgements not subject to appeal are involved. The Court cited here Article 363, paragraph 1, of the C.C.P.[54] Thus the Supreme Court applied the qualification of the notion of foreign judgement adopted in the Polish law. As regards the question whether a foreign judgement has become final (*res iudicata*), however, the Court pointed out — also in accordance with the doctrine[55] — that, since a question of a procedural nature is involved here, it should be evaluated in keeping with the procedure of the states whose court has passed a judgement.[56]

This view is supported by the provision of Article 1147, paragraph 2, of the C.C.P., according to which petition for the recognition of a foreign court judgement should include a statement to the effect that the judgement is final. The statement must come from the foreign court and be contained either in the text of the judgement, or in a copy of this judgement, or in a separate certificate. The lack of the statement of finality *(res iudicata)* makes the recognition of a foreign judgement impossible; however, the statement may be delivered in the course of the proceedings.[57]

2. Noteworthy is the Supreme Court's decision of March 30, 1966[58] in which the Court interprets the notion of a "foreign judgement." The decision was delivered in a case in which a petition had been submitted for granting the enforcement clause to a judgement adjudicating alimony and passed by the district court in Vilna in 1943, during the Nazi occupation. The Supreme Court recognized that the judgment is not at all a foreign court judgement, i.e. a judgement passed by the court of a foreign state, since it was handed down, though in the territory of the USSR, not by the court of that state but by the court of the German occupation authorities. As judgements passed by these courts

[53] J. JODŁOWSKI, *Nowe przepisy...*, p. 28 and *La reconnaissance...*, p. 554; E. WIERZBOWSKI, *op. cit.*, p. 299.

[54] Decision of Feb. 6, 1975, II CR 849/74, OSNC 1976, No. 1, item 11.

[55] See footnote 53.

[56] See footnote 54.

[57] Decisions of : March, 8, 1972, I CR 4/72, OSNC 1973, No. 9, item 166, and Dec. 29, 1972, I CZ 150/72, OSPiKA 1975, No. 12, item 267, with a gloss by J. JODŁOWSKI.

[58] Decision of March 30, 1966, I CZ 22/66, "Orzecznictwo Sądu Najwyższego," a supplement to "Biuletyn Prokuratury Generalnej," 1966, No. 7/8, item 34.

have no legal force according to the Soviet Law, they cannot be enforced in the territory of Poland.

Although the question of recognition of judgements passed by the German occupation authorities no longer has practical significance, the mentioned ruling of the Supreme Court is of essential importance in that it indicates that only a judgement of the court of a sovereign state may be enforceable in Poland.

3. In practice, the question has arisen whether a divorce decreed not by a court but by an administrative organ, providing the law of a foreign state admits this, can be recognized in Poland.

As emphasized, Article 1145, paragraph 1, of the C.C.P. refers to the recognition of foreign court judgements in civil cases and does not provide for the recognition of decisions of any other organ of a foreign state. Thus the doctrine unanimously assumes[59] that subject to recognition in Poland may only be court judgements, while decisions of other organs cannot be recognized. However, the Supreme Court, in a decision of September 2, 1975, adopted a different standpoint on this matter.[60]

In the case in which this decision was delivered, the petitioner demanded the recognition of a divorce decree issued by an administrative organ (head of a province) in Norway, in accordance with the Norwegian marital law. The Voivodship Court for the Capital City of Warsaw, acting as the court of first instance, rejected the petition, citing Article 1145, paragraph 1, of the C.C.P. The Supreme Court, while reviewing the appeal lodged by the petitioner, changed the lower court's decision and recognized the Norwegian judgement. The Court pointed out that

"the function and aim of the provisions of Articles 1145 - 1149 of the C.C.P. consist, above all, in the protection of the Polish legal order against the effects of such foreign judgments which would be incompatible with the principles of this order."

In the opinion of the Supreme Court, this function is fulfilled by meeting the conditions

"also in case of the recognition as effective of a judgment which, in accordance

[59] J. JODŁOWSKI, *Nowe przepisy...*, p. 19 and *La reconnaissance...*, p. 584; E. WIERZBOWSKI, *op. cit.*, p. 293; W. SIEDLECKI, Z. RESICH, *Kodeks Postępowania Cywilnego. Komentarz [Code of Civil Procedure. Commentary]*, Warszawa 1976, vol. 2, p. 1435.

[60] Decision of Sept. 6, 1975, I CR 559/75. This decision is cited by K. POTRZOBOWSKI in: *Kilka uwag dotyczących uznawania orzeczeń zagranicznych [Several Remarks Concerning the Recognition of Foreign Judgements]*, "Palestra," 1976, No. 4/5, pp. 28 ff.

with the foreign law, was delivered in a civil case transferred to the competence of an organ other than a court."

In conclusion, the Supreme Court recognized that

"the real meaning of the condition, set in Article 1145 of the C.C.P., that a foreign judgement be a court judgement is that, in case the foreign law so provides, it may also be a judgement by an organ other than a court."

As can be seen, the Supreme Court carried out here a broadening interpretation of the provision of Article 1145, paragraph 1, of the C.C.P. and based its decision on the so-called functional theory, equalizing with court judgements all decisions of other organs which perform functions similar to those of the courts. The Supreme Court's ruling is highly disputable and may doubtless give rise to serious objections.

IV. Right of Action in Recognition Cases

According to Artice 1147, paragraph 1, of the C.C.P., a petiton for the recognition of a foreign court judgement can be submitted by anybody who has a legal interest in it. Thus this provision principally resolves the question of the right to demand the recognition of a foreign judgement. However, the provision, citing legal interest, leaves much room for interpretation and evaluation of this interest in each particular case. No doubt the demand for the recognition of a foreign judgement can be made by every party in the lawsuit in which the judgment has been passed as well as a person who took part in the suit as an intervener and any participant in non-contentious proceedings in cases involving the recognition of a foreign judgment passed in such proceedings. Recognition of every foreign judgement can also be demanded by the prosecutor, when one of the premises listed in Article 7, paragraph 1, of the C.C.P. comes into play. The question remains open, however, what other persons can demand the recognition of a foreign judgement.

In practice, controversies have arisen as to the question who should be regarded as a person empowered to demand the recognition of a foreign divorce decree and to take part in proceedings concerning the recognition of such a decree: whether only the divorced spouses or other persons as well. Moreover, the question has arisen, closely connected with the first one, whether the demand for the recognition of a foreign divorce decree is admissible after the death of one or both spouses. The Supreme Court has on two occasions expressed its view on these questions.

In the first case, the wife, a Polish citizen residing in Poland, requested the recognition of a U.S. court judgement, in which that court, complying with the demand of her husband, a Polish citizen residing in the United States, had dissolved their marriage, committing the plaintiff to regularly pay a certain sum of money in his child's support to the grandmother of the child (the plaintiff's mother), who was actually taking care of the child in Poland. The court of first instance granted the request and recognized the U.S. court's judgment. The decision was appealed by the plaintiff and his mother (the grandmother and guardian of the child).

The Supreme Court [61] dismissed the plaintiff's appeal, considering it unjustified, and rejected his mother's appeal as inadmissible. The Court recognized that the latter appellant had no right to take part in the proceedings and appeal against the court's judgement on the question of the recognition of the divorce decree. In justifying its decision, the Supreme Court said that

"since only the spouses may take part in a divorce suit, only they may demand the recognition of aforeign divorce decree, or oppose such a demand."

Whereas in the case in question the refusal to recognize the right of the plaintiff's mother to participate in the proceedings and appeal against the decision recognizing the divorce decree was doubtless right, the thesis that only the divorced spouses are empowered to demand the recognition of a foreign divorce degree and take part in the proceedings concerning such recognition, for only they may participate in the divorce suit, raises substantial reservations and has been criticized in the doctrine.[62] The thesis seems to be founded on the assumption that proceeedings concerning the recognition of a foreign divorce decree are a continuation or a successive stage of the proceedings in the divorce case. Such an assumption, however, is unacceptable. For the subject matter in a divorce suit is different from that in a case concerning the recognition of a foreign divorce decree.[63]

[61] Supreme Court decision of Oct. 11, 1969, I CR 240/68, "Państwo i Prawo," 1972, No. 2, p. 161.

[62] J. JODŁOWSKI, gloss to the cited decision of Oct. 11, 1969, I CR 240/68, "Państwo i Prawo," 1972, No. 2, p. 170; W. SIEDLECKI, *Przegląd orzecznictwa Sądu Najwyższego za rok 1972* [*A Review of Supreme Court Decisions for 1972*], "Państwo i Prawo," 1973, No. 3, pp. 123 - 124.

[63] There is no question in the doctrine as to the fact that the subject matter of the proceedings concerning the recognition of a foreign judgement is the judgement itself, and not the law or the legal relation which was the subject of the lawsuit before the foreign court. Cf. E. BARTIN, *Principes de droit international privé*, Paris 1930, vol. 1, p. 520; H. BATIFFOL, *op. cit.*, vol. 2, No. 732; E. RIEZLER, *Anerkennung und Vollstreckung ausländischer Urteil*, in:

Moreover, the Supreme Court's thesis is incompatible with the wording of Article 1147, paragraph 1, of the C.C.P. and the adoption of this thesis would lead, in effect, to the exclusion of this provision in cases involving the recognition of foreign divorce decrees. It should be recognized that, according to Article 1147, paragraph 1, the right to demand the recognition of a foreign divorce decree is vested, aside from the divorced spouses, in all persons who have proved their legal interest in the recognition of such a decree in the territory of Poland, and particularly the successors of one of the spouses (providing he or she died following the dissolution of the marriage by the foreign court), a child borne by the divorced wife before the passage of 300 days from the dissolution of the marriage as well as the person whom the divorced spouse subsequently married. For such persons doubtless have the legal interest — in the personal as well as property sphere — in proving when the marriage ceased to exist.[64] It should be added that, in any case, the prosecutor has the right to demand the recognition of a foreign divorce decree, though he never has the right of action when filling a divorce suit is involved (Art. 7 of the C.C.P.).[65]

The other decision of the Supreme Court[66] concerns a situation in which, after an FRG divorce decree had become final, the husband died and the wife subsequently requested the Polish court to recognize the divorce decree. The court of first instance dismissed the petition, recognizing that the fact that the petitioner's husband had died provided sufficient grounds for assuming the lack of her legal interest in demanding the recognition of the divorce decree, since, in effect of the husband's death, the marital status of the petitioner had changed and she was free to remarry without a judgement dissolving the first marriage.

Das Internazionale Familienrecht Deutschlands und Frankreichs, Paris-Tübingen 1955, p. 570.

[64] In the Polish — as well as foreign doctrine, there is no question as to the fact that a recognized judgement produces legal effects in Poland upon recognition but *ex tune*. Cf. H. BATIFFOL, *op. cit.*, vol. 2, No. 459; J. FOYER, *Divorce et séparation de corps*, "Rép. Dalloz de Droit International," vol. 1, 1968, No. 166; J. JODŁOWSKI, *Nowe przepisy...*, p. 43; IDEM, *Uznawanie i wykonanie w Polsce wyroków zagranicznych w sprawach o pochodzenie i alimenty [Recognition and Enforcement in Poland of Foreign Judgements in Cases Involving Descent and Alimony]*, "Studia Cywilistyczne," 1975, No. 25/26, p. 73.

[65] Cf. J. JODŁOWSKI, *Le rale du ministère public dans le proces civil*, in: *Rapports polonais au IX-e Congres International de Droit Comparé*, Warszawa 1974, p. 97.

[66] Supreme Court decision of April 2, 1975, II CR 67/75, OSPiKA, 1976, No. 7/8, item 148, with a gloss by J. JODŁOWSKI.

This viewpoint, however, was rejected by the Supreme Court, which recognized that the judgement of the court of first instance violated Article 1147, paragraph 2, of the C.C.P. and that the petitioner had a legal interest in demanding the recognition of the divorce decree and proving that her marriage ceased to exist prior to the date of her husband's death. This is important for the petitioner not only with respect to her personal rights but also in the sphere of property rights, especially as regards the responsibility for liabilities incurred in the period after the dissolution of the marriage and until the husband's death.

The above ruling of the Supreme Court, which should be considered entirely right, resolves the question whether a foreign divorce decree can be recognized following the death of one of the spouses.

It should be noted that this decision, though it directly concerns only the question of the legal interest and right of action of the surviving spouse, indirectly affects also the question of the right of the deceased spouse's successors to demand the recognition of the judgement. Since the Supreme Court assumed that the surviving spouse has a legal interest in demand, following the death of the other spouse, the recognition of a foreign divorce decree and proving that the dissolution of the marriage took place prior to the date of the other spouse's death, it must be consequently assumed that also the successors of the deceased spouse have the same legal interest and, in effect, enjoy the right to demand the recognition of the divorce decree. For they, too, may be interested in proving that the marriage was terminated before the death of the testator and the other spouse lost the right to an inheritance from the deceased spouse and that the joint property of the spouses (providing there existed joint ownership between them) is not liable for the obligations incurred by the surviving spouse following the dissolution of the marriage and the termination of joint ownership.

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Le droit interlocal et le droit international privé

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Introduction

La non-uniformité interne d'un système juridique indiqué comme compétent, dans le cas donné, par les règles de conflit, peut — comme on le sait — se manifester dans trois directions. Cela peut être la non-uniformité sous l'aspect temporel (elle apparaît notamment dans la période des changements législatifs dans le pays dont le droit a été désigné comme compétent), la non-uniformité sous l'aspect personnel (connue depuis des siècles en Europe et aujourd'hui particulièrement actuelle dans les États de l'Orient) ainsi que la non-uniformité sous l'aspect local (le partage de l'État donné en quelques territoires juridiques à différent degré de l'indépendance). Parmi ces trois directions, nous ne nous occuperons que de la dernière. Elle est relativement la plus actuelle, car plusieurs États gardent la différentiation très poussée dans ce domaine. En outre, la Pologne a, à cet égard, une riche expérience de la période précédant l'unification de son droit civil, c'est-à-dire des années 1918—1947, quand les conflits, dits à cette époque « interprovinciaux », étaient régis par la loi séparée [1] qui était bien des fois commentée dans la littérature et appliquée par les tribunaux polonais. Nous voudrions présenter cette expérience à base de l'état de la théorie européenne et des opinions contemporaines en la matière. A cause du cadre limité de cette article, nous ne nous occuperons pas ici (du moins en principe) de vastes problèmes des conflits interlocaux (inteétatiques) aux États-Unis. L'énorme matériel de jurisprudence concernant ce sujet et de nombreuses énonciations de la doctrine américaine exigent une élaboration à part.

[1] La loi sur le droit interprovincial privé du 2 août 1926 (Journal des Lois n° 76, texte 580). Cette loi a été votée le même jour que la loi ancienne sur le droit international privé, abolie par la loi nouvelle sur le droit international privé du 17 novembre 1965.

1. Droit interlocal et droit international privé dans la théorie et la pratique européenne

Les conflits internes de lifférents systèmes juridiques en vigueur sur les différents territoires d'un État donné ont été appelés de différente manière, tenant compte des rapports entre ces territoires, de leur indépendance plus ou moins grande, etc.[2]. Ces conflits n'ont pas été parfois distingués des conflits réglés par le droit international privé[3]. Comme nous le savons, d'ailleurs, l'absence de cette distinction a été profondément justifiée par la genèse du droit international privé au Moyen Âge quand la notion moderne de l'État n'a pas enocore existé et quand tous les conflits de lois se sont rapprochés, dans le grand degré, de ce que nous appellerions aujourd'hui les conflits interlocaux.

Cela n'a rien d'étonnant que la partie considérable de la doctrine européenne suit dans cette mesure l'opinion de Savigny qui admet en principe l'identité des fondaments sur lesquels doit reposer la solution de deux sortes des conflits[4]. Le point de vue de Savigny a influencé non seulement la théorie allemande et autrichienne plus ancienne (cf. entre autres les opinions de Bar, Unger, Neumayer et Walker), mais aussi les éminents représentants ultérieurs de cette théorie, tels que, par exemple, Raape[5], Nussbaum[6], Wolff ou Wengler. Il est affirmé par certains éminents représentants de la doctrine contemporaine ouest-

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[2] On parle des conflits « interlocaux », « interterritoriaux », « intercantonaux », « interétatiques » « interrépublicains », etc. L'expression la plus générale, provenant encore de Zitelmann, et préférée dans ce domaine par les plus éminents spécialistes contemporains du problème est celle de « conflits interlocaux », et par la suite — « le droit interlocal », c'est-à-dire les règles de solution de ces conflits. Cf. E. VITTA, *Diritto internazionale privato*, I: *Parte generale*, Torino 1972; IDEM, *Conflitti interni ed internazionali. Saggio comparativo*, vol. I-II, Torino 1954.

[3] Comme, p. ex., aux États-Unis où la distinction du *interstate law* et du *international law* commence à gagner d'une signification depuis relativement peu de temps.

[4] F. K. VON SAVIGNY les a analysés dans les paragraphes 347 et 348 de son oeuvre *System des heutigen römischen Rechts* (vol. VIII, Berlin 1849), arrivant à la conclusion : « [...] die Collision der Territorialrechte unabhängiger Staaten [...] wesentlich nach denselben Grundsätzen zu behandeln [ist], welche für die Collision verschiedener Particularrechte desselben Staates gelten » (p. 27).

[5] L. RAAPE, F. STURM, *Internationales Privatrecht*, I. B., 6e éd., München 1977, p. 379. On y dit : « [...] eng verwandte Rechtsgebiete, gleichsam [...] Geschwister » ; « Lösungsmethoden [...] im wesentlichen die gleichen ».

[6] A. NUSSBAUM (*Grundzüge des internationalen Privatrechts*, München 1952, p. 5) écrit que les deux types des conflits « sind wesengleich » et les différences éventuelles sont « von nebensachlicher Bedeutung ».

-allemande (comme par exemple, Dölle [7] ou Beitzke [8]) ainsi que par certains représentants de la doctrine française (comme Batiffol [9] ou Francescakis). Le point de vue de cette sorte est particulièrement proche de la théorie anglo-américaine se prononçant pour l'unité de deux types des conflits de lois [10] (laquelle — conformément à notre réserve préliminaire — n'est pas ici étudiée de plus près).

Néanmoins, plusieurs théoriciens se sont abstenus de se prononcer au sujet du rapport entre les deux types des conflits [11] ou se sont bornés aux remarques particulières [12] ou bien discutent l'analogie des conflits interlocaux et internationaux avec différentes réserves [13], en réservant les différences plus ou moins grandes entre eux [14]. D'autres théoriciens vont plus loin en remarquant les divergences essentielles dans les deux types des conflits. Parmi eux se comptent, entre autres, Bartin [15], Niboyet ou Lerebours-Pigeonnière. Dans la théorie italienne, qui s'est occupée particulièrement de ce problème, il n'y a pas non plus d'accord quant à l'unité de deux domaines [16]. Le connaisseur italien le plus éminent du problème admet l'existence de l'analogie considérable de caractère général et, en même temps, l'existence d'un nombre de différences dans les questions particulières [17].

La différence entre les deux types des conflits est remarquée

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[7] H. DÖLLE (*Internationales Privatrecht*, 2e éd., Karlsruhe 1972, p. 12) s'exprime que les deux domaines discutés « die gleiche Natur haben ».

[8] G. BEITZKE, H. COING, K. FIRSCHING, F. KORKISCH, *Internationales Privatrecht*, Berlin 1970, p. 30 : « Die Methoden der Lösung sind aber in beiden Fällen wesentlich gleich ».

[9] H. BATIFFOL, P. LAGARDE, *Droit international privé*, vol. I, Paris 1974, n° 258 : « [...] la solution des conflits internes repose le plus souvent sur les mêmes principes que celle des conflits internationaux ».

[10] Cf. p. ex. DICEY-MORRIS, *The Conflict of Laws*, 8e éd., London 1967, p. 12 ; G. C. CHESHIRE, *Private International Law*, 8e éd., London 1970, p. 9 ; R. H. GRAVESON, *The Conflicts of Laws*, 6e éd., London 1969, p. 3 ; A. A. EHRENZWEIG, *Private International Law*, 2e éd., Leyden 1972, p. 21 ; et d'autres.

[11] P. ex., F. VISCHER, *Internationales Privatrecht*, Basel 1971 ; H. KÖHLER, *Internationales Privatrecht*, 3e éd., Wien 1966.

[12] Comme, p. ex., F. SCHWIND, *Handbuch des österreichischen internationalen Privatrechts*, Wien 1975, p. 26.

[13] P. ex. A. N. MAKAROV, *Grundriss des internationalen Privatrechts*, Frankfurt a. M. 1970, pp. 21 et s. ; G. KEGEL, *Internationales Privatrecht*, 3e éd., München 1971, pp. 56 et s.

[14] Ainsi P. GRAULICH, *Principes de droit international privé*, Paris 1961, p. 2 : « [...] leur analogie avec les conflits internationaux est plus ou moins grande selon les cas ».

[15] E. BARTIN, *Études de droit international privé*, p. 169.

[16] Cf. son tableau dans E. VITTA, *Diritto...*, I, pp. 91 et s.

[17] E. VITTA, *Diritto...*, p. 107.

même par les partisants de leur rapprochement, entre autres, en ce que les conflits interlocaux peuvent être résolus par les règles de conflit nationales supérieures, ce qui est inaccessible dans les conflits internationaux.

La pratique législative de certains pays fait aussi preuve de la différence de deux types des conflits. On peut ici citer l'exemple de la Pologne où les deux types des conflits ont été réglés séparément [18] et nous en parlerons à part. L'exemple de l'Union Soviétique est aussi intéressant. On distingue là-bas précisément les règles de conflit concernant les conflits de lois soviétiques et etrangères d'une part, et les règles concernant l'application du droit dans les républiques soviétiques d'autre part [19]. Ces dernières ne sont jamais applicables aux conflits entre les lois étrangères ou entre les lois étrangères et les lois soviétiques. Comme on le sait, chacune des républiques sovietiques possède son propre Code civil et aussi le Code de la famille. Pour cette raison apparaissent parfois les conflits entre ces Codes qui sont réglés par l'art. 18 des Principes de la législation civile de l'U.R.S.S. et des républiques fédérales de 1961 et par certaines autres dispositions de ces Principes concernant les questions particulières [20].

Conformément à l'art. 18 des Principes [21], dans les rapports résultant du droit de la propriété, on applique le droit en vigueur dans le lieu de la situation des biens. La capacité de juissance et la capacité d'accomplir des actes juridiques doivent être apréciées selon le droit du lieu de 'laccomplissement de l'acte. Le droit de ce lieu est égalament applicable à la forme de l'acte juridique et aussi aux obligations résultant des actes juridiques à moins que la loi ou le contrat n en disposent autrement. Aux obligations résultant des dommages, on applique la *lex fori* ou à la demande de la personne lésée — la *lex loci laesionis*. La

[18] Contrairement à l'opinion de P. H. NEUHAUS (*Die Grundbegriffe des IPR*, Berlin 1962, p. 214) que la législation polonaise confirme l'unité du droit interlocal et du droit internationale privé.

[19] Cf. L. A. LUNC, *Meždunarodnoe častnoe pravo, obščaja čast'*, 3e éd., Moskva 1973, pp. 73 et s.; IDEM, *L'objet et les principes fondamentaux du droit international privé en U.R.S.S. et dans les autres pays socialistes*, « Journal du droit international », 1973, n° 1, pp. 104 et s.; IDEM, *Les règles de conflit dans les Principes du droit civil de l'Union Soviétique et des Républiques fédérales*, « Revue critique de droit international privé » (R.C.D.I.P.), 1964, n° 4, pp. 633 et. s.

[20] Lesquelles ont remplacé la décision du 32e Plenum de la Cour Suprême de l'U.R.S.S. du 10 février 1931 « Sur l'application des différentes lois des républiques fédérales réglant les rapports patrimoniaux » (*Sbornik dejstvujuščih postanovlenij Plenum Verhovnogo Suda SSSR 1924 - 1957*, Moskva 1958, p. 123).

[21] Cf. *Naučno-praktičeskij kommentarij k Osnovam Graždanskogo Zakonodatel'stva Sojuza SSR i sojuznyh respublik*, sous la dir. de S. N. BRATUS et E. A. FLEJŠIC, Moskva 1962, pp. 103 et s.

prescription extinctive relève de la *lex causae*. Dans les rapports successoraux est applicable le droit du lieu de l'ouverture de la succession, néanmoins — conformément à l'art. 32 des Principes cités —, le mode de l'acquisition des biens sans propriétaire (*bezhozjajnoe imuščestvo*) relève du droit de la république fédérale en question [23].

La littérature soviétique souligne [24] que les Principes ci-dessus mentionnés sont applicables non seulement aux conflits de lois purement « internes », mais aussi aux conflits de lois à caractère international dans les cas où la compétence du droit soviétique entre en jeu. La désignation du droit contenue dans le système soviétique embrasse l'ensemble de ce système dans lequel entrent également les règles de conflits interrépublicaines.

Le cadre de cette étude ne permet pas de multiplier les exemples de la littérature et de la législation. Mais même sur la base des matériaux limitée s'impose la conclusion non seulement sur l'impossibilité d'admission de l'identité de deux types des règles mais aussi sur les différences considerables entre elles. Nous esseyerons de présenter ces différences plus largement dans la suite de cette esquisse, après avoir pris la connaissance du règlement polonais en la matière.

2. Droit interprovincial polonais de 1926

L'expérience polonaise en matière d'application du droit interprovincial de 1926 a une valeur particulière pour l'appréciation du rôle du droit interlocal et de son rapport au droit international privé [24]. Cela résulte aussi bien de la rédaction soigneuse de cette loi que du rôle important qu'elle a joué dans la cimentation du système polonais du droit civil laquelle a abouti à son unification en 1947 [25]. La loi, dont nous parlons, a suscité un grand intérêt dans la littérature étrangère [26],

[23] Sur cette disposition, cf. *ibid.*, pp. 152 et s.

[24] Cf. L. A. LUNC, *op. cit.*, p. 74.

[24] A. N. MAKAROV (*op. cit.*, p. 23) appelle cette loi « *Schulbeispiel* » pour les règlaments interlocaux.

[25] Dans la littérature polonaise, on a soulevé, d'ailleurs, que les dispositions interprovinciales n'ont pas automatiquement perdu leur importance à cause de l'unification progressive du droit civil. Cf. entre autres, Z. FENICHEL, *Kodeks zobowiązań a prawo międzydzielnicowe i prawo prywatne międzynarodowe [Le Code des obligations et le droit interprovincial et international privé]*, Warszawa 1935, p. 5 ; F. ZOLL, *Międzynarodowe prawo prywatne w zarysie [Précis de droit international privé]*, 4e éd., Kraków 1947, p. 17.

[26] Cf. SCHÖNDORF, *Die polnischen Gesetzesentwürfe über internationales und interlokales Privatrecht*, « Niemeyers Zeitschrift f. Intern. Recht », 1923, p. 17 ;

elle était plusieurs fois commentée dans la littérature polonaise [27] et appliquée largement dans la jurisprudence polonaise.

L'histoire de la codification de cette loi reflète les différents points de vue théoriques que nous avons présentés ci-dessus. Ainsi, à l'une des premières séances de la Commission de codification en 1920, le membre de la Commission, éminent théoricien polonais du droit Leon Petrażycki, s'est opposé à la codification séparée des règles du droit interprovincial et international privé. Il a proposé la loi unique pour les deux domaines (avec certaines modifications pour les nationaux et les étrangers). Une version prévoyait avant tout le droit interprovincial avec certaines dispositions particulières concernant les étrangers. D'autres membres de la Commission de codification ont également avancé la codification du droit interprovincial en considérant les règles du droit international privé comme secondaires par rapport au premier [28]. Cette priorité des questions interlocales a été bien caractéristique. Elle a reflété non seulement le point de vue théorique, déterminé et connu depuis des années en Europe occidentale, mais aussi les besoins actuels de l'État polonais nouveau né et déchiré — en ce qui concerne le droit civil — en cinq systèmes juridiques différents.

Cependant, dans les débats a prévalu l'opinion d'autres membres de la Commission de codification qui ont souligné l'importance des règles du droit international privé et la nécessité de deux lois distinctes consacrées à l'un et l'autre domaine. Tel a aussi été le point de vue du rapporteur général de la Commission — Fryderyk Zoll. Dans cette direction sont allés les premiers projets législatifs qui ont embrassé séparément les dispositions du droit international privé et du droit interprovincial.

Les deux lois, votées le même jour (le 2 août 1926) se sont distinguées sensiblement malgré plusieurs convergences. Différent a été avant tout le principal facteur de rattachement qu'elles ont employé. La loi sur le droit international privé a été, dans le grand degré, influencée par la nouvelle école italienne, ce qui s'est manifesté dans une large

M. UDINA, *La legge polacca del 2 agosto 1926, sui conflitti di diritto interregionale privato*, « Il Foro delle Nouve Provincie », vol. VIII, 1929, n° 1.

[27] Outre les travaux cités, cf. p. ex. Z. FENICHEL, *Prawo prywatne międzynarodowe i międzydzielnicowe [Droit international et interprovincial privé]*, Kraków 1928 ; S. RUNDSTEIN, *Zagadnienia międzydzielnicowego prawa prywatnego [Les problèmes du droit interprovincial privé]*, "Themis Polska", vol. VII, Warszawa 1917.

[28] Cf. *Protokoły obrad sekcji prawa cywilnego Komisji Kodyfikacyjnej RP. Prawo międzynarodowe i międzydzielnicowe prywatne [Les protocoles des séances de la section du droit civil de la Commission de codification de la République de Pologne. Droit international et interprovincial privé]*, Kraków 1920, pp. 2 et s.

application du rattachement à la nationalité (*lex patriae*). La loi sur le droit interprovincial a employé, dans ce lieu, le rattachement au domicile. Elle n'a pas appliqué non plus de nombre d'institutions de la partie générale du droit international privé : le renvoi, la clause d'ordre public (dont on va parler plus loin), la rétorsion. De la manière différente, ou avec certaines modifications, on a réglé un nombre de questions particulières, entre autres certaines questions en matière de droit des personnes (art. 2 et 3 du droit interprovincial), des empêchements au mariage (art. 13 du même droit), certaines questions en matière de divorce et de séparation de corps (art. 17), certaines questions en matière de rapports entre les parents et les enfants (art. 19), de tutelle (art. 24) et enfin celles qui concernent les droits successoraux et la procédure de succession.

Néanmoins, il faut reconnaître que les motifs des projets de deux lois de 1926 ont souligné le rapprochement des règles appliquées dans l'un et l'autre domaine, et même leur fondement sur la même idée [29]. On a même considéré les dispositions du droit interprovincial comme « un supplément au droit international privé » [30]. La pratique polonaise les a aussi considérées de la manière semblable. On a soutenu qu'à défaut des règles interprovinciales concernant une question réglée par le droit international privé, il est admissible d'appliquer les règles de ce dernier droit [31].

Il faut à ce propos faire remarquer que les systèmes locaux qui entraient en jeu en Pologne de l'entre-deux-guerres ont différé essentiellement des systèmes existant dans les États européens non uniformes ou, d'autant plus, dans les pays de la *common law*. Ces systèmes n'ont pas été liés ni à la structure administrative du pays ni à la tradition juridique séculaire de certaines provinces, fondée sur le droit coutumier, etc. C'étaient les systèmes juridiques étrangers, imposés aux territoires annexés après le partage de la Pologne, les systèmes adoptés parfois difficilement sur les territoires polonais, étant quelquefois en vigueur depuis relativement peu de temps. Pour cette raison, la comparaison des conflits naissant entre eux avec les conflits réglés par le droit international privé (concernant, en règle, les législations étrangères) a eu le fondement plus profond, bien que la

[29] Cf. W. DBAŁOWSKI, J. PRZEWORSKI, *Ustawy o prawie międzynarodowym i międzydzielnicowym [Les lois sur le droit international et interprovincial]*, Warszawa 1928, p. 145.

[30] Ainsi le rapporteur général de deux lois, F. ZOLL, *op. cit.*, p. 11.

[31] Comme cela résulte de la jurisprudence de la Cour Suprême dans les années vingt. Cf. K. PRZYBYŁOWSKI, *Prawo prywatne międzynarodowe. Część ogólna [Droit international privé. Partie générale]*, Lwów 1935, p. 6..

littérature polonaise ait souligné qu'il ne s'agissait pas de systèmes « étrangers ». Du point de vue formel, ils sont entrés, en effet, dans le domaine de la législation polonaise, ils n'ont pas été donc en ce sens « étrangers ». D'autre part cependant, tenant compte de la tradition et de l'approche caractéristique à eux dans les provinces particulières, il était difficile de dire que c'était le droit « polonais » résultant des convictions juridiques de la population du terrain donné et de la volonté du législateur polonais.

D'ailleurs, l'identification totale du droit interprovincial avec le droit international privé n'a jamais eu lieu en Pologne. S'y sont opposées aussi bien les considérations générales que les différences des règlements particuliers ci-dessus mentionnées. L'impossibilité de cette identification a trouvé sa nette expression dans la conception de la question d'ordre public. Il n'y avait aucun doute dans la doctrine et la jurisprudence polonaises que l'application de la clause d'ordre public était exclue dans les rapports interprovinciaux [82]. Cela ne signifie naturellement pas que l'action de l'ordre public est, en général, impossible sur le terrain du droit interlocal (on en parlera plus loin). Il faut néanmoins souligner que les principes et la pratique du droit interprovincial polonais ne fournissent pas d'arguments en faveur de l'application de l'exception générale d'ordre public dans les rapports interlocaux [83].

Sans prévoir la base g é n é r a l e de l'exclusion du droit d'une autre province sur le fondement de l'ordre public, on a pris cependant en considération le besoin des restrictions particulières dans ce domaine. C'est ainsi que l'art. 8, al. 3 du droit interprovincial discuté prévoit l'influence exclusive de la *lex rei sitae* en matière d'acquisition, de modification ou d'extinction des droits sur un immeuble. L'art. 13, al. 2 n'a pas, à la vérité, énuméré limitativement des restrictions au mariage que doit prendre en considération l'autorité compétente à célébrer le mariage (comme l'a fait l'art. 12 du droit international privé polonais de 1926, conformément à la teneur de la convention de La Haye), mais il a prévu la possibilité de renoncer à la célébration du mariage d'un ressortissant polonais, capable d'après sa loi personnelle

[82] « Dans les rapports interprovinciaux en Pologne, la clause générale d'ordre public n'entre pas en jeu » (K. PRZYBYŁOWSKI, *op. cit.*, p. 179). Dans le même ouvrage, l'auteur explique largement les motifs pour lesquels on n'a pas introduit au droit interprovincial de disposition correspondant à l'art. 38 de la loi polonaise sur le droit international privé de 1926. Analogiquement F. ZOLL, *op. cit.*, p. 94. Telle a été *communis opinio* de la doctrine polonaise.

[83] Contrairement à l'opinion de E. VITTA (*Diritto...*, p. 104) à qui paraît que la doctrine polonaise n'exclut pas l'intervention de la clause d'ordre public dans les rapports interprovinciaux.

mais incapable selon les dispositions de la *lex fori*[34]. L'art. 17, al. 2 de ladite loi n'admettait le divorce ou la séparation de corps sur un territoire où était en vigueur une loi différente de celle qui régissait personnellement les époux que lorsque, dans ce cas, le divorce ou la séparation de corps étaient également admis par la loi du lieu où la demande a été formée. L'art. 29 a prévu enfin que les biens, dont le défunt n'était pas libre de disposer à cause de mort, sont soumis à la loi du lieu où ils sont situés. La même loi a été applicable aux restrictions de droit public auxquelles l'héritage ou ses parties ont été soumis.

Comme il en résulte, malgré le rapprochement considérable de deux lois en question, il est impossible de parler, sur la base de l'expérience polonaise, de l'identité des solutions sur les champs interlocal et international. Cela nous permet maintenant d'aborder un essai de la comparaison générale des conflits interlocaux et des conflits réglés par le droit international privé.

3. Essai de comparaison de deux domaines

A la comparaison du droit interlocal et du droit international privé, on a consacré bien des travaux particuliers, sans compter des passages, parfois larges, contenus dans les manuels et les traités. On pourrait citer parmi eux, pour se limiter aux auteurs européens, entre autres, les travaux italiens, français[35], suisses[36], allemands[37] et autres. On y a essayé de faire un tableau des divergences et des ressemblances de deux domaines de la façon plus ou moins complète. Tout en se limitant à leur rassemblement sommaire, il convient de dire ce qui suit.

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[34] Les commentaires à la loi discutée ont appelé cette disposition « la clause particulière d'ordre public » ; ainsi p. ex., le commentaire de S. GOTTLIEB (Lwów 1933, p. 37).

[35] Entre autres, P. GANNAGÉ, *La distinction des conflits internes et des conflits internationaux de lois*, dans ; *Mélanges P. Roubier*, Paris 1961, pp. 229 et s. ; P. LAMPUÉ, *Les conflits de lois interrégionaux et interpersonnels dans le système juridique français*, R.C.D.I.P., 1954, pp. 249 et s.

[36] P. A. LALIVE, *Droit interrégional et droit international privé*, dans : *Recueil des Travaux Suisses au IVe Congrès International de Droit Comparé*, Genève 1954, pp. 103 et s.

[37] Entre autres, G. BEITZKE, *Die Anwendung der Grundsätze des internationalen Privatrechts auf interlokale Kollisionen in Deutschland. Deutsche Landesreferate zum IV Internationalen Kongress für Rechtsvergleichung*, Berlin 1955, pp. 125 et s. ; H. FICKER, *Grundfragen des deutschen interlokalen Rechts*, Berlin - Tübingen 1952 ; M. WOLFF, *Probleme des interlokalen Privatrechts in Deutschland, Festschrift L. Raape*, Hamburg 1948, pp. 181 et s.

L'élément le plus essentiel qui unit les deux domaines discutés est le caractère conflictuel de leurs règles. Comme on le voit, les problèmes de conflits de lois ne surgissent pas nécessairement par la suite du franchissement des frontières d'États [38] et de l'existence d'un « élément étranger » dans le rapport juridique donné.

En outre, les ressemblances et les divergences de deux domaines ne se montrent pas toujours dans la même mesure et aux mêmes points [39]. Il faut donc les traiter de la manière individuelle, conformément au rapport réciproque des territoires juridiques autonomes et aux différences existant entre les législations internes. Il faut aussi faire attention au jeu de différentes sortes d'intérêts qui agissent sur le champ interlocal, bien que pas toujours dans la même direction et avec la même force [40]. La comparaison de deux domaines en question est surtout impossible sans tenir compte des conditions particulières (politiques et sociales) qui existent dans un pays déterminé et influencent en même temps la solution des conflits internes de lois. Dans la littérature, on a fait des essais de systématisation de différentes sortes de conflits interlocaux [41]. Comme j'ai déjà soulevé, la question dépend dans une grande mesure du fondement politique de la non-uniformité [42]. L'exemple classique donnent à cet égard les États fédéraux où il n'y a pas d'unité de la législation ou dans lesquels cette unité est très limitée (par exemple aux États-Unis). Les conflits internes s'approchent alors beaucoup des conflits réglés par le droit international privé, d'autant plus dans le cas où chacun des territoires juridiquement autonomes a ses propres règles interlocales [43].

Certains théoriciens contemporains ne considèrent même pas les conflits interrégionaux (donc les conflits qui naissent dans les États

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[38] Ce que soulève fort à propos A. N. MAKAROV (*op. cit.*, p. 21).

[39] Comme le souligne dans la littérature polonaise K. PRZYBYŁOWSKI (*op. cit.*, p. 5).

[40] Comme le fait remarquer G. KEGEL (*Internationales Privatrecht*, 3e éd., München 1971, p. 56).

[41] Particulièrement juste est la systématisation de E. VITTA (*Diritto...*, pp. 98 et s.) qui divise ces conflits en comparaison des conflits du droit international privé, en trois groupes: 1° l'identité des solutions (comme dans les pays de la *common law*), 2° l'application *mutatis mutandis* des règles du droit international privé aux rapports interlocaux, et 3° la particularité des règles (comme en système polonais).

[42] P. H. NEUHAUS (*op. cit.*, p. 213) écrit donc à tort que la typologie des États juridiquement non uniformes a une valeur très limitée. Analogiquement G. BEITZKE, H. COING, K. FIRSCHING, F. KORKISCH, *op. cit.*, p. 30.

[43] A ce moment attire l'attention Z. KUČERA, *Mezinarodni právo soukromé*, Praha 1975, p. 99.

qui s'appuient, en principe, sur la législation unique) comme les conflits véritables [44]. Il semble cependant que cette opinion va trop loin. Les conflits des droits particuliers qui s'appuient sur la particularité juridique traditionnelle de certains territoires d'un même État ou les conflits qui résultent de l'annexion des territoires sur lesquels reste en vigueur la législation ancienne, ce sont sans doute les conflits de lois au sens propre de cette expression. Néanmoins, ils se distinguent essentiellement des conflits qui naissent dans les États fédéraux et à la fois s'approfondissent les différences avec les règles du droit international privé. Il faut tenir compte de cette différenciation des types de la non-uniformité interne quand on dresse un bilan des ressemblances de deux domaines qui ne se couvriront jamais pour tous les États non uniformes.

Comme différence fondamentale de deux domaines, il faudrait considérer, à côté de l'absence, en droit interlocal, de certaines institutions de la partie générale du droit international privé (ce que j'ai déjà mentionné ci-dessus), le remplacement du facteur de rattachement de la nationalité par celui du domicile. Cela a de nombreuses conséquences concernant le rapport entre ces deux facteurs de rattachement, les différentes conceptions du domicile dans les différents systèmes, etc. Ce seul moment rend déjà impossible l'identification de deux domaines discutés [45]. Par contre, les solutions analogues entrent en ce qui concerne la compétence désignée par le facteur du lieu. Ce dernier moment, comme nous en allons encore parler, permet même de transposer certaines solutions du droit international privé dans le droit interlocal.

Des difficultés singulières sont liées à l'application de l'exception d'ordre public dans les rapports interlocaux. Parlant du droit interprovincial polanais de 1926, nous avons fait remarquer un essai d'élimination totale de la clause générale d'ordre public avec certaines restrictions particulières dans l'application du droit d'un autre territoire interne d'État. Dans la littérature contemporaine, on rencontre des opinions hostiles à l'application de cette clause dans les rapports

[44] Comme un législateur ne peut avoir de deux différentes volontés, le conflit véritable peut surgir entre les législations des États différents. Ainsi P. MAYER, *Droit international privé*, Paris 1977, n° 83.

[45] Il est évident que dans les États où au lieu de la nationalité est plaé le domicile (comme p. ex. aux États-Unis), les différences entre le droit international privé et le droit interlocal peuvent s'effacer, bien que — comme le soulève la littérature européenne (p. ex. G. KEGEL, *op. cit.*, p. 58) — on y introduise dernièrement une pratique particulière relative aux conflits internes, ce qui contribue à la particularité de deux domaines.

interlocaux [46] mais il suffirait plutôt de dire qu'elle y est plus rare [47] sans être complètement exclue [48]. On pourrait en donner bien des exemples provenant non seulement du terrain laissé de côté dans cette esquisse, c'est-à-dire du terrain anglo-américain où le besoin de l'exception d'ordre public dans les rapports internes ne fait aucun doute, mais aussi du terrain des États où l'autonomie de différents territoires juridiques est moins grande. Sans répéter nos remarques à ce sujet, il faut encore une fois souligner que la question de l'application de la clause d'ordre public et l'étendue de cette application dépendent — comme dans les autres questions ici discutées — de l'ensemble des rapports qui existent dans l'État donné [49].

Les différences entre le droit interlocal et le droit international privé existent donc indubitablement, bien que leur sorte et leur étendue soient différentes dans les différents États. Ces différences ne font pas parfois obstacle à la transposition des solutions caractéristiques pour un de ces domaines dans un autre et cela dans les cas très différents. Il peut s'agir ici de certaines institutions de la partie générale (par exemple, la fraude à la loi), ainsi que des solutions particulières concernant, par exemple, les droits réels, les obligations, la forme de l'acte juridique, etc. Cependant, le rapprochement ou l'éloignement de telles ou telles solutions n'est pas le plus essentiel, mains un « climat » particulier, différent dans les rapports interlocaux et internationaux [50]. Grâce à lui, entre autres, il est difficile de parler (comme je l'ai déjà souligné à propos des lois polonaises de 1926) non seulement de l'identité de deux domaines discutés, mais aussi de leur considération sur le même plan [51], malgré leur caractère conflictuel commun et un nombre de solutions concordantes dans les différents points.

4. Solution des conflits interlocaux en droit international privé

La solution des conflits internes dans l'espace peut constituer aussi bien une question indépendante (dont nous avons parlé en principe jusqu'à présent) qu'une question partielle. Dans le second cas, la solution du conflit interlocal est — pour ainsi dire — un allongement de

[46] Ainsi p. ex. G. KEGEL, *op. cit.*, p. 57.
[47] Comme p. ex. A. N. MAKAROV, *op. cit.*, p. 24.
[48] A juste titre E. VITTA, *Diritto...*, p. 104.
[49] Comme fort à propos K. PRZYBYŁOWSKI, *op. cit.*, p. 179.
[50] Dont l'importance souligne justement P. MAYER (*op. cit.*, n° 82).
[51] « *Ein Feld* » — comme s'exprime G. KEGEL (*op. cit.*, p. 57).

la solution du conflit international. Le mode de solution d'un tel cas généralement adopté consiste à le soumettre aux principes de conflit (c'est-à-dire au droit interlocal) du système juridique désigné comme compétent en vertu des règles du droit international privé.

Dans cette direction sont allées les deux lois polonaises sur le droit international privé. Pourtant, entre la formulation de ce principe dans la loi de 1926 et la formule de la loi de 1965, il y a certaines différences, car l'art. 37 de la loi de 1926 a parlé de l'État « dont la loi est indiquée comme compétente par la présente loi », tandis que le problème du droit non uniforme surgit non seulement dans le cas où la compétence d'une loi résulte d'une directive de la loi sur le droit international privé, mais aussi dans le cas où la loi compétente est indiquée par une autre règle de conflit applicable ou quand elle est désignée par les parties[52]. C'est pourquoi la loi nouvelle de 1965 a remplacé, dans son art. 5, cette formule infortunée par la formule correcte qui parle de « l'État dont le droit est compétent ». Le droit de cet État détermine lequel des systèmes qui entrent en jeu sera applicable.

La disposition analogue dans son contenu à l'art. 5 de la loi polonaise se trouve dans la loi tchécoslovaque sur le droit international privé du 4 décembre 1963 (art. 34). Conformément à cette disposition, « lorsque le droit de l'État partagé en plusieurs territoires juridiques est compétent, les dispositions de cet État déterminent l'application du droit de l'un de ces territories »[53].

Les pareilles règles de conflit qui renvoient en matière de conflits interlocaux au droit de l'État donné, se trouvent également dans les autres systèmes de conflit, aussi hors de l'Europe. Il en est ainsi, par exemple, dans l'art. 26 du Code civil égyptien, dans l'art. 31, al. 2 du Code civil de l'Iraq, etc. Les solutions analogues, on les rencontre dans certains projets (par exemple dans l'art. 2286 du troisième projet français de 1967).

Qu'est-ce qu'il faut entendre par « le droit de l'État juridiquement non uniforme » dont parlent ces dispositions ? La réponse à cette question ne peut pas être univoque. La situation est la plus simple quand, dans cet État, sont en vigueur les règles particulières concernant les conflits

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[52] Dans la mesure, naturellement, où cette volonté est admise par la loi comme facteur déterminant la compétence d'un droit (K. PRZYBYŁOWSKI, *op. cit.*, p. 149).

[53] Quant à cette disposition, cf. entre autres R. BYSTRICKÝ, *La nouvelle loi tchécoslovaque sur le droit international privé et de procédure*, « Bulletin de Droit Tchécoslovaque », 1963, n° 4, p. 249.

internes. Une telle situation est cependant exceptionnelle [54]. Parmi les plus grands États du monde, le système de cette sorte ne possède que l'Union Soviétique, comme nous en avons déjà parlé ci-dessus. Pourtant, la grande majorité des pays juridiquement non uniformes n'a pas codifié les principes du droit interlocal (de même, d'ailleurs, que certains de ces pays n'ont pas codifié leur droit international privé). Il en est ainsi, par exemple, dans la République d'Afrique du Sud ou dans l'Australie. Aux États-Unis où l'on rencontre la pluralité des systèmes internes, il n'y a pas — semble-t-il — non seulement de principes codifiés du droit international privé, mais non plus de droit interétatique interne séparé [55]. En Grande-Bretagne, le système interlocal n'est pas bien établi non plus. En outre, les systèmes de droit international privé des parties particulières du Royaume Uni diffèrent entre eux (par exemple, le système conflictuel de l'Ecosse et celui de l'Angleterre).

Comment déterminer dans ces cas la compétence interne lorsque les règles du droit international privé n'ont indiqué que la compétence de l'État ? Au premier lieu, on admet alors, en général, la compétence locale qui est indiquée par les règles de conflit du for [56]. Il s'agit donc des cas où la règle applicable du droit international privé indique non un État mais un lieu : lieu du domicile, du siège de l'entreprise, de la situation d'une chose, de l'accomplissement de l'acte, etc. Cela produit une situation de cette sorte que l'indication conflictuelle dépasse — pour ainsi dire — le plan international et pénètre dans les rapports internes.

Dans l'application de la loi polonaise de 1965, cette solution ne peut toutefois jouer le rôle considérable, car ladite loi se sert conséquemment de l'expression « droit de l'État » et non pas « droit du lieu » (ainsi, par exemple, en ce qui concerne la forme de l'acte juridique — l'art. 12, en ce qui concerne l'objet des droits réels — l'art. 24 § 1 et 2, etc.). Cette solution ne peut, d'autant plus, conduire à un résultat direct, lorsqu'une loi (comme, par exemple, la loi polonaise) prévoit, dans la grande majorité des cas, la compétence du droit national.

Dans de tels cas apparaît une autre solution du conflit interlocal laquelle consiste à la tendance de résoudre ce conflit de la même manière que le ferait juge de l'État « non uniforme », c'est-à-dire de l'État dont le droit a été indiqué comme compétent. Il faudrait alors se laisser guider avant tout par la jurisprudence du pays donné, les

[54] « *Eine ganz seltene Ausnahme* » (A. N. MAKAROV, *op. cit.*, p. 88).

[55] Cf. à ce sujet, entre autres, P. HAY, *International versus interstate conflicts law in the United States*, « Rabels-Zeitschrift für ausländisches und internationales Privatrecht », 1971, n° 3, pp. 429 et s.

[56] Cf. H. DÖLLE, *op. cit.*, p. 13.

principes adoptés dans la doctrine de ce pays, et même par une analogie — judicieusement appliquée — avec les solutions du droit international privé adoptées dans le pays « non uniforme », d'autant plus quand il n'y a pas de différences essentielles dans la solution des conflits internationaux et interlocaux. Peuvent aussi venir en aide d'autres moments qui décident du rattachement du rapport donné à un territoire juridique [57]. Lorsque, par exemple, les ressortissants d'un État fédéral ont à côte de leur nationalité principale aussi la nationalité d'un territoire autonome déterminé, ou lorsque « le domicile » sera interprété comme « résidence habituelle », etc. La compréhension du caractère du droit de l'État indiqué peut ici beaucoup expliquer, malgré l'absence de nettes directives législatives en la matière.

Lorsque la recherche de cette sorte est sans résultat, la doctrine propose d'appliquer le droit de ce territoire auquel la persone donnée est le plus étroitement liée. Cette solution a été adoptée, par exemple, dans la convention de La Haye du 5 octobre 1961 sur les conflits de lois en matière de forme des dispositions testamentaires (art. 1er, al. 2) et dans la convention de La Haye du 15 novembre 1965 concernant l'adoption (art. 11) où, à défaut des règles du système déterminé, on prévoit l'application de la loi indiquée « par le lien le plus effectif » ou par « les liens les plus étroits » [58].

Les difficultés particulières surgissent en connexion avec la nationalité. Les uns recommandent dans ces cas la libre appréciation, les autres — comme on l'a indiqué ci-dessus — la recherche « du lien le plus fort (étroit) » avec un territoire juridique interne, ou ils adoptent la solution discutée plus haut, c'est-à-dire la recherche de la décision qui serait prise par le juge de l'État « non uniforme » donné. Lorsque ces solutions n'atteignent pas leur but, la littérature contemporaine [59] propose d'appliquer la loi : 1° de la résidence habituelle, 2° de la dernière résidence habituelle, 3° du séjour, 4° du dernier séjour, 5° la loi en vigueur dans la capitale de l'État donné.

S'il n'y a pas de moyen d'établir les règles internes de solution du conflit interlocal dans le pays donné, le juge peut toujours se référer, en cette matière, aux principes de la *lex fori*.

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[57] P. ex. l'art. 2286 du IIIe projet français dit qu'il faut résoudre les conflits interlocaux avant tout selon la loi de l'État donné « ou, à défaut, en tenant compte du lien effectif qu'a la cause avec l'une des législations de cet État » (cf. R.C.D.I.P., 1970, p. 842).

[58] Cf. F. RIGAUX, *Droit international privé*, Bruxelles 1968, n° 133.

[59] Ainsi L. RAAPE, F. STURM, *op. cit.*, p. 380.

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Polish Court Judgements in International Civil Law Cases

by MACIEJ TOMASZEWSKI

MAINTENANCE. — The scope of application of the New York Convention of July 20, 1956, on the recovery abroad of maintenance. — The legal basis of the jurisdiction of the Polish courts.

The Supreme Court Civil Chamber. — Decision of March 11, 1976 (IV CZ 14/76) in a case Dawid B. v. Godfryd B. concerning an increase in support payments. ("Orzecznictwo Sądu Najwyższego," seria cywilna — "The Supreme Court Decisions", Civil Law Series — 1977, No. 1, item 10).

The plaintiff, a Polish citizen, demanded, in an action against a Ghanaian citizen residing in Great Britain, an increase in support payments for the parties' son, a Ghanaian citizen residing with his mother in Poland. The payment were adjudicated in a divorce decree passed on March 29, 1973.

The District Court at Rzeszów *ex officio* turned the case over to the Voivodship Court at Rzeszów for deciding it in conformity with the provisions of the Convention on the recovery abroad of maintenance, signed in New York on July 20, 1956.

The Voivodship Court established that the provisions of the cited Convention were not applicable to the case and dismissed the action on the grounds that, in view of the different domicile and citizenship of the parties, the Polish court, in keeping with Article 1101, paragraph 1, of the Code of Civil Procedure (C.C.P.), had no jurisdiction to hear the case.

The plaintiff, in a complaint, demanded reversal of the judgment and referring of the case for re-examination.

The Supreme Court decided to overrule the judgements of both lower courts and turn the case over to the District Court at Rzeszów for re-examination.

In justifying its decision, the Supreme Court said:

"Contrary to the standpoint adopted in the appealed judgment, the New York Convention of July 20, 1956, on the recovery abroad of maintenance, ratified

by the Polish People's Republic on October 13, 1960, applies — as it results from its name and its provisions — to all maintenance claims which have their source in a legal obligation stemming from kinship or matrimony. As there are no exclusions in this respect, the Convention applies also to cases involving an increase in maintenance payments.

"Also incorrect is the District Court's view that the Polish court may *ex officio* refer a case for decision on the basis of the Convention. According to an explicit Convention provision, this may not happen without a petition from a person entitled to file it. Thus if, in view of the court, recovering maintenance by way of an action is inadvisible because a judgement, in the absence of an international agreement on mutual recognition and enforcement of judgements between Poland and the state in which the party obliged to pay support is residing, will have no practical significance for the plaintiff, assistance to the plaintiff may be rendered solely in the form of an instruction. (Art. 5 of the C.C.P.) on the effects of a judgement and the benefits deriving from the Convention provisions.

"As explained by the Supreme Court in a decision of September 22, 1966 (III CR 150/65, "Państwo i Prawo" — "State and Law" — 1967, No. 3, p. 529) and as follows from Article 1, paragraph 2, of the Convention, the form of legal protection provided for in that paragraph is an auxiliary means with respect to the means existing in the internal law nad does not replace the latter. Thus the existence of the Convention does not deprive the person entitled of the right to sue for maintenance or an increase therein by way of legal action before a Polish court. For the party may have legal interest in filing such a suit despite the non-existence of an international agreement on the recognition and enforcement of judgements — it may, for example, seek a judgement in order to exact its dues from the alimony fund.

"Thus there were no grounds for turning the case over for decision on the basis of the Convention, because the plaintiff had not filed an appropriate petition. Consequently, the District Court should have examined the case.

"Finally, it must be said that, contrary to the different opinion of the Voivodship Court, the legal basis for the jurisdiction of the Polish courts in cases involving support payments is provided not by Articles 1100 and 1101 of the C.C.P. but by Article 1103, paragraph 3, of the C.C.P. [...]

"As the plaintiff is reeclaiming maintenance, i.e. advancing financial claims, the connecting factor decisive of jurisdiction is the place of fulfilment of the obligation (Art. 1103, para 3, of the C.C.P.). This place is in Poland since the entitled person is domiciled here.

"For this reason, the case is subject to the jurisdiction of the Polish court".

MARRIAGE. — The scope of the court's cognizance in cases concerning the release of a foreigner from the obligation to submit a certificate of capacity to contract marriage. — The applicable law. — A foreigner s national law admitting polygamy. — Denial of release. — The public policy clause.

a) **The Supreme Court Civil Chamber.** — Decision of August 26, 1974 (I CR 608/74) in a case brought by Sekuo D. ("Orzecznictwo Sądów Polskich i Komisji Arbitrażowych" — "Decisions of the Polish Courts

and Arbitration Tribunals", 1976, No. 7—8, item 141, with a critical gloss by M. Tomaszewski).

A citizen of the Republic of Mali, who had been studying in Poland for six years, applied for releasing him from the obligation to present in the registry office of a certificate of capacity to contract marriage, which he was planning with a Polish citizen. The petitioner submitted to the court "a certificate of bachelorship", issued by the registrar of the Bamako district, according to which "he was not bound by marriage and was a bachelor". In another document enclosed to the petition, the Minister of Education of the Republic of Mali consented to the petitioner's marriage with a Polish citizen, Barbara L. with the reservation that

"the consent shall, in no way, obligate Mali with respect to the applicant's future wife".

The petitioner also enclosed a statement, made before a notary public in Poland, to the effect that he

"will not question the future wife's right to contact the Polish mision in the territory of Mali nor forbid her to return to Poland, and undertakes to cover the cost of her return to her native country".

At a hearing before the District Court, the petitioner made a recorded statement that during his marriage with Barbara L. he would not contract another marriage and would ensure to her the same rights she would enjoy in Poland.

The District Court dismissed the petition. Since it had established, on the basis of Mali's family code, that polygamy existed in that state, the Court recognized that the existing difference with respect to the woman's position and the attitude toward her justify the refusal to release the applicant from presenting the document required by the registry office, in view of the incompatibility of the Mali law with the fundamental principles of the legal order in Poland.

In examining the petitioner's appeal, the Voivodship Court addressed to the Supreme Court, on the basis of Article 391 of the C.C.P., the following legal question:

"Is the marriage of a Polish citizen with a citizen of Mali, where polygamy exists but where the law provides for man's option for a monogamous matrimony, compatible with the fundamental principles of the public order in Poland"?

The Supreme Court took over the case and dismissed the petitioner's appeal, stating in the justification, *inter alia:*

"[...] The scope of the court's cognizance in examining cases involving the release of a foreigner from the obligation to present a certificate of capacity to

contract marriage according to the foreigner's native law also embraces the question of the public national clause.

"Incompatibility of a foreigner's national law with the fundamental principles of the public order in force in Poland constitutes an irremovable obstacle to marriage.

"For according to Article 6 of the private international law (the Law of November 12, 1965, "Dziennik Ustaw" — "Journal of Laws", No. 46, item 29"), no rules of foreign law may be applied, which would be incompatible with the fundamental principles of the legal order in the Polish People's Republic. Thus, for example, a foreigner may not be allowed in Poland to contract marriage for a specified period of time, though such a form of matrimony is admissible in some legal systems.

"It is therefore in this context that the legitimacy of the petitioner's demand must be examined. [...]

"It is beyond any doubt that the petition would have to be dismissed if only polygamy existed in the applicant's native country, since a fundamental inconsistency would exist with the principles of the Polish marital law. The question arises, however, whether to resolve this question on the same basic when, given the existence of the polygamy, there is the possibility of option for monogamy, and a foreigner desiring to marry makes a declaration to this effect.

"At a hearing before the court of first instance, the prospective spouses stated that they intended to settle in Mali. But even if they declared their intention to take residence in Poland, the possibility of resettlement to the petitioner's native country could not be ruled out.

"Thus in considering the question whether also in the case of option for monogamy the applicant's national law is inconsistent with the fundamental principles of the Polish law, one should take into account the provisions of Article 17, paragraph 3, of the private international law, according to which the personal and financial relations between the spouses are governed by the law of the state in which both spouses have their domicile, as well as the fact that, with the wife's consent, the petitioner could contract other marriages. From the viewpoint of the public policy clause, it is essential what legal status the Polish citizen will enjoy as a wife. Nor is it unimportant what her social position would be in case of polygamy. Finally, it cannot be foreseen along what lines the changes in a foreign law will proceed. [...]

"Neither the law nor the doctrine define the boundaries of the notion of the public policy clause, and, therefore, the court must carry out a valuing appraisal of the foreign law. In doing so, it should consider that this clause is, first of all, an objective category in this sense, that the application of this clause cannot depend solely on the will of the Polish citizen, who, for a variety of reasons, may at a certain time submit to a less advantageous foreign law.

"Therefore, the court, in deciding cases concerning the release of a foreigner from the obligation to present the document referred to in Article 46 of the Law on registers of births, deaths and marriages, must — out of concern for the Polish citizen — have in view all the mentioned reservations.

"To this concern must be subordinated the reservations stemming from social and legal policies, including some obstacles to marriages with foreigners, because it is only this concern that underlies the mentioned solution.

"Thus if in the state whose citizen is seeking release from the obligation to present the document referred to in Article 46 of the Law on registers of births, deaths and marriages there exists polygamy, and the law of that state admits man's option for a monogamous marriage only as an exception, with the possibility of contracting further marriages with the monogamous wife's consent, then it should be recognized that there exists between the petitioner's national law and the principles of the Polish marital law a contradiction which excludes the possibility of granting the petition".

b) **The Supreme Court Civil Chamber.** — Decision of October 11, 1974 (II CR 735/74), in a case in which Abdelaziz H. H. sought release from the obligation to present a certificate of capacity to contract marriage ("Orzecznictwo Sądów Polskich i Komisji Arbitrażowych" — "Decisions of the Courts and Arbitration Tribunal", 1976, No. 7—8, item 142).

The petitioner, a Sudanese student staying in Gliwice, requested release from the obligation to present a certificate of capacity to marry Krystyna Z., a Polish citizen.

The District Court at Gliwice, in a decision of March 3, 1974, dismissed the petition.

The applicant appealed from the ruling.

The Voivodship Court, acting on the basis of Article 391, paragraph 2, of the C.C.P., asked the Supreme Court to clarify the question whether a foreigner whose national law admits polygamy may be relased from the obligation to present the mentioned document.

The Supreme Court took over the case, overruled the judgement of the District Court at Gliwice and turned the case over to that court for re-examination.

In justifying its ruling, the Supreme Court said, *inter alia:*

"[...] As regards [...] the legal question presented by the Voivodship Court, it has been worded too generally to give to it a univocal answer: either negative or positive. In each individual case various circumstances may come into play, necessitating the application of different solutions [...] It should be recalled that the Supreme Court has carried out an interpretation of the legal provisions concerning this question, stating that in cases involving the release of a foreigner from the obligation to present a certificate of capacity to contract marriage the court is bound to appraise the foreigner's capacity to contract marriage not only in the light of his or her national law but also from the viewpoint of the compatibility of that law with the fundamental principles of the legal order in the Polish People's Republic.

"It should be emphasized that the above interpretation should not be taken to mean that marriages between Polish citizens and citizens of states in which polygamy is the prevailing legal and customary regime, are inadmissible on principle. Of the many possible variegated situations, the court should, in any case, negatively treat a situation in which a citizen of a foreign state admitting polygamy who is planning marriage with a Polish citizen has already been married even to one woman.

"In this connection, it is the duty of the court to establish whether the applicant is not married. In this respect, an assurance of the petitioner is not sufficient. The court should ascertain this circumstance on the basis of appropriate evidence in the form of documents. For this end, it ought to be found out whether a register of marriages is kept in the applicant's native country, taking into consideration the reliability of this register for evaluating the validity of marriage, as well as which organs and on what basis are authorized to issue certificates of marital status. [...]

"Furthermore, the court should find out whether polygamy in a given country is only an accepted practice or whether it is legally sanctioned. For this end, a reference to materials containing general information on a given system of marital aw is not sufficient; the court must have at its disposal current legal sources".

SUCCESSION. — Jurisdiction of the Polish court in cases concerning the acquisition of movables bequeathed by a foreigner. — The applicable law for the form of testamentary disposition. — The Hague Convention of October 5, 1961, on the conflicts of laws relating to the form of testamentary dispositions.

The Supreme Court Civil Chamber. — Decision of May 31, 1975 (III CZP 78/75) in a case brought in by Wiesława S., with the participation of Halina S. and Tadeusz S., concerning acquisition of a bequest. ("Orzecznictwo Sądu Najwyższego", seria cywilna — "The Supreme Court Decisions", Civil Law Series — 1976, No. 2, item 33).

The testator, Stefan S., a U.S. citizen living in Poland, died in Poland on May 11, 1973. He left a will made on February 4, 1969, in the place where he formerly had his domicile, i.e. in New Jersey, U.S.A. The will, typewritten by the testator, was signed by himself and two witnesses in whose presence the will was made. The testator left movables and immovables in the territory of Poland.

A petition claiming the rights to Stefan S.'s estate was filed by his sister, who demanded acknowledgment of her rights in the basis of the rules governing intestate succession.

The court of first instance, in a decision of May 17, 1974, determined that the rights to the Stefan S. estate, as regards the property situated in Poland, had been acquired, by virtue of the testament, by his wife, Halina S. The court recognized that the case is subject to the jurisdiction of the Polish court, since the decedent estate was situated in the territory of Poland. The court of first instance further recognized that the will made by the testator was valid, because it fulfilled the requirements of the law of succession of the testator's national country (Art. 35 of the private international law).

In examining an appeal by the petitioner, the Voivodship Court at Warsaw, on the basis of Article 391 of the C.C.P., presented to the Supreme Court two legal questions: one of them concerned the existence

of the jurisdiction of the Polish court in that case and the other — the validity of the testamentary disposition in terms of form.

The Supreme Court decided to reply to these questions in the following way:

"1. When an inheritance left by a foreigner includes immovables situated in Poland, and the successor cannot obtain confirmation of his or her rights to the bequest from the national court of the testator, the Polish court has jurisdiction in a case involving acknowledgment of the acquisition of the inheritance.

"2. Sufficient for the validity of a will made by a foreigner is giving the will the form provided for in the law of the state in which the will has been drawn up, irrespective of the kind of property which makes up the estate".

In justifying the above replies, the Supreme Court stated *inter alia:*

Ad 1. "This question (i.e. the question of jurisdiction of the Polish courts in inheritance cases — M. T.) has been regulated in Article 1108, paragraph 1, of the C.C.P., according to which inheritance cases are subject to the jurisdiction of the Polish court when the testator had Polish citizenship at the time of his or her death, or when, having no citizenship, he was residing in Poland. It results *a contrario* from this provision that the Polish courts do not have jurisdiction in cases concerning acknowledgment of the rights to inheritance from foreigners. [...]

"The above cited view about the lack of jurisdiction of the Polish courts in cases concerning acknowledgement of the rights to inheritance from a foreigner undergoes a substantial modification when immovables left by a foreigner and situated in the territory of Poland are involved. This results from a comparison of Article 1108, paragraph 1, of the C.C.P. with Article 1102 of the C.C.P., contained in the title incorporating joint provisions governing national jurisdiction in litigious and non-litigious proceedings and ensuing from the principle of the territorial supremacy of the state in the territory whereof the decedent estate is situated. [...]"

"As emphasized, the place where the inheritance is situated justifies exclusive national jurisdiction only with respect to immovables, as provided for in Article 1102 of the C.C.P., whereas so far as movables are concerned the principles contained in Article 1108, paragraph 1, of the C.C.P. are applicable. [...]

"The Voivodship Court, however, in presenting this legal question, rightly pointed out that, against the background of the provision of Article 1108, paragraph 1, of the C.C.P. [...], it may turn out that no court of any state has jurisdiction. [...]

"In the case in question [...] the testator was a U.S. citizen who, prior to his settlement in Poland, had his domicile in New Jersey. As it results from information furnished by the Minister of Justice on the basis of Article 1143 of the C.C.P., the courts of that state, as regards their jurisdiction, apply domicile or the place where immovables are situated as the connecting factor and refuse to examine inheritance cases of their citizens unless their jurisdiction is justified either by the testator's domicile or the place where immovables included in the estate are situated.

"The above conflicts of the rules concerning jurisdiction in two different legal systems may lead to a situation, unforeseen by the Polish legislators, in which a Polish citizen interested in confirmation of his or her rights to inheritance

would be deprived of the possibility to advance his claims not only before a Polish court but also before any foreign court. Such a state of affairs, incompatible with the aims of the administration of justice, would violate the legal order in the Polish People's Republic, as it would be tantamount to refusal to extend legal protection to a Polish citizen. Thus, in a situation when, in the light of the rules of jurisdiction in force in the testator's national laws, a Polish citizen cannot institute inheritance proceedings — as regards movables situated in the territory of Poland and constituting part of a bequest left by a foreigner — before the testator's native court, then the Polish court, acting on the basis of Article 4 of the Civil Code, should depart from the principle laid down in Article 1108, paragraph 1, of the C.C.P. and recognize its jurisdiction in this respect".

Ad 2. "[...] The validity of a testament as regards form is subject to appraisal in the light of the Hague Convention of October 5, 1961, on the from of testamentary dispositions. The Convention has been in force in Poland since November 2, 1969 (Dziennik Ustaw 1969, No. 34, items 284 and 285). Although the United States has not acceded to the Convention, nonetheless — as it results from Article 6 of the Convention — the Convention is applied even when the law applicable under the Convention provisions is not that of any of the contracting states or when the persons involved are not citizens of any of those states. It results from the above that the Convention provisions are applicable not only in mutual relations between subjects belonging to the contracting states but in every case, just as the internal rules of conflicts are. In this situation, the validity of the testament in question is subject to appraisal, on the strength of Article 1, paragraph 2, of the private international law, in the light of the Hague Convention.

"According to Article 1 of the Convention, a testamentary disposition is valid as regards from when, *inter alia*, its from complies with the internal law of the place where the testator made it. The composition of the estate is of no consequence for the appraisal of the validity of a testament in terms of form, if only this form complies with the internal law of the place where it was made".

AIR CARRIAGE. — Responsibility of the air carrier for the acts and omissions of his handling agent with respect to the recipient of goods. — The Warsaw Convention of October 12, 1929, for the unification of certain rules relating to international carriage by air.

The Supreme Court Civil Chamber. — Decision of October 13, 1975 (I CR 64/75) in the case the Chemical Import and Export Company of Warsaw versus the Polish Air Lines LOT and the Soviet Air Lines AEROFLOT ("Orzecznictwo Sądów Polskich i Komisji Arbitrażowych", "Decisions of the Polish Courts and Arbitration Tribunals" — 1977, No. 1, item 7, with a gloss by J. Rajski).

The Chemicals Import and Export Company filed a suit in the Voivodship Court in Warsaw demanding from the Polish Air Lines LOT 502, 230 zlotys in damages for spoilt antirabics vaccine carried by air. The suit named the Soviet Air Lines AEROFLOT as co-defendant.

The plaintiff ordered from the Foreign Trade Company in Moscow

antirabics vaccine and entrusted AEROFLOT with the carriage of the vaccine. The Vaccine was delivered in two lots: 16 cases on August 3, 1973, and another 5 cases on August 6, 1973. LOT, acting as AEROFLOT's handling agent, deposited the goods in the airport storehouse and notified the plaintiff's forwarding agent (C. Hartwig) of the arrival of 5 cases, which were collected on August 7, 1973, without complaining about the lack of the remaining cases. It was not until October 30, 1973, that LOT notified the forwarder of a consignment of 16 cases, which the forwarding agent collected on the same day, making in the damage certificate a reservation as to lodging a complaint should the vaccine prove spoilt. On November 19, 1973, the plaintiff was notified by the recipient of the vaccine that the vaccine, due to its long storage at an inappropriate temperature, was worthless as a medicine. A complaint in this matter was lodged on January 16, 1974, with LOT, which conveyed it to the carrier, i.e. to AEROFLOT.

In a decision of June 4, 1975, the Voivodship Court dismissed the action in full, recognizing that the plaintiff was not connected by any obligatory relation with LOT, and thus the defendant, because of the lack of capacity to be sued in this case, cannot be held responsible for the damages that were caused during carriage. Whereas the other defendant, AEROFLOT, cannot be liable because of the failure to comply with the term and form of protest provided for in Article 26, paragraph 3, of the Warsaw Convention of October 12, 1929, for the unification of certain rules relating to international carriage by air.

Following an appeal by the plaintiff, the Supreme Court reversed the above judgement and turned the case over for re-examination to the Voivodship Court in Warsaw.

In justifying its decision, the Supreme Court stated, among other things:

"The Voivodship Court is right in recognizing that in the case under consideration the provisions of the Warsaw Convention of October 12, 1929, as amended by the Hague Protocol of September 28, 1955, are applicable. [...]

"Thus the plaintiff is right in alleging a violation of Article 26, paragraphs 2 and 3, of the Warsaw Convention in the wording defined by the Hague Protocol. This provision does not specify what content a "protest" should have, generally referring to a "reservations". However, it exhaustively defines the form of a protest, namely, a reservation should be included in the transportation document or made by way of a writing sent out with the delay envisaged for the protest. [...]

"It cannot [...] be required that a protest have such a comprehensive content as demanded of a complaint by the Polish air law.

"Therefore, the content of the reservation made in the damage certificate on October 30, 1973, by a representative of the recipient of the shipment fulfils the requirements for a protest set in Article 26, paragraph 3, of the Convention,

not only in terms of content but also of form; for the protest was included in a document destined for representatives of both the carrier and the recipient and was addressed to the carrier, amongst others, as a writing within the meaning of the cited provision. This fact simultaneously proves that the protest was made in due time.

"Article 19 of the Convention, which deals with responsibility for a damage that resulted from delay, certainly means a damage caused by the delay alone, and not spoilage ("damage") of goods. For responsibility for spoilage ("damage") is envisaged in Article 18, paragraph 1, of the Convention. Article 18, paragraph 2, of the Convention contains an authentic interpretation of the duration of aerial transport, stating that it comprises the period during which the goods are in the care of the carrier, whether in the airport, aboard the plane, or in any other place in case of a landing outside the airport.

"The carrier is liable for the acts and omissions of his handling agent with respect to the recipient of goods, and, therefore, he is liable within the limits of the provisions of the Warsaw Convention for the damage (spoilage) of goods which occurred while the goods were in the care of that agent, providing his act or omission was connected with the discharge of his functions. [...]

"On the other hand, the plaintiff's charge that the handling agent is responsible for damage as being the actual carrier is ungrounded. The Warsaw Convention does not define the notion of air carrier. It this only the Guadalajara Convention of 1961 that fills this gap, providing in Article 1 that "contracting carrier" means a person who makes an agreement for carriage governed by the Warsaw Convention with a consignor. Whereas "actual carrier" means a person, other than the contracting carrier, performs the whole or part of the above-mentioned carriage but who is not a successive carrier within the meaning of the Warsaw Convention. [...]

"Thus an agent of the contracting carrier cannot be regarded as the actual carrier within the meaning of Article 1 of the Guadalajara Convention.

"For the agent is neither a party to the agreement for air carriage nor does he actually perform this carriage by virtue of authority from the contracting carrier.

"The above view is generally accepted in foreign courts' decisions and in the doctrine, which, *inter alia*, critically assessed the solitary and different standpoint adopted by a Swiss court, the Tribunal de première instance in Geneva, in its decision of December 9, 1958, in the case G. W. Style *versus* P. Braun ("Revue Française de Droit Aerien", 1959, No. 4, p. 405).

"The ascertainment of the lack of grounds for responsibility of an agent of the contracting carrier in relation to the recipient of goods does not preclude recognition of this responsibility, on the basis of a prohibited act (Art. 415 ff of the Civil Code), for damages resulting from destruction, loss, or damage of goods or from a delay in aerial transport (Arts. 18 and 19 of the Warsaw Convention). Neither the Convention nor the Polish air law deal with such responsibility".

"However, the international air law (Art. 25 of the Warsaw Convention) and the Polish air law (Art. 22 of the Law on air law of May 31, 1961) in such a cese provide for the application to the responsibility of those persons of the same restrictions as those envisaged for the carrier (Art. 22, para. 2, point b, of the Warsaw Convention).

RECOGNITION OF A FOREIGN JUDGEMENT. — A divorce granted in the U.S.A. — Lack of the exclusive jurisdiction of the Polish court. — Formal finality of a foreign judgement. — Examination of the possibitity of defence before a foreign court.

The Supreme Court Civil Chamber. — Decision of February 6, 1975 (II CR 847/74) concerning a petition filed by Helena P. for the reccognition of a foreign judgement ("Orzecznictwo Sądu Najwyższego", seria cywilna — "The Supreme Court Decisions", Civil Law Series, 1976, No. 1, item 11).

The District Court in the state of Illinois, in a decision of February 11, 1974, decreed dissolution of a marriage of Polish citizens. The plaintiff was domiciled in the U.S.A. and the defendant resided in Poland. In a petition of April 24, 1974, the plaintiff demanded recognition of the decree by the Voivodship Court in Wrocław. In a ruling of September 14, 1974, the Court dismissed the petition on the grounds that the plaintiff had failed to prove that the decree, the recognition whereof she demanded, was final and that the defendant was duly notified of the suit and the date of the hearing. Moreover, the Court cited lack of the jurisdiction of the U.S. court, as the plaintiff was a Polish citizen.

Following an appeal by the petitioner, the Supreme Court reversed the Voivodship Court's decision and turned the case over to that court for re-examination, saying in justification, *inter alia:*

"The view expressed in the appeal that there existed the jurisdiction of the U.S. court to decree the divorce of the parties is fully justified. For according to Article 1100, paragraph 2, of the C.C.P., the national jurisdiction in marital cases is exclusive solely when at least one of the spouses has Polish citizenship and both spouses are domiciled in Poland. Contrary to the standpoint adopted by the Voivodship Court, in a situation when the defendant has Polish citizenship, the plaintiff's domicile, and not her citizenship, is of decisive importance. Since it was established beyond doubt that the plaintiff is permanently residing in the U.S.A., there existed the jurisdiction of that state's court to decree the divorce. [...]

"The question of the finality of the divorce decree, too, has lost practical significance at this stage of the proceedings. The provision of Article 1146, paragraph 1, point 1, of the C.C.P., which makes the recognition of foreign judgements dependent on their finality, means formal finality; in other words, a judgement is final when it is no longer subject to any form of appeal (Art. 363, para. 1, of the C.C.P.). Whether or not a judgement is final is determined by the provisions of the procedural law, and, therefore, this question should be appraised according to the law of the state whose court passed the judgement.

"Examination of the question whether there is no obstacle to the recognition of a foreign judgement in effect of the deprivation of a party of the possibility of defence should be based by the Polish court on the provisions of the foreign law, since this is a matter of a procedural nature. However, appraisal of this

question rests with the Polish court, which in this respect is not bound by the standpoint of the foreign court. The petitioner should therefore furnish the indispensable elements for carrying out such an appraisal. Namely, she should present the evidence on the basis of which the foreign judge assumed that the defendant had been duly notified".

RECOGNITION OF A FOREIGN JUDGEMENT. — A divorce granted in the Federal Republic of Germany. — One of the parties dies following the decree. — The legal interest of the other party in seeking the recognition in Poland of the foreign court judgement.

The Supreme Court Civil Chamber. — Decision of April 2, 1975 (II CF 67/75) concerning a petition filed by Zuzanna H. for the recognition of a foreign judgement ("Orzecznictwo Sądów Polskich i Komisji Arbitrażowych" — "Decisions of the Polish Courts and Arbitration Tribunals", 1976, No. 7—8, item 148, with an approving gloss by J. Jodłowski).

The Voivodship Court in Katowice, in a decision of November 18, 1974, dismissed Zuzanna H.'s petition for the recognition of a judgement passed by the District Court in Stuttgart, Federal Republic of Germany, decreeing the dissolution of the petitioner's marriage with Werner H.

The Voivodship Court established on the basis of the submitted death certificate that Werner H. died on April 17, 1971, and assumed that the petitioner's marital status changed and she did not need a divorce decree to contract another marriage.

In her appeal, the petitioner asked for reversing the Voivodship Court's decision on the grounds that the Court erroneously assumed the lack of legal interest on her part as regards demanding the recognition of the foreign judgement decreeing the dissolution of her marriage.

The Supreme Court reversed the appealed decision and turned the case over to the Voivodship Court in Katowice for re-examination.

In justifying its ruling, the Supreme Court emphasized, *inter alia:*

"The charge of transgression against Article 1147, paragraph 1, of the C.C.P. should be recognized as justified. [...] For, contrary to the stand adopted by the Voivodship Court, the petitioner has legal interest in determining that the change of her marital status occurred [...] not on the day of her husband, Werner H's death but earlier, on the day when the judgement of the foreign court decreeing the dissolution of her marriage became final. This is of significance for the petitioner not only as regards her rights relative to personal status but may also be important with respect to her property rights, *inter alia*, those concerning responsibility for the obligations from the time of her marriage. [...]"

RECOGNITION OF A FOREIGN JUDGEMENT. — A divorce granted in Great Britain. — Lack of the competence of the Polish court to correct inaccuracies or errors in a foreign court judgement.

The Supreme Court Civil Chamber. — Decision of August 27, 1975 (I CR 465/75) in the case Zygmunt K. *versus* Pamela Ewelina S. concerning the recognition of a foreign court judgment ("Orzecznictwo Sądu Najwyższego", seria cywilna — "The Supreme Court Decisions", Civil Law Series, 1976, No. 7—8, item 170).

Zygmunt K. sought the recognition of a final divorce decree issued in Great Britain on February 24, 1956, which dissolved his marriage with Pamela Ewelina K., nee S., contracted in Hasby on July 5, 1948. At the same time, the petitioner demanded the correction of the date of his marriage, as mentioned in the divorce decree, by setting it at July 5, 1947.

In a decision of February 10, 1975 the Voivodship Court recognized the decree as effective in the territory of Poland but dismissed the petition for correcting the date of marriage.

The petitioner lodged an appeal which the Supreme Court rejected, stating in justification the following:

"The legitimacy of the appeal was dependent on the answer to the question whether the Polish court, during proceedings concerning the recognition of foreign court judgements, is competent to decide petitions for corrections in the contents of such judgements.

"To this question, a negative answer should be given.

"Matters relative to the recognition of foreign court judgements are regulated by the C.C.P. of 1964 in book 3, part 3, title 1 (Arts. 1145—1149). None of the provisions contained in that part of the C.C.P. deals with the question of correcting errors in foreign court judgements, subject to proceedings before the Polish court.

"It is understandable in the light of the assumption adopted in the Polish procedural law that corrections in a judgement of inaccuracies, lapses of the pen, errors of calculation, or other apparent errors can be introduced only by the court which has issned the judgement (Art. 350, para. 1 and para. 3 of the C.C.P.).

"On such an assumption, it should be concluded that the Polish court is not competent to correct inaccuracies or errors in a fareign court judgement.

"Having this in view, the Supreme Court, acting on the strength of Article 387 of the C.C.P., resolved as above."

RECOGNITION OF A FOREIGN JUDGEMENT. — A divorce granted in U.S.A. — Premises of recognition. — Exclusion of the examination by the Polish court of the substantive ligitimacy of a fareign court judgement.

The Supreme Court Civil Chamber. — Decision of November 5, 1975 (I CR 625/75) in the case Marriet P. *versus* Eugeniusz Z. concerning the

recognition of a foreign court judgment ("Orzecznictwo Sądu Najwyższego", seria cywilna, "The Supreme Court Decisions", Civil Law Series — 1976, No. 10, item 215).

The Voivodship Court in Białystok, in a decision of January 27, 1975, dismissed Marriet P.'s petition for the recognition of a U.S. court judgement decreeingg the divorce of the petitioner, domiciled in the U.S.A., and her husband, Eugeniusz Z., resident in Poland. According to the Court, there were no grounds for complying with the petition because of the failure to fulfil all of the premises provided for in Article 1146, paragraph 1, of the C.C.P. The Court assumed as indisputable that the defendant was deprived of the possibility to defend his rights, since he had not been notified of the date of the hearing, and a judgment passed in such circumstances, as violating the fundamental principles of the Polish law, cannot be recognized as effective in the territory of Poland. Moreover, the defendant argued that the U.S. court had no grounds for decreeing the divorce, since their marriage was harmonious, the wife and the child left Poland with his approval, and the parties exchanged friendly letters until the divorce; to prove the latter, he enclosed the petitioner's letters in the court records.

In an appeal against the decision of the Voivodship Court in Bialystok, the petitioner argued that she had already remarried in the U.S.A. and that the Court had insufficiently considered all the circumstances indispensable for the recognition of the divorce decree.

The Supreme Court overruled the Voivodship Court's decision and turned the case over to that court for re-examination. In justifying its ruling, the Supreme Court stated, *inter alia:*

"[...] The appeal is justified in that it cites the charge of not clarifying all the essential circumstances for passing the right judgement.

"As it results from Article 1146, paragraph 1, of the C.C.P., a judgment is subject to recognition on condition of reciprocity when:

— the judgement is final in the state in which it was passed;

— the case — according to the Polish law or under an international agreement — is not subject to the exclusive jurisdiction of the Polish courts or the courts of a third state;

— the party was not deprived of the possibility of defence, and in case of the lack of capacity to be party in a lawsuit — of due representation;

— the judgement is not inconsistent with the fundamental principles of the legal order in Poland;

— in passing the judgment in a case in which the Polish law ought to be applied, this law was actually applied, unless the foreign law does not essentially differ from the Polish law.

"In considering the content of this provision, it should be noted that the principle of reciprocity is the fundamental condition, which admits the examination of further premises indispensable for recognizing a judgement.

"Meanwhile, the court which has passed the appeated judgements failed to ascertain whether the divorce decree issued by the U.S. court is final.

"This circumstance cannot be determined on the basis of the letter of the petitioner's counsel of November 6, 1974; it should be established, in accordance with Article 1147, paragraph 3, of the C.C.P., on the basis of a certificate issued by the foreign court which issued the appealed judgement. If the judgement is really final, and the court does not know how to ascertain this fact, is should demand additional confirmation of this premise, in accordance with the Polish legal procedure.

"The divorce case was not subject to the exclusive jurisdiction of the Polish courts, as the petitioner is domiciled in the U.S.A.

"It cannot be recognized — as the Voivodship Court did — that the defendant was deprived of the possibility to defend his rights, since it univocally results from the content of the decree that he was notified of the lawsuit by serving a writ of summons; besides, this fact results from the content of the correspondence between the spouses, enclosed in the court records. Therefore, the dismissal of the petition solely on this basis is not proper. [...]

"The content of the U.S. court's decree does not indicate that the decree is inconsistent with the Polish legal order. The Polish law, just as the law of the state in which the judgement under consideration was passed, admits the possibility of dissolving a marriage by way of divorce, deciding on entrusting custody of the children and on the parent's obligation to support the children.

"The foreign court, as it results from the content of the decree, decided all the basic questions which the Polish courts resolve in divorce cases. This fact does not mean, however, that the foreign court applied the Polish law, which in the present case should have been applied in accordance with Article 18 of the private international law.

"It is therefore necessary — next to establishing whether the judgement in question is final — to ascertain which law the U.S. court applied, Polish or American, and if it applied the latter — whether it does not essentially differ from the Polish law. By an essential difference is meant here the dissimilarity of divorce premises which decide about granting a divorce.

"As it results from Article 1146 of the C.C.P., the court which decides on the recognition of a foreign court judgement does not examine the substantive legitimacy of the judgment (Art. 1146 of the C.C.P.), since this lead to a dual decision on the merits of the case, which is not the aim of the proceedings for the recognition of foreign court judgements. If the defendant in a recognition case was notified of the date of the hearing in the divorce case, he or she should have raised the objection as to the illegitimacy of the demand before the foreign court. The failure to do so before the foreign court cannot be made up for before the Polish court, since the proceedings before the latter concern solely the recognition of the judgement as effective in the territory of Poland. [...]"

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Awards of the Court of Arbitration at the Polish Chamber of Foreign Trade in Warsaw

by ANDRZEJ W. WIŚNIEWSKI

The Court of Arbitration at the Polish Chamber of Foreign Trade has celebrated its 25th anniversary in 1976. During 27 now years of its activity the Court settled disputes between Polish and foreign (CMEA as well as Western) firms. The following research of the Court's decisions tends to present its achievements in interpreting and applying the law governing international commercial relations. The majority of the awards quoted were passed during the last eight years, with the exception of the first one which, in spite of its 20 years of age, remains highly actual and one of the most important in the Court's practice.

1. Award of February 11, 1958 Case No. 17/57

The Government's act interfering with the fulfilment of the conctrat may be considered as force majeure *in relations between enterprises from socialist states.*

The defendant (the Polish foreign trade enterprise) undertook to deliver to the claimant (an enterprise in the German Democtratic Republic), to the end of 1956 as many as 3,060,000 t. of coal and 615,000 t. of coke. On December 21, 1956 the defendant informed the claimant by cable that "because of the limitation of the export plan for coal and coke in the result of *force majeure*, as expressed in the decision of the President of the Council of Ministers" the claimant will deliver about 500,000 t. less of coal and 60,000 t. less of coke. On June 26, 1957, the claimant advised the defendant of the demand of penalties under Article 50 of the General Conditions of Delivery of goods from the Polish People's Republic to the German Democratic Republic (futher

quoted: GCD). The defendant remonstrated against the claim of penalties invoking in his letter of July 10 1957 the above mentioned decision of the President of the Council of Ministers concerning the lowering of the coal consumption for domestic as well as for export needs. The defendant interpreted this decision as *force majeure* exonerating him under Article 53 of the GCD from the liability for the partial non-fulfilment of contract.

The claimant argued that the decision in question should not be accepted as *force majeure*. The notion of *force majeure* in socialist states differs from that prevailing in capitalist states. In particular, a socialist state may not be apprehended separately from its foreign trade organs nor these organs — separately from the state. Moreover, the decision in question is contrary to the trade argreements between the Polish People's Republic and the German Democratic Republic for 1965 and offends the principle *pacta sunt servanda* of the law of nations. It is true that international agreements are concluded *rebus sic stantibus* but — according to the claimant — no new and imprevisible circumstances emerged to allow Poland to invoke this clause. The decision in question may not be treated as — in relation to the defendant — external, what is fundamental for the notion of *force majeure*. The defendant, being the state's enterprise in the socialist state, should — in the claimant's opinion — bear the liability under civil law for his government's acts. What's more, even accepting that the decision in question has been in fact justified by *force majeure* under the political and economic situation of the Polish People's Republic, to impose the consequences of this situation on the economy of the German Democratic Republic would be contrary to equity and equity must be taken into consideration by the court of arbitration.

The assertions of the claimant: that the decision in question cannot be considered as external in relation to the defendant, and that the defendant is liable for acts of the state being contrary to international agreements, were found wrong by the Court of Arbitration. Whether there is an international agreement and whether the government has been entitled under the law of nations to pass the decision contrary to this agreement or not, such decision making the fulfilment of the contract impossible is for the contracting party an external event which could be by no means prevented — and namely it is *force majeure*. The Court of Arbitration found also wrong the assertion of the claimant that, allegedly, in the socialist state the organs of foreign trade and the state itself shouldn't be apprehended separately. The dispute concerns the civil law claim directed against the state enterprise

which, under an express provision of law, bears no liability for the state as well as the state is not liable for the enterprise.

For these reasons the Court of Arbitration found immaterial the question if the circumstances referred to by the defendant justified in the light of the law of nations the appyling to the trade agreement between the German Democratic Republic and Polish People's Republic of the *rebus sic stantibus* clause. This question must be necessarily alienated from the civil-law dispute between the contracting parties.

Finally, the Court of Arbitration assumed that the decision of the President of the Council of Ministers dated December 1, 1956—let alone its meaning under the law of nations — constituted for the defendant, the last being a separate legal entity, an event of *force majeure*.

2. Award of June 16, 1969, Case. No. 605/68

The recourse claim between the enterprises from CMEA countries for costs beared in a certain currency must be satisfied in the same currency and not in transferable roubles.

The Hungarian enterprise "M" filed on November 11, 1968 the claim for an amount of 220 pound sterlings with interest from February 12, 1968 and costs of arbitration against the Polish enterprise "H". As grounds the claimant stated that it commissioned the defendant as sea forwarder of goods destined for an English firm. The defendant has been obliged a.o. to inform the receiver in due time of the date of loading and dispatch. By the delay of this information the defendant caused to the receiver damages which have been paid by the claimant. The defendant, without challenging the principle of his liability or the amount of damages, paid the demanded amount to "M" but recounted in roubles. The claimant did not accepted this payment and returned the amount of 476 roubles to the defendant.

In the reply to the claim the defendant confirmed the acknowledgement of the claim. However, it invoked the protocol signed between Hungary and Poland on October 22, 1963 in light of which it considered itself obliged to pay the damages only in roubles.

The Court of Arbitration found the defendant's opinion wrong. The quoted above Protocol of October 22, 1963 concerned the deliveries of goods and mutual accounts connected. Such relations were not entered into by the parties. Whart's more, the claim did not concern

damages but had a character of a recourse claim (Art. 441, para. 3 of the Polish Civil Code). The claimant paid for the defendant the damages due in pound sterlings and in this currency the defendant should have made the compensation.

3. Award of October 13, 1969, Case. No. 595/68

In accordance with the principle of nominalism prevailing in international relations, the damages caused by the devaluation of the contract's currency may not be adjudged except under an express preventive currency clause

Article 24 of the agency contract between the Polish foreign trade enterprise "T" and the Iraqi firm "A" (agent) regulated the matter of the agency commission, its amount and the way of payment. According to the said Article the commission was to be calculated on the invoice value of the delivered goods. The calculation of the commission had to be effected on the basis of books and files of the defendant "T", i.e. on the amount and currency of accounts connected with executed contracts of sale. The claimant argued that the sale of goods has been always carried out under the stipulation of the currency clause stating that:

"The value of the Contract, the prices and all amounts due are expressed in Pound Sterling being equal at present $2.80. Should this parity be altered, the value of the contract, the prices and all outstanding amounts under this contract shall be adjusted accordingly".

The claimant asserted that, because of the devaluation of pound sterling having place after the commission was due, the said commission should also be subject to a corresponding adjustment.

In the opinion of the Court of Arbitration, the form of the settlement of accounts accepted by the parties in Article 24 of the agency contract cannot be considered as a preventive currency clause. Such a clause cannot be implied. It should clearly be shown that the party seeks protection against the result of devaluation by the way of payment in gold or in a currency different that the one fixed in the contract. In any case this should be mentioned in the contract. If a clause of protection against devaluation hasn't been fixed in the contract, the debtor is released from his debt by payment of a convened amount of the currency. This principle is prevailing especially in commercial relations between enterpoises from different countries.

The Court is also of the opinion that the principle of nominalism

applies not only to the liabilitie which had arisen before the devaluation but also to the ones which have arisen later.

The sale contracts of the defendant "T" contained currency clauses but such clause did not exist in the agency contract. There is no correlation between these two kinds of contracts and the clause included in the contract of sale did imply itself upon the agency contract.

4. Award of May 4, 1970, Case No. 687/69

Under Polish law the date of delivery is, in case of doubt, considered as stipulated for the debtor. In case of the contract of sale, the seller is entitled to precize the contracted dates and amounts of successive deliveries

The parties — the Polish foreign trade enterprise "P" as seller and the Swedish firm "R" as buyer — agreed the deliveries under their contract to be executed "successively in five parts, about 4,000 pieces a month". The first delivery was to be made during a month from the date of the delivery of nails to the buyer and also from the date of confirming the standard by the buyer. The parties also shared the delivery of 20,000 pieces to be delivered during five monthly periods. In addition, the parties — what is even more important for the case — considered the dates of deliveries as not finally determined and demanding further exacting. From the view-point of law it is to be settled who is entitled to precise these dates, the buyer or the seller.

There are two solutions to the mentioned problem possible. The first one — prevailing in the law of numerous countries and in particular in English law — leaves the right to final determination of the date of delivery with the buyer, with the restriction that he chooses a "reasonable" date. The "reasonable" date should be undersood as corresponding with the contents and purpose of the contrat and — what is more — with the possibilities of the seller. The French court practice, e.g., demands the buyer when determining a "proper date" to take into account whether the seller has to buy the object of his prestation before delivering it to the buyer. The Court considered that the claimant "R" should have known that the defendant "P" neither produced not owned the goods to be delivered and that the "reasonable" date should correspond with this circumstance.

There is also, however, second possible solution to the said problem,

prevailing in particular in Scandinavian, also Swedish, as well as in Polish law. Under this solution the dates of the deliveries to be executed during a certain period of time are — in case of doubt — to be determined by the seller and not by the buyer (cf. para. 15 of the Swedish Law of 1905 on the sale of goods). The influence of this solution shows, too, in the 1956 Draft Convention on the International Sale of Goods. Under Article 17 of the Draft, if the parties determined a period of time during which the delivery is to be executed, the seller shall determine the exact date save, under the circumstances of the case, the choice of the date may be considered as reserved for the buyer.

Under Polish law — applicable to the dispute in question — "the date of the prestation determined in the legal act is considered, in case of doubt, as stipulated for the debtor" (Art. 457 of the Civil Code). In the case in question the date delivery is, therefore, considered as stipulated for the seller.

From the above said it is evident that under the applicable law only the defendant's (as seller's) determination, in frames of the contract, of the amounts of subsequent deliveries and exact dates could be legally binding. It must be also considered that (under point 8 of the General Conditions of Sale enclosed to the contract in question) all the agreed dates of deliveries "have an approximate value only" and are subject to a delay or anticipation according to the seller's possibilities.

It must be assumed, therefore, that the repeating cathegoric and one-sided demands of the claimant as to the dates and amounts of deliveries were unjustified in the light of law and contract. In particular, the claimant had no right to make punctual deliveries in thus one-sidedly determined dates a condition for payments from the letters of credit opened by him.

5. Award of February 9, 1976, Case No. 75/75

If the delay in the delivery is due to the buyer's fault, the buyer is not entitled to the penalties under Article 83 of the GDC CMEA (1968)

Under contracts between the Rumanian enterprise "M", the buyer, and the Polish enterprise "B", the seller, the last has been obliged to deliver 6 cranes in the 1st quarter 1973. The buyer was expected to send the dispatch instructions 45 days before the date of dispatch. According to the contract:

"Would the dispatch instructions not have been sent in due time, the deliveries shall be due in the next quarter of the year".

The dispatch instruction for the first 3 cranes has been sent on June 11, 1973 and the enterprise "B" delivered them on December 14, 1973. The claimant "M" assumed that the contractual date of delivery should be "August 1973" and claimed 8% penalties from that date.

The dispatch instruction for the next 3 cranes came only on December 3, 1973. The dispatch followed on June 14, 1974. The claimant "M" assumed that the delivery should have been made in I quarter 1974 and demanded the corresponding amount of penalty.

The Court of Arbitration came to the opinion that the quoted above clause of the contract were to be understood as follows:

The date of the delivery was to be delayed from I to II quarter 1973 in case if the dispatch instruction came less than 45 days prior to the contractual date of the delivery. It may be assumed that this was the situation and interpretation taken into account by the parties.

In fact, the dispatch instruction did not at all come before the contractual date of the delivery. On the contrary, the claimant have sent it 45 days after this date for the first 3 cranes and over 8 months after this date for the next 3 cranes. The claimant argued that, in these circumstances, the delivery was due during the quarter of the year following the date of sending the dispatch instruction. The claimant maintained also that this interpretation has been confirmed by the defendant in his telex of July 25, 1974 stating that the first 3 cranes were to be delivered in the III quarter 1973 (which quarter followed the date of instruction sending — June 11, 1973).

The Court of Arbitration assumed that the principle of equity makes the following interpretation of the contract's clause in question possible:

— either it did not at all find application in the situation in which the dispatch instruction were sent long after the contractual date of delivery,

— or the delay of delivery must have been long enough to leave to the seller 45 days + 4 months after the date of sending the dispatch instruction, for was is the time which apparently had been stipulated in the contract. It follows also from the principle that the undue fulfilment by one party may not impose negative consequences on the other.

In relation to the first 3 cranes the Court of Arbitration found the interpretation presented by the claimant justified and adjudged to him the penalties from thus established date of delivery (III quarter 1973). Desicive for this solution was the acknowledgement of the principle

and amount of this claim by the defendant in his telex dated July 25, 1974.

In relation to the next 3 cranes the Court took into account that this delivery has been executed after the telex of the defendant dated December 6, 1973, stating that as the result of the over 8-month delay in sending of the dispatch instruction by the claimant the defendant found himself compelled to abandon the contract in this part. In spite of this decision caused by the non-fulfilment of the claimant's obligations the defendant executed the contract. Under these circumstances the claimant cannot — in the opinion of the Court Arbitration — claim penalties. Other solution would mean that, contrary to equity — the negative results of the claimant's own undue behaviour are imposed upon the defendant.

6. Award of April 30, 1976, Case No. 145/75

The penalties due under Article 58 of the GCD CMEA (1968) are not subject to the provisions of Article 88 of the said Conditions. In particular, they are not subject to the 3-month prescription of claims provided in Article 88 point 1 a.

The delivery made by the enterprise "T" from the German Democratic Republic to the Polish fereign trade enterprise "A" has been paid for in the way of collection with immediate payment. Subsequently, however, the buyer "A" made a recourse collection in the amount of 2,811.38 roubles. The seller "T" found this recourse collection groundless and demanded the return of the said amount plus 5% penalties due under Article 58 of the GCD CMEA. After the arbitration proceedings before the Court of Arbitration commenced, the defendant "A" returned the amount in dispute but refused to pay the penalties. The defendant argued that the right to claim penalties exired as the claimant did not observe the 3-month term prescribed in Article 88 of the GCD for advising the other party of the claim of penalties.

The Court of Arbitration found that the view-point of the claimant that the provisions of Article 88 point 1 of the GCD cannot be applied to the penalty under Article 58 is right. As follows clearly from the formulation of Article 58 ("If the buyer acknowledges or the arbitration deems..."), the term for rising the claim of such penalties cannot be counted from the date of reaching the maximum amount of penalties. Consequently, the penalties in question might be claimed during a year

(see Article 93 of the GCD) from the date when "the buyer acknowledged or the arbitration deemed". As the defendant acknowledged on December 22, 1975 his being in fault with the recourse collection, the term would run only from that date.

BOOK REVIEWS * COMPTES RENDUS

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Remigiusz BIERZANEK, *Bezpieczeństwo regionalne w systemie ONZ [Regional Security in the UN System]*, Warszawa 1977, 220 pp.

The reviewed book deals with problems which at present are the subject of lively interest in academic and governmental circles of various regions and, especially, in Europe. Professor Bierzanek's study can therefore be considered a major contribution to the discussion of the problem of maintenance of peace and international security.

The outstanding feature of the book is its interdisciplinary character, as manifested by the combination of a scholarly expertise in the field of international law with a penetrating analysis of international political relations in all their aspects. The author starts with some introductory politological considerations devoted to a comparative study of regional and universal systems aimed at the maintenance of peace and international security (Chapter I, p. 1). He discusses both doctrine and actual international practice in this field.

The historical approach in Professor Bierzanek's work is very valuable. This is reflected in many parts of the book and especially in Chapter II dealing with the problem of regionalism during the period o fthe first universal organization aiming to maintain international peace and security — the League of Nations. The author discusses, among other topics, problems of regionalism debated on the forum of the League of Nations. He also considers some very interesting proposals concerning regional arrangements (including the so-called Eastern Pact with the participation of the USSR), which could not be put into practice under the then prevailing political situation.

The subsequent seven chapters of the book deal with contemporary problems of regional security and their relation with the world-wide system of the United Nations. Chapter III discusses proposals on regional security put forward during the Second World War and the discussions concerning the inclusion into the Charter of the new World Organization provisions dealing with regional systems.

In Chapter IV, the largest in the book, the author studies the practical implementation of the main provisions of the United Nations Charter concerning regional arrangements and agencies. Following discussions and resolutions of the Security Council dealing with the activities of the Organization of American States (OAS), Professor Bierzanek offers an interesting interpretation of Article 53 of the UN Charter which states that "[...] no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council [...]". He discusses the attitude adopted by the members of the Security Council towards the resolution of the OAS condemning the subversive action of the Dominican Republic in Venezuela (1960) as well as their stand on the armed interven-

tion of the United States in the Dominican Republic in 1965. He examines also the position of members of the Security Council on political and economic sanctions voted against Cuba at the OAS Conference in Punta del Este in January 1962. The results of the voting on this matter quoted by the author on page 82 have demonstrated that the Security Council was divided on the matter as to whether the measures envisaged in Article 41 of the UN Charter are covered by the concept of "enforcement action" under Article 53 of the Charter. (Four states — the USSR, Ghana, the United Arab Republic and Rumania considered that they are covered, while seven — the USA, France, the United Kingdom, Chile, Taiwan, Eire and Venezuela — held a contrary view.).

The author devotes the second part of Chapter IV to the idea of "try the OAS first", so often promoted in the Security Council, according to which member-states had to take advantage of the regional procedure before referring their disputes to the United Nations. He examines the various attitudes on this matter in the UN and concludes that "the Security Council or the General Assembly have, so far, never maintained that they had no competence to deal with a dispute in its initial stage; nor had they ever recognized the exclusive jurisdiction of a regional organization in that stage of the dispute" (p. 102).

Chapter V deals with the potential and actual use of regional organizations in the process of peaceful settlement of disputes. The author analyses in an interesting manner the influence of international economic cooperation and the role of economic organizations in the prevention of international disputes and use of force in international relations. The role of such organizations was exemplified by the West-European integration and the East-African integration (Kenia, Uganda, Tanzania). But the major part of this chapter is devoted to the analysis of the activities of political regional organizations (OAS, OAU, Arab League) in the process of peaceful settlement of disputes. Having discussed practice in the matter, the author concludes that "[...] regional organizations can be helpful in many ways in the peaceful settlement of international disputes" (p. 118). On the other hand, he points out that "[...] all regional organizations have, so far, attached greater importance to other functions than to the settlement of disputes among their member-states" (p. 119).

In chapter VI, entitled "Regional Organizations, Political and Military Alliances" Prof. Bierzanek undertakes a very difficult and complicated problem. He rightly points out dangers inherent in the existence of opposing military alliances and their incompatibility with the idea of international peace and security embodied in the United Nations Charter (p. 128 ff). However, in view of this idea doubts arise as to the correctness of author's opinion which seems to maintain that the Charter has left to the states the unlimited freedom to enter into military alliances under Article 51 (confer i.e. pp. 124 and 125).

Chapter VIII presents position of smaller states in international relations in close relation with the problem of regional security. The term "smaller states" used instead of the term "small states", is more precise since it reflects the international position of such states (unable to ensure their external security within a given region by themselves). Professor Bierzanek presents the role of smaller states in several aspects. He offers an original conception of the basic principle of equality of states in international relations in connection with the establishment of closer ties between states and the development of universal international organizations, in particular of organi-

zations created in order to strengthen international peace and security such as the League of Nations and the United Nations. He points out that in San Francisco the smaller states had manifested their readiness to make concessions in favour of the Big Powers and to endow them with special privileges in the hope that this will ensure their peace and security. He must however concede that for all practical purposes the United Nations failed to create an effective system of international peace and security and concludes that "if such a system could have been established on the basis of certain elements of regional cooperation while guaranting some special prerogatives to the big powers of these regions, the agreement of the smaller states to create such a system would surely not be an act directed against the reasonable national interest of these states". (p. 169).

Chapter VIII contains many interesting and intellectually stimulating comments concerning the European political scene as shaped in the postwar period by the division of the continent into two opposing military groupings and the steps taken in order to restore harmony and cooperation among them, with particular emphasis on the implementation of the Helsinki Conference resolutions.

The final Chapter IX entitled "Prospects of Development of Regional Organizations within the United Nations System" sums up the findings of the preceding chapters and contains some suggestions on the structural solutions of the problem of regional security within the system of the United Nations. The author points out that "there seems to be no doubt as to the fact that one of the conditions of effective action by the UN in favour of the maintenance of peace and of the fulfilment of the UN's tasks in this respect is a certain decentralization of activity and a greater reliance on the forms of regional cooperation which is markedly gathering strength". (p. 207). At the same time he emphasizes that "[...] a system of collective security worthy of our times must contain elements of regionalism and elements of universalism" (p. 214).

To sum up it can be said that the reviewed book represents an important and useful contribution to the struggle for peace and international security on both the regional and universal level.

Kazimierz Równy

Maria FRANKOWSKA, *Wypowiedzenie umowy międzynarodowej [Denunciation of International Treaties]*, Wrocław 1976, Ossolineum, 263 pp.

Dr. Frankowska's special branch of research has been the law of treaties for quite a number of years. She produced in this field several important studies. This time, she turned her attention to one of the most difficult problems among those involving the termination of treaties. It may be noted that the problem chosen is one which so far has been less studied than other grounds for termination of treaties (such as, e.g., the "fundamental change of circumstances" to which recently several interesting studies were devoted).

In her "Introduction", the author very pertinently draws a firm boundary between "denunciation" and such other causes of the termination of treaties with which it sometimes could be confused. She also, how rightly, stresses in this connection the paramount importance of the *Pacta sunt servanda* principle of which the right of denunciation is a limitation.

Dr. Frankowska's study is based,

before all, upon abundant source material, especially upon the work of the International Law Commission and of the Vienna Conference of 1968 and 1969 which eventually led to the adoption of the Vienna Convention on the Law of Treaties, signed on 23 May, 1969. She did not overlook either former attempts at the codification of that branch of international law, whether official or unofficial. Finally, she amply quotes from numerous treaties giving preference, understandingly enough, to treaties to which Poland is a party.

That she is extremely well-read also in the literature of her subject, in several languages, appears more from numerous footnotes in which the book abounds than from the selected bibliography (pp. 251—253) the latter, to this writer's mind, being somewhat scanty.

The composition of the book is extremely well-balanced. Between the two margins: an "Introduction" and a concise "Conclusion", the author divided her main argument into four big chapters, namely (1) "General Problems", (2) "The Agreed Right of Denunciation", (3) "The Presumed Right of Denunciation", and (4) "Competence of State Organs to Denounce Treaties".

* * *

Among the "general problems" treated in Chapter I (pp. 15—86), the first to be stressed is the clear distinction, drawn by the author, between the denunciation in its broader and its narrower sense. Dr. Frankowska limits henceforth her study to the latter, comprising in it merely such unilateral declarations of states as are based on the "right of denunciation". The chapter is full of highly interesting terminological observations. The author points out, rather convincingly, that the English term "termination" and the French "extinction", although given the same function under the Vienna Convention of 1969, are not exactly equivalent. (It may be replied, however, that the drafters of the French text of the Vienna Convention were at a loss how to find an unambiguous one-word equivalent of the English "termination": they finally agreed upon "extinction" for lack of anything better and upon the authority of such an eminent French specialist as Professor Charles Rousseau.)

A comparison between various attempts at the classification of the grounds for termination of treaties is another interesting matter dealt with by Dr. Frankowska in the very same Chapter. There are indeed many such classifications and it is highly interesting to note how differently various authors place the "denunciation". To Frankowska's mind, the denunciation should be considered as an autonomous ground for termination of treaties which should, however, be subdivided into an "agreed" (as between parties to a treaty) and unagreed or "presumed" right to denounce a treaty. While the first is firmly based on the existing *treaty* law, the latter, according to Mrs. Frankowska, is still chiefly an institution of the *customary* law.

Chapter II (pp. 87—133) deals with the "agreed" right to denounce a treaty. Although this could seem to be a comparatively simple proposition, the author found here as well the subject for some interesting observations. The right of denunciation as expressly agreed between the parties serves, in Dr. Frankowska's opinion, a double purpose: firstly, to find a remedy against the "perpetual" force of treaties which have become obsolete; secondly, to set the possibility of getting rid of within a concrete legal frame. Such remedy started taking shape of express denunciation clauses in the treaties on a large scale, in the second half of 19th century only. It is inter-

esting to note that such clauses were, and indeed are not, necessarily bound with specific groups of treaties. They do appear, e.g., in some of the treaties of a codificatory character as well as in some of the statutes of international organizations while in some other treaties of the very same types they do not. It seems obvious enough that the lack of an express denunciation clause may mean, in a number of cases, not that the possibility of denunciation has been altogether excluded but rather that the drafters of the treaty did not want to give to the parties an encouragement for such denunciation. (This seems to be, i.a., the case of the Charter of the United Nations, case analysed by Frankowska at some length.)

The "presumed" right to denounce a treaty presents, of course, far more difficult problems. In Chapter III devoted to them (pp. 134—197), Dr. Frankowska gives, first of all, a comparative study of views expressed in this respect in the science of international law. These views are threefold. They either denounce any such presumed right, or unreservedly admit it, or else admit it subject to reservations. The last view seems to prevail more especially in the British science of international law and, if it appeared from the outset in the draft articles on the law of treaties emerging from the International Law Commission, the very fact that all special rapporteurs of the Commission on the subject were British may not have been devoid of bearing.

After having analysed the work of the International Law Commission and of the Vienna Conference, the author also reviews the practice followed by States. According to her findings (see especially pp. 182—184), States hardly ever explicitly invoked the presumed *right* of denunciation. To this writer's mind, this may not necessarily prove that such right was either unknown to them, or not recognized by them. Provided they acted in a given way, the *opinio iuris* itself could have been presumed, perhaps even preceding the formation of practice.

In the concluding paragraphs of this highly interesting Chapter, the author analyses Article 56 of the Vienna Convention on the Law of Treaties. She rightly discerns in it three elements: the general rule and two exceptions to it. The general rule has been termed in a negative way: the right to denounce a treaty may not be presumed. Of the two exceptions, one is of a subjective (intention of the parties), another of an objective character (nature of the treaty). Dr. Frankowska seems to be afraid (and she quotes here an analogous opinion by Francesco Capotorti) that the latter formulation may seriously endanger the stability of treaties. This writer would not be over-pessimistic in this respect (though not too optimistic either). The general rule is *against* the possibility of denunciation. Consequently, any argument in favour of such possibility constitute an exception to the general rule and, as such, cannot be presumed but must be conclusively proved, the burden of such proof resting upon the party invoking the right of denunciation.

The fourth and last Chapter (pp. 198—245) is perhaps more descriptive than analytical. It is not, however, devoid of interest either. The comparative study of a certain number of constitutions, not of all, undertaken by the author shows that they do not necessarily provide for the competence to denounce treaties as being vested in a given organ. If they do, they make of it a kind of counterpart to the competence of ratification. (Against Frankowska's assertion — p. 234 — this writer would see here a plausible argument for the existence, in international law, of the "acte contraire" theory.)

In her brief "Conclusion" (pp. 246—250), the author formulates two wishes: to avoid any misunderstandings, it would be highly desirable, firstly for treaties to contain express clauses on denunciation and, secondly, for constitutions expressly to provide for the competence of denouncing treaties. Though logically faultless, these wishes probably shall never be fulfilled to the full extent — the first one especially for reasons already explained by this writer in his discussion of Chapter III of Dr. Frankowska's book.

It can certainly be said, by way of conclusion, that Maria Frankowska's *Denunciation of Treaties* is a book of considerable value. Widely read both in sources and in literature, well-balanced in composition, conscientious in analysis, convincing in synthesis, such are the main characteristics of the author. In the series of monographs on various aspects of the law of treaties, provoked throughout the world by the signature, on 23 May, 1969, of the Vienna Convention, Dr. Frankowska's excellent book occupies a place of honour. It is a great pity — a lot which she shares with a number of other Polish authors — that language difficulties do not make this book easily accessible to such a circle of readers as it certainly deserves.

S. E. Nahlik

Marian IWANEJKO, *Spory międzynarodowe (Studium prawno-polityczne [International Disputes (A Legal and Political Study)]*, Warszawa 1976, PWN, pp. 275.

The problem of international disputes is undoubtedly one of the major topics in the science of international law and international relations, for it is closely connected with the maintenance of peace and the fundamental functions of international law in general. And this alone, in spite of modest progress achieved so for in the field of settlement of disputes, makes it so important to pursue persistently our efforts in order to explain the reasons of our failures and to explore new ways which may lead to better results, as we do in the complicated domain of disarmament. It has to be recalled that M. Iwanejko has already published several valuable studies on the International Court of Justice. The book under review deals, with the general problem of international disputes in the light of modern international relations.

The book has two parts: the first is devoted to "the systematization and classification" of disputes, the second — to their "regulation".

In the first, the author deals with such problems as: nature and substance of a dispute, conceptual scope and classification of disputes. In other words, this part is of a rather theoretical and introductory character.

The presentation is both convincing and timely, for it defines clearly the scope of fundamental concepts and explains the sources of existing terminological misconceptions. The author rightly defines an international dispute as a situation in which a claim presented by one party is rejected by another party. Thus, it has been definitely stated that a conflict of opinions and even interests between states is not, in itself, a dispute, but at most its motive.

However, when reading Chapter II one gets the impression that some thoughts have not been expressed decidedly enough. For example, as far

as the distinction between political and legal disputes is concerned (which could find a better place in Chapter III dealing with the classification of disputes) one must arrive at the inescapable conclusion that every dispute between states is, by its very nature, political, for everything related to states is political. Every dispute is also legal in that sense that it does not occur in a legal vacuum, nor is it neutral with regard to the law. Hence the distinction between political and legal disputes is of a rather practical importance only, as reflecting the preponderance of either political or legal elements. As a rule, one qualifies as political such disputes which are not judicial settlement, for they involve so-called vital interests. On the other hand, typical legal disputes are, according to Aritcle 36, paragraph 2 of the Statute of the International Court of Justice, mainly those which are connected with concrete treaty obligations.

Regarding the relation of so-called legal questions to disputes, the author seems to share the opinion that each legal question is the outgrowth of a dispute (p. 49). This is not very convincing. For example, doubts concerning the interpretation of a provision, which as a typical legal question may be the subject matter of an advisory opinion, can arise from a simple difference of views in an international organization. As far as the relation of a so-called situation to a dispute is concerned, one might have expected that the author will emphasize much stronger that every dispute is a situation but not every situation is a dispute endangering peace and security. Inversely, not every situation of that kind is a dispute (e.g., a concentration of troops).

In Chapter III, which is devoted to the classification of disputes, M. Iwanejko introduces a new one based on the criteria arising from reservations to declarations accepting the compulsory jurisdiction of the International Court of Justice. The author lists five such criteria: the object of the dispute in its substantive sense, the subjects understood as parties to the dispute, the place of the dispute in the political and geographical sense and the place proper to deal with the dispute. The most essential thing seems to be the increasing number of subjects which appear as parties in international disputes (intergovernmental and non-govermental organizations, enterprises and even private persons).

The second part of the book dealing with the settlement of disputes is undoubtedly related to practical needs. At the outset objections may be raised to the author's acceptance of the Polish term *uregulowanie sporów* (regulation of disputes). This seems hardly justified even in the light of his own arguments. Furthermore, in the Polish language the term *regulowanie* (regulation) makes one think of regulating or restoring order to something and not of liquidating or doing away with an undesirable pathological phenomenon such as a dispute. The Polish term *załatwianie* (which corresponds to the English "settlement") would seem much more appropriate.

In his preliminary considerations to this part of the book the author seems to have overhastily joined the rather isolated supporters of the opinion that from the point of view of international disputes Chapters VI, VII and VIII of the United Nations Charter must be treated jointly. It may be added that he himself provides strong arguments in favour of the thesis that Chapters VI and VII deserve separate treatment. Indeed, Chapter VI deals exclusively with the settlement of disputes, while Chapter VII is concerned with the problem of action with respect to threats to

the peace, breaches of the peace and acts of aggression, which of course are most often connected with disputes but, by no means, involve their settlement. The allegedly most convincing argument in favour of a joint treatment of the three chapters seems, according to the author, to stem from the fact that Chapter VIII is connected with both Chapters VI and VII (pp. 131—132). However, as a matter of fact, Chapter VIII confirms that the function of settlement of disputes is separate from that of the action in case of a threat to the peace, since the two functions are dealt with by two separate Articles, 52 and 53. A joint treatment of Chapters VI and VII is therefore unwarranted when considering methods of settlement of disputes and may even lead to misunderstandings.

Chapter II of Part II dealing with diplomatic and quasi diplomatic means contains many valuable observations concerning the latest developments in the field of direct negotiations and consultations, e.g., between organizations together with some considerations on the reasons why those methods are gaining popularity as compared to methods involving the participations of a third party. Of interest are also the remarks concerning collective negotiations and the role of international organizations in the settlement of international disputes by means of recommendations and special procedures.

In the chapter on judicial means the author deals mainly with judicial clauses, arbitration and regional tribunals. Little space has been consecrated to the International Court of Justice. This is to some extent justified, since the author devoted his preceding book to this subject. Furthermore, its treatment would go beyond the scope of the reviewed work. What could however be expected is at least a short comment explaining the rather paradoxical fact that many countries, including the socialist states, are ignoring the International Court of Justice almost as a matter of principle, while at the same time the Courtas the main judicial organ of the United Nations enjoys the highest authority on matters of interpretation and the competiton for places on which the Court is so keen.

In the concluding part, under the subtitle "Methods of Settlement of Disputes" the author deals with problems connected with the tactics of settlement of disputes, the qualifications of the mediator, etc. Conclusions in the form of recapitulation are, of course, not indispensable. However such a summing up would serve a useful purpose in focusing our attention on the contribution of the author to the theory of the international dispute. His contribution consists in an interesting attempt at classifying and explaining some fundamental concepts, at verifying and proposing new classifications of disputes and in collecting and interpreting a new some controversial questions, all this made in confrontation with present international reality.

Karol Wolfke

MIECZYSŁAW PASZKOWSKI, *Dyplomacja wielostronna na forum organizacji międzynarodowych [Multilateral Diplomacy within International Organizations]*, Warszawa 1976, PISM, 308 pp.

Generally speaking, lawyers two fundamental types of approach to problems of international organizations. Some of them are interested in the problems that result when one considers an organization as a certain

independent phenomenon, separate from its founders and main subunits (i.e. the member-states). The state appears, through this point of view, to be an element of a certain corporate boody. This approach is first of all characteristic, but by no means exclusive, to lawyers writing about integrational types of organizations. It is caused by the attitude of theoreticians who often think in advance of reality and who consider the autonomy of international organizations to be the means for securing an extention and fulfilment of their functions. It can not be said *a priori* that this approach is false, and similarly the other approach, which focuses on state and its interests, cannot be accused of being traditional or simply conservative. Both of them have their merits but each reflects only a certain part of reality. Thus the undertaken subject is decisive about the suitability of approach.

In their works dealing with general theory of the law of international organizations writers tend to consider both points of view harmoniously taking for the basis history, present day and considering also the forseable future of international organizations and their role in international relations. Their task, would be more likely to reach satisfactory accomplishment through a team work. Such a team should necessarily consist of both theoreticians and practitioners who would have experience in organizational activity of the participating member states, and they would also have a vast knowledge, resulting from their positions in the secretariates of organizations, of all issues characterizing distinct features of such organizations in international legal order.

The author of the book under review has contributed many theoretical works on legal problems of international organizations from both above mentioned points of view. His practical experience gained throughout several years of service for the Polish representation to the United Nations in Geneva, makes him prone in this book to focus his attention mostly on problems of position and role of member-states within an international organization. The title of his work shows his interest in international organizations from the point of view of their elementary units — though states undoubtedly act on the "forum" of international organizations. M. Paszkowski clearly defines the scope of his work in the introduction: "Here, international organizations are first of all dealt with as the forum for cooperation between states and a setting for multilateral diplomacy". One of the principal objectives of the research work has been to determine elements which are substantially new to multilateral diplomacy in contrast to traditional forms of relations between states.

In order to accomplish the research projected in such a way, the author had to concentrate consciously on these organizations and organs, where multilateral diplomacy has reached, as he points out, its full bloom. Obviously it concerns the United Nations and its General Assembly which he takes as the background. The issues of the international organizations, mainly those belonging to the United Nations system, have also been touched on in the discussed work. Despite the subject and the aim of the research being explicitly defined — the book necessarily includes many diverse issues and it has been not possible, as the author admits (p. 9), to give each of them equally thorough account. It is surely thanks to M. Paszkowski's precise and explicit style that a reader finds his book to be a coherent whole.

The book includes a short introduction, four chapters and an extensive bibliography. As an introduction

to the general discussion one may consider the first four sections of Chapter I ("The Setting") which embrace a concise account on the nature of diplomacy, position of a state in international relations, forms of bilateral relations, and finally, forms of multilateral relations other than within international organizations. As the author points out, this part of Chapter I seemed to be necessary "...for a due systematization of the material and the comparative analysis". (p. 8). Finally, the two last sections of Chapter I ("International Organizations as the Forum for Multilateral Diplomacy" and "Co-ordination of State's Relationships with International Organizations") take the reader directly into the sphere of author's main interest. Particularly the first one is vital for the author's work in providing a short, but fairly exhaustive review of such fundamental problems as the legal character of the statutes of international organizations, the membership, their organizational structure, basic classification and finally the question of non-governmental organizations and their co-ordination. These problems have been explained from the point of view of member states with particular regard to benefits which could result from the fact of their participation in international organizations. Section Six deals with a complex and extremely subtle problem of distribution of duties arising out of membership in international organizations for the state organs.

The next three chapters of the book have been devoted successively to the analysis of state organs of multilateral diplomacy, to its working methods and effects. There are no general conclusions at the end of the book — but each chapter ends by a sort of recapitulation (especially Chapter IV).

Such on order of the work is by no means accidental. The author presents thus his conviction that multilateral diplomacy on the forum of an international organization is not an aim in itself and that eventually of its success or failure would decide the fulfilment of functions, which are formulated in its status, in other words, the results of the activities of an organization. While concentrating his attention on problems of state and its interests, the author simultaneously refers to it as an element of an independent whole, namely an international organization, but he also endeavours to take into account all these elements, other than state and its organs, which are mutually responsible for the success or fiasco of an organization.

Problems of the state and its organs operating within international organization are the main subject of discussion in the longest Chapter II of the book. Having discussed different organs and the sources of law defining their position, the author rightly devotes most of his attention to the permanent mission. Here, the discussion on the functions of permanent mission is the most important and it refers to Article Six of the Vienna Convention on Representation of States in Relations with Universal International Organizations. The problem of appointment is but a technical matter whereas the status of a permanent mission, discussed in the section on privileges and immunities, results directly from its functions as formulated in the mentioned Article Six.

Section (a) in the Article Six of the Convention on Representation of States in Relations with Universal International Organizations, which among other functions of permanent missions gives priority to the one of "securing the representation of a Sending State in the organization", supports in author's view the preponderance of the above mentioned function of permanent mission. Taking no account of possible difference of

terminology rather in the subject-matter in comparison to the Vienna Convention of 1961, which clearly speaks of the representation of the state as the fundamental function of bilateral diplomacy — one could argue this point just on the ground of the above mentioned difference of approach to the problems of international organizations and their organs, including also the state organs. Thus, it seems that the writer argues from the point of view of the status of the permanent mission within an international organization which, even though essential, from the practical point of view does not seem to be more important than the intra-organizational approach. Along the lines of his argument in favour of superiority of functions of a representation the writer none the less spells out a number of issues, in fact included in the remaining sections such as communication arrangements, negotiations, ensurance of participation of state in activities of an organization and the safeguard of state's interests. Some elements of the communication function, as the author say (p. 88), interlink with the function of representation. Practically, the same applies to the majority of other functions. The function of representation of state within international organization does not, to my mind, play a major role from the point of view of achieving goals of an international organization — an ultimate objective of multilateral diplomacy.

The author is most persuasive in his argument against assuming that protection of national interests is in fact the only valid function of permanent missions. M. Paszkowski is right pointing out (p. 103) that the duty to join all efforts for the accomplishment of tasks and general functions of an international organization as a whole, of course not against states' own interests, results from a binding in international law principle of co-operation between states. One can distinguish here the fundamental difference between bilateral and multilateral diplomacy, namely, that the direct protection of national interests always takes the priority in the first case. In the second case though, protection of national interests means above all striving to secure state's adequate share in the achievement of common goals, which have been considered its own by participation in an organization. This classification directly gives way to the division of methods, main subject of Chapter III.

Distinct character of methods of multilateral diplomacy results most of all, as the author rightly points out (p. 178), from a distinct character of the setting. This concept has been very broadly described. It involves such diverse issues as for instance continuity, opennes, practical absence of the "third party", and finally the existence and activity of secretariate, which due to their nature represent the general interest of the whole organization (p. 180). Against this background M. Paszkowski explains questions of location of a session, its organization and regulations, the agenda, public debate and consultations, and finally the decision-making.

In this chapter the author was forced, as one could expect, to abandon temporarily his main interest in problems of state and its organs within international organizations in order to explain other elements involved. As far as the organization of a session, its agenda and public debate are concerned, it was essential to consider carefully the role of secretariates and representatives of states who are elected to act as chairmen of the principal plenary organs and main committees. One remark should be made here, that perhaps the role of secretariates has been discussed too briefly. Saying that the secretariate can possibly give a particular tinge (p. 180) to the ge-

neral opinion of the whole organization does not explain much, and many examples could be provided from the UN practice of a direct political influence exercised by its secretariate. It would also be advisable to give more consideration to the legal status of the chairmen functions; the political importance of their position has been most clearly shown on the 7th Special Session of the General Assembly.

A very interesting section on decision-making includes a particularly stimulating argument on consensus, a method which is "[...] very relevant to the needs of our times" (p. 252). The author rightly warns here against state's attempts to overestimate importance of its own interests, since this could cause problems or lead to a failure in reaching a general agreement. "In such situation there would obviously arise tendencies to seek a solution within narrower group or outside the international organization, and that in turn would diminish the role of organizations". (p. 251). Here again, the author gives evidence of his pragmatic approach towards multilateral diplomacy.

Among other issues discussed in Chapter IV (closing the book) dealing with the nature of resolutions passed by an organization and resulting out of them the measurable and unmeasurable gains, and finally their influence over activities of states — the last two deserve particular attention since they give a kind of general conclusion. As M. Paszkowski rightly argues "in the effect of interaction between many elements and especially the adopted statutory norms, a qualitative change occurs which leads to the crystallization of a position of an organization as a corporate body". There are different ways in which such position can reveal itself (frequently in the form of legal rules or their projects) and member-states cannot remain indifferent to this — but on the contrary — it increasingly affects not only their foreign affairs but also their domestic activities. One could risk a conclusion that the influence on internal policy of various states is much stronger under the process of multilateral diplomacy than under the bilateral diplomacy, where the problem of sovereignty stands in the focus of attention. Hence, one can fully agree with the final statement of the author of that interesting and valuable work, that both forms of diplomacy interact with each other, contributing together to the increasingly complex network of contemporary international relations.

Jerzy Makarczyk

Eugeniusz PIONTEK, *Udział państw socjalistycznych w GATT [The Participation of Socialist Countries in GATT]*, Warszawa 1975, PWE, pp. 214.

After a long period of silence interrupted from time to time by a general article and summary information in textbooks dealing with international organizations or international trade Polish international lawyers took a closer look in the past few years at the problems of the General Agreement on Tariffs and Trade (GATT) from the point of view of international law. One of the manifestations of that interest is the monograph of E. Piontek.

In a concise and comprehensive introduction the author presented in a clear and most convincing way the motives of his interest for the legal and economic problems of GATT, defined the purpose of his research work and its scope.

The purpose of his study stems

naturally from the steadily growing interest for the intensifying East-West economic contacts in which GATT plays a prominent part. The importance of this organization in this field requires no further elaboration. Facts speak for themselves. It suffices to recall that the member-states of GATT account for almost 90 per cent of world trade. Its membership includes all states participating in the European Economic Community, the major integration venture of the capitalist world, as well as socialist states, members of the Council for Mutual Economic Assistance (CMEA), with Czechoslovakia, Poland, Hungary and Romania as full members and Bulgaria with observer status. Within the institutional framework of GATT a continuous search is going on for solutions of essential economic and, in particular, commercial problems which are of interest for both economic groupings, including of course Poland.

The author had no intention of reviewing all legal and economic problems of GATT's activities. Following faithfully the title of his book he limited himself to a presentation of the fundamental questions which are directly connected with the membership of the socialist states, attempting to deal not only with their legal aspects but with their economic aspects as well.

But such a plan involved a difficult task of following a hitherto unchartered path and the author was conscious of that. First, the question of membership of the socialist states in GATT has, in spite of all appearances, no uniform features. Each state acceeds to GATT on the basis and under conditions negotiated individually and set forth in its own protocol of accession. That is why the road to membership and the legal status of each socialist state in GATT is different. The author has therefore quite rightly opted for a separate treatment of each of them.

His book was divided into four chapters. In Chapter I he dealt briefly with some general introductory problems concerning GATT as an international organization of a specific character. He stressed, in particular, the variety of forms of membership of states in this organization. It is only to be regretted that this general information was dissociated from its historical background which weighted so heavily on the final shape and character of GATT. This found its most striking reflection in the provisions concerning the functions, competence and structure of the organization. A reader unfamiliar with all these matters may encounter some difficulties in grasping these intricacies.

Chapters II, III and IV have been devoted to the discussion of the main topic, namely to the problem of membership of socialist states in GATT. The criteria which led to the division of the presentation into three chapters are clear and well chosen. The author presented, first, the general problems of membership which are the same for all socialist states (Chapter II). He proceeded then to discuss the individual and specific features of their situation in GATT (Chapters III and IV) and followed this with some concluding remarks.

The general problems of membership of socialist states in GATT have been presented following three main threads. The first focused on the interest of the socialist states in membership, the second — on the difficulties connected with such membership, the third — on the evolution of GATT in this respect. The most revealing and interesting are the authors remarks concerning the difficulties which the socialist states encounter when contemplating GATT membership (pp. 54—71). He points out quite rightly

that the General Agreement on Tariffs and Trade was drafted so as to conform with the requirements of a capitalist free market economy and could therefore apply to a limited extent only to the economy of socialist states based on central state planning, state foreign trade monopoly, different price system and a foreign exchange regime which is not under the control of international financial organizations (pp. 54—55). At the same time, the author rejects the extreme opinions of many Western experts who claim that the search for a *modus cooperandi* with the socialist states within the framework of GATT is fruitless and doomed to failure. It must however, be said that the adoption of correct assumptions and generally correct views does not protect the author from presenting the so-called objective difficulties in a too one-sided and formalistic manner. Sometimes he even contradicts himself. For, at first he seems to recognize, at least partially, the correctness of the Western view that the General Agreement on Tariffs and Trade can, because of its very nature, apply only to a limited extent to the socialist states, but tends to forget about it completely in his subsequent, detailed considerations.

The book offers a comprehensive and detailed presentation of all problems connected with Poland's participation in GATT, and this forms its core. It is quite understandable that the author is paying his greatest attention to his country's interests. However, he ventures beyond that and looks for solutions, which while applied to Poland, could serve as an example to be followed in the case of other socialist states. Examining Poland's experience with GATT he tries to draw some conclusions concerning the advantages and shortcomings of certain solutions and to advance his own proposals. This explains the importance of the chapter dealing with the character of model research.

In this connection the author points out quite rightly to lack of precision in the wording of the Polish obligation as stated in p. 1 annex B. For, it fails to provide an unequivocal answer to the basic question as to whether the 7 per cent increase in Poland's annual imports is to be calculated with reference to a constant basic quantum or with reference to the level of imports achieved over the previous year. His misgivings over the adoption of the latter interpretation are entirely justified. (p. 88). The presentation of the interpretation and implementation of this obligation, offered by the author is quite impressive. The more so that the importance of this problem cannot be underestimated in view of the fact that the same kind of obligation can be found in the other protocols of accession signed by other socialist states with GATT and is being considered as a counterpart for the concessions granted to the socialist states by the other member-states of GATT.

Chapter IV deals with some specific features of the situation in GATT of the other socialist states such as Czechoslovakia, Yugoslavia, Romania and Hungary. Of particular interest is, in this connection, the case of the two latter states. The negotiations which they held with GATT could refer to the Polish precedent, however the development of their membership status followed a somewhat different path. Romania, and earlier Hungary, having carried out an economic reform in 1968 allowing for the functioning to a large extent of certain free market mechanisms, did enter GATT on the basis of tariff concessions in the free market sense. In spite of all these efforts even Hungary failed to achieve the same status as that enjoyed by other states with a free market economy.

This led the author to the conclusion that the highly developed capitalist states and, especially the states of Western Europe are trying to treat all socialist states in a similar way without paying too much attention to the efforts of the latter to adapt themselves to the principles and requirements of GATT. In spite of their verbal utterances the capitalist states are still unwilling to accept the two socio-economic systems on an equal footing.

The book by E. Piontek must be recognized as an important and original contribution to the legal literature on the subject. It offers a comprehensive and well documented presentation of a difficult and important problem which was never before treated in such detail. Its additional quality rests in the competent discussion of the mutual relationships of legal and economic problems and of the mutual interaction of theory and practice.

Jan Kolasa

Jacek ŚLADKOWSKI, *Pomoc i współpraca techniczna w systemie Narodów Zjednoczonych [L'assistance et la coopération technique dans le système des Nations Unies]*, Wrocław 1975, Wrocławskie Towarzystwo Naukowe, 152 p.

Il manquait jusqu'à présent, dans la littérature polonaise de droit international, une étude monographique consacrée à l'assistance technique dispensée aux États membres, dont surtout ceux en voie de développement, par les organisations appartenant au système des Nations Unies. Cette constatation ne signifie nullement que cet important domaine d'action de l'O.N.U. et de ses institutions spécialisées ait échappé aux auteurs polonais. Il est vrai cependant que le nombre d'études en la matière ne correspondait guère au poids acquis par l'assistance technique dans le système des Nations Unies. On le souligne souvent, et à juste titre, que, privé des institutions chargées d'assistance ou, si l'on préfère, de coopération technique, le système des Nations Unies ne serait pas devenu ce qu'il est aujourd'hui. Pour un juriste, il ne s'agit pas uniquement de calculer la part du budget d'une organisation internationale consacrée effectivement à l'aide au développement, mais il importe avant tout de suivre le développement et les transformations de structure qui interviennent au sein du système des Nations Unies au fur et à mesure qu'apparaissent de nouveaux besoins et possibilités en matière d'aide au développement. Au début de cette évolution, l'aide était dispensée, selon la formule la plus simple, par quelques organisations internationales sur leurs propres moyens. On a assité ensuite à la naissance du Programme élargi d'assistance technique et du Fonds spécial des Nations Unies, pour lancer enfin le Programme des Nations Unies pour le développement dans lequel coopèrent, outre l'O.N.U. même, plusieurs institutions spécialisées, organes auxiliaires et organes communs. Ces institutions et organes sont liés entre eux par une série d'actes conventionnels, plus ou moins formels, pour lesquels les notions élaborées jusqu'à présent dans la terminologie du droit des traités s'avèrent souvent inadéquates. Finalement, c'est grâce à l'assistance technique, plus que toute autre forme d'action, que le système des Nations Unies mérite sa dénomination et n'est pas devenu, contrairement à certaines prévisions, un simple groupe d'institutions liées uniquement par des

accords purement formels, prévus dans la Charte.

Une telle manière d'aborder la question de l'assistance technique constitue la valeur essentielle de l'étude de J. Śladkowski. Qeulqu'un pourrait prétendre qu'il s'agit d'une approche trop sturcturaliste, car l'auteur place au centre de son inérêt non le but — c'est-à-dire l'assistance technique aux pays qui en ont besoin, — mais les formes et les mécanismes mis en oe — uvre pour atteindre ce but, leurs transformations et leur développement. Il est assez caractéristique que la majorité des auteurs polonais, spécialistes en la matière, ont surtout étudié les accords conclus avec les États bénéficiaires, donc l'avant-dernière étape — précédant celle de l'exécution de l'accord — du processus de la coopération technique. J. Śladkowski traite de ce problème dans le dernier chapitre de son étude, mais il n'y attache pas trop d'importance. Par contre, il se penche plus particulièrement sur la question de savoir si les accords d'assistance technique peuvent être qualifiés de traités, au sens strict du terme ; abordant cette question, l'auteur fait délibérément abstraction du riche et large domaine du *treaty-making* des organisations internationales. Selon les mots de l'auteur, « [...] cete étude traite de l'assistance technique vue sous l'angle de la coopération des organisations internationales faisant partie du sysème des Nations Unies ». Il convient de souligner le choix pertinent des problèmes, surtout si l'on tient compte de l'influence qu'exerce l'assistance technique sur le fonctionnement du système des Nations Unies et des demandes — qui viennent d'être formulées — de réforme de ce système.

L'étude de J. Śladkowski est divisée en deux parties (la première — de l'aide à la coopération, la deuxième — de la coopération à l'organisation) dont chacune comprend quatre chapitres. Sauf le dernier chapitre, que nous venons de mentionner, les autres concernent la naissance et le concept de la coopération technique, les bases juridiques de l'assistance et de la coopération technique et, enfin, la structure de son fonctionnement. Quelques brèves conclusions couronnent le livre.

La composition de l'étude est claire et logique ; le style, malgré sa concision, a permis à l'auteur de garder la clarté de l'exposé.

Il est assez évident que, devant la complexité du problème, l'auteur n'a pas évité quelques erreurs qui ne doivent cependant pas déprécier la valeur de l'étude. Elles appellent néanmoins une brève explication.

Abordant la question des débuts de l'assistance technique, l'auteur ne traite que de la période d'après-guerre. Pourtant, certaines formes d'assistance technique, dont surtout les missions d'experts, étaient déjà connues à la Société des Nations et à quelques autres organisations de cette époque. Citons à cet égard l'aide de la Société des Nations accordée à la Chine dans sa réforme monétaire, qui eut tous les traits d'une consultation technique ; cette même forme d'aide a également trouvé une large application dans le cadre des Nations Unies, surtout à leurs débuts. Il suffirait donc que l'auteur précède son analyse de quelques remarques historiques pour éviter ce malentendu.

Dans le chapitre aux fondements juridiques de l'assistance technique, l'auteur constate qu'au bout de trente ans d'action « il n'est pas opportun de se demander si les organisations internationales disposaient de la compétence statutaire pour agir dans le cadre de ce qu'on appelait l'assistance et, ensuite, la coopération technique ». A la lumière de la pratique homogène de longues années, il semble que la réponse à cette question ne soit pas d'une importance primordiale. Pourtant,

l'auteur y consacre une vingtaine de pages dans lesquelles il analyse successivement la Charte des Nations Unies, les statuts de dix institutions spécialisées, de l'U.N.I.D.O. et de l'U.N.C.T.A.D., qualifiant ces deux dernières, un peu trop hâtivement, d'institutions spécialisées. S'il est vrai que ces deux organes subsidiaires de l'Assemblée Générale ressemblent, à plusieurs égards, aux institutions prévues à l'art. 57 de la Charte et assument, à n'en pas douter, des fonctions analogues à celles-ci, plusieurs raisons formelles et de fond s'opposent à ce qu'ils soient considérés comme institutions spécialisées. Il est d'ailleurs à rappeler que le Conseil de l'U.N.I.D.O. a demandé, en 1975, de bénéficier du statut d'institution spécialisée.

Tout en analysant les statuts des organismes chargés de dispenser l'assistance technique, l'auteur conclut que la majorité de ces documents ne contiennent pas de dispositions directes autorisant un tel type d'action. L'auteur estime, avec raison, que c'est en dehors des textes statutaires qu'on doit rechercher les fondements de la structure d'organisation en matière d'assistance technique (p. 43). Il fait notamment remarquer que deux types d'actes sont à l'origine de cette structure : d'une part, les résolutions — divisées en statutaires et exécutives — des organisations internationales ; et, de l'autre, les accords conclus — à l'issue des consultations concernant la méthode et les formes de la coopération — entre les organisations faisant partie du système des Nations Unies.

De l'avis de l'auteur, qui procède à cette division dichotomique des résolutions, « pour les besoins de cette étude,» la méthode la plus appropriée pour classer les résolutions est celle qui, au lieu de se concentrer sur le contenu, mettrait surtout l'accent sur le rôle joué par une résolution, ou plutôt un groupe de résolutions, dans le mécanisme de la coopération technique ».

Cette approche, appliquée d'une manière conséquente, pourrait présenter quelques dangers. Or, le rôle d'un acte de l'organisation internationale est en rapport directe avec son contenu, surtout si, comme c'est le cas de l'assistance technique, l'acte n'est pas une simple répétition de dispositions statutaires, mais, au contraire, a pour but de créer une situation juridique nouvelle. D'ailleurs, c'est le domaine réglementé par une résolution qui possède une importance décisive pour la classer dans l'un des deux groupes en question. La division des résolutions en statutaires et exécutives est assez vague et son utilité semble douteuse. Par contre, il est juste et raisonnable de distinguer, comme le fait l'auteur, dans l'ensemble des accords conclus par les organisations chargées de fournir l'assistance, les accords de coopération et les accords de coordination. Il s'agit en effet des domaines différents nécessitant, chacun, une réglementation particulière.

Les analyses concernant la qualification juridique des programmes d'assistance technique (p. 92 et s.) s'avèrent fort intéressantes, car il s'agit d'un phénomène spécifique propre au système des Nations Unies. L'auteur estime, avec raison, que ces programmes constituent un stade intermédiaire entre les organes subsidiaires et les organisations internationales autonomes ; selon lui, ils forment une sorte d'association des organisations chargées de la mise en oeuvre de la coopération technique, faisant partie du système des Nations Unies. Cette partie de l'étude de J. Śladkowski est certainement la meilleure et la plus inventive.

Les conclusions sont brèves, mais permettent de dégager avec clarté les grandes lignes du raisonnement de l'auteur. On doit partager l'avis de J. Śladkowski lorsqu'il constate que

« l'assistance technique [...] est un exemple des transformations caractéristiques non seulement des relations internationales, mais également du développement du droit international ». Concentrée sur les problèmes de structure, l'étude de J. Śladkowski constitue un apport considérable à l'oeuvre de la doctrine polonaise dans ce domaine, important et de grande actualité, de la vie internationale.

Jerzy Makarczyk

Mieczysław SOŚNIAK, *Précis de droit international privé polonais*, Warszawa 1976, Ossolineum, 245 p.

L'édition du *Précis de droit international privé polonais* dans la langue française constitue une grande réussite. L'ouvrage du professeur Mieczysław Sośniak, éminent spécialiste polonais en la matière, a pu paraître grâce à l'heureuse initiative de l'Institut de l'État et du Droit de l'Académie Polonaise des Sciences. Le besoin de cette publication destinée à l'usage des étrangers se faisait d'autant plus sentir que le droit international privé polonais ainsi que sa riche doctrine furent peu connus en dehors des frontières polonaises. Et pourtant, il s'agit d'un domaine lié étroitement à la coopération internationale des peuples et des individus dans laquelle la connaissance mutuelle joue un rôle de premier plan.

Précis de droit international privé polonais est un livre très réussi et remplit toutes les conditions posées aux ouvrages qui présentent le droit et la doctrine juridique polonaise aux lecteurs étrangers. Bien que concise, la présentation des problèmes est très cohérente. L'auteur a notamment réussi à dresser le tableau complet de la législation nationale polonaise, de la jurisprudence, et des traités internationaux dont la Pologne est partie. Il a su en même temps donner au lecteur étranger une large caractéristique de la doctrine polonaise de droit international privé, de ses traits spécifiques et de ses tendances axiologiques.

Il convient également de souligner que, grâce à sa profonde connaissance de la doctrine mondiale, l'auteur a présenté les conceptions polonaises sur un large fond du droit international privé contemporain, ce qui devrait permettre au lecteur de porter son jugement sur ces conceptions et solutions.

Dans les annexes du livre figurent la traduction française de la loi polonaise sur le droit international privé de 1965 ainsi que la bibliographie polonaise en matière de droit international privé.

La clarté et la concision du style rendent la lecture très facile.

Jerzy Jakubowski

J. SYMONIDES, *Międzynarodowa ochrona praw człowieka [International Protection of Human Rights]*, Warszawa 1977, KiW.

Professor Janusz Symonides has undertaken a study of a subject which is, no doubt, of great topicality. The international protection of human rights is a matter of world-wide interest. It had also become, on the initiative of some Western powers a subject of ideological confrontation. The interest attached to human rights must be seen in conjunction with the entry

into force of the Covenant on Human Rights (ratified by Poland March 3, 1977) as well as with the adoption by the Helsinki Conference of the principle of respect for human rights as principle number VII of peaceful coexistence.

The study by Professor Symonides came therefore at the right time and is all the more valuable as having been written by an eminent scholar and expert in international public law. A view taken by an authentic specialist in international law on the whole area of human rights protection in its international aspect is of special value.

Apart from its introductory part, the study contains six chapters. It deals with the United Nations Charter as the foundation of international cooperation in the field of human rights protection and promotion. The author analyses the characteristic features of human rights and fundamental freedoms as formulated in the declarations and international covenants adopted by the United Nations. He describes the cases of criminal massive violations of human rights threatening international peace and security and discusses the principle of respect for human rights in the Final Act of the Conference on Security and Cooperation in Europe. A special chapter deals with international control of the implementation of treaties concerning human rights and the final chapter takes up the problem of Poland and the international protection of human rights.

The texts of all major documents concerning international protection of human rights quoted in the study represent a very valuable complement to the author's substantive comments.

In the introductory part the author discusses the difference between the bourgeois concept of human rights on the one hand, and the socialist one on the other, which is so essential for the understanding of the present international situation. According to Professor Symonides the bourgeois concept reduces the obligations of the state to a set of negative undertakings not to violate the traditional human rights and liberties, while failing to grapple with the need to ensure their implementation through the creation of appropriate social and economic conditions. On the other hand, the socialist conception, while accepting fully and developing the political and civic rights of the individual, broadens them by the inclusion of economic, social and cultural rights as well.

In the introduction Professor Symonides stresses that in our modern world human rights are developing more and more into an arena of peaceful competition between the opposing social and economic systems, each trying to demonstrate its superiority as far as the fullest possible satisfaction of the individual needs and aspirations and the practical implementation of the most democratic and humane social relations are concerned.

When discussing the United Nations Charter, the author joins those who claim that the obligatory character of its provisions concerning human rights can not be questioned. This is in accord with the socialist doctrine. He maintains also that the Charter contains and defines the principle of respect for human rights (p. 17).

Symonides points out quite rightly that human rights belong to the internal competence of states, with the exception of widespread and serious violations of human rights threatening international peace and security which, as for example in the treaties on genocide or apartheid have been branded as international crimes (p.21).

When discussing the Covenant on Human Rights, J. Symonides taking issue with the Western doctrine, stresses that the cost involved in the implementation of social, economic and

cultural rights is no excuse for their neglect; the scope of obligations of specific countries depends on their financial means (p. 44).

The author has some very interesting comments to make on the admissibility to restrict the rights and liberties provided for in the International Covenant on Civic and Political Rights (p. 53).

Evaluating the Covenant, J. Symonides points out that they reflect a compromise between various ideological, political, social, cultural and legal systems, but a compromise in which the socialist countries supported by a group of developing countries succeeded in ensuring the acceptance of almost all proposals which were rejected during the drafting of the Universal Declaration. This explains also why the Covenants are at the very centre of the entire international system of human rights protection (p. 63).

Of particular interest are the author's views on the problem of wide-spread violation of human rigths threatening international peace and security and, in particular, his opinions on aggression (p. 93) and colonialism (p. 127). His penetrating opinions imbued with humane feelings in which he demonstrates the interdependence between aggression and violation of human rights and liberties as well as his emphasis on the importance of the rigth to self-determination of nations merit particular attention.

Very pertinent are also the comments of the author on the Final Act of the Helsinki Conference, which represents, in his view, a multilateral declaration containing a set of moral and political obligations (p. 146). This is followed by a presentation of Poland's achievements in the field of international protection of human rights.

J. Symonides concludes his study by an analysis of the achievements of Polish legislation in the light of the Covenants and has this to say on the subject: "To sum up it can be asserted that Polish legislation and practice is in accord with the Covenants. In several cases it is even more progressive and advanced compared with the requirements of the Covenants. This should not come as a surprise, since the shape and development of human rights and fundamental freedoms in a socialist system has a dynamic character. On the other hand, it is possible to agree with the thesis according to which Poland, while participating actively in the shaping of the model of international protection of human rights and attempting to enrich that model by the most progressive socialist solutions, can also find, especially in the fundamental provisions of international acts, an inspiration to guide its own law and internal practice".

In conclusion it can be said that Professor Symonides' study on the international protection of human rights offers a broad insight into the problem, presents convincingly the socialist point of view on the matter and contains a wealth of pertinent and valuable comments. Its publication fills an important gap and constitutes a valuable contribution to the literature on international public law dealing with human rights.

Zbigniew Resich

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Principaux traités internationaux entrés en vigueur à l'égard de la Pologne en 1976

La liste que nous publions comprend les principaux traités internationaux, bilitéraux et multilatéraux, entrés en vigueur à l'égard de la Pologne en 1976. Les arrangements administratifs (accords conclus entre les ministères de deux États) sont absents de ce registre qui ne contient que les traités conclus par le Conseil de l'État et le 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 traités en question, ne figurent non plus sur notre liste.

Conformément à la Constitution de la Pologne, le Conseil de l'État — composé de 17 députés à la Diète (Parlement) — est le seul organe autorisé à ratifier et à dénoncer les traités internationaux. Bien que la Constitution ne le déclare pas explicitement, le consentement à être lié par un traité peut être exprimé par le Conseil des Ministres qui le donne soit sous forme d'approbation *(approval)*, soit sous forme de signature par un plénipotentiaire dûment autorisé ; certains traités sont conclus sous forme d'échange de notes. Enfin, les ministres on également la compétence pour conclure les traités, à condition que la matière régie par le traité soit du ressort d'un ministre (arrangements administratifs).

La Constitution polonaise ne précise pas quels sont les traités qui nécessitent la procédure de ratification. Selon la Résolution du Conseil de l'État et du Conseil des Ministres, 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,

— d'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,

— d'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 explicitement quels traités doivent être soumis obligatoirement à la procédure d'approbation.

Dans la pratique, seulement 20 - 30 % des traités bilatéraux et multilatéraux, conclus par le Conseil de l'État ou par le Gouvernement, 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 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'expresion du consentement à être lié, date de l'entrée en viguer à l'égard de la Pologne.

Les traités multilatéraux observent le même schéma.

Traités bilatéraux

République Démocratique Allemande

— Accord sur les fournitures réciproques de marchandises et sur les paiements pour les années 1976 - 1980, Varsovie, le 26 janvier 1976 ; approbation ; le 26 janvier 1976.

— Protocole à l'Accord sur les échanges juridiques dans le domaine du droit civil, pénal et de la famille signé le 1er février 1957, fait à Varsovie le 18 avril 1975 ; ratification ; le 2 avril 1976.

— Convention portant sur la réglementation des doubles nationalités, Berlin, le 12 novembre 1975 ; ratification ; le 25 avril 1976.

République Fédérale d'Allemagne

— Accord sur les pensions de retraite et d'accident, Varsovie, le 9 octobre 1975 ; ratification ; le 1er mai 1976.

— Arrangement concernant les opérations financières entre la Pologne et la R.F.A. en matrière des pensions de retraite et d'accident, Varsovie, le 9 octobre 1975 ; échange de notes ; le 1er mai 1976.

— Déclaration commune sur le développement des relations entre la Pologne et la R.F.A., Bonn, le 11 juin 1976 ; signature ; le 11 juin 1976.

— Accord sur le développement continu de la coopération économique, Bonn, le 11 juin 1976 ; signature ; le 11 juin 1976.

Angola

— Accord sur les transports aériens, Luanda, le 24 avril 1976 ; approbation ; appliqué provisoirement dès la date de la signature.

Autriche

— Accord sur la coopération en matière de protection de la santé, Varsovie, le 23 mai 1975 ; approbation ; le 6 juin 1976.

Bulgarie

— Accord sur les fournitures réciproques de marchandises et sur les paiements pour les années 1976 - 1980, Sofia, le 16 janvier 1976 ; approbation ; entré en vigueur avec effet rétroactif le 1er janvier 1976.

Canada

— Agreement Governing Continued Fishing by the Polish Fleet in Waters off Canada's Coasts, Ottawa, 24 March 1976 ; exchange of notes ; 24 March 1976.

— Agreement on Mutual Fisheries Relations, Ottawa, 14 May 1976 ; signature ; 14 May 1976.

République Populaire de Chine

— Arrangement concernant les échanges commerciaux et les paiements en 1976, Pekin, le 19 janvier 1976 ; signature ; entré vigueur avec effet rétroactif le 1er janvier 1976.

Chypre

— Operational Programme for Co-operation in the Field of Science, Education and Culture, Nicosia, 26 May 1976 ; signature ; 26 May 1976.

République Démocratique Populaire de Corée

— Accord sur les fournitures réciproques de marchandises et sur les paiements

pour les années 1976 - 1980, Pyongyang, le 10 février 1976 ; approbation ; entré en vigueur avec effet rétroactif le 1er janvier 1976.

Costa Rica

— Accord commercial, San José, le 10 septembre 1976 ; approbation ; appliqué provisoirement dès la date de la signature.

Cuba

— Accord sur les échanges commerciaux dans les années 1976 - 1980, La Havane, le 30 mars 1977 ; approbation ; appliqué provisoirement dès le 1er janvier 1976.

— Accord sur les paiements, La Havane, le 1er avril 1976 ; approbation ; appliqué provisoirement dès la date de la signature.

— Plan quinquennal de la coopération culturelle et scientifique pour les années 1976 - 1980, Varsovie, le 2 mars 1976 ; signature ; le 2 mars 1976.

— Accord sur les compensations monétaires pour équilibrer les cours officiels du zloty polonais et du peso cubain dans les paiements non commerciaux, Varsovie, le 20 mai 1976 ; approbation ; le 24 décembre 1976.

Danemark

— Accord sur le développement continu de la coopération économique, Copenhague, le 17 mai 1976 ; signature ; le 17 mai 1976.

Égypte

— Accord commercial à long terme, Le Caire, le 27 novembre 1975 ; approbation ; le 27 mai 1976.

États-Unis

— Agreement Regarding Fisheries in the North — Eastern Pacific Ocean off the Coast of the United States, Washington, 16 December 1975 ; signature ; 1 January 1976.

— Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, Washington, 8 October 1974 ; ratification ; 23 July 1976.

— Agreement Relating to the Reciprocal Acceptance of Airworthiness Certifications, Washington, 8 November 1976 ; signature ; 8 November 1976.

France

— Protocole relatif à l'approfondissement et à l'élargissement de la coopération polono-française dans le domaine de l'économie et de l'industrie, Paris, le 7 mai 1976 ; signature ; le 7 mai 1976.

— Convention tendant à éviter les doubles impositions en matière d'impôts sur le revenu et sur la fortune, Varsovie, le 20 juin 1975 ; approbation ; le 12 septembre 1976.

Grande-Bretagne

— Agreement on International Road Transport, London, 26 September 1975 ; approval ; 6 May 1976.

Grèce

— Agreement on Merchant Shipping, Athens, 25 April 1975 ; approval ; 14 May 1976.

— Accord à long terme concernant les échanges commerciaux et la coopération économique, industrielle et technique, Varsovie, le 4 novembre 1975 ; signature ; le 1er janvier 1976.

Hongrie

— Accord sur les fournitures réciproques de marchandises et sur les paiements pour les années 1976 - 1980, Varsovie, le 30 janvier 1976 ; approbation ; entré en vigueur avec effet rétroactif le 1er janvier 1976.

— Accord sur les fournitures réciproques d'oxyde d'aluminium et d'aluminium en blocs pour les années 1976 - 1980, Varsovie, le 31 mars 1976 ; signature ; entré en vigueur avec effet rétroactif le 1er janvier 1976.

— Accord sur la coopération dans le transport des marchandises dans le cadre des échanges bilatéraux, le transit par les territoires respectifs des deux pays ainsi que l'échange de services dans le domaine des transports pour les années 1976 - 1980, Varsovie, le 5 avril 1976 ; signature ; entré en vigueur avec effet rétroactif le 1er janvier 1976.

— Accord sur les transports aériens, Varsovie, le 12 février 1976 ; approbation ; le 23 octobre 1976.

— Protocole portant abrogation de l'Accord polono-hongrois sur les transports aériens du 28 août 1947, Varsovie, le 12 février 1976 ; ratification ; le 23 octobre 1976.

— Accord sur la prestation des services dans les transports relatifs aux échanges polono-hongrois ainsi qu'au transit par les territoires respectifs des deux pays pour les années 1976 - 1980, Budapest, le 4 novembre 1976 ; signature ; le 4 novembre 1976.

— Accord sur la coopération dans la construction d'une ligne de transport d'énergie de 750 kV Vinnitsa (Ukraine) — Albertirsa (Hongrie), Budapest, le 1er décembre 1976 ; signature ; le 1er décembre 1976.

Indonésie

— Accord commercial, Varsovie, le 5 juillet 1974 ; approbation ; le 18 février 1976 ; appliqué provisoirement dès la date de la signature.

Irak

— Agreement on Co-operation in the Field of Tourism, Bagdad, 22 October 1975 ; approval ; 24 February 1976.

— Protocol on Amendment of the Agreement on Economic and Technical Co-operation dated 26th August 1972, Bagdad, 11 December 1975 ; approval ; 17 May 1976.

Italie

— Accord sur la coopération économique pour les années 1975 - 1979, Rome, le 28 octobre 1975 ; approbation ; le 18 février 1976.

Koweït

— Agreement on Economic and Technical Co-operation, Koweit, 10 June 1975 ; approval ; 22 November 1976.

— Trade Agreement, Koweit, 10 June 1975 ; approval ; 22 November 1976.

Laos

— Protocole sur la coopération économique pour les années 1976 - 1977, Varsovie, le 4 octobre 1976 ; signature ; le 4 octobre 1976.

Libye

— Agreement on Social Insurance of Employees Sent Temporarily to the Territory of Either State, Warsaw, 7 November 1975 ; ratification ; 27 May 1976.

Maroc

— Accord culturel, Rabat, le 30 octobre 1969 ; ratification ; le 30 octobre 1976.

Mongolie

— Accord sur les fournitures réciproques de marchandises et sur les paiements pour les années 1976 - 1980, Varsovie, le 18 mars 1976 ; approbation ; entré en vigueur avec effet rétroactif le 1er janvier 1976.

— Accord sur l'aide économique et technique fournie à crédit par la Pologne

à la Mongolie au cours des années 1976 - 1980, Varsovie, le 15 mai 1976 ; signature ; entré en vigueur avec effet rétroactif le 1er janvier 1976.

— Convention portant sur la réglementation des cas de double nationalité et sur la prévention des double nationalités, Oulan-Bator, le 23 mai 1975 ; ratification ; le 1er janvier 1976.

— Accord concernant la suppression des visas dans les voyages de service et les voyages privés, Oulan-Bator, le 23 mai 1975 ; approbation ; le 14 mars 1976.

— Accord sur l'usufruit à long terme des parcelles de terrain pour les ambassades respectives des deux pays à Varsovie et à Oulan-Bator, Varsovie, le 7 juin 1976 ; signature ; le 7 juin 1976.

Nigeria

— Trade Agreement, Lagos, 4 October 1976 ; approval ; provisional application as of 4 October 1976.

Norvège

— Long Trade Agreement, Oslo, 29 March 1976 ; approval ; provisional application as of 29 March 1976.

Roumanie

— Accord sur les fournitures réciproques de marchandises et sur les paiements pour les années 1976 - 1980, Varsovie, le 31 octobre 1975 ; approbation ; le 5 mars 1976.

— Accord sur les compensations monétaires pour équilibrer les cours officiels du leu roumain et du zloty polonais dans les paiements non commerciaux, Bucarest, le 24 mai 1976 ; aprobation ; appliqué provisoirement dès la date de la signature.

— Accord portant création d'une Commission mixte polono-roumaine pour les questions de la coopération culturelle, Varsovie, le 6 mai 1976 ; signature ; le 6 mai 1976.

Suède

— Agreement on the Mutual Granting of Fishery Rights within Their Sea Fishery Zones, Stockholm, 9 December 1975 ; ratification ; 23 March 1976.

— Programme on Polish-Swedish Cultural, Scientific and Educational Co-operation for the Academic Years 1976/77 and 1977/78, Warsaw, 18 June 1976 ; signature ; 18 June 1976.

Tchécoslovaquie

— Accord sur les fournitures réciproques de marchandises et sur les paiements pour les années 1976 - 1980, Varsovie, le 16 décembre 1975 ; approbation ; le 1er janvier 1976.

— Accord sur la nouvelle délimination de la frontière d'État polono-tchécoslovaque et certains autres problèmes liés à la construction et à l'exploitation par la Pologne du barrage sur le Dunajec, Varsovie, le 21 mars 1975 ; ratification ; le 14 mars 1976.

Union des Républiques Socialistes Soviétiques

— Accord sur les échanges commerciaux et les paiements pour les années 1976 - 1980, Varsovie, le 5 décembre 1975 ; approbation ; le 1er janvier 1976.

— Accord sur la coopération dans la construction d'une ligne de transport d'énergie de 750 kV Vinnitsa (Ukraine) — Albertirsa (Hongrie) et des sous-stations Vinnitsa et Albertirsa, Moscou, le 11 février 1976 ; signature ; le 11 février 1976.

— Accord sur la coopération économique et technique dans la construction d'une ligne de chemin de fer reliant la frontière polono-soviétique à l'aciérie « Katowice », Moscou, le 27 mai 1976 ; signature ; le 27 mai 1976.

— Déclaration commune sur le développement continu de la coopération entre

l'U.R.S.S. et la Pologne et sur le renforcement de l'amitié entre les peuples polonais et soviétique, Moscou, le 10 novembre 1976 ; signature ; le 10 novembre 1976.

Viêt-nam

— Accord sur les fournitures réciproques de marchandises et sur les paiements pour les années 1976 - 1980, Hanoi, le 12 avril 1976 ; approbation ; entré en vigueur avec effet rétroactif le 1er janvier 1976.

— Accord sur la fourniture à crédit par la Pologne à la République Démocratique du Viêt-nam, de machines, d'équipements et de services techniques, Hanoi, le 12 avril 1976 ; signature ; le 12 avril 1976.

— Accord relatif aux transports aériens civils, Varsovie, le 11 septembre 1976 ; approbation ; appliqué provisoirement dès la date de la signature.

Yougoslavie

— Accord sur les paiements, Varsovie, le 16 novembre 1974 ; approbation ; le 9 janvier 1976.

Traités multilatéraux

— Accord tripartite sur la création d'une Organisation commune chargée de la prospection du pétrole et du gaz naturel en mer Baltique dans les eaux territoriales de la Pologne, de la R.D.A. et de l'U.R.S.S. ainsi que sur leur plateau continental, Gdańsk, le 24 novembre 1975 ; approbation ; le 28 janvier 1976.

— Protocole concernant la modification des statuts du Conseil d'Assistance Économique Mutuelle (C.E.A.M.) et de la Convention sur la capacité juridique, les privilèges et les immunités du C.A.E.M., Sofia, le 21 juin 1974 ; ratification ; entrée en vigueur pour tous les pays membres du C.A.E.M. le 13 février 1976.

— Protocol Relating to an Amendment to Arcitle 56 of the Convention on International Civil Aviation signed at Vienna, on 7 July 1971 ; ratification ; 17 May 1976.

— International Convention on Civil Liability for Oil Pollution Damage, Brussels, 29 November 1969 ; ratification ; 16 June 1976.

— International Convention on the Suppression and Punishment of the Crime of Apartheid of 30 November 1973 ; ratification ; 18 July 1976.

— Convention on Psychotropic Substances, Vienna, 21 February 1971 ; ratification ; 16 August 1976.

Nota : sous réserve que la Pologne ne se sent pas liée par les articles 19, al. 1er et 2, et 31, al. 2.

— Convention internationale sur l'intervention en haute mer en cas d'accident entraînant ou pouvant entraîner une pollution par les hydrocarbures, Bruxelles, le 29 novembre 1969 ; ratification ; le 30 août 1976.

— Convention pour la protection du patrimoine mondial, culturel et naturel, adoptée le 16 novembre 1972 à Paris par la Conférence générale de l'UNESCO ; ratification ; le 29 septembre 1976.

— Adoption par la Pologne des statuts de l'Organisation mondiale du Tourisme, faits à Mexico, le 27 septembre 1970 ; approbation ; le 11 février 1976.

— Protocole portant modification de l'Accord du 20 décembre 1962 sur la protection des stocks du saumon en mer Baltique, Stockholm, le 21 janvier 1972 ; ratification ; le 24 novembre 1976.

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