

POLISH YEARBOOK OF
INTERNATIONAL LAW

V

1972—1973

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V

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Legal Regulation of Economic Relations Within the Council for Mutual Economic Assistance. Trends of Development

by ANDRZEJ WASILKOWSKI

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The steady expansion of economic functions of modern States leads to the development of public law regulation with regard to their domestic and international economic relations. This trend is particularly well-marked in relations between the socialist countries where the State appears not only as a sovereign political subject, but also as owner of the basic means of production. In such circumstances legal acts characteristic of a sovereign often interwine with those characteristic of owner, and public international law enters very deeply into the sphere of economic relations. This undoubtedly creates a number of new, practical as well as theoretical problems of international law

The traditional function of the State with regard to external economic relations lies mainly in creating specific conditions, a certain framework for the economic turnover. Such conditions may be determined unilaterally, through internal regulations (e.g. customs tariffs, tax reduction for exporters) and bilaterally or multilaterally through international regulations. The last domain is undergoing a visible evolution in three mutually complementary directions. From the material point of view, cooperation consists in coordinating more and more instruments of economic policy of the State. From the formal point of view the centre of gravity is decisively shifting from bilateral relations to multilateral regulations of a regional or universal range. And finally, from the institutional point of

view the trend towards a higher degree of organization in international economic relations is becoming more visible, and in many cases international organizations perform not only "executive" functions by helping to carry out international agreements, but also become to some extent independent centres of initiative.

This evolution, however, does not alter the fact that international legal regulation embodies mainly the setting up of a particular framework for the development of economic relations. Generally, coordination applies to those instruments of economic policy of the States that have *indirect* influence on the international division of labour. The use in one or another way of a framework created by the State, that is, the shaping of *material links* between various countries rests traditionally with economic subjects which do not operate in the domain of public international law.

The development of economic relations between the CMEA countries brings new elements into this traditional practice. In the course of mutual cooperation the CMEA States create not only a definite framework for the development of economic relations, but also — and as yet perhaps in the first place — give shape to their material links. And so, for instance, cooperation in economic planning brings into the foreground the necessity of establishing material links between the national economies of the CMEA countries (especially with regard to mutual delivery commitments). In this way—and this is a new factor—international legal regulation affects not only the traditional sphere of coordination of the *economic policy* instruments, but also the establishment of trends and volume of *material links*.

Likewise, with regard to the functions of international organizations of the CMEA countries, of a decisive significance is the fact that these organizations coordinate the activities of the States which are direct organizers of economic life. Created as international organizations, and therefore subordinated to public international law, they fulfill — along with their traditional functions — a number of functions characteristic of producers' associations. Their organizing function with regard to economic activity becomes fully visible in mutual relations between the socialist States. It manifests itself mainly in international, planned regulation of the international division of labour which constitutes — as is well known — the essence of the concept of socialist economic integration.¹

¹ "The deepening and improving of economic, scientific, and technological cooperation and the development of socialist economic integration of the member countries of the CMEA consists in conscious and planned regulation of the process of international socialist division of labour by Communist and Labour Parties as well as Governments of the CMEA member countries [...]" proclaims the Comprehensive Programme for Further Deepening and Improvement of Cooperation and

In the light of hitherto existing practice, following main development trends in legal regulation of the economic relations within the CMEA countries may be discerned:

- (1) formulation of principles and institutional structures of mutual cooperation;
- (2) coordination of the economic policy of the CMEA States;
- (3) harmonization or unification of laws important to economic co-operation within the CMEA,
- (4) harmonization or unification of technical and organizational norms (standards) in particular sectors of production, transport, communication, etc.,
- (5) shaping of material links between the CMEA countries.

All these trends of international law expansion within the CMEA require a separate description.

Formulation of Principles and Institutional Structures of Cooperation

The development of international legal principles controlling economic relations is a characteristic feature of modern times. This is above all the problem of extending the authority of general international law over those relations.² Within this realm the World Conference on Trade and Development (UNCTAD) has played and is still playing an important role.³ The principles we are referring to have essentially universal importance and apply to international economic relations as a whole (irrespective of the domain of these relations).⁴

Development of the Socialist Economic Integration (Part I, Chapter I, point 2). This document—abbreviated later in the text to “Comprehensive Programme”—has been approved at the XXV Session of the CMEA in July 1971 as a recommendation for the States, and later recognized (accepted) by all the CMEA States in accordance with the Art. IV of the CMEA statute.

² Cf. for instance, the first of so-called general principles passed by the World Conference on Trade and Development (UNCTAD). The final act of the Geneva UNCTAD Conference, “Zbiór Dokumentów,” [“Collection of Documents”], Warszawa 1964, No. 7/8.

³ Cf. J. MAKARCZYK, *Problematyka prawna Konferencji Narodów Zjednoczonych do spraw handlu i rozwoju* [Legal Problems of the United Nations Conference on Trade and Development], “Studia Prawnicze,” 1970, No. 24.

⁴ Apart from these principles, there are certain others which also have a universal character in view of their operational range. They do not apply, however, to international trade relations as a whole, but only to their particular fields or aspects. For instance, the ban on dumping, formulated by one of the so-called UNCTAD special principles, belongs to them.

By explicit enumeration of the basic principles of international law in the statute, the CMEA States have applied them to mutual economic, scientific, and technological cooperation (Art. I, para. 2). In accordance with the statute "the Council for Mutual Economic Assistance bases itself on the principle of sovereign equality of all the member countries of the Council. Economic, scientific, and technological cooperation between the member countries of the Council is carried out in accordance with the principles of full equality of rights, respect of the sovereignty and national interests, mutual benefits, and friendly mutual assistance." As has been rightly pointed out in the literature, the fact that not all of the basic principles of international law have been quoted *expressis verbis* in this Article (e.g. the principle of nonintervention in internal affairs) does not mean that they are not binding.⁵ Of a decisive importance here is the fact that the CMEA States, having based their economic, scientific, and technological cooperation on the principle of sovereign equality, have at the same time subordinated their relations in this respect to international law. Enumeration in an international agreement of all the consequences resulting from this fact is by no means necessary, and does not seem useful.

Apart from applying basic principles of international law to mutual economic, scientific, and technological cooperation, the CMEA countries put into shape some other principles of a general nature, too (that is, principles referring to mutual economic, scientific, and technological relations as a whole or to mutual relations in general). However, beeing of a general character, these principles do not — unlike the category discussed previously — have a universal range, but apply to relations between those parties only that have formulated them explicitly. In connection with this the principles of socialist internationalism⁶ and mutual friendly assistance⁷ are most often quoted. The interrelation of those principles

⁵ See H. de FIUMEL, *Rada Wzajemnej Pomocy Gospodarczej. Studium prawnomiędzynarodowe* [The Council for Mutual Economic Assistance. An International Law Study], Warszawa 1967, p. 29.

⁶ The nature of the principle of socialist internationalism (as a legal or ideological principle) is a matter of discussion in legal literature. See H. de FIUMEL, *op. cit.*, pp. 29 - 35. The Comprehensive Programme of 1971 mentions the "principles of socialist internationalism" and then quotes the principles determined by the CMEA statute. Thus it could follow that the Comprehensive Programme did not formulate a separate principle of socialist internationalism, independent of other principles, but that all subsequently enumerated principles were treated rather as a summing up of the principle of socialist internationalism.

⁷ The importance of the principle of mutual assistance has been extensively described by H. de FIUMEL, *op. cit.*, pp. 29 - 35. Also see E. USENKO, *Formy regulowania socialističeskogo meždunarodnogo razdelenija truda*, Moskva 1965, p. 102, and A. WASILKOWSKI, *Zalecenia Rady Wzajemnej Pomocy Gospodarczej* [Recommendation of the Council for Mutual Economic Assistance], Warszawa 1969, p. 249.

and their relation to basic principles of international law arouses some divergencies of opinion in the legal doctrine.⁸ A full analysis of this problem would, however, go beyond the subject-matter of this paper.

It is worthwhile, however, to stress the more general aspects of the problem discussed here. As is well known, there are trends in the modern world to shape international economic relations without taking into account such principles as sovereign equality, noninterference in internal relations, mutual benefits (this expresses itself mainly in relations between highly developed capitalist countries and developing countries). Accordingly, we are sometimes confronted in the practice of the Western countries with views challenging the very assumption that the basic principles of international law also fully apply to economic relations between the States.⁹ And as to the characteristic of the present-day regional integration processes, opinions are often heard that setting up of supranational institutions is a necessary requisite for, or even the essence of integration. Against this background the foundations of the socialist integration model, incompatible with the idea of establishing supranational institutions, have undoubtedly a great international significance.

The principles under discussion exert a fundamental influence on the nature and kind of competence of international structures being created by the CMEA countries in the course of the integration process. As is well known, the CMEA countries have been granting a status of international (interstate, interdepartmental) organization to the great majority of jointly created bodies.¹⁰ In these bodies a dominant role is played by organs consisting of representatives of all the member countries, and taking their decisions only unanimously or with the assent of the representatives of the countries concerned. The competence of those bodies does not manifest itself directly in internal affairs of the member countries, which means that their resolutions (not only recommendations, which would have been evident, but also decisions) could be carried out only through appropriate domestic organs.¹¹ These circum-

⁸ See H. de FUMEL, *op. cit.*, pp. 29 - 35.

⁹ In this respect the standpoint of several capitalist countries, especially that of the United States, during the Geneva UNCTAD Conference (1964) was typical. This refers particularly to the voting on the Final Act which provides for application of general principles of international law to international economic relations. More on this see J. MAKARCZYK, *op. cit.*, pp. 35 - 36. Also comp. G. SCHWARZENBERGER, *The Frontiers of International Law*, London 1962, p. 28 ff.

¹⁰ See P. TOKARIJEVA, *Stanovlenie sistemov meždunarodnykh organizacij socialističeskikh stran*, "Sovetskoe Gosudarstvo i Pravo," 1967, No. 10.

¹¹ Cf. C. BEREZOWSKI, *Prawo międzynarodowe publiczne [Public International Law]*, Part I, Warszawa 1966, p. 23.

stances determine to a high degree the predominantly coordinating character of the international economic organizations of the CMEA countries. Nevertheless, in a socialist system of integration the notions of "integration" and "coordination" are not only mutually non-exclusive, but coordination becomes a method — the basic method — of attaining the integration goals.¹²

There is a certain equilibrium between the role of a sovereign and that of owner when performed by States belonging to organizations endowed, like the CMEA, with competences of a more general character. This is so because coordination of the general economic policy and of its particular instruments plays an essential role in the activities of these organizations, which is consistent with the role of the States as sovereigns. However, the more the competences of such organizations become partial and specialized, the less they get engaged in these tasks; they would rather promote material links between particular branches of the national economies of the member countries, which would be consistent with the role of the States as owners.¹³ It is the rise of such organizations in the process of socialist integration that shows how far international law has expanded into the domain of economic relations. This causes various difficulties because international law is adjusted to relations between States acting as sovereigns, and not as owners. These difficulties were taken into account while the Comprehensive Programme of 1971 was being worked out. The Programme tends to distinguish between "inter-state economic organizations" and "international economic units"—subject to the type of tasks.¹⁴ Although also the last-mentioned—as can be anticipated—would be established mainly as a result of international agreements concluded by the States concerned, they would act in the domain of civil law. Undoubtedly the intention is to keep the expansion of international law within rational limits.

¹² As is well known, the notions of "integration" and "coordination" are incompatible from the point of view of the formal integration theory. This is so because integration is identified with the transfer of the right of decision to an international organ. We can speak about integration only within the scope of decision—and not coordination—undertaken by this organ. As far as the formal concept of integration is concerned, see A. WASILKOWSKI, *Ekonomiczne i prawne pojęcia integracji w stosunkach międzynarodowych* [Economic and Legal Concepts of Integration in International Relations], "Studia Prawnicze," 1970, No. 23. It is worth stressing that J. TINBERGEN is one of the few Western authors that does not set both discussed concepts one against another. See *International Economic Integration*, Amsterdam—London—New York 1965, pp. 67–68.

¹³ As an instance, such organizations as "Ball-Bearings Manufacturing Cooperation Organization" or "Organization of Metallurgical Cooperation—Intermetal" can be here mentioned.

¹⁴ The Comprehensive Programme of 1971, Part II, Chapter VIII, point 3.

Coordination of the Economic Policy of the CMEA States

This problem has three aspects which ought to be treated separately.

1. Coordination (or even unification) with regard to specific instruments of the external economic policy of the States, which applies exclusively to relations between contracting parties, is not a new phenomenon. The process of the expansion of international law into the domain of economic relations has started in this very sphere, having initially found its expression in clauses of various type included in international agreements (e.g. the most-favoured-nation clause, regional clause, anti-dumping clause, etc).¹⁵ This coordination of the instruments of economic policy has developed for a considerable time mainly in bilateral relations. But today the role of multilateral agreements in the sphere under discussion is steadily increasing. Together with the enrichment of the external economic policy instruments, the material scope of this coordination in relations between parties to international agreements is also expanding. Also today problems of customs policy—for instance mutual customs facilities or creation of free-trade areas—occupy a rather important place in the domain under discussion. An essential role, too, fulfill agreements on commodity quotas, instruments promoting export or limiting imports, etc. However, attempts to coordinate the policy of the States in new domains, for instance in international monetary relations, are increasingly gaining in importance.

The above-mentioned type of economic policy coordination has developed within the CMEA rather widely. In view of the fact that the socialist States are owners of the basic means of production, the precise limits between the coordination of economic policy instruments, which indirectly influences the system of material links, and the direct shaping of these links are difficult to draw within the CMEA countries, all the more so because both kinds of this activity are often connected with the process of coordination of the national economic plans. In many instances, however, the fact that we have to do with the coordination of the economic policy instruments, and not with the shaping of material links, is entirely beyond a doubt. We can mention here, for instance, agreements establishing the so-called price basis in the foreign trade between the CMEA countries, agreements on settlements, agreements on the so-called non-contingent exchange or—in quite another domain—agreements determining conditions of access to scientific and technological attainments.

¹⁵ A full enumeration and closer characteristic of the clauses has been presented by J. MAKOWSKI, *Podręcznik prawa międzynarodowego* [Textbook of International Law], Warszawa 1948, pp. 449 - 455. Also see T. ŁYCHOWSKI, *Międzypaństwowe umowy gospodarcze* [Interstate Trade Agreements], Warszawa 1968, pp. 34 - 35.

2. Coordination (or unification) of the specific instruments of economic policy introduced by a number of countries (State groupings) in relation to their turnover with third countries differs from the traditional type of coordination discussed in the point 1. First attempts of such kind were undertaken rather under the influence of political and military than *sensu stricto* economic needs, and in connection with certain circumstances of exceptional character (for instance, coordination of particular instruments of economic policy introduced by the coalition of States that were at war with third countries). Another aspect of the same problem was introduced by the attempt of the leading member countries of the NATO to coordinate their economic policy in relation to all the socialist countries or to some of them. These attempts found their formal expression in establishing lists of strategic goods (sometimes very extensive) under embargo.

The trend towards coordination (or unification) of the instruments of economic policy by the State groupings with regard to third countries, and motivated *sensu stricto* economically, has developed widely only recently and is characteristic of groupings with integration aims.

So far coordination of the instruments of economic policy within the CMEA in relation to third countries has not been widely practised. After all, the CMEA statute did not stipulate any tasks in this regard, underlining at the same time in the preamble that the member States confirm their readiness to develop economic relations with all countries irrespective of their social and State systems and in accordance with the principles of equality, mutual benefits, and non-intervention in internal affairs.

This standpoint has been also fully endorsed by as important programmatic CMEA document as the "Basic Principles of the International Socialist Division of Labour" passed by the XV CMEA Session and approved in 1962 by the consultative meeting of the Communist and Workers' Parties representatives of the CMEA member countries. In accordance with this document, the "international socialist division of labour is being shaped with regard to the world-wide division of labour. The socialist countries, developing economic ties with all countries of the world, strengthen at the same time the material foundations of peaceful coexistence of the two world-wide social systems."

These declarations of a general character do not, of course, exclude certain moves directed towards coordination of the economic policy in relation to third States.¹⁶ The very fact of coordination, however, does not

¹⁶ Some authors accordingly, a joint trade policy towards third States would be out of accord with, or even "completely alien" to the statutory competences of the CMEA. See H. de FUMEL, *op. cit.*, p. 19; L. CIAMAGA, *Od współpracy do integracji. Zarys organizacji i działalności RWPG w latach 1949 - 1964* [From Coopera-

necessarily mean that barriers in international economic relations are to be established or that an automatic discrimination against all or some of the States not belonging to the grouping is to be introduced. It is the object and aim of the coordination that is decisive in this respect.

In practice coordination within the CMEA countries was connected with economic aid to developing countries and with assistance to those countries that had been subjected to particularly rigorous discrimination or aggression on the part of imperialistic States.

In general, however, the CMEA community as a whole has not been isolated from the world economy by a common economic boundary based on specific international agreements. The economic contacts of particular CMEA countries with third States are made in an independent way, mainly in virtue of bilateral agreements. But in practice sometimes important differences appear as to the scope of these relations or forms of cooperation.

It seems that this traditional caution of the CMEA countries, as far as coordination of the economic policy towards third States is concerned, resulted in a high degree from the reluctance to take actions which from the point of view of third States could have been interpreted as an indirect impediment of access to the CMEA market, for instance, by creating legal preferences stimulating the development of mutual turnover within the CMEA.¹⁷ Lack of coordination, however, hindered the defence of interests of the CMEA countries against discriminatory trends which appeared in the practice of some States or economic groupings. That was the reason why the Comprehensive Programme of 1971 proclaimed certain changes in the domain under discussion.

The Programme confirmed the hitherto existing standpoint of the CMEA countries as far as relations with other countries are concerned by stating:

"In accordance with their policy of peaceful coexistence and in the interest of social progress, as well as assuming that international socialist

tion to Integration. An Outline of Organization and Activity of the CMEA in 1949 - 1964], Warszawa 1965, p. 189. The standpoint of the above-mentioned authors corresponded with the practice. Yet it seems too categoric because it does not take into account the possibility of evolution in this respect and the fact that the blanket clause of the Art. III, point(e) of the CMEA statute creates a sufficient legal basis for such an evolution.

¹⁷ Some time ago Z. KAMECKI suggested that the instruments of customs policy of the CMEA countries should be used to create appropriate preferences for the development of mutual turnover. These suggestions, however, have not been put into practice. See Z. KAMECKI, *Problemy integracji gospodarczej krajów RWPG* [Economic Integration Problems of the CMEA Countries], "Gospodarka Planowa," 1968, No. 10, pp. 12 - 13.

division of labour is taking place with regard to world division of labour, the CMEA member States will continue to develop economic, scientific, and technological links with other countries irrespectively of their social and State systems, basing themselves on the principles of equality, mutual benefits, and respect of their sovereignty."

At the same time the Comprehensive Programme—and this is a new factor—announced that the CMEA countries "will coordinate their foreign economic policy in the interest of normalization of international trade and economic relations and, above all, with the view of eliminating discriminations in this domain."

Thus the further development of legal regulation with regard to the process of socialist economic integration will comprise in a much larger scale than before the coordination of particular economic policy instruments of the CMEA States in relation to third countries, but on the understanding that the defence of justified interests of the CMEA States against discrimination, and not the establishment of barriers against the development of international trade relations, will be the aim of this coordination.

3. Coordination (or unification) of particular domestic economic policy instruments of the States constitutes the third aspect of the problem under discussion. Apparently, it is this tendency that is particularly characteristic of the integration process, constituting perhaps the main criterion which distinguishes the integration process from other aspects of the intensification of international economic relations.

Both above-mentioned types or rather directions of the economic policy coordination comprise those instruments that are directly connected with international economic relations—mainly with the exchange. On the other hand, however, coordination of the internal economic policy of the States is aimed at a certain convergence of the development conditions of the productive forces in particular countries. In this way coordination reaches the very foundations of the economy and not its specific results in the form of international exchange.

As it seems, the International Labour Organization, which already in the twenties had tried—through its projects of conventions—to verge working and social conditions in particular domains and on international scale, had been the forerunner of such activities, no matter how modest and fragmentary they were. The aim of these initiative was to establish, at least in these domains, binding rules of play, rules of competitive struggle.

Under the present-day conditions, there are no further expansion possibilities of the internal economic coordination policy of the States on an universal scale. Here the initiative was taken over by regional

organizations which assemble countries uniform with respect to their socio-political system. Undoubtedly the European Economic Community is the most experienced organization in this field.

For a long time in the CMEA countries the conviction had dominated that the shaping of material links in the process of the coordination of plans, in five-year trade agreements, and in agreements on specialization and coordination of production, had established sufficient prerequisites for a proper development of the international division of labour. The problem of internal economic policy coordination of the member countries had not been thoroughly dealt with.

The practice had shown, however, that the assumption unilaterally stressing the role of the State as owner had been one of the sources of difficulties in transition from cooperation to integration. As the system of planning and management of the national economies of the CMEA countries evolved, the difficulties increased. The shaping of material interrelations carried out only by the States through international agreements could be effective in conditions when direct and command-like methods of the national economy management dominated absolutely. The differentiation and growing flexibility of the methods of management, and the multitude of incentives influencing economic units, increase their freedom of decision in the process of accomplishing the functions of the State as owner. Thus the effectiveness of material interrelations shaped by the States in international agreements depends more and more on economic and legal circumstances accompanying the activities and decisions of the economic units. The more the methods of management are differentiated and the range of indirect economic methods wider, the stronger is the need of the economic coordination policy of the States and particularly of those instruments that influence the decisions taken by the economic units participating in the international turnover within the CMEA. Thus it can be said that the more active, more independent participation of the economic units in the process of carrying out the function of the State as owner emphasizes the importance of the sovereign function of the State which shapes and—together with other partners—coordinates legal and economic conditions, as well as the framework and instruments of the economy.

The necessities of the development of planning point out in the same direction. The need of improving the cooperation in this field requires a coordination of the general economic policy of the States. It concerns most of all the concept of long-term social and economic development, that is, the premises that form the basis for economic planning.

These problems, not fully appreciated for a long time, had been taken up by the Comprehensive Programme of 1971. The Programme (Part II,

Chapter III) established a new form of cooperation, namely, mutual consultations on main problems of the economic policy. In the first place consultations are to be related to those problems that are of importance in mutual relations between the CMEA countries. The subject of consultations is defined as follows:

(a) main directions and instruments of the economic, scientific, and technological policy which determine the shaping of mutual cooperation in important branches of production and in other sectors of national economy;

(b) main trends in the development of national economies of the CMEA countries and of the socialist commonwealth, the account of which is taken at determining the main tasks of particular countries;

(c) cooperation in the field of scientific and technological policy: more important trends in scientific and technological progress, preparation of scientific and technological cadres as well as ventures aiming at utilization of scientific and technological achievements in the national economy of the member countries, widening of coordination, cooperation, and common scientific and technological research in important fields of the modern technology;

(d) main directions of the socio-economic policy of the CMEA countries: concepts of a long-term economic development, including main directions in the investment activity; main directions in the development of more important branches of the material production, including fuel, power and raw materials branches; prospective changes and ventures in the field of manpower and material incentives utilization, internal finance and credit problems, and price shaping;

(e) problems of improving the planning and national economy management in the CMEA countries, including the necessity of creating conditions for a wider development of their mutual economic links;

(f) problems of improving the economic, scientific, and technological cooperation between the CMEA countries: establishing an organic link between the coordination of plans and a fuller utilization of commodity-money relations, main directions of the foreign economic policy.

The Comprehensive Programme anticipates multilateral consultations within the CMEA organs and bilateral consultations between the States concerned in accordance with the agreed procedure. The principle of interest, which arises from the general rule contained in the Article IV of the CMEA statute, applies to bilateral consultations too.

According to the Program "consultations between the countries concerned end with acceptance of appropriate agreements, protocols, or other joint documents." However, the Programme does not deal separately with legal consequences of multilateral consultations conducted within the

CMEA organs. Thus general rules, without any modifications, are here binding. Any resolution of an CMEA organ relating to the result of a consultation on specific problems of the economic policy of the member countries will have the form of a recommendation.

Harmonization of Internal Law Regulations

The necessity of adjust internal relations in the member States to the needs of the integration process comprises not only coordination of the internal economic policy, but also harmonization of the legal instruments which exert influence on the structure of mutual relations and the functioning of the nascent international economic system. It is worth stressing that with the growth of integration the objective range of the qualification "which exert influence on the structure of mutual relations" is beeing steadily widened. This results in a tendency to harmonize the internal law regulations in more and more fields.

Thus at the foundations of the process under discussion lie the same needs that are conducive to the development of the internal economic policy coordination of the CMEA States. It could be therefore said that also the harmonization of legal regulations is an element of a widely understood coordination of the economic policy. Such a view would seem to be justified. However, the peculiar character of the subject suggests a different treatment of the problem discussed here.

The term "harmonization" is beeing used here in a most general meaning without prejudicing either the degree of uniformity (convergence of rules, the so-called special regulation) or its form (internal legislation, international agreement, resolution of an international organization). It seems that it is precisely the diversity of methods and means serving the attainment of the above-mentioned goals that has made such a general term necessary.

In the hitherto existing practice of the CMEA countries, the process under discussion has expressed itself above all in creating a uniform, special legal regulation with regard to international situations. The gist of such a regulation consists in introducing uniform internal law regulations of a group of States with regard to international relations between persons belonging to these States.

The main achievement of the CMEA countries in the area under discussion consists in creation of a uniform legal regulation concerning foreign trade contracts. This regulation comprises rules reffering to concluding and contents of the sale contracts between the enterprises of the CMEA countries, to assembly operations and other technical services,

and to maintenance work. It has been effected by three acts: 1. General Terms of Delivery within the CMEA (last wording of 1968); 2. General Terms of Assembly and Other Technical Services (1962); 3. General Terms of Maintenance Services (1962).

The General Terms of Delivery include not merely regulations of the substantive law. The jurisdictional norm formulated in paragraph 90 of the GTD of 1968 establishes a uniform principle of determining the jurisdiction of arbitration courts. This principle has been adopted by both of the remaining uniform special regulation acts.

Basically, the system should be complete and refer to all contracts concluded between the enterprises of the CMEA countries. Sometimes an opinion is offered that in practice some specific problems arising in connection with the contracts concerning specialization and coordination of production have not been hitherto taken into due consideration. The use of the GTD sometimes fails to stand the test of life. Thus the need will probably arise to supplement the existing system of legal acts by adding to it general terms of specialization and cooperation in production. It could be concluded that with the progress of integration also other needs will arise of further development of the uniform special regulation.

As far other domains are concerned, the Agreement on Multilateral Settlements in Transfer Roubles and on establishing the International Bank for Economic Cooperation (1963) comprises a number of uniform norms. Uniform regulation is also binding in the field of goods and passenger railway traffic (SMGS and SMPS of 1950). However, this regulation extends the limits of the CMEA.

The needs in the domain under discussion had become one of the premises that led to the establishment in 1970 of a new organ of the CMEA—the Conference of the Representatives of the CMEA Countries for Legal Matters. Article II of the Conference Order, enumerating functions of this organ states, i.a. that the Conference “cooperates in bringing closer the legal norms of the CMEA member countries with regard to economic, scientific, and technological cooperation of those countries” (point e) and “arranges mutual consultations, exchange of experiences and informations between appropriate organs, organizations and institutions (scientific inclusive) of the CMEA member countries on legal matters concerning economic, scientific, and technological cooperation, and also on domestic legal norms regulating the economic activities of those countries connected with economic, scientific, and technological cooperation between themselves (point f).

Thus it is to expect that in the coming years a number of new initiatives aiming at harmonization of domestic legal regulations in various fields will be carried out in the CMEA countries. One of the first initia-

tives of the Conference in this domain was the preparation of a draft convention on the jurisdiction of arbitration courts (of the CMEA countries) in foreign trade matters.

Processes under discussion are often extensively described in the literature as law unification processes. Some are, however, of the view that this is not a precise term.¹⁸ This view accordingly, by law unification only such uniformity of domestic legal regulations could be understood that comprises all relations in a particular domain (e.g. an attempt taken on some time ago by Poland and Czechoslovakia to introduce identical family law in both countries). However, the above-discussed legal acts do not refer at all to relations between persons under municipal law inside particular countries. They regulate exclusively situations in which these persons enter into relations with foreign contracting parties within the CMEA. Thus they exclude specific foreign situations from the municipal general law, regulating them differently; this regulation, however, does not comprise all foreign situations of a given kind, but only those that take place in relations with contracting parties of the strictly determined States.

It seems that the above-mentioned arguments justify the usefulness of excluding the indicated solution from the generally termed law unification. For this solution has specific features which in this case could favour the use of a more precise term "special uniform regulation." However, these two terms should not be set one *against* another. For the development of a uniform legal regulation constitutes only one of the specific aspects of the trend towards law unification in a most general sense. It is a specific solution of a unifying character, satisfying the present conditions of cooperation between the CMEA countries.

It cannot, of course, be excluded that also more extensive processes of law unification *sensu stricto* will develop in the future within the CMEA. One can already perceive such a tendency in technical fields—technical norms and organizational standards—which will be discussed separately. The problem, however, seems to be rather complicated. One should take into consideration the fact that the rules regulating economic life in the CMEA countries are being in their major part created for the needs of a State economy. Thus they regulate relations within one of the systems of socialist ownership. But the relations between the CMEA countries have the nature of those between various owners. This objective premise justifies, as it seems, the need of differentiation between

¹⁸ See M. KEMPER, H. WIEMANN, *Die charakteristischen Merkmale der Aussenhandelslieferverträge im Bereich des NYW*, "Staat und Recht," 1965, No. 2; M. BOGUSLAVSKI, *Pravovoe regulirovanie mezhdunarodnykh hazhajstvennykh otnoshenij*, Moskva 1970, pp. 33 - 34.

regulation concerning relations within one ownership system, and regulation concerning relations between persons (enterprises) representing different socialist ownership systems. Thus presently conditions for full unification exist rather in technical fields (norms, organizational standards) which are unconnected with ownership relations. Where, however, problems strictly connected with ownership relations come to the fore (e.g. exchange of goods), a uniform special regulation would probably also in the future be often particularly useful.

It is also worth stressing that the harmonization of domestic legal regulations influencing the international economic turnover is by no means exclusively connected with international groupings. In the first place we are confronted with a trend towards a spontaneously growing concurrence of organizational forms, lines of conduct, and standards in the international trade turnover.¹⁹ It seems that this process also comprises to some extent substantive (mainly civil) and procedural law regulations, especially in countries which participate in the international division of labour most actively. This stems from the fact that the same needs often produce similar solutions even without an organized international action, and that comparative law research, conducive to mutual gathering of experience, is evolving widely.

Against this background attempts are also being made at universal harmonization or unification—theoretically at least. The CMEA States are bound together by a number of unifying acts, universal in their character.²⁰ They also actively participate in further endeavours of the same kind, for instance, in work on the commercial law unification. Thus the processes taking place within the CMEA should be analyzed in connection with those more general trends.

This does not, of course, alter the fact that economic integration makes specific demands on the municipal law order of the States belonging to a grouping. To cope with these demands an organized international action is necessary. Theoretically, this action can take the following forms:

(a) Authorization of an international organization to proclaim uniform rules which on publication in the promulgatory organ of the organization become directly binding in member countries. As is well known, such a model has been accepted in the European Economic Community. The countries of the socialist community do not accord similar rights to international organizations created in the process of integration.

¹⁹ Cf. H. SPILLER, *Die objective Tendenz zur Internationalisierung des Wirtschaftsleben und die Rechtsentwicklung*, "Staat und Recht," 1963, No. 8/9.

²⁰ See J. JAKUBOWSKI, *Integracja gospodarcza krajów RWPG a niektóre problemy unifikacji prawa* [Economic Integration of the CMEA Countries and Some Law Unification Problems], "Państwo i Prawo," 1970, No. 5, pp. 685 - 686.

(b) Authorization of an international organization to pass uniform rules which, however, are not directly binding in member countries. Instead, the member countries are bound to implement these rules in accordance with their internal order. Such a commitment, according to legal construction of the resolutions passed by the organization, may result either from the very fact that a resolution has passed (when it is a decision by nature) or from the fact of its recognition (acceptance) by the States (when the resolution has the character of a recommendation and, as far as the so-called "contracting out" system is concerned, the recognition takes place through waiving the demur). As is well known, the respective CMEA resolutions have the character of qualified recommendations. It was in this manner that the basic acts of uniform special regulation have been implemented in the CMEA countries: general terms of delivery, general terms of assembly, and general terms of maintenance services. As a consequence of recognition acceptance of the CMEA recommendations, appropriate domestic legislation had been set in motion in every member country.

(c) Authorization of an international organization to work out convention drafts containing uniform norms, and to submit them to the States. In this case, too, the means of pressure that could be applied on the part of the international organization are manifold, depending first and foremost on legal construction of its resolutions. The here discussed solution has been adopted by the CMEA, for instance, in the form of the Agreement on Multilateral Settlements in Transfer Roubles and by establishing the International Bank for Economic Cooperation. It is to be expected that in connection with the activity of the Conference of the Representatives of the CMEA Countries for Legal Matters, precisely this method will find in the future more use than up to the present time. This would be in accordance with the postulates of many authors who maintain that the method of implementing a uniform special regulation through setting in motion the domestic legislation (point b) is not the most suitable one.²¹

Harmonization and Unification of Technical Norms and Organizational Solutions

From the point of view of the needs of international turnover, the process of harmonization or unification of technical norms (standards) and organizational solutions had been started by the States in the 19th cen-

²¹ See M. BOGUSLAVSKI, *op. cit.*, pp. 55 - 56; J. JAKUBOWSKI, *op. cit.*, p. 685.

tury, first by bilateral, and later by multilateral agreements concerning the postal traffic. Subsequently tasks of this kind had been taken over by international unions—postal, telegraphic, etc. At present these tasks are being fulfilled—on an universal scale—by specialized institutions belonging to the United Nations system. They are also carried out by numerous regional organizations. From the wider point of view also in this case we have to deal with a harmonization of municipal law, though in narrow and specialized fields.

The role of international law in the process of harmonization or unification of technical norms and organizational solutions is greater within the CMEA than in universal or capitalist countries organizations. This stems from the above-stressed fact that economic organizations of the CMEA States fulfil certain functions of producers' associations. Accordingly, the international legal form of harmonization or unification embraces not only the traditional fields, like communication or transport, but also the domain of material production. Thus, for instance, the Standing Engineering Industry Committee of the CMEA issues, among others, recommendations on the standardization of the machinery and installations, and on the unification of the machinery parameters; the Ball-Bearings Manufacturing Cooperation Organization occupies itself i.a. with the unification of ball bearings produced in the member countries and makes efforts to achieve uniformity of the technological processes in those countries; the Organization for Metallurgical Cooperation—"Intermetal", works out i.a. joint nomenclature for metallurgical production, joint methodology of production programming, etc. In the field of power industry tasks of this kind are also performed, along with a permanent CMEA commission, by the Central Dispatching Board of the Unified Power Systems. In relation to various kinds of production these tasks are fulfilled by the CMEA Institute for Standardization (which is a specialized organ of the CMEA) by submitting projects to competent standing commissions of the Council.

Harmonization and unification of technical norms and organizational solutions does not constitute a domain of activity reserved exclusively for the States and international organizations created by them. In the capitalist world these problems are often a matter of interest for monopolistic associations, international cartels, etc. Moreover, there are extra-governmental organizations that act between different social systems as one-line enterprises which carry out such tasks (air carriers, shipowners).

It seems that also within the CMEA not all of the above-mentioned problems must be regulated by the State. Inasmuch as harmonization and unification of legal regulations constitutes, as a matter of fact, an exclusive domain of the State, harmonization and unification of differ-

ent factors of the production process and production organization may be sometimes contractually regulated between the economic units concerned. It applies, of course, to those problems of production and organization that are not regulated by State rules. Thus some problems under discussion can be subject both to international and civil legal regulation. In this instance the manner of regulation is being decided by the qualifications of subjects engaged in such activities. And since in the CMEA practice they were carried out mainly by States and international organizations, the expansion of international law in this direction has gone very far.

Yet it cannot be excluded that certain changes will happen in this domain. Their coming is favoured by the fact that the Comprehensive Programme of 1971 lies a heavy stress on the development of international economic units, and among them, international economic associations (Part II, Chapter VIII, point 3.3). Exemplifying the functions of such associations, the Programme mentions i.a. the working out of norms (standards) in production. In this way certain problems which are at present being elaborated by the permanent CMEA commissions and specialized organizations like "Internal—that is, legally regulated from the point of view of international law— may also in the future become a subject of joint action of the economic units.

Shaping of Material Links Between the CMEA Countries

As is well known, the coordination of national economic plans constitutes a basis for shaping material links between the CMEA countries. So far it takes place first and foremost in a bilateral way, finding its expression in minutes of the central planning organs and in five-year trade agreements. However, the importance of multilateral coordination is steadily growing in the CMEA and in specialized economic organizations, on the understanding that the resolutions of the CMEA and other organizations do not replace bilateral agreements, but determine only their starting points in some problems exceptionally important for the development of the community.

Likewise, agreements on specialization and interplant cooperation, on raw materials and investments, and on joint ventures, play an important role in shaping mutual material links between the CMEA countries.

In the process of shaping mutual material links, the function of the CMEA States as owners comes to the fore in a significant way. This expresses itself above all in the five-year trade agreements which represent the last legal stage of the economic planning coordination process.

The five-year trade agreements determine the whole turnover between the contracting parties independently of whether the respective obligations have been shaped in the five-year agreement itself, or had been undertaken earlier in other agreements (e.g. in agreements on specialization and interplant cooperation). In connection with this they fix export and import lists.

The lists under discussion are called in agreements, as well as in the Comprehensive Programme of 1971, quota goods (in terms of volume or value). They are, however, quotas of specific kind, incomparable with those in traditional use. In international trade agreements the quota goods generally denote an impassable ceiling for the import of particular line of goods. This ceiling can be determined in terms of volume or value. The fixing of quota goods constitutes in no way an obligation to import or export the quantity of goods determined by the quota. The degree of utilization of the possibilities presented by an international trade agreement depends on the activity of the economic units in concluding appropriate contracts. A quota determines the ceiling of this activity only.

Yet the notion of quota has another meaning when applied to trade agreements of the CMEA States. It denotes an obligation concerning mutual deliveries of goods in volume determined by the agreement. Thus, for instance, the Article 1 of the Polish-Bulgarian Trade Agreement for 1971—1975 states that the lists of goods (determining obligations concerning mutual deliveries) “constitute an integral part of the agreement and are binding for the parties.” This practice has been confirmed and substantiated by the Comprehensive Programme of 1971.

In accordance with the Programme (Part II, Chapter VI, points 13—23) the CMEA countries will continue to differentiate the mutually delivered goods in the following manner:

(a) main kinds of goods for which rigid volume quotas are established in long-term trade agreements and annual trade protocols, and for which other more important delivery term are settled;

(b) groups of goods or goods for which only value quotas are established in long-term trade agreements and annual trade protocols, and for which the specific trade nomenclature is to be agreed between the buyer and the seller;

(c) goods for which no quotas are established.

The Programme deals with the definition of quota as tantamount to an obligation of delivery and states that “volume quotas as well as value quotas for goods that come within long-term trade agreements and annual trade protocols are of binding character.”

The specific feature of the quota in trade agreements of the CMEA States is that it not only forms an obligation to deliver the goods, but

also is in no way tantamount to establishing a ceiling for the import. This is particularly clear, for instance, in the light of the Article 4 of the Trade Agreement between Poland and the German Democratic Republic for 1971—1975 which states i.a., that the enterprises of both parties can also conclude agreements for goods after the exhaustion of the quota. The Comprehensive Programme of 1971 has elevated this practice to the rank of general rule by stating (Part II, Chapter IV, point 2) that the member countries “will spare no efforts to widen the mutual trade exchange beyond quotas determined in agreements by way of detecting additional export possibilities.”

Undoubtedly, obligations concerning mutual deliveries determined by trade agreements between the States constitute an example of far-reaching expansion of public international law. Also in this case the expansion expresses the specific character of relations between the States as owners. Since international law is not yet sufficiently adapted to its new functions, this kind of expansion creates a number of practical and theoretical problems.²²

²² See more A. WASILKOWSKI, *Zagadnienie odpowiedzialności majątkowej państwa za zobowiązania podejmowane w obrębie RWPG* [The Problem of State Material Responsibility for Obligations Assumed Within the CMEA], “Państwo i Prawo,” 1971, No. 8/9.

Les accords de spécialisation et de coopération dans la production conclus entre les entreprises des pays membres du CAEM

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1. L'intégration économique internationale socialiste repose surtout sur la collaboration dans le domaine de la *production* des pays participants.¹ C'est pourquoi on peut émettre la thèse que la forme fondamentale de réalisation de cette intégration, la forme la plus progressiste de la division internationale socialiste du travail, est la spécialisation et la coopération dans la production².

On en trouve l'expression dans le Programme complexe de l'intégration économique socialiste adopté au cours de la XXV^e session du CAEM (juillet 1971). Dans ce document, on peut lire entre autres:

« Les pays membres du CAEM partent du principe que le développement de la spécialisation et de la coopération dans la production constitue une condition importante de l'extension et du perfectionnement continus de la coopération et du développement de l'intégration économique socialiste » (chapitre X — point 4)³.

2. La forme juridique sous laquelle sont réalisées la spécialisation et la coopération dans la production en constitue un élément important.

¹ Cf. *Problemy ekonomicznej integracji stran-členov SEV* (sous la rédaction de G. M. Sorokin et P. M. Alampiev), Moskva 1970, p. 65.

² *Ibid.*, p. 67.

³ *Kompleksowy program dalszego pogłębiania i doskonalenia współpracy i rozwoju socjalistycznej integracji gospodarczej krajów członkowskich RWPG* [Programme complexe d'approfondissement et de perfectionnement de la coopération et du développement de l'intégration économique socialiste des pays membres du CAEM], Warszawa 1971, p. 81.

La pratique dans ce domaine indique que nous avons affaire ici à deux plans fondamentaux: le plan interétatique réglé par le droit international public, ainsi que le plan des relations entre les unités économiques (entreprises) des différents pays membres du CAEM, réglé en principe par le droit civil.

De ces deux catégories de rapports, la première a incontestablement une importance fondamentale, s'exprimant sous forme d'engagements interétatiques. Cela découle déjà du monopole même des relations économiques avec l'étranger, du caractère planifié de l'économie socialiste. C'est pourquoi, on doit souligner le caractère *interétatique* de la spécialisation et de la coopération internationales socialistes dans la production⁴.

Certains principes fondamentaux et directions de la coopération dans ce domaine doivent être établis sur le plan interétatique car telles ou autres décisions sur la spécialisation concernent les intérêts de toute l'économie nationale des États en tant que tels et englobent tout le territoire de l'État. C'est en cela que réside justement l'aspect spécifique de la spécialisation et de la coopération internationales socialistes dans la production⁵.

3. En ce qui concerne la forme juridique de cette sphère des relations internationales dans le domaine de la spécialisation et de la coopération dans la production, nous avons affaire ici aussi bien avec les recommandations des organes du CAEM ou d'autres organisations économiques internationales des pays socialistes, qu'avec les accords intergouvernementaux ou interministériels et enfin avec les décisions correspondantes des commissions bilatérales de coopération économique et scientifico-technique des pays membres du CAEM⁶.

Pourtant, en règle générale, les accords interétatiques sur la spécialisation et la coopération dans la production ne règlent pas les détails dans ce domaine, mais se bornent à établir certains principes généraux, ou à obliger les parties à donner les instructions correspondantes à leurs unités économiques pour que celles-ci passent des accords de droit civil sur la spécialisation et la coopération dans la production.

⁴ Cf. M. M. BOGUSLAVSKIJ, *Pravovoe regulirovanie meždunarodnyh hazjajstvennyh otnošenij*, Moskva 1970, pp. 144, 167; J. KORMNOV, *Międzynarodowa specjalizacja produkcji* [La spécialisation internationale dans la production], Warszawa 1970, p. 148.

⁵ Cf. M. M. BOGUSLAVSKIJ, *op. cit.*, p. 145.

⁶ Cf. H. de FIUMEL traite plus largement de cette forme juridique dans: *Znaczenie międzynarodowych umów o specjalizacji i kooperacji produkcji krajów członkowskich RWP* [L'importance des accords internationaux de spécialisation et de coopération dans la production des pays membres du CAEM], «*Studia Prawnicze*», 1972, n° 32, pp. 3 - 12.

C'est ainsi que les décisions prises à l'échelle des gouvernements ne constituent en général que les *prémices* des accords de spécialisation entre les entreprises des pays membres du CAEM. Le nombre de ces accords a augmenté considérablement ces dernières années et ils englobent des domaines de plus en plus variés. Cette tendance est étroitement liée aux réformes en cours dans les pays socialistes portant sur la question de la planification de l'économie nationale, prévoyant un accroissement considérable de l'autonomie dans l'activité des entreprises et dans le domaine des rapports avec leurs partenaires étrangers.

4. L'existence et le développement des accords de spécialisation conclus entre les différentes unités économiques sont fondés surtout là, où il s'agit de *coopération* industrielle dans le sens strict du mot, c'est-à-dire là, où la coopération directe de ces unités économiques qui fabriquent en commun un produit final est particulièrement importante⁷. Dans ces conditions les deux entreprises qui coopèrent sont directement intéressées économiquement à ce que les résultats de leur coopération soient les plus effectifs.

C'est ainsi que la conclusion d'accords de spécialisation à l'échelon des unités économiques (entreprises) constitue un phénomène naturel favorisant le processus de la plus grande intégration économique socialiste. Quoique, dernièrement, on ait enregistré les premiers accords multilatéraux de ce genre, nous avons toujours affaire surtout à des accords de caractère *bilatéral*.

En particulier, la pratique polonaise connaît une série de ce genre d'accords dont la majeure partie a été conclue avec des partenaires de la R.D.A.

5. Voyons de plus près ces accords qui donnent naissance à d'intéressants problèmes juridiques.

Tous les accords bilatéraux que nous examinons ci-dessous, se réfèrent en général à des décisions prises par les commissions bilatérales de coopération économique des pays socialistes intéressés. Ainsi qu'on le sait, ces organes existent depuis des années et sont autorisés à déterminer les principales directions et principes de la coopération économique bilatérale des pays socialistes⁸. Ce sont des organes bilatéraux de caractère *international*.

Ces dernières années, les problèmes de la spécialisation et de la coopération bilatérales dans la production ont été inclus dans le domaine

⁷ Cf. S. POLACZEK, *Integracja gospodarcza krajów socjalistycznych a handel zagraniczny Polski* [L'intégration économique des pays socialistes et le commerce extérieur de la Pologne], Warszawa 1971, pp. 162 - 166.

⁸ Cf. J. KORMNOV, *op. cit.*, pp. 169 - 171.

des problèmes dont sont chargées ces commissions. En particulier, ces commissions ont défini certains *principes* sur la *préparation* et la *conclusion* des accords sur la spécialisation et la coopération dans la production entre les unités économiques des pays respectifs⁹.

Ces principes sont formulés de façon presque identique. Ils stipulent en particulier que les accords de spécialisation et de coopération dans la production sont conclus par les organes compétents de l'industrie et du commerce extérieur des deux parties et constituent des accords conjoints de l'industrie et du commerce extérieur.

Les principes indiquent à titre d'exemple quels sont les problèmes qui devraient être traités dans les accords de spécialisation, c'est-à-dire, quelle doit être leur teneur.

Il y est souligné que ces accords seront conclus en tenant compte des documents correspondants du CAEM, et en particulier des Conditions générales de livraisons du CAEM 1968.

Ces principes stipulent que les accords de spécialisation ne doivent pas se substituer aux contrats de livraison de produits spécialisés et que ces contrats doivent être passés par les entreprises de commerce extérieur sur la base d'accords de spécialisation.

Ainsi que nous l'avons déjà souligné, les accords de spécialisation se réfèrent en général dès le début aux décisions correspondantes des commissions bilatérales de coopération économique. C'est ainsi que, dans l'un de ces accords, on constate que le présent accord est conclu « conformément à la décision de la VII^e session du comité polono-allemand de coopération économique et scientifico-technique ».

Quoique dans certains accords, on se réfère aux « recommandations » correspondantes de la commission bilatérale, il semble que les décisions de ces organes doivent être toujours considérées en principe comme ayant un caractère obligatoire. Ainsi, les deux parties, en consultant certaines mesures dans le domaine de la spécialisation et de la coopération dans la production, s'engagent par là-même à donner les instructions nécessaires aux organes ou aux organismes économiques qui en dépendent en vue de la conclusion d'accords de spécialisation correspondants. C'est pourquoi, les différences dans les termes employés (décision, accord, recommandation) qui apparaissent parfois n'ont probablement pas de grande importance du point de vue juridique.

⁹ Par exemple les principes adoptés au cours de la X^e session de la Commission polono-tchécoslovaque de coopération économique des 13-14 VI 1966; au cours de la VII^e session de la Commission polono-hongroise de coopération économique des 6-8 II 1967; au cours de la VII^e session du Comité polono-allemand de coopération économique et scientifico-technique; au cours de la VIII^e session de la Commission polono-bulgare de coopération économique des 7-9 III 1968.

6. Ainsi que nous l'avons signalé, les Principes fixés par les commissions bilatérales établissent que les accords de spécialisation sont conclus par les organes compétents de l'industrie et du commerce extérieur des deux parties. Cependant, il s'agit ici d'organes qui, conformément au système de gestion de l'économie nationale du pays donné « disposent des pouvoirs indispensables pour conclure ces accords et peuvent assurer la responsabilité de leur réalisation ».

Comment ce problème se présente-t-il en pratique? Des accords de spécialisation sont conclus à l'échelon des unités économiques, avec ceci de particulier que ce sont en général des entreprises industrielles (unions industrielles) et des entreprises de commerce extérieur qui les signent au nom de chaque partie.

Pour certains accords, la partie polonaise est représentée par trois unités économiques. Ainsi, dans l'un de ces accords la partie polonaise est représentée par: l'Union des industries de machines-outils et d'outils, la Fabrique de machines-outils « Rafamet », ainsi que la centrale de commerce « Metalexport ».

A part cela, le fait caractéristique c'est que par exemple l'un des accords, conclus à vrai dire par les organes centraux de l'État de Pologne et de R.D.A. (organes de planification) prévoit en même temps la conclusion ultérieure d'un accord détaillé de coopération entre les unités économiques de deux parties; le partenaire polonais prévu, étant une coopérative industrielle de l'échelon du *district*. Cet exemple montre l'ampleur (quant aux partenaires) des accords de spécialisation.

7. Certains accords de spécialisation définissent clairement leur objet. Il y est, par exemple, stipulé que « l'objet de l'accord porte sur la spécialisation de la production et les livraisons de Pologne en R.D.A. et de R.D.A. en Pologne » de produits définis. D'autres accords établissent que leur objet est tout simplement la « spécialisation » dans la fabrication de certains produits.

L'analyse des accords en question conduit à la conclusion que la majorité de leurs stipulations portent sur la spécialisation elle-même, et partant sur des problèmes liés à la production en tant que telle. Pourtant à part cela ces accords contiennent aussi des dispositions concernant les échanges de produits spécialisés, c'est-à-dire qu'elles touchent des questions de commerce extérieur. En règle générale, ils prévoient la conclusion de contrats additionnels pour déterminer ces livraisons.

A part ces deux groupes fondamentaux de dispositions, les accords de spécialisation règlent aussi la question de sanctions éventuelles pour la non-exécution des obligations contractuelles, ainsi que le problème du règlement des différends éventuels afférents.

8. Les dispositions portant sur la *production* elle-même, sont les plus

importantes dans les accords de spécialisation. Ce sont elles qui déterminent en effet l'aspect spécifique des accords, et qui les différencient des contrats commerciaux habituels, concernant les échanges de marchandises (même s'il s'agit de produits spécialisés).

Quels sont les engagements concrets des parties dans ce domaine? Les accords stipulent que, par exemple, l'une des parties s'engage à se spécialiser dans le domaine de la fabrication de certains produits et couvrir la demande du partenaire. Dans d'autres cas, on établit une « répartition de la production et de la spécialisation » entre les partenaires, en énumérant les produits qui doivent faire l'objet de la spécialisation de chacune des parties. On trouve en même temps dans une série d'accords des dispositions selon lesquelles l'un des partenaires s'engage, à une date déterminée, « à cesser ou bien à ne pas initier la fabrication » de produits définis, dans la production desquels se spécialise l'autre partie. De même, il est expressément stipulé dans certains accords, qu'ils engagent « toutes les entreprises de production dans le pays de chacun des partenaires ».

D'autres dispositions portant sur la production règlent des questions telles que: la qualité des produits, les droits de brevet, la cession de la documentation technique, le service technique, les pièces de rechange, les réparations, la collaboration dans le domaine du développement technique, etc.

L'examen de ces dispositions amène à conclure que les accords de spécialisation imposent dans leur ensemble, aux partenaires des engagements dans le domaine de la production elle-même, c'est-à-dire dans des questions qui en principe n'avaient jusqu'à présent pas fait l'objet d'un règlement sur le plan international dans les relations économiques mutuelles des pays socialistes.

Jusqu'à présent, seules les questions de *livraisons* mutuelles de marchandises, c'est-à-dire des questions de commerce extérieur, avaient fait l'objet d'engagements juridiques sur le plan international. Les parties s'engageaient à livrer dans des délais fixés certains articles définis d'un commun accord.

Les accords de spécialisation vont plus loin, établissant les engagements mutuels dans le secteur de la production elle-même, dans celui des produits qu'englobe la spécialisation et qui, en résultat, font l'objet d'échanges commerciaux.

Ce qui paraît particulièrement digne d'intérêt, c'est le fait que le partenaire ait acquis, semble-t-il, d'après les dispositions correspondantes, le droit d'exiger de l'autre partie, qu'elle exécute non seulement ses engagements concernant la livraison de produits compris dans la spécialisation, mais *aussi* qu'elle remplisse ses engagements en ce qui concer-

ne la *mise en marche* ou la *cessation de la fabrication* des produits spécialisés. Le partenaire de l'accord possède en effet ce droit, car celui-ci constitue l'objet expressément conclu d'un engagement juridique.

Il est évident que dans ce cas, reste ouverte la question de la responsabilité du partenaire pour la non-exécution des engagements, ainsi que celle de la nature et de l'importance de l'indemnité. Nous reviendrons plus loin à cette question.

9. Ainsi que nous l'avons déjà constaté, à part les dispositions concernant directement la production, les accords de spécialisation règlent aussi la question des échanges commerciaux des produits spécialisés. Dans certains cas, cela est exprimé dans le titre même de l'accord (*Accord sur la spécialisation de la production et les livraisons...*).

Toutefois, les accords de spécialisation ne règlent que d'une façon fort générale la question de livraisons, en disposant que des contrats particuliers en matière de livraisons seront conclus par les entreprises de commerce extérieur des deux parties. En même temps, dans certains accords, on peut trouver des dispositions stipulant que les contrats mentionnés sont conclus par les entreprises de commerce extérieur ou les fondés de pouvoir des entreprises industrielles participant à l'accord. Cette disposition semble prendre en considération, pour certaines entreprises industrielles la possibilité de posséder le droit d'exercer directement une activité relevant du commerce extérieur sur les marchés étrangers.

En même temps, certains accords engagent les deux parties à transmettre les informations concernant les demandes mutuelles de produits spécialisés à leurs autorités et organisations compétentes dans le but d'inclure ces produits dans les listes de marchandises des accords commerciaux.

Dans ce groupe de prescriptions, on trouve également des dispositions concernant les prix ainsi que la question de réexportation des produits spécialisés. En ce qui concerne les prix, ils sont fixés, soit sur la base des principes déterminant les prix en vigueur entre les deux pays, soit l'on décide que ces prix seront établis d'après les principes du CAEM en la matière.

Pour ce qui est de la réexportation, une série d'accords de spécialisation interdisent la réexportation par l'acquéreur des produits qu'englobe la spécialisation, à moins que ceux-ci ne fassent partie intégrante d'installations complètes. Il y a toutefois des accords qui prévoient expressément le droit illimité des parties de réexporter les produits spécialisés importés.

10. Une série d'accords de spécialisation prévoient des amendes conventionnelles pour la non-exécution de certains engagements figurant

dans les accords. Il s'agit ici de cas où le contrat de livraison de produits spécialisés n'a pu être signé par suite du non-respect des délais dans lesquels doivent être passées les commandes, ou bien de cas de commandes plus petites que prévues, de non-confirmation des quotas annuels de livraison établis, de retard dans les livraisons, etc.

Selon les cas, les accords prévoient des amendes conventionnelles de l'ordre de 6 à 12 pour cent de la valeur de la marchandise qui fait l'objet du contrat.

Comme on le voit, les amendes conventionnelles sont uniquement prévues dans le cas de la non-exécution ou de la mauvaise exécution des engagements de livraison de produits spécialisés; elles portent donc sur la sphère du commerce extérieur et non pas sur la spécialisation en tant que telle.

Il résulte aussi clairement des accords de spécialisation que ce sont *uniquement* les entreprises de *commerce extérieur* qui ont à payer les amendes conventionnelles, étant parties contractantes de l'accord de spécialisation, car ce sont elles qui en principe passent les contrats de livraison de produits spécialisés. Ainsi les amendes conventionnelles ne grèvent en aucun cas les unités économiques productrices qui sont également parties contractantes des accords de spécialisation.

11. Parallèlement aux dispositions concernant les amendes conventionnelles, les accords de spécialisation règlent la façon de trancher les différends qui peuvent surgir dans l'exécution de l'accord.

Dans ce domaine, certains accords de spécialisation se bornent uniquement à constater en général que tout différend pouvant surgir de l'accord en question « sera tranché selon la procédure prévue dans les Conditions générales de livraison du CAEM 1968 » en précisant parfois qu'il s'agit du § 65 des CGL du CAEM (prévoyant comme on le sait l'arbitrage).

Quoiqu' il soit question, dans ce cas, de « tout différend » en général, il semble que cette disposition concerne uniquement les différends qui peuvent porter sur la réalisation des *livraisons* de produits spécialisés par les entreprises de commerce extérieur qui sont parties de l'accord. Cela semble découler clairement du fait de la référence au texte des CGL du CAEM, concernant en effet les livraisons de marchandises réalisées par les entreprises de commerce extérieur sur la base de contrats.

Ainsi, malgré les apparences, la formule « tout différend » ne semble pas exacte, car cette disposition ne prend pas en considération la possibilité d'un différend qui aurait pour origine non pas les échanges mêmes de produits spécialisés, mais la spécialisation en tant que telle, c'est-à-dire par exemple les engagements concernant la mise en marche ou la cessation d'une production donnée.

12. Par contre, la possibilité de tels différends est prévue dans d'autres accords de spécialisation. Ils en fixent expressément la division selon le genre et déterminent en conséquence la procédure de règlement.

C'est ainsi qu'un accord prévoit que les différends pouvant naître des livraisons de marchandises spécialisées doivent être réglés par les partenaires eux-mêmes (les centrales de commerce extérieur), c'est-à-dire au moyen de conversations directes. Au cas où l'on ne parviendrait à aucun accord, la partie lésée peut avoir recours à l'arbitrage prévu pour les différends dans le domaine du commerce extérieur du pays dont ressort la partie qui est à l'origine du dommage. On souligne en même temps, qu'en ce qui concerne la procédure, on applique les articles correspondants des CGL du CAEM.

En même temps, et ceci est essentiel, l'accord prévoit que dans tous les autres cas d'infraction aux clauses, en particulier en cas de *non-respect* des dispositions en ce qui concerne l'engagement de cesser une certaine production, c'est une *commission d'arbitrage* nommée par les directeurs généraux des unions industrielles des deux parties, sur la demande du partenaire intéressé, qui décide.

Cette commission d'arbitrage examine et tranche le problème de l'infraction à l'accord et des conséquences qui en découlent, ainsi que « la question du montant de l'indemnité ».

Nous avons donc ici une disposition expresse prévoyant la responsabilité pour la non-exécution des engagements dans le domaine de la *production* elle-même, indépendamment des échanges ultérieurs des produits spécialisés. Cette responsabilité doit trouver son expression dans l'indemnité éventuelle versée à la partie lésée par celui qui a enfreint les engagements. On prévoit donc nettement la responsabilité *matérielle* des partenaires.

Toute la procédure ne s'arrête pourtant pas à l'échelon de la commission d'arbitrage précitée, car au cas où cette commission est dans l'impossibilité de régler le différend, elle transmet ses propositions aux présidents des Comités de coopération économique et scientifico-technique des pays intéressés. Il faut donc présumer que la solution adoptée par les présidents constitue le règlement définitif du différend. Il convient de souligner ici que ce règlement intervient dans ce cas à l'échelon interétatique, chaque président du Comité de coopération économique étant en effet vice-président du Conseil des ministres de son pays.

13. Une nette division semblable des différends existe dans un autre accord de spécialisation, prévoyant que ceux portant sur l'exécution d'engagements tels que « la mise en marche d'une production, son exécution ou sa cessation, éventuellement l'apport d'une aide scientifico-technique », seront tranchés de manière obligatoire pour les deux partenaires

« par le Comité bilatéral de coopération économique et scientifico-technique » des parties.

Ainsi, dans ce cas, la question du règlement des différends issus de l'exécution des engagements dans le secteur de la production a été placée au premier plan; le seul organe compétent pour les régler étant de nouveau un organisme intergouvernemental sous forme d'un Comité bilatéral de coopération économique. On mentionne ici le comité en tant que tel et non pas ses présidents. Il semble pourtant que cette différenciation ne change pas l'essence du caractère de l'organe lui-même.

En même temps, conformément à l'accord, tous « les autres différends » seront tranchés par le tribunal *d'arbitrage* compétent du siège du défendeur et selon ses lois. Ce sont les CGL du CAEM 1968 qui seront appliquées et complétées par le droit civil en vigueur.

Il semble que la notion « les autres différends » comprend justement ceux qui découlent des livraisons de produits spécialisés et qu'elle concerne par conséquent la sphère du commerce extérieur. Cela est confirmé par le fait qu'on a à nouveau recours au mécanisme de l'arbitrage, compétent dans le règlement des différends provenant justement du commerce extérieur.

14. Il résulte clairement des dispositions précitées que la responsabilité pour l'infraction aux clauses de l'accord de spécialisation ne se limite pas uniquement à la responsabilité au titre de la non-exécution des livraisons de produits spécialisés, mais porte également sur la non-exécution des engagements concernant la spécialisation de la production elle-même (sa mise en marche ou sa cessation).

C'est pourquoi, il est difficile d'accepter l'opinion que représentent certains auteurs socialistes, selon laquelle l'accomplissement des engagements découlant des accords de spécialisation « peut s'exprimer *uniquement* par les échanges »¹⁰ (souligné par l'auteur).

Le fait est que la réalisation de cette responsabilité matérielle au titre de la non-exécution de la teneur de l'engagement de spécialisation peut se heurter en pratique à de sérieuses difficultés. Il s'agit du fait que, d'après la législation en vigueur, par exemple nos unions industrielles ne semblent pas posséder les pouvoirs et les possibilités leur permettant de prendre la responsabilité de l'exécution des engagements de production envers un partenaire étranger et de payer éventuellement des indemnités à ce titre.

En pratique, dans cette situation, seules les entreprises du commerce extérieur pourraient porter la responsabilité de la non-exécution d'un

¹⁰ *Liefervertrag, Montagevertrag, Kundendienstvertrag im Aussenhandel der RGW-Staaten* (travail collectif), Berlin 1967, p. 32.

accord de spécialisation. Et ces entreprises, comme nous l'avons vu, ne sont responsables que de la réalisation des livraisons de produits spécialisés¹¹.

Ce genre de situation ne semble pas souhaitable, car il se produit une certaine dissonance entre les termes de l'accord et sa réalisation pratique. Il semble donc nécessaire de régler au plus vite sur le plan intérieur les questions des pouvoirs des unions industrielles et des entreprises productrices (en tout cas celles qui sont partenaires d'accords de spécialisation) pour contracter ce genre d'engagements et, en cas de nécessité, d'en porter la responsabilité sous forme de paiement d'indemnités correspondantes¹².

15. Après avoir examiné les dispositions fondamentales des accords de spécialisation, il faut se pencher sur leur caractère juridique en général. A la lumière des dispositions précitées, il semble incontestable que nous avons affaire en l'occurrence à des accords de droit civil¹³. Premièrement, ces accords sont conclus par des personnes juridiques relevant du droit interne (organismes industriels et de commerce extérieur), deuxièmement ces accords ont pour but de régler les rapports entre ces personnes juridiques — rapports de droit civil.

Afin de ne laisser subsister aucun doute sur le caractère juridique des accords examinés, par exemple les Principes de conclusion d'accords de spécialisation entre les unités économiques polonaises et hongroises, adoptés au cours de la VII^e session de la Commission permanente polono-hongroise de coopération économique, en février 1967, stipulent expressément au point II — *in fine*: « Les accords de spécialisation et de coopération dans la production, sont des accords à long terme de droit civil ».

D'autre part, il ne faut pas oublier que les accords de spécialisation sont conclus en vertu de décisions des Comités bilatéraux de coopération économique qui sont des organes intergouvernementaux. Ainsi, les décisions de ces organes ont un caractère d'actes de droit international.

Ces décisions dans le domaine du problème qui nous intéresse, signifient l'engagement réciproque des parties qu'elles ordonneront à leurs organismes économiques respectifs la conclusion d'accords de spécialisation. Sous cet aspect, ces décisions ont un caractère obligatoire.

Ainsi, indépendamment des engagements des parties découlant des accords de spécialisation, sont également contractés des engagements des

¹¹ Cf. S. GIERCZAK, *Uwagi o porozumieniach specjalizacyjnych* [Remarques sur les accords de spécialisation] (article de discussion), « Prawo w Handlu Zagranicznym », 1967, n° 17, p. 16.

¹² *Ibid.*, p. 15.

¹³ Cf. M. M. BOGUSLAVSKIJ, *op. cit.*, p. 174.

États en tant que tels, tout au moins dans la partie dans laquelle ils s'engagent à amener à la conclusion d'accords de spécialisation correspondants par leurs organismes économiques.

16. Il y a pourtant un autre aspect du problème. Il faut en effet se rappeler qu'au cas où une unité productrice n'exécuterait pas ses engagements, de sérieuses difficultés économiques pourraient surgir dans le pays du partenaire, difficultés provoqués non seulement par le fait que ce pays n'obtiendrait pas certains produits sur lesquels il comptait et qu'il avait prévus dans son plan économique, mais de plus, et ceci est essentiel, que ce pays a pu se priver sciemment de sa propre *fabrication* de certains produits qu'il devait uniquement recevoir de son partenaire. Il est en effet compréhensible que ce genre de décisions, limitant la production ou l'abandonnant complètement, doit par son importance même entraîner de profondes conséquences économiques.

Et s'il en est ainsi, est-ce qu'il ne serait pas opportun d'examiner les possibilités (tout au moins dans certains cas pouvant entraîner de sérieuses conséquences) que l'*État* prenne envers un autre *État* la responsabilité *directe* de l'exécution d'un engagement de spécialisation dans le domaine de la production elle-même? ¹⁴. Nous aurions alors affaire au plan *interétatique* de règlement quant au fond des problèmes de spécialisation, étant entendu que ce règlement n'excluerait évidemment pas l'existence d'un plan parallèle des rapports mutuels entre unités productrices. Bien plus, ces derniers devraient évidemment constituer la règle.

Un tel engagement de l'État portant sur le fond de la spécialisation devrait évidemment trouver son expression dans un accord de caractère intergouvernemental — un *accord de droit international*.

Il faut également rappeler que certains des accords de spécialisation examinés plus haut prévoient, comme nous l'avons vu, que le Comité bilatéral de coopération économique constitue l'organe compétent pour régler les différends entre les entreprises productrices, issus de la non-exécution des engagements dans le domaine de la spécialisation en tant que telle. De cette façon, l'accord de spécialisation reconnaît indirectement que le problème de la spécialisation de la production quoiqu'il soit l'objet d'un règlement du domaine du droit civil, est en quelque sorte finalement un problème de caractère interétatique (c'est un organe intergouvernemental qui règle l'affaire en définitive).

Nous n'avons examiné que certains problèmes juridiques découlant des accords de spécialisation conclus par les unités économiques des pays

¹⁴ *Ibid.*, p. 168.

membres du CAEM. Ces problèmes posent à la science juridique socialiste se dédiant aux relations économiques internationales, le devoir important de contribuer au perfectionnement du mécanisme juridique de la spécialisation et de la coopération dans la production dans le cadre du CAEM.

Legal Problems of the Peaceful Uses of the Sea-Bed and the Ocean Floor: Denuclearization

by WOJCIECH GÓRALCZYK

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The Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil thereof

Recently there have arisen considerable possibilities of utilizing the sea-bed and the ocean floor for military purposes with the simultaneous threat of spreading the arms race over this area.¹

The possibility already exists of emplacing classic and atomic weapons, as well as their means of transport, onto the shallower under-sea areas. It is possible to build appliances on the sea-bed to detect foreign submarines as well as supply bases for one's own submarines.

All the possibilities of using the sea-bed and its subsoil for military purposes had to be avoided at all costs in order to prevent the spread of the arms race in this area. This was an extremely urgent matter since it

¹ Various possible uses of the sea-bed, ocean floor and the subsoil thereof for military purposes were discussed in the working document prepared by the UN Secretariat: *The Military Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of Present National Jurisdiction*, (A/AC. 135/28).

was necessary to take steps before the use of the sea-bed for military purposes became an accomplished fact. For, as experience shows, disarmament is a much more difficult matter than the ban on new armaments and hence, the limitation of the arms race.² Unfortunately, it seems that this has not been entirely successful. The United States' rejection of the proposal to prohibit all possible kinds of military activity on the sea-bed and ocean floor emerged from the fact that the United States had already built certain military installations (in particular appliances to detect submarines).

The spread of the arms race on the sea-bed and ocean floor, and above all of nuclear weapons, would constitute a new threat to international peace. The extension of surfaces for military confrontations would give fresh grounds and possibilities for armed conflicts to arise.

As far as nuclear weapons are concerned, their emplacement on the sea-bed and ocean floor, despite safety precautions, would constitute, as a possible consequence of unforeseen contingences, an additional danger of radio-active contamination of sea waters.

The arms race on the sea-bed and ocean floor would entail considerable costs and further displacements of the means and resources of certain States for military, but non-productive and basically useless, purposes instead of for their peaceful development and the improvement of the living conditions of the highest possible number of their citizens.³

For it is necessary to realize that as a result, this race would by no means alter the existing balance of power. And even if one side gained a sort of temporary advantage over another side, then this advantage would, as experience shows, be of extremely short endurance. Whereas the another side would be obliged to make all possible efforts to liquidate it as quickly as it could, and thus this would be yet another example of the "arms spiral," as it is termed, when the armament of one State causes the immediate armament of another in no way whatsoever altering the existing balance of power.

The militarization of the sea-bed and ocean floor would also have an unfavourable influence on the peaceful progress in research and the exploration of these areas, as well as on the later exploitation of their mineral resources. There is no doubt that from the aspect of the priority of military purposes (to which the necessity of protecting military installa-

² This was pointed out by the Polish delegate when addressing the Ad Hoc Committee (A/AC. 135/SR. 16).

³ W. W. KRIEGER Jr. indicates this from the United States' point of view: *The United Nations Treaty Banning Nuclear Weapons and Other Weapons of Mass Destruction on the Ocean Floor* ("Journal of Maritime Law and Commerce," Vol. 3, No. 1, p. 125).

tions and military secrets may be included), the use of the sea-bed and ocean floor for peaceful purposes may well be impeded.⁴

The Question of Reservation of the Sea-Bed and Ocean Floor Exclusively for Peaceful Purposes

Bulgaria was the first country to put forward a suggestion at an international forum concerning the demilitarization of the sea-bed. In 1958 at the Geneva Conference on the Law of the Sea, Bulgaria advanced a proposal by which the Convention on the Continental Shelf would include a provision that a coastal State shall not use the continental shelf for the purpose of building military bases or installations (A/CONF. 13/C. 4/L.41 and Rev. 1).⁵ Bulgaria's proposal was subsequently replaced by India's analogous proposal (A/CONF. 13/C.4/L. 57) in which this same conception was more clearly formulated.⁶ According to India's proposal: "The continental shelf adjacent to any coastal State shall not be used by the coastal State or any other State for the purpose of building military bases or installations." It is necessary to bear in mind that in 1958 the use of the sea-bed and ocean floor beyond the outer limits of the continental shelf for military purposes was considered technically impossible and hence, to all intents, the proposals of Bulgaria and India signified the demilitarization of the whole of the accessible sea-bed.

Because of objections by western States and certain of developing States (whose politics were influenced by them, especially of those influenced by the United States),⁷ India's proposal was rejected by 21 votes to 18, with 6 abstentions.⁸ Various formal reservations were raised against India's proposal as, for example, that the problem of the use of the shelf for military purposes was not the subject of the Conference although, in actual fact, the western States simply did not wish at the time to take an obligation of demilitarizing the continental shelf.

⁴ In R. BIERZANEK's reply (*Towards a Better Use of Oceans. A Study and Prognosis*, SIPRI, Stockholm 1968, pp. 217 and 218).

⁵ See: *The United Nations Conference on the Law of the Sea*, „Official Records,” Vol. 6, p. 137. The first version of Bulgaria's proposal was modified as a result of India's suggestion (*ibid.* p. 75).

⁶ *Ibid.* p. 141.

⁷ The discussion on Bulgaria's and India's proposals took place in the Fourth Committee of the Geneva Conference at the 25th, 26th and 30th meetings (*ibid.* pp. 74 - 77, 83 - 85, 8891).

⁸ A roll-call vote was taken (*ibid.* p. 91). At the next meeting the Polish delegate who held his vote, subsequently rectified it stating that "he fully intended to vote for the amendment" (*ibid.*).

The question of reservation of the sea-bed and ocean floor exclusively for peaceful purposes was once again put before an international forum in 1967 when the General Assembly, at the suggestion of Malta,⁹ took up the question "of the reservation exclusively for peaceful purposes of the sea-bed and ocean floor underlying the seas beyond the limits of present national jurisdiction, and the use of their resources in the interests of mankind."

This matter was initially dealt with by an Ad Hoc Committee appointed at the 22nd session of the General Assembly "to study the peaceful uses of the sea-bed and ocean floor beyond the limits of national jurisdiction,"¹⁰ and afterwards by a permanent Sea-Bed Committee (a Committee on the Peaceful Uses of the Sea-Bed and Ocean Floor beyond the Limits of National Jurisdiction), appointed at the 23rd session of the Assembly.¹¹

During discussion in the General Assembly and in the Ad Hoc Committee, a number of States emphasized that the use of the sea-bed for military purposes would greatly endanger peace. It was agreed that the sea-bed and ocean floor beyond the limits of national jurisdiction should be used "exclusively for peaceful purposes," but there was no agreement as to the designation of this term.

In the opinion of the United States it only signified that the use of the sea-bed would conform to the UN Charter and to other international obligations, but that the "peaceful purposes," not excluding general "military activities" would require the negotiation of a convention on the details of armament control. Military activities not prohibited by that convention could be continued in compliance with the principle of the freedom of the seas but exclusively for peaceful purposes.¹²

The Soviet Union however, aimed at the complete demilitarization of the sea-bed and the control of the arms race on this area. On this basis, the USSR submitted to the Ad Hoc Committee the draft resolution on the prohibition of the use of the sea-bed and ocean floor beyond the limits of territorial waters for military purposes (A/AC. 135/20).¹³

⁹ See the verbal note dated 12 August, 1967 from the Permanent Mission of Malta to the United Nations, addressed to the Secretary General (A/6695).

¹⁰ See A/RES/2340/XXII.

¹¹ See A/RES/2467/XXIII. The Committee was instructed, *inter alia*, "to study further [...] the reservation exclusively for peaceful purposes of the sea-bed and the ocean floor [...] taking into account the studies and international negotiations being undertaken in the field of disarmament."

¹² A/AC. 135/SR. 17.

¹³ This draft was reprinted in the Ad Hoc Committee report (A/7230, p. 54).

This draft called upon all States to use the sea-bed and ocean floor exclusively for peaceful purposes and also suggested that the Eighteen Nation Disarmament Committee should immediately put on its agenda the ban on the use of this area for military purposes.

In reply to the Soviet proposal, the United States presented a draft resolution on the prevention of the emplacement of weapons of mass destruction on the sea-bed and ocean floor (A/AC. 435/24).¹⁴

The American draft resolution, limited to the prohibition on the emplacement of weapons of mass destruction, did not constitute a real barrier against the militarization of the sea-bed.

Both draft resolutions provided for negotiations leading to concrete international obligation in this field to be carried out in the Eighteen Nation Disarmament Committee, it being the most competent organ.¹⁵ Simultaneously, in this way, certain difficulties were avoided, emerging from the fact that the future conventions concerning this question should also include the shelf areas, while the Sea-Bed Committee, in accordance with its mandate, should only concern itself with the areas situated beyond the limits of national jurisdiction.

The Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed

On 18 March, 1969 the USSR submitted to the Disarmament Committee a draft treaty on the prohibition on the use of the sea-bed, ocean floor and the subsoil thereof for military purposes.¹⁶

The Soviet proposal was founded on the same basis as the draft resolution (A/AC. 135/20). It provided for the prohibition of the use of the sea-bed, ocean floor and the subsoil thereof beyond a 12-mile coastal zone for military purposes. The draft specified the types of military uses subject to the prohibition: the emplacement of structures with nuclear weapons or other types of weapons of mass destruction, the construction of military bases, structures, installations, fortifications and other

¹⁴ See also A/7230, p. 54.

¹⁵ In 1969 it was decided to increase the composition of the Committee to 26 States (including France which neither participated nor participates in the Committee's work). The enlargement in the Committee's membership was confirmed by the General Assembly provision 2602 B/XXIV.

¹⁶ EN DC/240.

objects of a military nature. Its acceptance would have denoted the complete demilitarization of this area.¹⁷

As far as concerns the territorial scope of the proposed demilitarization, the Soviet draft treaty provided for its application to all the areas of the sea-bed, ocean floor and subsoil thereof lying beyond a 12-mile coastal zone. This zone was not defined as to its general legal status, for the concern was to detach the characteristic controversies concerning the breadth of the territorial sea, like the rights of the coastal State over the continental shelf as well as an assurance of the uniform treatment for all coastal States, irrespective of whether they possess the 12-mile territorial sea or a narrower one, or even if they claim a territorial sea exceeding the breadth of 12 miles.

The draft treaty also stipulated the strict control over the observance of the treaty's provisions. Since it was based on the complete prohibition of military uses, it also stipulated that, on a basis of reciprocity, every State had right of access to all the installations and structures on the sea-bed and ocean floor in order to verify whether or not they served military purposes. Such a comprehensively conceived control would be possible in the context of the complete ban on military uses. For this would mean that no possible type of installation or structure in this area could contain any military secret.

On 22 May, 1969 the United States submitted to the Disarmament Committee its counter-proposal: The Draft Sea-Bed Arms Control Treaty. It stipulated the ban on the emplacement on the sea-bed, ocean floor and the subsoil thereof of nuclear and other weapons of mass destruction,¹⁸ and thus did not signify the complete demilitarization of the sea-bed and ocean floor. This ban was to be in force beyond the 3-mile coastal zone.

During the course of discussion that went on not only in the Disarmament Committee but also in the General Assembly Committee on the Peaceful Uses of the Sea-Bed and Ocean Floor, a number of States supported the Soviet conception of the complete demilitarization of the sea-bed. This conception was supported by the socialist countries (in-

¹⁷ See by G. F. KALINKIN, J. A. OSTROVSKIJ, *Morskoe dno: komu ono prinadležit? Meždunarodno-pravovoi režim dna morei i okeanov*, Moskva 1970, p. 142, E. J. Even-
sen, although not so strongly, similarly interpreted Art. 11 of the USSR draft: *The Military Uses of the Deep Ocean Floor and its Subsoil—Present and Future*, in: *Symposium on the International Regime of the Sea-Bed, Proceedings*, p. 554. If the Soviet draft had been accepted as the basis of negotiation, then undoubtedly all doubts concerning the scope of the prohibition would have been resolved as, for example, the question of whether the temporary presence of submarines on the sea-bed infringes the prohibition on its use for military purposes.

¹⁸ EN DC/249.

cluding Poland) as well as by the majority of the developing States and certain of the developed States (for example Sweden).

However, in the spheres of limiting the arms race and disarmament, decision cannot be made by majority. For any practical progress to be made they would have to be unanimously adopted by all the interested States so as to allow them to be effective in the given sphere. For the non-acceptance by certain States of the disarmament agreements would, as to the necessity of preserving uniform rights, preclude their acceptance and observance by those other States which, in principle, would observe their provisions. Universalism, also important in the other fields of international law, in this field has a particular significance. Thus, agreement is always plausible, but only on the basis of proposals with the most limited scope. Besides, the acceptance of such proposals, constituting a partial step to limiting armament, or towards disarmament, is only possible if they do not affect the existing balance of power to the disadvantage of certain States and do not cancel out, or hinder, the general and basic realization of such an aim as is general and complete disarmament.

In this particular situation, the Soviet Union and the other socialist countries together with a number of developing States had to agree that the important question, namely the non-emplacement of nuclear or other weapons of mass destruction on the sea-bed, was isolated from the problem of the demilitarization of the sea-bed. For it was better to solve only this extremely important question than, while waiting for a more comprehensive agreement on demilitarization, to permit nuclear weapons to be emplaced on the sea-bed and ocean floor.

On 7 October, 1969, the USSR and the United States submitted to the Disarmament Committee the revised draft treaty on the Prohibition of the Emplacement of Nuclear and Other Weapons of Mass Destruction on the Sea-bed, Ocean Floor and the Subsoil Thereof.¹⁹ This draft became the subject of discussion in the Disarmament Committee. The non-engaged States raised a series of critical observations referring to the draft treaty and also presented a series of amendments. These concerned the protection of the rights of the coastal States,²⁰ and the inclusion in the treaty's text a provision committing States to negotiate on further measures that should be taken towards the complete prohibition of the use of the sea-bed and ocean floor for military purposes²¹ and on the possibility to apply to the Security Council in cases when States had

¹⁹ CCD/269.

²⁰ Brazil's proposal (EN DC/264) and Canada's proposal (CCD/270).

²¹ See Sweden's proposal (CCD/271). It received the support of the majority of the non-engaged States.

justified suspicions that the treaty's provisions were not respected by another party.²²

Reckoning with the series of corrections and suggestions proposed by the non-engaged States, the USSR and the United States presented an amended draft treaty on 30 October, 1969.²³ It became the subject of discussion at the 24th session of the General Assembly, during the course of which a series of further suggestions, alterations and supplements to the draft were forwarded. Among others, Brazil²⁴ and Canada²⁵ proposed an amendment to Article III of the draft concerning the verification of the observance of its provisions, while Argentina advanced the proposal that the draft provisions referring to the Geneva Convention on the Territorial Sea and Contiguous Zone should be reworded.²⁶

Taking into consideration most of the suggestions advanced during the General Assembly session, the USSR and the United States introduced an amended draft treaty on 23 April, 1970.²⁷ Following further discussion and consultation in the Disarmament Committee as well as various suggestions forwarded there, the two powers yet again corrected the draft text and submitted the revised and supplemented draft on 1 September, 1970.²⁸ This text gained the support of the members of the Disarmament Committee²⁹ and was presented at the 25th session of the General Assembly.

The debate over the draft and provisions accompanying it (A/C. 1/L. 525) took place in the First Committee of the Assembly.³⁰ Peru proposed a number of essential amendments (A/C. 1/L. 528) However, these amendments were rejected during the voting.³¹ Subsequently, by the roll-call vote, the draft treaty was accepted by 91 votes, to 2 (El Salvador, Peru) with 6 abstentions.³²

²² Canada's proposal—CCD/270. Simultaneously Canada proposed that the United Nations Secretary General should be given analogous powers. Among others, the United Kingdom, the Netherlands, Mongolia and Poland supported the conception of defined powers granted to the Security Council.

²³ CCD/269/Rev. 1.

²⁴ A/C. 1/992 and Add. 1.

²⁵ A/C. 1/993 and Rev. 1.

²⁶ A/C. 1/997.

²⁷ CCD/269/Rev.2. The difference between the drafts are discussed in the report of the Conference of the Committee of Disarmament (CCD/317, p. 12 and 13).

²⁸ CCD/269/Rev. 3; also published in report CCD/317, Annex. A and in document A/8059, Annex A.

²⁹ See CCD/317, p. 14.

³⁰ See the Report of the First Committee A/8198.

³¹ *Ibid.*, p. 7.

³² *Ibid.*, p. 8.

At the plenary meeting of the General Assembly the text of the treaty was accepted and recommended to the States by 104 votes to 2 (El Salvador, Peru) with two abstentions (Ecuador, France).³³ And thus it was accepted practically unanimously. France's abstention was the result of this country's hitherto negative position in reference to negotiations in the matter of disarmament and the limitation of armament. France, as is known, did not participate in the work of the Eighteen Nation Disarmament Committee and does not participate in the work of the enlarged Committee. In addition, France has not signed or taken part in the international conventions limiting armament negotiated over the last period.

On the other hand, the lack of support for the treaty on the part of the Latin American countries mentioned above should be understood in the light of their claims to control the 200-mile coastal belt and the fear that certain formulations of the treaty might to some degree outweigh these claims.

The treaty was signed on 11 February, 1971, simultaneously in Moscow, Washington and London and came into force on 18 May, 1972.³⁴

The Scope of the Prohibited Activities

According to Article I, the parties to the Treaty committed themselves not to emplant or emplace on the sea-bed, the ocean floor and on the subsoil thereof beyond the coastal zone defined in Article II, any nuclear weapons or any other types of weapons of mass destruction as well as structures, launching installations or any other facilities specifically designed for storing, testing or using such weapons and also not to assist, encourage or induce any State to carry out these prohibited activities and not to participate in any other way in such actions.

The prohibition includes various types of nuclear weapons, i.e.:—not only the so-called strategic weapons, but also the tactical ones. On the other hand, it does not concern nuclear installations and facilities of a non-military character.³⁵ Besides nuclear weapons, it also covers every other type of weapons of mass destruction, and thus not only those that already exist but also those that may be invented in the future. Above all this applies to biological and chemical weapons, although it may perhaps seem that the prohibition of the emplacement of these weapons

³³ A/PV. 1919, p. 21.

³⁴ Poland ratified the Treaty.

³⁵ Such a standpoint was taken by the United States during the course of negotiations (see W. W. KRIEGER, *op. cit.*, p. 120).

does not have such a practical significance as the prohibition of the emplacement of nuclear ones. For in all probability the sea has much less significance for the possibility of waging a chemical or biological war than of a nuclear one.

The prohibitions also covers the emplantation or emplacement on the sea-bed of all types of facilities specifically designed for storing, testing or using weapons of mass destruction. The word "specifically" may give rise to a certain difficulty. For this signifies that facilities would be permissible which are not specifically designed to store, test or use weapons of mass destruction, although equally adequate to these purposes.³⁶

It would appear from the declarations made by the USSR and the United States during the course of negotiations that the prohibitions included in Article I concern not only the "emplantation" of permanent objects specially designed for purposes defined in the treaty, but also the emplacement of moveable objects that can be shifted exclusively when in close contact with the sea-bed.³⁷

On the other hand, the prohibition does not extend to the system of weapons emplaced in sea waters and to the submarines equipped with nuclear weapon launching installations or with similar weapons, even if they are anchored or lying on the sea-bed; since the United States, during the course of negotiation in the Disarmament Committee, reserved for itself the right to such an interpretation of this provision.³⁸

The obligation not to assist other States in any of the prohibited activities and not to participate in them in any form is aimed to prevent attempts by a contracting party to the Treaty to by-pass its provisions by having recourse through a third State, i.e.: a State not bound by the provisions.

Generally speaking, the Treaty does not stipulate the disarmament measures (since, as yet, nuclear weapons have not been installed or emplaced on the open sea-bed), but it takes precautions against, the spread

³⁶ See Elisabeth MANN BORGESE, *Reflections on Pacem in Maribus* (In: *Proceedings, Pacem in Maribus Convocation, Malta, June 28—July 3, 1970*, p. 96). Krieger called this to attention when referring to the official attitude of the United States: "[...] the Treaty would only prohibit facilities 'specifically designed' for storing, launching or using such weapons, and would not prohibit facilities designed for scientific research or commercial exploitation, even though such facilities might be able to accommodate such weapons." (*loc. cit.*).

³⁷ A. SKOWROŃSKI remarks on this in his paper: *Problemy demilitaryzacji dna morskiego* [*The Problems of Demilitarizing the Sea-bed*] (mimeograph). This paper was presented at the conference in Sopot organized by the Institute of Legal Sciences of the Polish Academy of Sciences.

³⁸ See CCD/PV. 440, p. 11.

of the nuclear arms race in these areas. The provisions of the Treaty constitute only a partial demilitarization (and above all the denuclearization) of this area.³⁹ The limited scope of the Treaty presented above is a result of the United States' objection to the proposal of complete demilitarization of the sea-bed and ocean floor, as proposed by the USSR, the socialist countries and a number of other States, particularly the developing ones.

The Territorial Scope of Prohibitions

In this instance the point of concern was that the prohibition should be extended over the largest possible area including the continental shelf so that the limit of the partial demilitarization area would be uniform for all States irrespective of the breadth of their territorial sea, so that an accepted formula would define this limit in the most precise manner possible and so that this formula would be a neutral one from the aspect of the controversions concerning the breadth of the territorial sea or, in other words, so that all States, regardless of their positions as to the maximum breadth of the territorial water, could become parties to the Treaty. It was correctly assumed that the present Treaty should not be used as an opportunity to settle those very important issues of a really quite separate character.⁴⁰

It would seem that the provisions of the Treaty meet the objectives mentioned above.

Article II of the Treaty stipulates:

"For the purposes of this Treaty, the outer limit of the sea-bed zone referred to in Article I [i.e.: the zone in which the prohibition of the emplacement of nuclear and other weapons of mass destruction is binding—W. G.] shall be co-terminous with the twelve-mile outer limit of the zone referred to in part II of the Convention on the Territorial Sea and the Contiguous Zone, signed at Geneva on 29 April, 1958, and shall be measured in accordance with the provisions of part I, section II, of that Convention and in accordance with international law."

The zone, referred to in part II of the Convention, is the contiguous zone defined in Article 24 of the Geneva Convention referred to above. The drafting of Article II evoked lively discussion and its final text was the result of compliance by the co-authors, that is by the USSR and the United States, of the draft with the amendments and suggestions for-

³⁹ See Mrs Alva MYRDAL's statement: *No Arms on the Ocean Floor* (In: *Proceedings, Pacem in Maribus Convocation*), p. 24.

⁴⁰ See A/7622/Add. 1, para. 3.

warded by certain other States.⁴¹ One of the concerns here was that the reference to the provisions of the Geneva Convention of 1958 would not imply the recognition of the Convention as binding by States which have continuously rejected certain of its provisions, as for example some of the Latin American countries.

Article IV of the Treaty, constituting an additional guarantee in this field, states:

"Nothing in this Treaty shall be interpreted as supporting or prejudicing the position of any State Party with respect to existing international conventions, including the 1958 Convention on the Territorial Sea and the Contiguous Zone [...]"

Thus, it may be asked: Why refer to the provisions of the Geneva Convention at all? The answer is that this is linked with the necessity to determine as accurately as possible the provisions concerning the delimitation of the area of prohibition. The fixing of the 12-mile breadth of the sea-bed coastal zone in which the prohibition formulated in Article I is in force, is still insufficient for the precise delimitation of this coastal zone. And in addition it is necessary to determine more precisely the so-called baseline, from which that breadth should be measured, as well as to decide upon the technical methods for delimiting the outer limit of the 12-mile sea-bed coastal zone.⁴²

The Geneva Convention, in section II, part I that includes Articles 3 to 13, regulates these questions. Hence, instead of repeating these rules in the Treaty, reference is made to the Geneva Convention.

An additional reference to international law was dictated by the fact that the Geneva Convention does not regulate some of the questions. Here, in particular, must be mentioned the question of the so-called historic bays and waters, i.e.: those areas that on the basis of a historical title (prolonged exercise of authority in these areas recognized by other States) constitute the inland waters of a coastal State, as well as that of the oceanic archipelagoes.

The complete prohibition on the emplacement of nuclear and other weapons of mass destruction is in force beyond the 12-mile coastal zone of the sea-bed. Whereas the legal situation of the coastal zone is defined by paragraph 2, Article I of the Treaty:

"The undertakings of paragraph 1 of this Article shall also apply to the sea-bed zone referred to in the same paragraph, except that within such a sea-bed zone,

⁴¹ The final text of Art. 11 was based on Argentina's working document A/C.1/997, of 11 December, 1969.

⁴² The question of the delimitation of coastal areas, and particularly the matter of the base-line is comprehensively discussed in W. GÓRALCZYK's book: *Szerokość morza terytorialnego i jego delimitacja* [*The Breadth of the Territorial Sea and Its Delimitation*], Warszawa 1972.

they shall not apply either to the coastal State or to the sea-bed beneath its territorial waters.”

At first glance this text may seem a little ambiguous and it even was the subject of official interpretations and explanations by the co-authors of the Treaty.⁴⁸

Firstly, it stipulates that within the 12-mile limit of the coastal zone, irrespective of its legal situation and thus, independently of whether it constitutes territorial or high sea (or whether the coastal State has determined the breadth of its territorial sea as less than 12 miles as, for example, Poland)—the coastal State is not bound by the prohibition determined in Article I, paragraph 1, and thus it may emplace in this zone nuclear weapons and the means to transport them. Consequently, from the subjective point of view, this prohibition does not apply to the coastal State within the 12-mile zone.

But from the objective point of view, it does not cover the sea-bed lying beneath that State's territorial waters within the limits of this zone. That is to say, the coastal State exercising sovereign rights on the territorial waters, may itself emplace nuclear weapons and the means to transport them, and may permit similar activities by other States.

Thus, if the breadth of the territorial sea amounts to 12 miles and is the same as the breadth of the sea-bed coastal zone, then from the point of view of the Treaty all sea areas can be divided into two areas: (1)—the sea-bed and ocean floor situated beyond the 12-mile coastal zone in which the prohibitions stipulated in Article I of the Treaty are in force in full, and (2)—the coastal area (within the 12-mile limit) on which the prohibition is not binding for the coastal State, or for the States acting with the permission of that State.

On the other hand, if the breadth of the territorial sea amounts to less than 12 miles, then in accordance with the Treaty three areas may be distinguished: (1) the area of complete prohibition situated beyond the 12-mile coastal zone limit; (2) the sea belt lying between the 12-mile coastal zone limit and the outer limit of the territorial sea; the Treaty's prohibition is not binding within this limit for the coastal State, but it is binding for all other States. Within this belt the coastal State can authorize no other State to undertake activities prohibited in Article I of the Treaty, for this area constitutes high seas and the coastal State does not have the right to give this type of authorization; (3) territorial waters on which the prohibitions do not bind coastal States and the States acting on the basis of their authorization.

⁴⁸ See A/C. 1/PV. 1762, p. 34 - 36 and 47, as well as A/8198, p. 5 ff.

It is also necessary to add that, in accordance with Article IX, the Treaty's stipulations in no way affect more comprehensive obligations assumed by States in other documents and international conventions providing for zones free from nuclear weapons.

An example of this is the treaty on the prohibition of nuclear weapons in Latin America (The Treaty of Tlatelolco, as it is called, of 14 February, 1967) which stipulates the complete demilitarization of the territories of its parties, including their territorial waters.

The Control and Guarantee of the Observance of the Provisions of the Treaty

As has been indicated, the first Soviet draft stipulated a ban on the use of the sea-bed, ocean floor and the subsoil thereof for military purposes. It also provided for the verification of the observance of this prohibition on the basis of a free access to all installations and structures on the demilitarized submarine areas.

Since the text of the Treaty that was finally accepted did not prohibit all military activities, the provisions dealing with verification had to be formulated in a different and much more limited way.⁴⁴ These questions were regulated in Article III of the Treaty.⁴⁵

It stipulates that each State Party to the Treaty shall have the right to verify through observation⁴⁶ the activities of other States Parties to

⁴⁴ Interesting classification of the ways in which verification has been provided for in various arms control and disarmament treaties is contained in the Working Paper—CCD/287/—submitted by Sweden to the Disarmament Committee. It includes the collection of information, inquiry, on-site inspection by Parties (on the basis of free access, or on consultation, cooperation or invitation), international supervision and inspection as well as complaint procedure. The types of control are discussed in detail by J. SYMONIDES, *Kontrola międzynarodowa [International Control]*, Toruń 1964, p. 69 ff.

⁴⁵ To a large extent, the final formulation of Art. III was based on Canada's working document (A/C. 1/992) which took into consideration a number of earlier suggestions and amendments of the non-engaged States. During the concluding phase of negotiation on the Treaty, additional amendments were submitted by Burma, Ethiopia, Mexico, Morocco, Nigeria, Pakistan, Sweden, the United Arab Republik and Yugoslavia (Doc. CCD/297 of 23 July, 1970). Particular questions have arisen as to verification in coastal areas as a result of the existing controversy concerning the breadth of the territorial sea and the character of the rights over the continental shelf. W. W. KRIEGER writes about this, *op. cit.*, p. 122 ff.

⁴⁶ A. SKOWROŃSKI draws attention to the blurred conception of this observation saying: "The Treaty neither closely defines the scope of observation nor answers the questions of whether observation can be made from the interior or exterior

the Treaty on the Sea-Bed and Ocean Floor and in the subsoil thereof beyond the 12-mile coastal zone, provided that such observation does not interfere with such activities.

If after such observation reasonable doubts arise concerning the fulfilment of the obligations assumed under the Treaty, the State having such doubts and the State responsible for the activities giving rise to the doubts shall consult with a view to remove them.

If the consultation does not remove these doubts, the State having them shall notify the other State Parties, and the Parties concerned shall cooperate on such further procedures for the verification, as may be agreed, including appropriate inspection of objects, structures, installations, or other facilities that reasonably may be expected to be prohibited on the basis of Article I of the Treaty.

If consultation and cooperation have not removed the doubts, then the State Parties to the Treaty may, in accordance with the provisions of the Charter of the United Nations refer the matter to the Security Council which may take action in accordance with the Charter.

From this it is apparent that the Treaty stipulates the entire stages of verification and control measures. However, it is necessary to notice that it does not provide for the free access to all objects arousing suspicion, or for on-the-spot verification without the consent of the interested State. Inspection can be carried out only after agreement is expressed by the State conducting the activities giving rise to doubts.

And thus a situation may arise in which on-the-spot verification is impossible and when other means for verifying the observance of the Treaty's obligations do not exonerate all the doubts. And then the State Party to the Treaty will be able to refer the matter to the Security Council. But if the Security Council does not take measures which, in the opinion of that State, would settle the doubts concerning the observance of the Treaty's provisions and simultaneously, if in the opinion of that State the extraordinary events related to the subject matter of this Treaty have jeopardized its supreme interests, then in accordance with procedure provided for in Article VIII—that State would be able to withdraw from the Treaty.

of the structure, or whether this is direct (on-the-spot), intermediate (at a distance, from the sea or by an aircraft) or observation with the participation of an observation party or equipment. Within the framework of its existing regulations relating to the legal status of the open and territorial seas and the continental shelf, the Treaty recognizes that the State has a free choice of appropriate observations methods." (*op. cit.*, note 67).

According to A. Skowroński, four elements are merged in the safeguard system: peaceful settlement of international disputes (the possibility of applying institutions like negotiation and inquiry); verification in the exact meaning of the word (observation and inspection); international guarantee (the competence of the Security Council); and sanction (within the limits of the Security Council's competence).⁴⁷

However, verification of the observance of the provisions of the Treaty not only give rise to legal problems but also to technical ones. Not all States, even having the right to conduct various control activities, will have at their disposal the appropriate technical means to realize that right. That is why a number of non-engaged States have proposed to introduce an international verification system of the observance of the Treaty.

The draft treaty (the draft of 23 April, 1970—CCD/269/Rev. 2) provided for verification in accordance with the Treaty's provisions which might be undertaken by any State Party using its own means, or with the full or partial assistance of any other State Party.

The final version of the Treaty (in accordance with proposals contained in document—CCD/297), provides for the possibility of international verification of the observance of the provisions of the Treaty through "the appropriate international procedures within the framework of the United Nations and in accordance with its Charter."

Article III of the Treaty stipulates yet another situation when the State responsible for the activities giving rise to doubts concerning the observance of the Treaty is not identifiable. Then the State having such doubts gives notice about them and directs the appropriate questions to the State Parties to the Treaty.

If, as a result of these investigations, it is determined that the given State is responsible for these activities, then the whole procedure of verification previously described is binding. But if the State responsible for arousing suspicions about its activities is not identified, then further verification procedure, including inspection, may be undertaken by the inquiring State. In this case the inspection does not require the consent of any State, since it cannot be required—for it is not known which State conducts or conducted activities arousing doubts and which State emplaced or constructed objects or facilities on the sea-bed or in its subsoil giving rise to suspicion that they are prohibited by the provisions of the Treaty.

⁴⁷ A. SKOWROŃSKI, *op. cit.*, p. 17.

The Prospect of Complete Demilitarization of the Sea-Bed and Ocean Floor

The Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-bed and the Ocean Floor and in the Subsoil Thereof does not solve the problem of the demilitarization of this area and it also does not cover activities on the sea waters.

During the course of negotiation on the Treaty and when it became evident, because of the objections from the United States and certain of its allies, that an agreement with a more comprehensive scope could not for the time being be agreed upon, the problem then arose of indication of prospects for further negotiation which would provide for more comprehensive disarmament measures and, in particular, for the complete demilitarization of the sea-bed and ocean floor. On 16 October, 1969, Sweden made the proposal to include an article containing this type of stipulation in the Treaty.⁴⁸

The USSR and the United States did not include such an article in the draft treaty, but in the preamble to the draft from the 23 April, 1970 (CCD/269/Rev. 2) the statement was included that "this Treaty constitutes a step towards the exclusion of the sea-bed, ocean floor and the subsoil thereof from the arms race [...]" and the Parties to the Treaty are "determined to continue negotiations concerning further measures leading to this end."

The significance of the wording of the preamble was increased by Article VI of the Treaty stipulating that five years after the Treaty came into force, a conference should be convened in Geneva with the aim "to review the operation of this Treaty and with a view to assuring that the purposes of the preamble [...] are being realized."

Complying with the idea carried in the draft preamble, the Polish delegation proposed in the Disarmament Committee that the matter of taking precautions to prevent the arms race on the sea-bed should be kept on the agenda of the Committee's debates.⁴⁹ The Polish proposal gained universal support.

A group of non-engaged States, with an aim to consolidate the obligation to conduct negotiation towards the complete demilitarization of the sea-bed, proposed a new Article V.⁵⁰ A text, partially based precisely on this proposal, is found in the final version of the Treaty. It stipulates

⁴⁸ CCD/271.

⁴⁹ CCD/PV. 471.

⁵⁰ According to the working document—CCD/267—cited above.

that the Parties shall "undertake to continue negotiation in good faith concerning further measures in the disarmament field so as to prevent the arms race on the sea-bed, ocean floor and the subsoil thereof."

It is to be noted that because of lack of agreement on the part of the United States, it is not clearly stated that the final aim should be the prohibition of all possible types of military activities in these areas.

Thus the question arises of how should the Treaty's significance be assessed. To a certain extent this was done by the assenting Parties in the Treaty's preamble—namely that it constitutes a step towards the exclusion of the sea-bed, ocean floor and the subsoil thereof from the arms race as well as a step towards a treaty in the matter of universal and complete disarmament—although there still remains the question of how large a step this is.⁵¹ In all events the socialist countries, and among them Poland, would have liked this step to have been a greater one.

In the Treaty one should draw attention not only to military problems but also to its political importance. The Soviet representative addressing the First Committee at the 25th General Assembly Session pointed out to the political significance of the Treaty stating that it would contribute to the elimination of the international tension and strengthen the co-operation between States in the interest of peace and security of the nations.⁵²

⁵¹ For example, compare Elisabeth MANN BORGESE's view, an extremely critical one in relation to the Treaty (*op. cit.*, p. 95 ff). Whereas W. W. Krieger evaluates the Treaty very positively: "[...] the only real danger of an arms race on the sea-bed has been eliminated by the banning of nuclear weapons of mass destruction." (*op. cit.*, p. 125).

⁵² A/C. 1/PV. 1777, pp. 33 - 35.

Sovereign Rights to the Sea-Bed Resources and the Declaration on the Continental Shelf of the Baltic Sea

by ANDRZEJ STRABURZYŃSKI

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1. Legal and Geological Concepts of the Continental Shelf

In these days when our contemporaries are beginning to travel and communicate in outer space, it is a remarkable fact that the submarine areas of the World Ocean, which covers nearly three-quarters of the Earth, are for the most part unexploited or even unexplored. It seems, therefore, to be necessary for mankind to do more with the oceans and seas on its own planet than to confine itself to their traditional or "surface" uses. Consequently, it may also be said that a last frontier of "inner space" to be conquered by man lies under the all-encircling waters of the World Ocean, and that such a conquest would enable us to solve our landbound problem how to meet essential economic needs of exploding populations and industrially developing nations. Furthermore, the extraction of minerals and other resources from the sea-bed is undoubtedly the best way—and perhaps the only one now accessible—to add almost limitless riches to the supplies from which international community can draw for these needs.

However, although much remains to be done, particularly in relation to the discovery, appraisal and exploitation of the potential resources of the deeper submarine areas, the period after the Second World War has been characterized by a rapid technological progress in the drilling and mining operations in relatively shallow parts of the sea-bed. The economic interests in these operations and the needs for new mineral

deposits or oil and other raw materials sources in offshore areas simultaneously lead the coastal States to appropriation of the said parts of sea-bed beyond their territorial seas for their exclusive use. This trend, which began in 1945 when the United States laid claim to "jurisdiction and control" over "the natural resources of the subsoil and sea-bed of the continental shelf beneath the high seas but contiguous to the coast,"¹ has met with the strong support in the international practice.

Before turning to the legal and geological concepts of the continental shelf, we should add that, although some States did claim exclusive rights over specific sedentary fisheries beyond their territorial seas long before 1945, the earlier practice can in no sense be regarded as related to the post-war doctrine of the continental shelf. In short, these claims did not use the term "continental shelf," and were confined only to sedentary species in small areas of the bed of the high seas and—what was much more important—were rested on the effective occupation of the bed of the high sea as *res nullius* or upon some quasi-prescriptive of historical title. By contrast, the claims to the continental shelf are intended to cover the whole area of the sea-bed extending outward from the outer limit of the territorial sea under the high sea waters to the depth not less than 200 metres and all natural resources which, on or under the sea-bed's surface, are to be found within that area. Moreover—and first of all—the claims in question are based on "natural" or "unconditional" title of each coastal State to the above mentioned area "since the continental shelf may be regarded as an extension of the land mass of the coastal nation and thus naturally appurtenant to it."² The title to the continental shelf exists, therefore, merely by reason of the geographical situation of the coastal State or, to put it another way, "there is here an inherent right."³

The claims to the continental shelf since 1945 till 1958 had only been made by way of unilateral legislative acts taken by rather a limited number of States. But, when in 1958 the United Nations Conference on the Law of the Sea adopted at Geneva four conventions, one of them was captioned "On the Continental Shelf." The Geneva Convention grants to each coastal State sovereign rights for the purpose of exploring and exploit-

¹ Presidential Proclamation No. 2667 of 28 September, 1945. Text in "United Nations Legislative Series: Laws and Regulations on the Regime of the High Seas," vol. 1, New York 1951, pp. 38 - 39.

² *Ibid.*

³ International Court of Justice, Reports of Judgments, Advisory Opinions and Orders, North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands); Judgment of 20 February 1969, p. 22.

ing the natural resources of the continental shelf. Moreover, such rights are not to be dependent on effective or national occupation, or any formal claim by way of an express proclamation, or even on its being exercised. Consequently, even if the coastal State does not choose to explore or exploit the natural resources subject to these rights they remain valid *erga omnes* and, therefore, no one else may undertake these activities without its express consent. The natural resources in question include, in addition to mineral and other non-living resources of the sea-bed (e.g. the manganese nodules) and its subsoil (e.g. the oil or natural gas sources), living organisms belonging to sedentary species. But, the term "sedentary species" embraces as well those which—like sponges or corals—have a permanent attachment to sea-bed as those which are rather "artificially sedentary," namely "unable to move except in constant physical contact with the sea-bed or its subsoil."⁴

Nevertheless, the Geneva Convention rejects completely the claims to exclusive rights over the organisms living in the waters above the continental shelf. Furthermore, both the Convention and the practice of overwhelming majority of States expressly confirm that the coastal State's sovereign rights over the continental shelf do not affect the legal status of the superjacent waters as the high seas or that of the airspace above those waters. Indeed, it should be regarded as a logic consequence of the "specialized character" of these rights which exist merely for limited purposes of exploring and exploiting the above mentioned natural resources which, of course, may only be found on the surface of the sea-bed or under it, i.e. at its subsoil.

There is now no doubt that the coastal State's sovereign rights over the continental shelf—and, therefore, the keystone of the fundamental legal regime of such a part of the sea-bed—may be recognized as an accepted concept of customary international law.⁵ It follows at least from lack of protests against the enjoyment of these rights by any State whatsoever, i.e. toleration of accomplished facts which, with the passage of time, leads to the formation of customs and hence to binding customary rules.⁶ Thus, it is today obvious that every coastal State, whether it has or has

⁴ Convention on the Continental Shelf, United Nations Conference on the Law of the Sea, Official Records, Vol. 2, Geneva, 24 February—27 April, 1958, pp. 142 - 143.

⁵ See, for example, J. A. C. SALCEDO, *Funciones del acto unilateral en el régimen jurídico de los espacios marítimos*, Estudios de Derecho Internacional Marítimo, Universidad de Zaragoza 1963, pp. 21 - 23 and R. ZAORSKI, *Eksploracja biologicznych zasobów morza w świetle prawa międzynarodowego* [Exploitation of the Living Resources of the Sea in the Light of International Law], Gdynia 1967, p. 134.

⁶ See K. WOLFKE, *Custom in Present International Law*, Wrocław 1964, p. 167.

not ratified the Geneva Convention or acceded to it, is entitled to exercise the above mentioned rights.

When the expression "continental shelf" is used in the legal sense we should, therefore, think of a submarine zone over which the coastal State has unquestioned sovereign rights to explore and exploit all natural resources which, on or under the sea-bed, may be found within such a zone. But, when we turn to the question of the geographical extend of the said zone, in whatever terms we define its landward and seaward limits, we should at least remember that: "the institution of the continental shelf has arisen out of the recognition of a physical fact; and the link between this fact and the law, without which that institution would never have existed, remains an important element for the application of its legal regime."⁷

In other words, the continental shelf is not merely—like the territorial sea or the contiguous zone—a legal fiction applied in order to delimit the various rights over the portions of the World Ocean which are only „man-made areas" but, quite the contrary, it constitutes really existing shallow part of the sea-bed. Although exceptionaly this part of the sea-bed occurs at greater depths, the most extreme being 550 metres for the Sahul Shelf off the coast of northern Australia, it usually takes place at depth of about 200 metres. Consequently, the geological concept of the continental shelf refers to the submarine extension of the continent into the sea, the outer edge of which is at a depth of approximately 200 metres, beyond which usually the continental slope begins.⁸

Although the "continental shelf" is a term which international law has adopted from geology, its legal meaning does not conform to geological one. It follows from the difference in extent between the "legal continental shelf" and the geological one because the former is defined to be

"the sea-bed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits the exploitation of the natural resources of the said areas."⁹

It is obvious that geologically the submarine area under the territorial sea is a part of the continental shelf. Nevertheless, the clear-cut distinction between the "five-dimensional regime" of the territorial sea—the

⁷ International Court of Justice, *op. cit.*, p. 51.

⁸ Cf. Report of the Ad Hoc Committee to Study the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, General Assembly, "Official Records," Twenty-Third Session, New York 1968, pp. 22-23 and U.S. Department of State: *Sovereignty of the Sea*, "Geographic Bulletin" October 1969, No. 3, pp. 8-9. See also K. ŁOMNIEWSKI, *Oceanografia fizyczna [Physical Oceanography]*, Warszawa 1969, pp. 100-108.

⁹ Art. 1 of the Convention cited *supra* note 4.

airspace above it, the surface of its waters, the water column above its bed, the surface of—and the subsoil—under its bed, and that “two-dimensional” (the fourth and fifth “dimensions” only) of the submarine area qualifying as “legal continental shelf,” i.e. also between complete sovereignty and the limited sovereign rights for particular purposes, is undoubtedly much more important than the application of purely scientific definition of the area in question.

On the other hand, it is equally clear that the regime of the continental shelf should likewise be distinct from that governing the use of the sea-bed area which lies beyond its seaward limit and is now considered to be the “common heritage of mankind.” It should, however, be stressed that the coastal State’s rights over the “legal continental shelf” do not end at the 200-metres or any other one than that imposed by the technical possibility of exploitation of its natural resources through greater depth of superjacent waters. Thus, the 200-metre depth is only a minimum one in relation to fix such a limit. Moreover, although the “legal continental shelf” should be adjacent to the coast or, strictly speaking, to the outer limit of the bed of the territorial sea, this “adjacency” is not determined in any concrete distance measurement. It is, therefore, hard to believe “that by no stretch of imagination can a point on the continental shelf situated, say, a hundred miles, or even much less, from a given coast, be regarded as “adjacent” to it.”¹⁰ Consequently, since it would be difficult, if not impossible, to apply either “adjacency” or “exploitability” tests in a concrete manner, there is practically no seaward limit of the “legal continental shelf.” The latter test, which is as much unprecise as dangerous, might be, however, used to move such a limit into deeper and deeper submarine areas—even those lying beyond the 550-metre isobath which would include all of the World’s geological shelves—no matter how far they will be from the coast. If so, then any deep sea-bed area, from the beginning of the continental slope to the abyssal or headal

¹⁰ International Court of Justice, *op. cit.*, p. 30. Among writers similar opinions are expressed by W. GÓRALCZYK, *Zagadnienia pokojowego wykorzystania dna mórz i oceanów* [The Problems of the Peaceful Uses of the Sea-Bed and the Ocean Floor], “Sprawy Międzynarodowe,” March 1969, p. 58 and L. F. E. GOLDIE, *The Exploitability Test—Interpretation and Potentialities*, “Natural Resources Journal,” July 1968, p. 447. On the other hand see also L. M. ALEXANDER’s remarks on the “interrupted” shelves (*National Jurisdiction and the Use of the Sea*, *ibid.*, p. 390) and Z. J. SLOUKA’s opinion that “it appears neither from the Conference debates nor from the Convention that the term ‘adjacent to’ ought to be interpreted ‘in the vicinity of’ or ‘in the proximity of’ the national coasts.” (*International Custom and the Continental Shelf*, The Hague 1968, p. 108).

depths like the Mariana and Tonga Trenches—should be, although nonsensically but legally, considered as the “potential shelf.”¹¹

It would, of course, be an exaggeration to insist that the legal concept of the continental shelf permits the coastal States to extend their submarine boundaries out into the ocean or sea halfway to the next land mass from which the “national shelves” of the opposite States begin. The work of the United Nations since 1967 on the peaceful uses of the sea-bed and the ocean floor beyond the limits of national jurisdiction confirms that many States do not agree to the open-ended legal concept of the continental shelf. Nevertheless, the future regime governing the use of submarine areas beyond the limits of national jurisdiction, i.e. in fact beyond the limits of “national shelves,” is up to now not much more than “castle in the air” because no one practically knows what these limits are. Thus, a precise limit separating these areas from the “legal continental shelf” should first and foremost be defined and, as may be assumed, the United Nations efforts will result in the world-wide recognition of such a limit and a completely new regime for the submarine areas extending seaward from it.

The foregoing remarks have naturally related to all submarine areas of the World Ocean. It may also be added that the geological continental shelf constitutes less than ten per cent of the sea-bed and ocean floor of the World. On the other hand, considering that the World Ocean is geographically divided into parts, it cannot be overlooked that “there is little doubt that the sea-bed of the Adriatic, Baltic and of most of the North Sea come within a reasonable geophysical definition of the continental shelf.”¹²

The legal consequences of these physical realities boil down to the appropriation of these sea-beds. In other words, there are some seas the beds of which, because of natural fact of their shallowness, should entirely be placed under two legal regimes only: the territorial sea, and, beyond it, the continental shelf. Considering that the special situation which we are now concerned with is also that of the Baltic Sea, neighbouring upon our coasts, let us turn to a more detailed examination of this particular case.

¹¹ Cf. S. ODA, *Proposals for Revising the Convention on the Continental Shelf*, “The Columbia Journal of Transnational Law,” Spring 1968, p. 9 and A. PARDO, *Sovereignty under the Sea—The Threat of National Occupation*, “The Round Table,” October 1968, pp. 351 - 352.

¹² *Ibid.*, p. 352.

2. Legal Status of the Bed of the Baltic Sea

The Baltic Sea is an intra-continental sea lying between North and Central Europe and surrounded by Denmark, Finland, the Federal Republic of Germany, the German Democratic Republic, Poland, Sweden and the Soviet Union. Although both the German States are not parties to the Geneva Convention on the Continental Shelf, they naturally have, under customary international law, the same sovereign rights in respect to the continental shelf areas as have the other Baltic States which ratified the said Convention or acceded to it. But, apart from such a customary rule and the provisions of the Geneva Convention, the regional approach to legal status of the bed of the Baltic Sea may be observed.

On 23 October, 1968, three of the above mentioned Baltic States, namely the German Democratic Republic, Poland and the Soviet Union, being guided by the desire "to confirm and further develop the provisions contained in the 1958 Geneva Convention on the Continental Shelf in conformity with the concrete conditions of the Baltic Sea," signed a Declaration on the Continental Shelf of the Baltic Sea. The Declaration is open to the accession for all Baltic States. Moreover, the Signatory States: "Proceeding from the fact that the solution of questions of delimiting and using the continental shelf of the Baltic Sea is of interest to all Baltic States," consider that the accession of other Baltic States would be "desirable."¹³

It can, therefore, easily be seen that the Declaration was signed with the view of reaching a regional adjustment of the said questions in conformity with the general rules of the Geneva Convention. In other words, the main purpose of the Declaration boils down to concretize these general rules and to develop them further in relation to the case of the Baltic Sea. But what are "the concrete conditions of the Baltic Sea"?

Thus, one of the characteristic features of the Baltic Sea is its shallowness. The mean depth is about 65 metres. Moreover, although in some places the sea-bed plunges into much greater depths—the most extreme being described as 459 metres—the whole area of the Baltic Sea of about 350,000 square kilometres is for the most part no deeper than 200 metres. Its sea-bed, therefore, generally falls into category of a continental shelf.¹⁴

¹³ The Preamble and Art. 11 of the Declaration on the Continental Shelf of the Baltic Sea (hereinafter referred to as the Baltic Declaration). The English translation in "International Legal Materials," November 1968, pp. 1393 - 1394.

¹⁴ See P. ALHONENEN, "Baltic Sea" in: *The Encyclopedia of Oceanography*, ed. by R. W. Fairbridge, New York 1966, pp. 87 - 90 and K. DEMEL, *Życie morza [Life of the Sea]*, Gdańsk 1969, pp. 388 - 418.

Since the bed of the Baltic Sea is itself part of the shelf of the whole neighbouring land mass which does not descend to continental slope, there is here the geographical justification for the following provisions contained in the Declaration on the Continental Shelf of the Baltic Sea: Article 1

"In accordance with the provisions of the 1958 Geneva Convention on the Continental Shelf, the surface and subsoil of the bed of the Baltic Sea as a shallow sea are a continuous continental shelf, which is subject to delimitation among the respective Baltic States."

Article 2

"Each Baltic State, in conformity with Article 2 of the 1958 Geneva Convention on the Continental Shelf, has sovereign rights on the continental shelf of the Baltic Sea belonging to it for the purpose of exploration and exploitation of natural resources in the sea-bed and its subsoil."¹⁵

There can be no doubt, in the light of this Declaration, that the whole bed of the Baltic Sea is divided among the coastal States. This means that here is no submarine areas having any other legal status than that of the territorial sea or the continental shelf.

Let us now consider the question of how the continental shelf of the Baltic Sea should be divided among neighbouring States. The above mentioned Declaration expressly states that the delimitation of the continental shelf of the Baltic Sea must be carried out in conformity with the principles set forth in the Geneva Convention on the Continental Shelf and, in particular, in Article 6 of the said Convention. This provision applies to the division of the continental shelf adjacent either to the territories of two or more States whose coast are opposite each other or to the territories of two adjacent States. In principle the boundary of the continental shelf appertaining to such States should be determined by agreement between them. But, where no other line is agreed, and unless another boundary is justified by special circumstances, the boundary of the shelf in both cases should be the line equidistant from the baselines from which the breadth of the territorial sea of each State is measured.

It should, however, be remembered that both German States are not parties to the Geneva Convention on the Continental Shelf. Nevertheless, the German Democratic Republic, which—in consequence of the discriminatory policy of the Western Powers—had neither been a participant in the Geneva Conferences on the Law of the Sea nor, after the Conferences, was invited by the General Assembly to become a party to the said Geneva Convention by way of accession to it, recognizes all provisions contained in the Convention in question. Besides, the German

¹⁵ Baltic Declaration.

Democratic Republic signed the Declaration on the Continental Shelf of the Baltic Sea. Thus, in taking this step, she—like other Signatory States, i.e. Poland and the Soviet Union, being parties to the Geneva Convention—had been guided by the desire “to confirm and further develop the provisions contained in the 1958 Geneva Convention on the Continental Shelf in conformity with the concrete conditions of the Baltic Sea.”¹⁶ This means, of course, that all such provisions, namely among others those dealing with the boundary delimitation of the continental shelf between neighbouring States, are recognized to be binding to each Signatory State.

It may also be added that the Proclamation on the Continental Shelf of the German Democratic Republic enacted in 26 May, 1964, i.e. four years before the signature of the Declaration on the Continental Shelf of the Baltic Sea in 23 October, 1968, expressly refers to the provisions contained in the Geneva Convention.¹⁷ And further, only six days after the said Declaration had been signed, namely on 29 October, 1968, an agreement was concluded between Poland and the German Democratic Republic under which the lateral boundary line of their continental shelves is determined to be, according to Article 6 of the Geneva Convention, “the line every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each of the Contracting Parties is measured.”¹⁸

As regards the Federal Republic of Germany it should be noted that although she had been participated in the Geneva Conference and signed the Convention on the Continental Shelf, she did not ratify it. Moreover, despite of the Federal Republic of Germany having manifested her agreement to the Convention in respect of a number of its provisions, she had disputed the possibility of regarding its Article 6, i.e. the application of the “equidistance principle” to dividing the continental shelf among adjacent or opposite coastal States, as binding upon her. And further, when the disputes with regard to the boundary of the continental shelf between the Federal Republic of Germany, on the one side, and Denmark and the Netherlands on the other were submitted to the International Court of Justice in the North Sea Continental Shelf Cases of 1969, the Court found that the equidistance method or principle was not established as obligatory in international law.¹⁹ Thus, since Article 6 of the Geneva Convention on the Continental Shelf is not contractually binding upon the

¹⁶ Preamble to the Baltic Declaration.

¹⁷ Text in “Neues Deutschland,” 27 May, 1964. See also *Gesetzblatt*, Teil I, No. 2, 23 February, 1967.

¹⁸ Text in “Dziennik Ustaw” [Journal of Laws] of 1970, No. 15, item 127.

¹⁹ International Court of Justice, *op. cit.*, p. 53.

Federal Republic of Germany, she may refuse to conclude any agreement providing for the use of the above mentioned method and, therefore, her accession to the Declaration on the Continental Shelf of the Baltic Sea, owing to the express reference to the said Article of the Geneva Convention, seems likewise to be more than doubtful.²⁰

There are also other provisions of the Declaration referring to the Geneva Convention or, strictly speaking, concretizing its general rules in relation to the Baltic Sea. The main purpose of these provisions is to preserve the status of the waters above the continental shelf as the high seas and thereby to ensure that the sovereign rights of the coastal States over the sea-bed will not be exercised in a manner which might seriously impair the rights of all States to enjoy the freedom of the seas. Moreover, although both Poland and the German Democratic Republic are not parties to the Geneva Convention on the Territorial Sea and the Contiguous Zone, the Declaration provides that the baselines used to compute the breadth of territorial sea in conformity with the said Convention are reciprocally recognized and considered to be the baselines for delimiting the continental shelf, whose precise coordinates shall be determined in the bilateral or multilateral agreements among the States concerned.²¹ Thus, "an analysis of the provisions of the 1968 Moscow Declaration (i.e. the Declaration on the Continental Shelf of the Baltic Sea signed at Moscow) shows that they are conformable to the principles of the 1958 Geneva Conventions on the Law of the Sea and in particular to those contained in the Convention on the Continental Shelf."²²

The Signatory States have, however, indicated that the Declaration in question is not merely tended "to confirm," but also to "further develop the provisions contained in the 1958 Geneva Convention on the Continental Shelf in conformity with the concrete conditions of the Baltic Sea."²³ Besides, several innovations have also been introduced into the Declaration in order to secure more effective, peaceful and purely exclusive, but rather within the regional framework than "singlehanded," use of the bed of the Baltic Sea. Thus, as regards the purely exclusive

²⁰ For further discussion on the attitudes of both the German States see: W. GÓRALCZYK, *Sytuacja prawna dna i podziemia morza Bałtyckiego* [The Legal Position of the Bed and Subsoil of the Baltic Sea], in: *Problemy prawne Bałtyku* [Legal Problems of the Baltic Sea], ed. by L. Gelberg, Wrocław 1969, pp. 47 - 54, and A. GRZESKOWIAK, *Podział szelfu kontynentalnego na Morzu Bałtyckim* [The Division of Continental Shelf of the Baltic Sea], "Sprawy Międzynarodowe," May 1969, pp. 68 - 72.

²¹ See Arts 5 - 8 of the Baltic Declaration.

²² F. PRZETACZNIK, *La Declaration sur plateau continental de la mer Baltique et le droit international*, "Revue belge de droit international," 1970, No. 2, p. 483.

²³ Preamble to the Baltic Declaration.

character of the sovereign rights exercised over the continental shelf, hence—in the legal sense—over all submarine areas beyond the territorial seas of the Baltic States, the Declaration provides that:

“Parcels of the continental shelf of the Baltic Sea must not be given for exploration, exploitation, and other use to non-Baltic States, their nationals or firms.”²⁴

In this connection it should be remembered that only the coastal State is competent to decide whether admit or not admit foreigners to use the continental shelf and, therefore, such a decision, no matter it was taken unilaterally or agreed with other States, confirms merely the exclusive character of the sovereign rights which are to pertain *ipso iure* to the said State.²⁵ Moreover, because of the fact that no formal claim is needed to demonstrate the existence of these rights, until the coastal State's decision, no matter what this decision would be, no one else may engage in any use of the area of continental shelf. Thus, it cannot be said in this case that “silence gives consent,” but quite the contrary, it involves the unshared use of such a submarine area by the coastal State.

Let us turn, however, to the problem which must at all events be solved by the coastal State, namely that to arrive at the best possible decision. In this respect the application of the “regional exclusivity regime” by the neighbouring coastal States, i.e. the solution similar to that in the Declaration on the Continental Shelf of the Baltic Sea, seems to be a reasonable safeguard from the perspective of their future interests. It follows at least from two reasons. Firstly, such a regime is intended to eliminate only third States which may probably be inclined more to make profits on the exploitation of the sea-bed resources far from their own continental shelves than to cooperate with the coastal State or States in adopting effective—and fairly profitable to all—programmes of the exploration and exploitation of these resources. Secondly, in view of the fact that identical types of the natural resources existing under sea-bed areas bordering each other may be—and indeed are often—discovered, the neighbouring States have undoubtedly common interest in the coordination of their efforts in order to reduce the costs of the discovery, appraisal or exploitation of the said resources. Consequently, it would be much more desirable for such States to engage rather in the mutual than individual exploration, or even exploitation, of their continental shelves.

Although the Declaration on the Continental Shelf of the Baltic Sea

²⁴ Art. 9 of the Baltic Declaration.

²⁵ Cf. F. PRZETACZNIK, *op. cit.*, pp. 482 - 483.

goes not so far as to obligate the coastal State to go shares in the utilization of its continental shelf with other Baltic States, there can be no doubt that it not forbids to do so. In other words, there is here the possibility that the Baltic States will be applying *inter se* the "shared use system," although *vis-à-vis* third States the "unshared use system" should be applied. Moreover, the Declaration encourages the Baltic States to co-operate among themselves and the starting point in this direction boils down to obligate the participants, i.e. theoretically all of these States, to "consult among themselves concerning questions of mutual interest in connection with the use of the continental shelf of the Baltic Sea."²⁶

The above mentioned innovations are, of course, intended to safeguard the interests of the Baltic States. Nevertheless, apart from the limitation of the group of participants and the area of application of the Declaration on the Continental Shelf of the Baltic Sea, its weightness transcends the regional frameworks. For, the Declaration provides that:

"The Continental Shelf of the Baltic Sea must be used by all States exclusively for peaceful purposes."²⁷

When we move out from the bed of the Baltic Sea to other submarine areas of the World Ocean, although in fact only those lying outside the continental shelves, we can observe that the United Nations General Assembly and its Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction have many times emphasized that the deep sea-bed should be used exclusively for peaceful purposes. In other words, the idea of peaceful utilization may now be regarded as embodying the essence of the future legal regime for the underwater parts of the globe beyond the limits of national jurisdiction. But at the same time it is also undeniable that the areas lying within these limits should likewise be barred to all military uses. Furthermore, since under to Geneva Convention on the Continental Shelf the coastal State is granted only "specialized" or "functional" sovereign rights, namely those of exploring and exploiting the natural resources of its continental shelf area, it should be maintained that such a State could not use the said area for military purposes. Thus, the cited provision of the Declaration is merely the logic interpretation of the Geneva Convention.

For all of that, however, the view is sometimes held that "a coastal State which builds an oil drilling platform in conformity with the provision of the Convention would be entitled to install thereon a weather station or a radar antenna as a part of its right to take measures necessary

²⁶ Art. 10 of the Baltic Declaration.

²⁷ Art. 3 of the Baltic Declaration.

for protection of its instalations [...] or [...] to put such devices on separate platforms [...] and [...] establish defense instalations which were in no way connected with the instalations used for exploring and exploiting the natural resources.”²⁸

If one accepts this view on the ground of non-existence of the distinct rule of the Geneva Convention containing an absolute prohibition of any military uses of the continental shelf, then it becomes hardly necessary to realize the slight difference between the defensive and offensive kinds of military instalations. Consequently, such a view would lead in practice to an escalation of the arms race which might put the unforeseeable obstacles in the way towards the better use of developing technical capabilities for commercial exploitation of the sea-bed and likewise be dangerous for the traditional freedoms of the superjacent waters. It is needless to say that only these commercial activities offer the States most inviting opportunities for economic growth and that such a growth is still limited by their military expenses.

Nevertheless, from year to year after the Geneva Conferences the efforts to stop the arms race on the sea-bed, including the continental shelf as well as the areas beyond it, become stronger and stronger. On 11 February, 1971, some sixty States signed and opened for ratification the Treaty on Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and in Subsoil Thereof.²⁹ The draft treaty, based on the Soviet Union and the United States proposals, was approved in the General Assembly by votes of more than hundred States with only two (El Salvador and Peru) dissenting and also two (Ecuador and France) abstainers.³⁰

It may, of course, be said that the Treaty in question is rather restricted in the scope and, therefore, is not going far enough in real demilitarization of the submarine areas. But, although it would be highly premature to expect early progress towards prohibiting all military uses of the sea-bed, the Treaty should at least be regarded as “a bird in the hand” diminishing the danger of nuclear war and offering hope of further cooperation in more complete disarmament of the World Ocean. Moreover, since under the Declaration on the Continental Shelf of the Baltic Sea a small part of underwater areas of the globe should be used ex-

²⁸ C. M. FRANKLIN, *The Law of the Sea: Some Recent Developments (With Particular Reference of the United Nations Conference of 1958)*, in *U. S. Naval War College: International Law Studies 1959 - 1960*, p. 66.

²⁹ Text in United Nations Press Release GA/4355, 17 December, 1970, Part II, pp. 1 - 7.

³⁰ *Ibid.*, p. 7. See also L. HENKIN, *The Sea-Bed Arms Treaty—One Small Step More*, “Columbia Journal of Transnational Law,” Spring 1971, pp. 61 - 65.

clusively for peaceful purposes, it cannot be overlooked that three years before the above mentioned Treaty a first step was made towards the elimination of all military uses of the sea-bed, not only the emplacement of nuclear or other weapons of mass destruction. In this respect the Declaration may, therefore, serve as a good example to follow by other States.

International Legal Problems of Marine Pollution *

by JAN ŁOPUSKI

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I. Environmental Pollution and Law

It is only very recently that man has become conscious of the reality of threat of environmental pollution. But our consciousness of this problem is still far from being common and our knowledge of the far-reaching effects of environmental pollution is by no means complete. Scientific research and social education will have a great deal to do in this matter.

But even a fuller and more common consciousness of the problem of environmental pollution will not by itself be sufficient to get this phenomenon under control. In order to achieve this aim one will have to create suitable mechanisms in which law would play its important role of an instrument of social engineering.

The technological progress, development of all branches of science and rapid social changes—have all deeply influenced the legal thought. Necessity is being felt to abandon some well-established legal concepts and principles. In the dynamic societies one of the functions of law is to control the process of development by imposing thereon the requirements of social discipline. We should not overlook this new function of law when considering the problem of protection of the human environment against

* This article has been based on the author's experience while collaborating with international organizations dealing with marine pollution before 1971. A number of his proposal has been meanwhile realized.

pollution. In the envisaged solution due consideration should be given to the dynamism of environmental pollution. Adequate measures should prevent harmful changes to the environment before irreparable damage has been done and adequate protection should be provided for the individuals against effects of pollution.

It may be assumed that environmental pollution will accompany the process of development of industrial civilization and urbanization. It is also probable that this problem may become more acute. There are no reasons to believe that the waters of rivers and of the sea, or the atmosphere, may recover their original degree of purity. Environmental pollution will remain an inevitable phenomenon but by way of an organized action man must keep it within permissible limits; one of the tasks of science will be to determine the levels of permissible pollution in respect of particular constituents of the human environment.

One may expect here serious difficulties. Which criteria should be taken into account in order to determine the degree of permissible pollution? Should a finding that any further concentration of defined chemical compounds in the marine environment caused by certain activities will bring about the destruction of certain species of marine animals—be a sufficient reason for stopping or limiting these activities, even if they bring considerable advantages to the society? The expansion of man has already brought about the extinction of numerous biological species and the destruction of others is only a question of time. Although man has so often disturbed the ecological balance of his environment, the development of humanity is in full swing.

We touch here upon the sphere of problems where the conflicting views of “conservationists” and “anthropocentrists” meet. In such a matter we cannot count for durable solutions. The basic criterion should be the creation of optimal conditions for a full, both material and spiritual, development of man. We are aware, however, that these values cannot be scientifically verified and that the material and spiritual development of man is conditioned historically. Man may adapt himself to changed conditions and our requirements concerning the purity of environment may be modified.

We have only indicated this complicated problem. Before the introduction of legal regulations on standards of permissible pollution, restrictions of activities, safety requirements or other anti-pollution measures, this problem will have to be examined by representatives of proper branches of science. Considering, however, the fluid criteria of its appraisal, the final decision of the legislator will necessarily be more or less arbitrary. Being more a practical solution than the expression of scientific truth its

correctness will have to be verified in practice and an elastic procedure of revision should be provided.

II. Marine Environment as a Distinct Object of Anti-Pollution Policy

Air, soil and water are the three main constituents of the human environment. In dealing with the problem of environmental pollution these three constituents have usually been distinguished, even if their inter-relation has been fully realized. Human environment is an entirety.

Considering the integrity of human environment it may be argued that a concerted action against environmental pollution is needed, and that the protection of human environment against pollution should be solved within the framework of a consolidated anti-pollution system. But environmental pollution is an immensely complex problem, and for practical reasons it is necessary to distinguish certain fields of common characteristic features as objects of both scientific research and anti-pollution measures. In practice such basic problems as pollution of air and of water as well as noise have been distinguished.

In the last decades pollution of inland and sea waters has largely been considered as one and the same problem of water pollution. In the national legislation of many countries the anti-pollution regulations concerning inland waters have been extended to cover the coastal sea waters. But with the growing threat of harm to the marine environment, the above approach to the problem of water pollution should be reconsidered. Measures are necessary to protect the whole marine environment and not only the narrow belt of national sea waters. Moreover, most of the problems created by marine pollution are international or even global and require an international solution.

Marine pollution has recently become the subject of intensive studies in which various marine disciplines are involved. In the research programmes of the United Nations and specialized agencies marine pollution has clearly been distinguished from fresh water pollution as subject of scientific research. There are some valid arguments for making this distinction. It is admitted that the results of scientific research on pollution obtained in marine environment cannot be simply extrapolated to fresh water environment, and vice versa. Marine environment as such is infinitely more complex than fresh water environment, and our knowledge thereof is far less complete. The interaction between fresh water environment and marine environment is mainly one-sided. It is the pollution of fresh waters which strongly contributes to the pollution of the oceans and not *vice*

versa. The sea is generally considered as a distinctly integrated environment.

Since in the matter of anti-pollution policy the administrators and legislators will be inscreasingly dependent on scientific advice, these differences between inland water and marine pollution phenomena seem to be a particularly strong argument for considering marine pollution as a distinct field of anti-pollution action, even if measures applied in respect of pollution affecting particular constituents of human environment will have to be necessarily coordinated.

III. Some Remarks About Marine Pollution To-Day

Views of scientists concerning the gravity of the problem of marine pollution and in particular of its long-term effects are considerably divided. While some of them take a very pessimistic view, prediction that life in the oceans may commence to die within a relatively short period, others are more optimistic and think that modern human knowledge has sufficient means at its disposal to deal with the problem. But even if our belief in the wisdom of man compels us to share the views of the latter, attention should be drawn to the fact that real difficulties in solving the problem of preventing and combatting marine pollution do not lie so much in the lack of sufficient knowledge concerning proper technical means or technological processes, but in organizing the collaboration among various States and individual users of the seas as necessary for the effective application of these means and processes. The creation of adequate mechanisms of international collaboration may prove to be more difficult and time-taking than the working out of technological solutions. It is, however, indispensable. We already know a lot about the direct harmful effects of marine pollution. Its long-term, low-level effects are, to a considerable extent, beyond the sphere of scientific experiment, what should make us extremely prudent.

The inter-agency group of experts for the scientific aspects of marine pollution has indicated major categories of marine pollution. These are: (1) domestic sewage, including food processing wastes, (2) pesticides, (3) inorganic wastes, (4) radioactive materials, (5) oil and oil dispersants, (6) petrochemicals—organic chemicals, (7) organic industrial wastes, including pulp and paper null waste, (8) military wastes, (9) heat, (10) detergents, (11) solid objects, (12) dredging spoil and inert wastes. The role played by them in the process of pollution of marine environment is, of course, not identical. With the progress of researches on marine pollution, views concerning the importance of certain categories are currently re-

vised. Some time ago the main threat to the marine environment was ascribed to hydrocarbons and in particular to oil carried by ships. Later on it was seen in pesticides (DDT in particular) after their concentration in marine animals had been established. Now special attention is attached to the concentration of heavy metals (in particular mercury compounds).

IV. Classification of Sources of Marine Pollution for the Purpose of Prevention

In order to implement an effective anti-pollution policy it is necessary to identify the main sources of marine pollution i.e. these human activities as a result of which pollutants are introduced, directly or indirectly, into the marine environment. To these activities inspections, prohibitions, restrictions, safety measures or other instruments of prevention may be applied by law.

One should not confuse the sources of pollution with the pathways of pollutants. The latter may reach the marine environment by various routes. They may come from the atmosphere or with the water of rivers or streams discharging into the sea. They may come from municipal sewers or industrial canals drained off directly into the sea. They may be deliberately dumped from ships or pipelines or may originate from various human activities carried out in the marine environment (shipping, exploration or exploitation of the sea-bed and subsoil, operation of submarine pipelines, dredging, etc.).

Once we are careful enough to distinguish the source of marine pollution from the route of pollutants, it is obvious that neither the atmosphere nor the inland waters discharging into the sea can, as such, be considered as sources of marine pollution. Measures of control or prevention cannot therefore be applied to them, as they are only routes of pollutants, while the real sources of marine pollution are these activities which pollute the atmosphere or the inland waters and, indirectly, the marine environment. In this case problems of control and prevention of marine pollution cannot be clearly distinguished from problems of control and prevention of pollution of the atmosphere or of the inland waters.

Some of the main sources of marine pollution fall under both these categories. This concerns in particular such sources as industry, or administration of municipalities which may cause marine pollution both directly and indirectly depending on their localization and the way applied of disposal of their products of waste.

With regard to the direct sources of marine pollution a further distinction should be made between the permanently localized and non-localized

sources. In particular, marine pollution deriving from the land-based activities is mostly regional (or even local) in character, being closely connected with the general level of development of the region. From the point of view of control and prevention it presents quite a different problem than pollution deriving from activities carried out in the marine environment.

When considering the problem of anti-pollution legislation due regard must be paid to the gravity and scope of implications created by certain sources of marine pollution as well as to the range of interests involved. Having these factors in mind we may divide the marine pollution problems into three basic groups:

- local problems which qualify to be solved within the framework of national organization and legislation (national level),
- regional problems, the solution of which requires the collaboration of States of the given region based on a corresponding regional agreement (regional level),
- international problems of a universal character, requiring collaboration of States organized on a possibly broad international basis (international level).

V. Legal Protection of Marine Environment Against Pollution: Some General Aspects of the Problem

Although marine pollution has lately become the cause of a growing concern, it may be astonishing to find that in spite of the formidable progress of marine pollution and considerable number of international conferences, meetings and committees concerned with this problem, so little has so far been done to curb marine pollution. It would seem that this problem has certain aspects which make its solution particularly difficult. These aspects will deserve full consideration from the part of policymakers and legislators. We shall tentatively try to indicate these aspects, discussing them under the following headings:

- complexity,
- untraceability,
- dynamism,
- internationality,
- novelty.

Complexity. Marine pollution is an extremely complex phenomenon and its implications are far-reaching and diversified. Pollutants reach marine environment by various routes, directly and indirectly, deriving from human activities carried out all over the world, and the marine

environment is the ultimate common receptacle for most of the pollutants.

In order to stop or reduce marine pollution deriving from these various activities, prohibitions, restrictions or safety measures will have to be imposed on them. But these activities are, as a rule, beneficial to certain countries or even to the world community. Sacrifices and gains will have to be duly weighed, which may present difficulties considering the range of interests involved.

Difficulties are increased by the complexity of the marine environment itself and gaps in knowledge of the oceans and behaviour of pollutants. We generally know very little of what happens in the deep layers of the oceans and various actions undertaken by man in the marine environment are still like groping in the darkness.

Untraceability. This aspect of marine pollution presents a serious obstacle in the implementation of the anti-pollution policy. We still cannot trace with certainty the sources of pollution and the extent of harm done by many pollutants to the marine life is a matter of speculation.

Dynamism. Marine pollution, similarly as environmental pollution in general, is a dynamic phenomenon. Even if we succeed in getting under control the main sources of marine pollution which exist at present, new pollution problems are likely to arise in the future and will have to be dealt with adequately before their harmful effects are felt.

Internationality. Marine pollution is an international problem of global implications. Since the marine environment is an entirety, one should reckon with the cumulative effect of pollution deriving from activities of various States. The effect of individually conceived anti-pollution programmes may be, therefore, insignificant. Only the biggest integrated State organisms (such as the USSR or USA) may obtain certain results by way of an individual action. A cooperative effort seems to be indispensable.

The present trend in marine pollution cannot be stopped or even reversed without resignation of certain economic gains by those who carry out various activities polluting the marine environment. Expensive safeguard measures are to be introduced, other means of disposal of harmful waste found, and even economic plans revised. But in view of the international competition no single country may be prepared to impose financial burdens or restrictions affecting the economic interests of its nationals unless it is part of a common international effort.

Novelty. Although from his very origin man has polluted his environment, the pollution problem which we are facing now is a new one; the present level of pollution and its formidable progress have altered its intrinsic nature. It would seem that this new aspect of the crisis of

human environment and in particular of the pollution problem, is one of the main difficulties in finding its adequate solution. In order to cope with the problem of international regulation of marine pollution, a revision of certain principles and philosophy underlying the present laws may be of primary importance. We need even more: a change of social consciousness.

VI. Legal Regime of the Seas and the Pollution Problem

It has been suggested on various occasions that from the point of view of international control and prevention of marine pollution, the present legal regime of the seas is not very adequate. A new approach to the law of the sea is necessary.

Under the present legal regime the seas are divided into zones. In consequence of this division certain portions of the sea are under the jurisdiction of coastal States, and the extent of authority which may be exercised by coastal States over these portions of the sea depends on the character of the given zone (interior waters, territorial sea, contiguous zone, area of the continental shelf waters). In view of the obvious trend to extent the more or less restricted authority of the coastal State beyond the limits of its territorial sea, the line dividing the areas under national jurisdiction from the open sea begins to lose its sharpness.

But with regard to the biological effects of pollution, the marine environment is an indivisible totality. Whatever is the juridical character of the zone in which pollution occurs, its effects spread out to other zones and may effect the marine environment in a large area. The division of the seas complicates the establishment of an effective system of control of marine pollution which should embrace the entirety of the marine environment and even reach to the land area.

The present international regime of the high seas has been based on the assumption that the marine environment is not threatened by freely exercised human activities because of its immensity. These views are no more valid. The intensity of human activities in the marine environment grows rapidly and is accompanied by a speedy progress of marine pollution. Protection of the marine environment against pollution necessitates the introduction of an appropriate international regulation of human activities on the high seas, subject to international control. This would imply the necessity of an agreement providing for certain restrictions of State's sovereignty exercised on the high seas.

A different problem presents marine pollution deriving from activities carried out in the area which is entirely within the limits of national

jurisdiction. Any such activities are regulated by national laws of the coastal State and are subject to its exclusive authority, being for all purposes considered its internal affair.

However, marine pollution originating in the coastal area may spread out beyond the limits of the territorial sea and affect the interests of other States and of the international community. It is not possible for any State to modify the natural interchange of waters. The contamination of the national waters of a State may be of direct concern to other States and thus present an international problem.

We see, therefore, that the protection of marine environment against pollution calls for a departure from certain basic concepts of the international law of the sea. States should undertake international obligations to prevent marine pollution deriving from activities within the limits of national jurisdiction (including exclusive uses of the seas outside the territorial waters), and to collaborate with other States in the matter of prevention and control of marine pollution. International regulations are to be introduced in respect of activities belonging to the inclusive uses of the high seas. And adequate forms of international control will have to be conceived in order to safeguard the fulfilment by States of their international obligations. All this may be achieved by the introduction of an exceptional international legislation on marine pollution (to be supplemented by national laws) without impairing the authority of certain well-established rules of the law of the sea.

VII. Present International Legislation on Marine Pollution—Attempt of an Appraisal

In the UN General Assembly Resolution 2566 (XXIV), it has been noted that in spite of the sustained efforts being made at present many aspects of marine pollution have not yet been dealt with or are not being fully covered, and that additional agreements on this subject may be required. It is also generally felt that the activities of the UN system in the field of marine pollution have been carried out mainly along sectorial lines, and that a more comprehensive unified approach is necessary.

Articles 24 - 25 of the High Seas Convention are framework law and mean little more than admonishments to States how to proceed in solving the problem of marine pollution. Nevertheless they declared the obligation of States to protect the marine environment against pollution and indicated the way to proceed in order to create the necessary international regulation by obliging States to cooperate with international organizations in adopting the necessary measures. These articles themselves lack, how-

ever, the precision as necessary to base on them international claims for stopping pollution, combatting its effects or compensating the victims. Such basic questions as degree of harm, standard of care required, liability, causality link, measure of damage, etc., are left open. The same may be said of Article 5 (7) of the Convention on the Continental Shelf although some authors attach to it considerable importance. It is probable that one could not expect to get much more on this particular subject in conventions concerning much broader problems. The point is that meanwhile too little has been done to implement these provisions through the introduction of international regulations with more precise rules (in some cases even highly technical ones) concerning the obligations of States and particular users of the seas with regard to the protection of marine environment against pollution.

There is a more developed international legislation concerning oil pollution caused by ships, which kind of pollution was virtually the first to cause concern. But the International Convention for the Prevention of Pollution of the Sea by Oil, 1954—even considering amendments introduced in 1962 and 1969—did not achieve the much desired aim of total prohibition of discharge of oil from ships into the sea. Two Brussels Conventions of 1969 on Intervention on the High Seas in Cases of Oil Pollution Casualties and on Civil Liability for Oil Pollution Damage (supplemented by the 1971 Convention on the International Compensation Fund) concern only some fragments of the big problem of marine pollution. Preparations are being made to solve certain problems by regional agreements but results obtained so far are not encouraging.

VIII. National Legislation—Lack of Uniform Approach to the Problem of Marine Pollution

A survey of national legislation concerning marine pollution as prepared by FAO gives a picture of the present situation which is far from satisfactory. This is mainly due to the existing confusion as to the scope and purpose of the national legislation dealing with marine pollution and in particular its relationship to the legislation on inland water pollution. The physical continuity of inland and sea waters as opposed to the integrity of the marine environment presents a dilemma which in the legislation on the water pollution control has not been solved by States in a uniform way. While differences between characteristic features of the fresh water environment and marine environment—which should necessarily be reflected in measures concerning the control and prevention of pollution—are generally appreciated, there seems to

be a considerable difficulty in drawing a line dividing the spheres of application of relevant regimes of pollution control.

When analyzing the legislation of various States concerning marine pollution we may distinguish the following general lines of approach to this problem:

A. *Extension of inland water pollution regulations to national coastal waters.* In most cases this is accompanied by the introduction of fragmentary legislation on marine pollution, extending in some cases beyond the limits of the territorial sea. This kind of approach, which may be traced in the water pollution legislation of most countries reflects the traditional view that the marine pollution problem is of secondary importance as compared with that of inland water pollution, particularly if considered in terms of national interest.

B. *Creation of a comprehensive distinct legislation on marine pollution.* This new approach to the problem of marine pollution may be found in the legislation of some States and in particular in the Finnish Law on the Prevention of Pollution of the Sea, 1965.

C. *Protection of marine environment against pollution within a consolidated system of protection of human environment covering air, water and soil—the three main constituents of the physical environment.* This modern approach has been followed by Bulgaria which accepted a consolidated act (Law of 24 October, 1963) relating to the protection of air, water and soil against pollution. Later on a similar solution has been accepted in Sweden, where the law relating to the protection of natural human environment came into force in 1969.

There is a predominant factor which is common to the present national legislation on marine pollution; its purpose is to protect the national interest of the coastal State and not the interest of the international community. Some recent laws of certain States extending their jurisdiction beyond the limits of the territorial sea in order to protect their coasts and adjacent waters against pollution originating on the high seas serve exactly the same over-all purpose (e.g. the Canadian Arctic Waters Pollution Prevention Act). They may be cited as examples of the dangerous trend leading to a further division of the seas, generally motivated by the lack of confidence in the effectiveness of an international action on marine pollution.

Generally it may be stated that while with regard to the inland water pollution control certain concepts have been elaborated and many industrial countries possess a developed and even traditional legislation concerning this problem, their legislation on marine pollution is generally less developed and it may be difficult to trace therein any clear line of thought as to how this problem should be solved.

IX. Legislative Solution of the Problem of Marine Pollution: a General Concept

In view of the variety of sources of marine pollution and diversity of aspects of this problem it would not be feasible to seek for it an all-embracing solution—in any way at the international level. But there is an obvious need for determination of the general concept of the envisaged system of control and prevention of marine pollution. It is proposed to discuss this problem tentatively under the following headings:

- A. General approach,
- B. Basic objectives and aims,
- C. Guiding principles,
- D. Delimitation of areas in respect of which national and international regulations are required,
- E. Relationship between the national and international legislation,
- F. International organs responsible for the protection of marine environment.

A. The dynamism and complexity of the marine pollution phenomenon cause that the legislation on marine pollution should be viewed as a process strongly influenced by the development of scientific researches. This would imply the necessity of selection of proper legislative techniques; widely termed principles implemented by flexible provisions with a simplified procedure of revision. Although the legislation on marine pollution will be developed at three different levels, there may be an urgent need for a general uniformity of solutions accepted at these levels for the purpose of facilitating the international collaboration.

In view of the rapid progress of marine pollution one should resort to all available instruments of prevention: prohibitions or restrictions imposed on certain activities, control of discharges, safety measures minimizing the incidental pollution and the risk of major pollution accidents, broadening of liability for pollution damage, penalties. This may result in a certain complexity of the pollution legislation.

The international control and prevention of marine pollution will probably meet with considerable obstacles in view of the diversity of conflicting interests involved. For this reason a piecemeal approach following a general legislative framework should be advocated as a practical way to achieve as soon as possible some degree of international agreement. One may anticipate a series of agreements reached at the regional or universal level, some of which dealing only with specific sources of marine pollution.

B. Basic objectives and aims of the legislation on marine pollution should correspond with an established anti-pollution policy. In the legislation accepted at different levels they will be largely identical. They may be formulated as follows:

- prevention of pollution of the marine environment,
- treatment of harmful effects of marine pollution,
- compensation of marine pollution damage,
- monitoring of marine pollution,
- postering of scientific researches concerning marine pollution.

C. Guiding principles concern a number of questions. We shall refer only to the most essential ones. One of them is the priority of aims, and in particular: prevention of pollution or treatment of its effects? It would seem that priority should be given to prevention. The relevant principle may be formulated as follows: prevention of pollution is better and less expensive than treatment of its effects.

Another problem presents the repartition of the so-called "cost of pollution" (i.e. the cost of preventive measures, the cost of treatment of effects of pollution, compensation for pollution damage). Who should bear it: the community or those who actually cause pollution by their activity?

Views are represented that since the problem of environmental pollution has been created by modern technology, it is that technology which should combat it. Although this statement may be accepted as fundamental for our philosophy, it does not solve the problem in question. Following this general idea an effective system of sanctions and incentives should be created.

The cost of pollution must be regarded as the "cost of growth" closely connected with the social, economic and technological development. It should be borne by those who cause pollution. In this way various industries being main sources of pollution would be made interested in prevention of pollution which will become one of the costs of industrial development and element of planning.

The structure of anti-pollution machinery and in particular the separation of the protective functions from the exploitative ones presents another problem. It was raised by Kennan with regard to the role to be played by the international organizations in the protection of human environment. He criticised the view that the same organizations which deal with the development and exploitation of natural resources should deal with the protection of environment and warned of dangers which that solution may bring about; giving priority to exploitative motives over protective and conservational ones.

This is certainly a capital question which concerns also the solution of the environmental problem at the national level. During recent years high-level central environmental authorities have been created in some States, which may be indicative of a strong tendency to separate the exploitative functions from the protective ones.

D. In order to be effective the measures of control and prevention should be applied at the very source of marine pollution. The determination of the sources of marine pollution in conjunction with an appraisal of pollution problems created by certain categories of pollutants will provide necessary indications for a general delimitation of areas which qualify best for legislative action at the national, regional or international level. This delimitation should be flexible and, if necessary, verified on the basis of scientific information available.

E. Because of the already indicated aspects of marine pollution the spheres of national and international interests cannot be divided by an artificial line drawn on the map of the sea. In the legislation on marine pollution one should realize therefore the concept of two overlapping legal regimes. The first one would serve the protection of national interests of the legislating State and the implementation of its provisions would be considered as an internal matter of the given State. The second one, based on international agreements, would serve the protection of international interests.

F. It has been proposed to create international organs endowed with authority as necessary for the implementation of an effective control of environmental pollution. The necessity of such international organs is particularly strongly felt when considering the problem of protection of the marine environment.

A general concept of solution of this problem with regard to the entirety of human environment was presented by Kennan (International Environmental Agency). It assumes the existence and even a further development of various international organizations (regional or universal) dealing already with the problem of environmental pollution in some sectors. The Agency would constitute some sort of keystone of this complicated construction helping to transform the insufficiently coordinated and harmonized activities into an adequate global system of protection of the human environment. Before, however, this integrated system of control of environmental pollution will be created, the controlling functions should be exercised by international organs acting in certain sectors. For this purpose international conventions (both regional and universal) concerning marine pollution should provide for the creation of organs responsible for the regulation of certain questions (including issuing of

recommendations for State-members) and control over the effectiveness and application of the rules of the respectation conventions.

X. Liability for Damages

With regard to this problem the basic question may be put as follows: can the problem of liability and damages in respect of marine pollution be effectively solved within the sphere of civil law without resorting to State's responsibility based on public international law.

Two basic functions of civil liability must be taken under consideration: the compensatory and the preventive one. Certain specific aspects of marine pollution may considerably weaken their role.

First of all due regard must be paid to the fact that harmful effects of marine pollution are very often not appraisable and assessable in money. Quite often they do not concern individual persons but the whole nations, or even the future generations.

This problem may be clearly seen when it comes to the appraisal of the long-lasting, harmful effects of marine pollution. How to determine losses caused by the extension of stagnant areas in the sea owing to the decrease in the oxygen content? How to determine losses caused by the concentration of DDT and mercury compounds in marine animals, when science has not spoken the last word in this question? How to determine losses caused by the increase of radioactivity in the marine environment?

But in order to make use of the mechanism of civil liability, one should not only determine the claim but also indicate to person who is bound to stop activity causing damage and to make good the loss. Here new difficulties will arise. Harmful effects caused by the concentration in the marine environment of pesticides, heavy metals or phosphorus are consequences of activities carried out in various States by thousands of individuals and organizations. Even in case of oil pollution it is not easy to indicate the wrongdoer.

Another essential factor is the plurality of persons suffering damage, who may reside in various countries and whose interests may suffer in various degree. Who should mobilize them and organize for them recovery actions since, for purely practical reasons, one may doubt whether they would be able to pursue their claims individually.

It would follow therefrom that only in certain situations marine pollution may provide basis for claims under civil law; the person of wrongdoer must be known and the infringement of the law established. In case of damage claims sufficient grounds must be provided to accept

the existence of wrongdoer's liability and to prove the amount of damages."

In spite of these difficulties one should not disregard the importance of civil liability of the wrongdoer because of its preventive effect. Since, however, in these circumstances the effective functioning of civil liability may be restricted, it will be necessary to introduce the system of fines which, in case of pollution of the high seas, might be payable to the Fund put at the disposal of the international organ dealing with the protection of marine environment. The importance of fines as means of repression and prevention is generally appreciated and in the modern legislation of developed countries we may observe an obvious trend to increase considerably fines imposed in cases of pollution of the sea within the limits of their national jurisdiction.

Considering, however, the problem of compensation for pollution damage, any solution based solely on the liability of the wrongdoer (even if strengthened by compulsory insurance) may be inadequate. The widespread practice of "one-ship companies," the so called "corporate veil," problems of jurisdiction, duration of lawsuits—these are only some of the circumstances which would make the recovery difficult.

The present aspects of this problem indicate that any solution confined to the sphere of civil law, although necessary, may be insufficient, and that one should seek also a solution in the sphere of international public law. This would require a considerable increase of State's liability for marine pollution having its source in the activity carried out in the area within the limits of national jurisdiction of this State as well as in the international area, by persons or bodies having their seat or residence on the territory of the given State. There are some valid arguments for such a solution. Firstly, pollution of the marine environment is to a considerable extent caused directly by a activities of State organs (military, administrative). Secondly, it is only the State which may compel its nationals to apply adequate preventive measures by the introduction of appropriate regulations and means of control.

In order to bring forward the State's responsibility for marine pollution a certain reform of the international public law might be necessary; in particular one may envisage the interpolation of some concepts elaborated by the modern theory of civil law—strict liability based on the motive of risk, strengthened by an international compensation fund.

XI. Need for Scientific Advice in the Process of Legislation

Marine pollution has only recently become the subject of intensive scientific researches. There is still disagreement among scientists as to

the degrees of danger presented by certain pollutants, and a clear scientific picture of the present situation and probable future development is lacking. As a result, marine pollution is quite often considered an "unknown."

We know from experience that the problem of pollution of inland waters has not been dealt with effectively until the administrations concerned have been pressed by the public opinion. They must overcome the opposition of industries which being guided by purely economic factors are hostile towards preventive and controlling measures.

In order to help the administrations to perform their task, it is necessary to make the general public interested in the problem of marine pollution. Society needs more scientific information on the long-term consequences of marine pollution, particularly those consequences that will affect future generations.

But the governments responsible for the introduction of anti-pollution measures will also need a more specific scientific motivation as well as certain economic data in order to overcome the opposition of those who will eventually pay for anti-pollution measures. A solid scientific basis will be necessary to defend the proposed legislation against criticism.

It must be deplored that scientists very often confine themselves to indicate pollution phenomena and their consequences without indicating the sources of pollution and without making workable proposals as to the measures necessary to prevent pollution or reduce its consequences. Moreover, research in most cases is concentrated on the effects of individual pollutants on individual species, without considering the cumulative effect of various pollutants in the marine environment. More synthetic views are indispensable, even if the synthesis should be a provisional one.

In particular legislative action on both national and international level requires precise information on the following basic problems:

- actual state of pollution,
- anticipated progress of pollution,
- main sources of pollution.

With regard to the state of pollution, some sort of "inventory" of the seas should be prepared. Regions highly affected by pollution should be identified by scientists, particularly those regions where pollutants are accumulating. A world-wide system of monitoring of marine pollution seems to be a necessity.

Legislation which provides for the control and prevention of pollution will require concrete data on which to base its anti-pollution measures. Standards of quality for sea water are to be established, since the levels of pollution are to be measured against "baseline." Scientific in-

vestigations are necessary to establish levels of "permissible pollution" in respect of specified regions of the seas and to provide indications as to the anticipated progress of marine pollution.

Another important task of scientific research would be to indicate the ways to be applied in order to make the unavoidable pollution as harmless as possible. In particular indications are necessary as to the measures which may be imposed by law on human activities which cause pollution, and as to the best means which may be employed in order to combat the accidental pollution.

International control of marine pollution will require the standardization of methods of sampling and analysis which will give sufficiently accurate and uniform results to support the application of the pollution control laws. Scientific advice is needed for the purpose of selecting such methods which may be accepted by law as authoritative.

XII. Pollution of the Baltic

One of the regions where the pollution of marine environment has reached its critical point, is the Baltic. Under certain aspects the Baltic belongs to the most contaminated seas of the world.

The hydrographic conditions of the Baltic are favourable for concentrations of certain persistent chemicals. Moreover, there is a steady decrease in the oxygen content of the deeper water layers accompanied by an increase of phosphorus content.

Researches indicate that certain toxic substances are accumulating in living organisms; PCB, DDT and mercury may be specifically mentioned. The concentrations of these substances have reached a dangerous level.

Domestic sewage presents a considerable problem and the industrial pollution is particularly important. A dangerous trend is expected in the industrial pollution of the Baltic since a variety of new industries will be located in the coastal area (power plants, refineries, fertilizer factories etc.).

Dumpings of industrial wastes by certain countries have occurred within and outside their territorial waters.

Oil pollution in the Baltic is increasing although the present situation in the Baltic in this regard is better than in certain regions of the North Sea or of the Mediterranean. But the density of traffic and the size of tankers entering the Baltic grow, and the petroleum industry in the coastal area is being developed.

Because of the hydrographic conditions of the Baltic some major pollution accidents may have disastrous consequences for the marine life and the coasts of the Baltic.

The pollution of the Baltic is mainly a regional problem concerning above all—the Baltic States. Their activities constitute the main source of this pollution and they exploit chiefly the natural resources and amenities of the Baltic area. The pollution problem cannot be therefore effectively solved without close collaboration of the Baltic States. It should concern in particular:

- scientific research as necessary to control pollution levels and the effects of pollution on the environment,
- application of preventive measures,
- treatment of effects of major pollution accidents.

With regard to the scientific research the regional collaboration has not passed the first stage—exchange of scientific information. It is being felt, however, that it should be intensified and brought on a higher level. It should also receive a proper framework in order to give it a permanent character.

The application of necessary preventive measures would require the conclusion of a regional agreement imposing certain obligations on the participating States; the execution of these obligations should be warranted by agreed forms of international control. Such an agreement should also provide for pooling the resources and common action in case of a major pollution accident in the Baltic area.

The regional agreement of the Baltic States should not be restricted to the problem of oil pollution; oil is not the most dangerous pollutant in the Baltic environment. It is necessary to subject to common control the most dangerous kinds of pollution (industrial pollution in particular) and impose preventive measures on its respective sources. It does not mean that the growing threat of oil pollution may be overlooked. Restrictions should be envisaged concerning the size of tankers (or rather of oil cargoes) cleared in the Baltic ports and safety regulations should be introduced concerning the movement of tankers in the Baltic. Regional collaboration concerning the tracing and combatting of major oil slicks should be established.

XIII. Polish Legislation on Marine Pollution

The basic legal provisions concerning the prevention and control of marine pollution are contained in the Water Law Act, 1962. This law deals with various aspects of the water economy and among others with the problem of pollution.

The Water Law Act, 1962 (“Dziennik Ustaw” No. 34, item 158), is

a modern comprehensive statute containing 173 articles. It is supplemented by a number of executory orders issued by central administrative bodies.

Chapter IV on the Water Law deals with the protection of waters in general and its Section 2 deals with the protection of waters against pollution. This section applies to inland surface waters and waters in the subsoil, as well as to the interior sea waters and the territorial sea. These areas of the Polish coastal waters are subjected therefore—as far as their protection against pollution is concerned—to the same general rules as the inland waters.

The Water Law makes a distinction between “water pollution” and “harmful water pollution” and provides for the protection of waters against both these kinds of pollution. The protective measures applied are, however, different.

The harmful water pollution is defined by Law (Art. 82, para. 3, of the Act). It occurs when by the introduction into the water environment of excessive quantities of solid, fluid or gaseous substances, or of radioactive substances, or of excessive quantities of energy, physical, chemical or biological changes are produced which cause that water is not suitable to be normally used for the communal, industrial, agricultural, fishery or other purposes.

The provisions of the Water Law are applicable to the pollution of soil or atmosphere in the way which may cause the harmful pollution of waters.

The Water Law does not contain any detailed provisions on the standards of permissible water pollution, sewers, etc. These questions are regulated by executory orders issued by the Council of Ministers. In particular the Order dated 9 June, 1970 (“Dziennik Ustaw” No. 17, item 144) dealing with standards of permissible water pollution is of considerable importance.

The introduction into the inland waters, interior sea waters or territorial sea of any substances or energies which may cause a harmful pollution requires a permission. Permission is also required for dumping in the coastal area of substances which may cause water pollution. The voivodship water administration authorities are competent bodies to issue such permissions and to determine conditions on which a permission is granted.

The inland surface waters are classified into three categories of purity depending on their planned appropriation. The extent of control exercised over sewers and the standards of permissible pollution applicable are closely connected with this classification.

Standards of permissible pollution depending on the category of

purity which are in force in respect of inland waters are generally applicable to Polish interior sea waters with the exception of the Gulf of Gdańsk. The requirements are, however, less strict than in case of inland surface waters (certain standards are not applicable).

Standards of permissible pollution do not apply in respect of the waters of the Gulf of Gdańsk and of the territorial sea. But the introduction of sewers into these waters is subject to the control of the water administration authorities and requires a permission. The above mentioned Order of the Council of Ministers has determined conditions on which such a permission may be granted, specifying substances which cannot be drained off into these waters.

It has been ordered that special provisions should be issued concerning the discharge of waste from vessels and other floating appliances into the inland and sea waters. These provisions have not, so far, been issued. In the matter of pollution deriving from ships, control is exercised by marine authorities (marine boards).

Poland has ratified in International Convention on the Prevention of Pollution of the Sea by Oil, 1954, as well as the amendments to this Convention accepted in 1962. These amendments have entered into force in international relations from 18 May, 1967. In Poland the executory provisions to the amended Convention are contained in the Order of Minister of Shipping No. 34 of 21 April, 1967. The provisions of the Order impose on the Polish sea ships the duty to respect the preventive and controlling measures modelled on the rules of the Convention. The discharge by Polish ships of the oil or oily mixture on the high seas contrary to the rules of International Convention is treated by the Order like the pollution of waters under Polish jurisdiction.

Special provisions deal with the protection of harbour waters against pollution. These provisions are contained in the injunctions issued by the Directors of Marine Boards on the strength of their statutory competences. They deal, however, with the problem of harbour pollution from the point of view of safety and order in harbours and not from the point of view of biological consequences of marine pollution.

Under the Water Law harmful pollution is punishable offence. The penalty for deliberate pollution of waters is deprivation of liberty up to two years and fine. In case of unintentional pollution the penalty is deprivation of liberty up to one year and fine. Penalties may also be imposed on anybody who contrary to a legal obligation does not operate the installations protecting the waters against pollution. Pollution of harbour waters by vessels is punished by marine boards in accordance with harbour bylaws. Article X, paragraph 2 of the Introductory Provisions to the Penal Code of 1969 provides that anybody who illegally

discharges from a ship oil or other substance causing pollution of the sea in a prohibited zone is subject to penalty of deprivation of liberty up to 2 years or fine (up to 25,000 zlotys). The Penal Code is applicable in respect of offences committed on board the Polish vessels also outside the limits of the Polish territorial waters.

Article 86 of the Water Law provides that any harmful water pollution creates an obligation to make good the damage inflicted by such pollution. Such a liability is strict. It arises irrespective of the fact whether proper safety measures have been applied or not. If the harmful pollution has been caused by several persons, they are jointly and severally liable unless the extent of damage caused by each of them can be established.

According to the new division of competences in the central administration of Poland, maritime economy and inland water economy are in the competence of distinct ministries: Ministry of Shipping and Ministry of Agriculture. The Ministry of Shipping is responsible, however, for shipping on the sea as well as on inland waters. There is a legal delimitation of sea and inland waters.

The recently created Ministry of Area Administration and Protection of Environment is responsible for the whole of environmental problems including the prevention and control of water pollution (also marine pollution). In this way the conservational and exploitative functions of administrative bodies have been separated at the highest administrative level. In matters concerning the conservation of environment the new Ministry has coordination competences in relation to other administrative bodies. Its competences cover i.a.: control of environmental pollution; programming and planning of the conservation of environment; fixing standards of permissible pollution; development and coordination of scientific researches; international collaboration concerning environmental problems.

XIV. Final Remarks

The consideration of these various aspects of the problem of protection of marine environment against pollution allows us to draw some general conclusions.

First of all it would seem that the lack of sufficient knowledge concerning the origins and effects of marine pollution presents a serious impediment in establishing a system of control and prevention. In the struggle for clean seas possible success of any contemplated actions will very much depend on the results of scientific research. Close links and

collaboration between laboratories and centres of decision will become an obvious necessity; scientists, lawyers and administrators will have to find common language.

Furtheron, it would seem that in view of the complexity of the problem, no single solution or remedy is conceivable to deal adequately with a wide range of problems. The anti-pollution machinery should be flexible, ready to deal with new rising problems under the constant guidance of marine science.

There is an urgent need for change of consciousness. It will not be enough to establish anti-pollution regulations. One should assure that these regulations are strictly observed, and one cannot rely on coercive measures only, although these will be unavoidable. It may be necessary to make the users of the seas understand that the seas are common good of mankind and that the protection of marine environment against pollution is in our common interest.

The need for change of consciousness does not concern only the attitude of individuals. It concerns even more the attitude of governments which should approach the solution of the problem of marine pollution in a proper spirit.

In the final remarks to his excellent book *Avant que la nature meure* Professor Jean Dorst has stressed that the conservation of natural environment cannot be motivated by arguments of pure reason and immediate advantages only. This idea should not be forgotten when we consider the solution of the problem of marine pollution. It is really disheartening to see to what a degree the attitude of governments participating in international conferences concerned with marine pollution is determined by purely economic factors—weighing of financial implications of conservational measures proposed against possible economic advantages to the national interests. In view of the diversity of interests there is little hope that an adequate international solution of the marine pollution problem may be found unless governments reconsider their attitude.

The problem of marine pollution should not be viewed under its purely utilitarian aspect. Curbing of marine pollution is a great humanitarian task which will not be achieved unless the users of the seas act in a proper spirit. A common international action aimed at the solution of this problem may strengthen our faith in the feasibility and effectiveness of international effort thus enhancing the spirit of international solidarity so badly needed in order to solve the more controversial international problems of our time.

International Legal Problems of the Fight Against the Pollution of Rivers

by JANUSZ SYMONIDES

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General Remarks

The increasing industrialization and the constant introduction of new technologies constitute a serious threat to waters, especially inland waters, with special reference to pollution. Rivers in highly industrialized countries are often considered as a kind of natural means of disposal, serving to get rid of all sorts of waste and refuse of industrial and municipal origin. A dramatic illustration of this was the River Guyahoga in Cleveland, which was so saturated with oil, that in the summer of 1969 it burst into flame, which threatened two railway bridges.¹

It is the crude oil, chemical, cellulose and paper as well as metallurgical industries which, above all, cause pollution. Another source of pollution may also be irrigation and even rain, or waters which, drawing off fields, carry artificial fertilizer and pesticides. Such substances, when they get into rivers or water reservoirs in concentrations exceeding the capacity of the water to purify themselves become a pollution problem.² In many rivers, this limit has already been surpassed.

¹ *The Environment*, New York, p. 20.

² B. M. KLIMENKO, *Mieżdunarodnye reki*, Moskva 1969, p. 96.

The list of substances causing pollution includes: (a) organic substances in municipal and industrial waste, (b) non-organic salts, of industrial origin—primarily from the mining industry, (c) bacteria and other organisms, (d) specific toxic substances, (e) mineral oil, (f) radioactive waste.³

Pollution causes, depending on the type, certain specific damage. It deprives the population of healthy drinking water and recreation possibilities, it destroys biological life, threatens agriculture and industry with damage of various kinds.⁴

The serious consequences of river pollution have led in many countries to the drawing up of national programmes for the fight against this danger. But it has emerged that the problem cannot be solved without appropriate international cooperation. This is because of the world-wide network of inland waters together with the fact that frequently the rivers, lakes and water reservoirs which most require protection do not belong to one country, but are utilized by many.⁵ The origin of many complications lies also in that existing frontiers were not established on the basis of rational water management as regards certain hydrographic basins. International law had to focus attention on this problem because of the necessity to organize international cooperation in the fight against pollution of inland waters, the need to define and establish laws and the relevant obligations of the various countries, but above all because river pollution in one country may cause serious damage to another.

However the science of international law began to take an interest in the pollution of inland waters only in the fifties of the present century.

The possibility that serious harm may sometimes be caused to the territory of another country really also exist and quite frequently leads to controversies and even international conflicts. For example—the controversy between Mexico and the United States in 1962, regarding the salinity of the Colorado River.⁶ The agreement reached in 1944 between the countries interested laid on the United States the obligation to supply

³ *Water Pollution Control in Europe. Progress Report by the Executive Secretary, E/ECE/312, 24 February, 1958, p. 1.*

⁴ Polluted water is unsuitable for hydration because it may cause the destruction of cultivated vegetation, and it cannot be used in animal breeding since it may give rise to poisoning or illness. In industry, it increases corrosion and hinders the usage of certain installations, as well as it prevents certain technological processes.

⁵ M. FLESZAR, *Granice i kierunki odnowy środowiska geograficznego* [Limits and Directions of the Protection of the Geographical Environment], "Sprawy Międzynarodowe," 1971, No. 2, pp. 19–136.

⁶ On that subject, cf. Don. C. PIPER, *A Justifiable Controversy Concerning Water Rights*, AJIL, 1962, p. 1019 ff. *États Unies et Mexique. Différend relatif à la contamination du fleuve Colorado par un excès de dépôts salins provenant des déserts américains de l'Utah, du Colorado et de l'Arizona*, RGDIP, 1962, pp. 618–621.

a certain amount of water. Due to the implementation of a melioration and drainage programme involving the fields in the state of Arizona, the salinity of the Colorado River was actually trebled by 1961. This constituted a serious threat to Mexican agriculture, over 500,000 acres being irrigated by this river. As proof of the tension which arose as a result of this pollution, stands the fact that in a proclamation addressed to the people of the United States the Mexicans declared the salination of waters to be an aggression. Since the 1944 agreement made no reference to the quality of the water supplied, it was necessary to establish whether the United States had in this respect complete freedom or whether, as Mexico maintained, they were under obligation to supply water of good quality. Finally, the matter was made the responsibility of the American-Mexican Frontier and Water Committee, and the United States undertook appropriate steps to decrease the salinity of the water.

Slightly later, but also in 1962, the United States reversed the positions by accusing Mexico of causing the salinity of the River Rio Grande to be excessive, and in some circles it was even maintained that this salinity was a reprisal by the Mexicans for the pollution of the Colorado River. In his explanations, the Mexican Minister of Foreign Affairs, maintained that the salinity of Rio Grande was not caused by his country, but was a natural phenomenon; it was not the first time it had happened, and it had never seriously endangered the interests of farmers in Texas.⁷

Other examples of harmful effects of pollution have also time and again been laid to the charge of Switzerland,⁸ whose hydro-electric installations every few years dump accumulated waste into the Rhône.

In contradistinction to the classical conception of international rivers, as regards pollution, international law interests itself not only in rivers forming boundaries to several nations or such which flow through the territories of several States, but also in all kinds of surface and ground waters, provided their pollution leads to pollution of waters belonging to another country. With a view to broadening the sphere of interests of international law it was proposed to introduce such terms as "international waterways" or "international river basin." The criterion as to whether a given reservoir or stream may be the subject of interest of international law was to be the fact that consequences transcend State boundaries.⁹

⁷ *États-Unies et Mexique. Difficultés consécutives à la contamination du Rio Grande par un excès de dépôts salins*, RGDIP, 1962, pp. 775 - 776.

⁸ *France et Suisse. Mesures contre la pollution du Rhône*, RGDIP, 1965, pp. 1114 - 1175.

⁹ In this elaboration we are talking about international law problems of the struggle against pollution on a *pars pro toto* principle, but we realize that a more appropriate definition would be given by the use of the term "inland waters."

In this connection it should be noted, that this broadened and universally accepted conception is, it seems to us, not entirely adequate for the requirements of environmental protection, since it eliminates from the sphere of interest of international law the pollution of national rivers, which from source to mouth are entirely within the territory of a single State. But though these rivers do not actually pollute the territories of a neighbour country, they nevertheless pollute the open sea.

Before giving an answer to the question as to whether international law establishes an obligation not to pollute inland waters, some attention should be devoted to the explanation of the notion—pollution.

The Notion of "Pollution"

International law has not so far established a definition of "pollution." This can be explained by the lack of international legislative acts of a universal nature requiring such a term, as also by divergences in the legislation of the various countries. Such countries refer either to general definitions,¹⁰ or to more detailed ones—based on standards of water purity the failure to conform to which signifies pollution. In the second case, purity norms tend to be rather rapidly revised and adapted to changing conditions,¹¹ so that international practice cannot entirely rely on them.

The lack of a binding definition does not, however, mean that neither in doctrine nor in practice are attempts made to define this notion more precisely. Among the proposals which recent years have received wide support, may be noted a definition, suggested by a group of experts consulted in February 1957 by the Executive Secretary of the European Economic Commission. According to this definition pollution of water means a change in its state or composition, being the direct or indirect result of man's activity, due to which the water becomes less suitable.

Similar formulations were accepted by the conference on problems related to the pollution of waters in Europe. "A river is polluted when

¹⁰ Such a definition is given by the Polish act on water rights of 30 May, 1962, Art. 82, pt. 3: "In the understanding of the aforesaid act, detrimental water pollution is inducing in it of physical, chemical or biological changes by the introduction into it of excessive amounts of solid, liquid or gaseous substances, or excessive amounts of energy as well as radioactive or other substances that could cause the water to be unsuitable for communal, industrial, agricultural, fishing or other usages." "Dziennik Ustaw" ["Journal of Laws"], 1962, No. 34, item 158.

¹¹ R. COLAS (*La pollution des eaux*, Paris 1968, p. 58) summarizes the review of internal legislations with the statement that, in general, they are a general outline only and make no attempt to find a rigid definition of pollution.

its water changes its state or composition, directly or indirectly as the result of man's activity, in such a way that it becomes less suitable for some or all purposes, for which it had been suitable in its original state."¹²

A broader definition of the notion pollution is also given by the agreement, dated 17th July, 1964, between the Polish People's Republic and the Union of Soviet Socialist Republics on water management in relation to frontier waters.¹³ Article 4, item 2 leads to the conclusion that pollution means:

"[...] the direct or indirect introduction into water of such an amount of solid, liquid, gaseous and heated substances, as may cause physical, chemical and biological changes, limiting or excluding the possibility of normal utilization of such water for municipal, industrial, agricultural, fishing or other purposes."

Despite certain differences in detailed formulations, these definitions tend unanimously to point to the fundamental elements in the term pollution. We are confronted by pollution wherever, from the physical (technological), chemical or biological point of view, changes in the composition, state or quality of the water are the result of direct or indirect human activity. This means, for example, that a change taking place in the composition of water as the result of natural washing away of mineral salts or the outflow of crude oil, is not pollution from the point of view of international law.¹⁴

Human activity, causing water pollution, is not reduced merely to the introduction of solid, liquid, gaseous or radioactive substances, in such quantities or of such a temperature that this causes changes.¹⁵ A substantial increase in the temperature of water which may yield dangerous results, may occur without the introduction of any substances of a high temperature, but be simply the result of the immersion or location in the vicinity of enterprises which release considerable quantities of thermal energy. In a similar way, radioactive contamination may be the result of irradiation, caused by a breakdown of an atomic pile, though no radioactive substances actually find their way into the river bed.

¹² UN Doc. E/ECE/3111, p. 4.

¹³ "Dziennik Ustaw," 1965, No. 12, item 78.

¹⁴ However if, as in the given example, the mineral salt of petroleum inflow pollution is the consequence of an altered river-bed, by the construction of a dam e.t.c., then we are dealing with the pollution directly resulting from man's activities.

¹⁵ Art. 8 of the Agreement between the Polish People's Republic and German Democratic Republic governments on cooperation in the domain of water administration of borderland waters of 11 March, 1965, "Dziennik Ustaw," 1965, No. 49, item 303. It seems that a more general formulation speaking about the introduction of warm substances, rather than those with higher temperatures conducting changes, would be better.

Even so, not every artificial change in the composition of water can automatically be qualified as pollution. Such a rigoristic approach would necessitate considering as pollution even activity aimed at improving the water.¹⁶ Despite the existing differences of opinions, predominant is the view that only harmful changes, causing a decreased usefulness or complete uselessness of the water, give rise to a legal problem. Thus the term pollution suggests an existing or potential limitation of possibilities of using the water of a river, canal, lake or water reservoir for various communal and economic purposes.

But the fact that the term pollution is applied only when it causes harmful effects, imparts to it, to a considerable extent, features of relativity. The same amount of industrial dust fall into various rivers may in one case cause pollution and in another not. That will depend on a variety of factors, the amount of water and the biological and hydrological properties of the given basin.¹⁷ Moreover, it may happen that that same activity which as a rule does not cause harmful results may seasonally—due to a lowering of the river level—turn out to be hazardous. Consequently a more accurate definition of what signifies pollution can be arrived at only as between countries interested, in relation to some specified river or water reservoir.

From the point of view of international law, however, it does not seem correct to reason on the basis of the term pollution being applied only in cases of effects adverse to the utilization of inland waters. In international relations, the term pollution should be applied to any activity which, though it has so far had no harmful effects on the suitability of the waters, involves the danger of an epidemic, of radioactive contamination, destruction of the landscape or pollution of the air.¹⁸

Acceptance of this amendment would mean that not only a change as a consequence of man's activity, in the state, composition or quality of the water decreasing its utility, will be considered pollution, but also if the use of such water endangers man and his natural environment—that would be pollution, too.

¹⁶ Among such processes may be noted: coagulation chiefly caused by the introduction of aluminium, iron and salt, de-ferrugination, de-manganation, chlorination, ozonation, etc.

¹⁷ M. WOLFRAM, *L'utilisation à des fins autres que la navigation des eaux des fleuves, lacs et canaux internationaux*, Paris 1964, p. 236.

¹⁸ Similarly E. J. MANNER, *Water Pollution in International Law. The Rights and Obligations of States Concerning Pollution of Inland Waters and Enclosed Seas*, in: *Conference on Water Pollution in Europe*, Geneva 1961, vol. 2, p. 450.

The Duty to Abstain from Pollution

In the struggle against the pollution of rivers it is important to ascertain whether international law includes provisions which clearly define the relevant responsibilities of States.

As regards conventional norms, it is possible to indicate a number of international agreements imposing such obligations; but very few—and those signed only recently—exclusively concern questions of pollution. Reference may be made to the 1960 convention on the protection of Lake Constance, signed between the German Federal Republic, Switzerland and Austria,¹⁹ the 1962 French-Swiss convention on the protection of Lake Geneva,²⁰ or the 1963 agreement on the protection of the Rhine, signed between the German Federal Republic, France, Luxemburg, Holland and Switzerland.²¹

Among agreements containing provisions of any kind concerning the protection of water, two groups can be distinguished: those on fishing and those on frontier rivers. The first group includes the following agreements:²² between Baden and Switzerland—1869 and 1875; between France and Switzerland—1880 and 1904; Italy and Switzerland—1882, 1906 and 1913; Luxemburg and Prussia—1892. The second group includes:²³ the USA-Canada treaty—1909; the French-German treaty—1925; the agreement between Holland and the German Federal Republic—1960; between the USSR and Finland—1964; the Polish People's Republic and the USSR—1964; and a number of other agreements signed between European socialist countries.

A review of provisions regarding the protection of water from pollution shows that these are not uniform clauses, but rather formulations differing considerably one from another. Together with relatively rare agreements stipulating the absolute prohibition of pollution,²⁴ much more frequently encountered are relative prohibitions, placing a country under obligation to fight only increasing or excessive pollution, as is stipulated in the 1960 Indian-Pakistani agreement, concerning the River Indus.²⁵

The formulation of interdictions may depend on the consequences. Thus, agreements on fishing usually place on both sides the obligation to

¹⁹ M. WHITEMAN, *Digest of International Law*, Washington 1964, vol. 3, p. 1045.

²⁰ RGDIP, 1963, p. 1 ff.

²¹ RGDIP, 1963, p. 28 ff.

²² M. WOLFRAM, *op. cit.*, p. 237.

²³ M. WHITEMAN, *op. cit.*, p. 1044.

²⁴ Here, it is also possible to mention the Dutch-German agreement of 1922 and the Belgian-German agreement of 1929.

²⁵ Art. 4, pt. 10, AJIL, 1961, p. 803.

abstain from discharging any wastes which could be harmful to this activity.²⁶

Also to be encountered are formulations which clearly distinguish only certain types of contamination. Thus, the 1939 understanding, in the form of an exchange of notes, between the USA and Canada, mentions various types of oil and its derivatives, and the Euratom (European Atomic Energy Community) treaty of 1957 (Articles 35 - 38) concentrates on the protection of waters from radioactive contamination.²⁷

No universal conventional norms exist in international law, more closely defining the duties of a State as regards the protection of waterways; formulations found in bilateral and multilateral agreements, but involving somewhat narrow group of continents only, show no uniform features indicating that appropriate customary norms are taking shape.

The attitude adopted by various countries also provides no evidence as to the existence of international customs and practices. Harmon's doctrine, formulated in 1895, to the effect that international law laid on the United States no obligations whatsoever as regards the use of rivers, is no longer so determinedly insisted upon, not even by the USA itself,²⁸ as is shown by the attitude adopted in the controversy with Mexico. However, practice continues to lack uniform features to a degree enabling a precise definition of the obligations of countries in the matter of water protection. The international courts have also not made any specific contribution towards disclosing the existence of customary norms. So far, neither the Permanent Court of International Justice nor the International Court of Justice have been called upon to deal with any case, arising out of pollution. And decisions handed down by the Federal Court of the United States in controversies between different States are only of limited significance.²⁹

Despite the lack of uniformity in the conduct of States, Brigg's opinion as to absolute freedom in regard to river pollution, is already an anachronism.³⁰ The principle that countries have certain definite obligations will undoubtedly take shape, but it is of the utmost importance that such principles should be defined with precision, at least in the form of a codify-

²⁶ Such a decision is also contained in the convention on fishing in the waters of the Danube, negotiated between Bulgaria, Rumania, Yugoslavia and the USSR from 1958.

²⁷ "Zbiór Dokumentów" ["Collection of Documents"], 1957, No. 5, pp. 836 - 838.

²⁸ *Utilisation des eaux internationales non-maritimes, Rapport provisoire* présenté par J. ANDRASSY, *Institut de Droit International*, Genève 1959, pp. 111 ff.

²⁹ Cf. examples given by A. P. LESTER, *River Pollution in International Law*, AJIL, 1963, p. 844 ff.

³⁰ H. W. BRIGGS, *The Law of Nations*, New York 1952, p. 274.

ing process relating to the problem of industrial utilization of rivers and protection of the environment. This would substantially increase the effectiveness of the struggle against inland water pollution.

The Basis for Responsibility for River Pollution

Is a country responsible, despite the lack of universal conventional and customary norms, for harmful consequences inflicted on other countries as a result of pollution—or is it not? Various answers have been given to this question. The Bulgarian author Stainov—speaking for a minority—thinks that responsibility is not self-originating, and that the only way to create legal foundations is by signing of special agreements.³¹

The Institute of International Law in its resolution adopted at the Salzburg session in 1961, adopted a different attitude, mentioning responsibility in case of damage. In Article 4, the Institute explicitly declared that one condition for the utilization of the waters of an international river or basin by one country is that, in the event of such use seriously jeopardizing the possibilities of its utilization by another country, compensation appropriate to cover the losses and damage inflicted must be made.³² The principles adopted by the International Law Association in 1956, as a basis for the work of the Committee concerned with the use of the waters of international rivers, include a formulation to the effect that pollution of waters in one country, which inflicts harm on another country, makes the former responsible for the harm inflicted.³³ This attitude was fully elaborated and developed at conferences of the Association, held in 1964 in Tokyo and in 1966 in Helsinki.

In order to justify responsibility for harm inflicted by pollution in situations not regulated by international agreement, the authors refer to various theories and principles of international law and even mention geographical facts. Thus they quote: the theory of the coherence of a river basin, abuse of the law, servitudes, the principle of territorial integrity, neighbourhood or supreme authority over a territory.

1. The theory of the coherence of an international river basin, introduced by Hartwig³⁴ and named “Kohärenprinzip,” is based on the

³¹ P. STAINOV, *Les aspects juridiques de la lutte internationale contre la pollution du Danube*, RGDIP, 1958, pp. 114–116.

³² *Session de Salzburg 1961*, Institut de Droit International, Genève 1962, p. 2.

³³ M. WHITEMAN, *op. cit.*, p. 1047.

³⁴ E. HARTWIG, *Internationale Wasserwirtschaft und Internationales Recht*, Wien 1955, p. 45.

assumption that a river basin, divided by frontiers and belonging geographically to several States, should be treated as a single coherent legal entity—as a single waterway. That is why all countries through whose territories flows an international river remain in mutual dependence as regards not only utilization but also pollution. This theory also stresses the element of the common interest of the countries falling within a certain river basin. This move was mentioned by the PCIJ in its decisions on the territorial competence of the International Odra River Commission.³⁵

The theory of the coherence of a river basin can, however, not explain what kind of norms or principles lead to the change in the physical and legal coherence—and why.³⁶ It suffices to refer to the example of sea waters, which are to an even greater extent a geographical entity, but even this has not led to the emergence of a legal system.

2. The conception of abuse of law, introduced above all in France (*abus de droit*), finds a number of adherents also among internationalists. A full outline of this conception was presented by Politis in a lecture given in 1925 at the Hague Academy of International Law.³⁷ Even though this conception, has twice been mentioned by international law,³⁸ it cannot be considered a binding principle of such law, due to its controversial aspects. It uses such notions as: guilt—and that in various degrees, individual or collective—intent to harm, social harm, i.e., notions which in principle are not known to international law. As has been correctly emphasized in the literature, the problem does not consist in the fact that legislation may be abused or become invalid, but under what circumstances such invalidation takes place.³⁹ Theory is not in a position to give a precise answer to this question. The introduction of the conception of abuse of law, in relation to the problems under discussion, may also be questioned since in fact it stresses “the right” of a country to pollute and finally makes responsibility dependent on guilt or intent to harm, which is not in accordance with present-day trends.

3. There must also be basic doubts concerning the attempt to introduce responsibility for the existence of servitudes—international rendering of services—as a result of which a country situated on the lower

³⁵ CPJI, Ser. A, No. 23, p. 27.

³⁶ P. STAINOV, *Meždunarodnopravnata reglementacija po spazbanije cistota na meždunarodnite reki*, Sofia 1964, p. 51 ff.

³⁷ N. POLITIS, *Le problème des limitations de la souveraineté et la théorie de l'abus de droit dans les rapports internationaux*, RCADI, Vol. 6, 1925, p. 55 ff.

³⁸ This was done by PCIJ in the case of German interests in Polish Upper Silesia. Ser. A, No. 24, p. 12, as well as by the ICJ in the case of fishing, between England and Norway, *Reports*, 1951, p. 412.

³⁹ A. P. LESTER, *op. cit.*, p. 834.

course of a river should receive unpolluted water. Service in this case most frequently means permanent limitation of State authority as regards part of a country's territory, resulting either from international agreements or from limitations formally imposed on a territory arising out of the interests or certain aims of another country (usually economic or military).⁴⁰ Controversy exists in international law as to whether the existence of such obligatory services is permissible, legal science in general tending to deny it. This negative attitude is due to the fact that the concept of "servitudes" originates in Roman law and stems from treating the territory of a State as property.⁴¹ International judiciaries, too, have several times denied the existence of this institution.⁴²

Referring to international obligatory services, even if we assume that such exist in international law, it remains the outcome of a number of misunderstandings. If obligatory services are seen as an agreed limitation on sovereign territorial rights, then the relevant agreement is in itself already sufficient foundation for the arising of responsibility. It does not seem to the present writer that the fact that a particular country has for certain stretch of time not polluted a river basin could be used to justify the existence of an obligation on its part not to pollute. The fact of pollution, after all, need not be the result of a volitional act on the part of the given country, but merely a result of technological development, of the location of industry or preference for certain trends in industrialization. Finally, let us add that obligatory services assume unilaterally—on the part of the country, situated on the upper course of the river, limitation on its sovereign rights as regards its own territories. It seems that acceptable would be only a theoretical system which stipulated mutual rights and obligations.

4. The principle of territorial integrity, introduced by M. Huber⁴³ is based on the assumption that all countries are entitled to demand that their territorial sovereignty be respected. No State has the right to exert influence on the territories of another but also need not tolerate foreign interference. The correctness of this statement is unchallengeable.

In our times the prohibition against threats and the use of force violating territorial integrity has become one of the fundamental prin-

⁴⁰ M. YDIT, *Internationalised Territories*, Leyden 1961, p. 19, as well as W. N. Durdieniewski, S. B. Krylow, *International Law Handbook*, Warszawa 1950, p. 254 ff.

⁴¹ E. N. van KLEFFENS, *Sovereignty in International Law*, RCADI, Vol. 82, 1953, pp. 94 - 95.

⁴² This was stated by the mediatory tribunal in the case of North Atlantic fishing, as well as by PCIJ in the case of the ship, "Wimbledon," AJIL, 1910, p. 948, CPJI, Ser. A, No. 1, p. 42.

⁴³ M. HUBER, *Ein Beitrag zur lehre von der Gebietshoheit an Ganzflüssen*, "Zeitschrift für Völkerrecht und Bundesstaatrecht," 1907, p. 163.

ciples of international law. Thus, if pollution is regarded from the point of view of territorial integrity, we are obviously transferring the problem to the plane of prohibition against having recourse to economic pressure, which in turn may lead to the introduction of sanctions. This course of reasoning probably led in the Mexican-American controversy to the acceptance of the fact that the pollution of the waters of the Colorado River constituted an aggression.⁴⁴ However, not every pollution can be approached as an infringement of territorial inviolability. That is why the principle of integrity can be used only to a limited extent and only in the case of exceptionally serious consequence resulting from pollution.

5. In recent years the principle of neighbourhood, sometimes called good neighbourly relations, has come to the fore in international law. Its principal and convincing exponent is J. Andrassy.⁴⁵ Another is G. Sauser-Hall.⁴⁶ This principle, considered as binding in international law, is based on the maxim *sic uti re tua, ut alienum non laedas* (use your property so as not to inflict harm on others). It makes use of certain elements of conceptions already mentioned, emphasizing the interdependence of the interest of countries with common frontiers or the necessity to observe the territorial integrity of a neighbour. For the interests of good neighbourly relations, activity which may inflict harm on territories outside the national boundaries should be constrained. This principle, however, is based on mutuality. The rights and duties of countries are approached from a comprehensive, point of view.⁴⁷ That is why it is necessary, in order to establish the violation of any norms of good neighbourly relations, to take into account the consequences of certain activities and the claims of a neighbouring country as well as the extent to which such demands have been satisfied. It is necessary to ascertain what damage has been done and what advantages have accrued. Thus the law on good neighbourly relations is a derivative of the fact that beyond boundaries State competences come into contact and quite often even clash, giving rise to conflicts. This law also takes into account the fact that it is impossible to limit the consequences of activity exclusively only to own territory.

⁴⁴ Don C. PIPER, *op. cit.*, p. 1021.

⁴⁵ J. ANDRASSY, *Les relations internationales de voisinage*, RCADI, Vol. 79, 1951, p. 4 ff., as well as *Utilisation des eaux...* p. 122.

⁴⁶ G. SAUSER-HALL, *The Industrial Use of International Rivers*, RCADI, 1953, p. 553 ff.

⁴⁷ From this aspect not only the State situated on the upper course of the river can cause damage. A neighbouring State, situated on its lower course, can poison the air or, building a dam, it may flood a part of the territory. Cf. the general considerations of J. SYMONIDES, *Terytorium państwowe w świetle zasady efektywności* [State Territory in the Light of the Principle of Effectiveness], Toruń 1971, p. 68.

6. The rule that a country may not utilize its territory in a manner liable to inflict harm on another country can be combined either with the law on good neighbourly relations or with that concerning territorial sovereignty. The wielding of supreme power over own territory not only imparts rights but also imposes obligations. Further, it makes a country responsible for any harm inflicted on another country. This principle was stressed during arbitration procedures in the *Trail Smelter* case⁴⁸ between the United States and Canada. At that time, the Tribunal reached the conclusion that in accordance with the principles of international law no State has the right to utilize its territory or permit it to be utilized in a manner which may cause damage to another State. Therefore, the obligation was laid on Canada to pay compensation for the damage caused to the United States by copper smoke, emitted by a private Canadian metallurgical plant. Also, in its ruling in the *Corfu Channel* case,⁴⁹ the International Court of Justice emphasized the duty of every State not to permit its territory to be used for activity incompatible with the laws of other countries. A country is held responsible for any change in the state and composition of the waters of a hydrographical basin, causing damage to another subject of law, but there are no accurate definitions of many relevant detailed problems.⁵⁰

The list of doubts starts with the question as to whether responsibility arises in the case of any kind of damage, or only if such damage is serious. Acceptance of the second eventuality makes it necessary to explain, in turn what should be considered true damage. In commentaries to the rules accepted at the 1966 session of the International Law Association in Helsinki it appears that damage is serious, if it materially hampers the utilization of or makes it difficult to utilize waters in a reasonable manner.⁵¹

A State is held responsible for its own activity as well as that of physical and legal personalities on its own territory. In the second case, the State is held responsible for abrogation and not taking appropriate administrative and legal steps.

The universally accepted form of compensation for real losses suffered, is the payment of an appropriate sum of money. This finds its confirmation in practice. International Law, however, demands above all restoration of the previous state of affairs, and only when this proves impossible,

⁴⁸ AJIL, 1941, p. 684.

⁴⁹ ICJ, Reports, 1949, p. 22.

⁵⁰ Considerations on liability are to a great extent based on J. SYMONIDES' elaboration, *Odpowiedzialność państwa w prawie międzynarodowym* [State Liability in International Law], "Studia Prawnicze," No. 30.

⁵¹ B. M. KLIMIENKO, *op. cit.*, p. 103.

the payment of compensation. As a rule, it is impossible in the case of pollution to restore the previous state and hence a country has to pay compensation. But it is obliged for the future to prevent the occurrence of such damage and this obligation cannot be replaced by compensation periodically paid. In some situations, if pollution is so substantial that it gives rise to a serious threat to the life of the inhabitants of a neighbouring country, to an extent justifying the use of the concept of genocide—there arises the problem not only of financial compensation, but also of other sanctions.

Does responsibility come into being at the moment when serious damage is inflicted on another State or only at the moment when a State is held responsible for such damage, when proof has been established of neglect on its part or intent to harm. In other words: is responsibility objective—is it consequential or arising from guilt? At least some of the reasons tend to be in favour of the acceptance of the theory of objective responsibility.⁵² Let us start with the statement that such a complicated matter as pollution of water does not always allow of the establishment of guilt. In fact, the State raising the claim would in that case have to look for evidence in a sphere where to a considerable extent the given subject is competent, namely its internal affairs. In the case of objective responsibility, it suffices to establish the existence of real damage caused in own territory.

Consequences as the basis for responsibility are actually more and more frequently taken into account in international law. This refers to such new spheres as nuclear activity and activity in outer space. It is not without significance that responsibility for the pollution of water in domestic legislation is also of an objective nature. Thus, the acceptance of objective responsibility might markedly facilitate solution of the problem of water pollution in international law.

Conclusion

Coordination in the international arena is necessary in order to obtain positive results in the struggle against pollution. That is why this problem has been included in the programmes of many international organizations. It is dealt with in the United Nations system above all by the United Nations Economic and Social Council, which considers the struggle against pollution as part of the vast problem of the development and

⁵² Likewise M. WOLFRAM, *op. cit.*, pp. 245 - 246. This view met a wide support at the European conference in 1961 as well as in the International Law Association works.

protection of water resources.⁵³ In Resolution 675/XXV, the Council on the one hand stressed in particular the necessity to decrease water pollution in industrialized countries, and on the other hand it emphasized the necessity to protect the water in developing countries. Other specialized agencies, such as: FAO, IAEA and WHO also concern themselves with the pollution problem. Important work to prevent the pollution of rivers is being undertaken by CMEA, the Council of Mutual Economic Assistance,⁵⁴ where a special body has been set up—a conference of the heads of the central organs of water management of the member States. Its object is to solve current as well as long-range problems of water economy. One of the first problems facing the conference was that of frontier waters. In 1962, the fundamental principles were laid down in a document concerning cooperation of CMEA countries in the protection of the purity of frontier waters, on the basis of which socialist countries including Poland, signed a number of bilateral agreements. A problem that still awaits solution is the establishment of uniform criteria and norms of water purity.

How may the results obtained so far in the struggle against pollution of inland waterways be evaluated? Certain achievements are to be recorded in two regions in Europe and North America, which is the natural result of the fact that the waters of these parts of the world are seriously endangered. But it seems that the necessity to organize cooperation faces other regions as well.

Even in Europe, not all the river basins are as yet the subject of proper agreements. Moreover, a number of existing agreements cannot be considered fully effective instruments in the struggle against pollution. Only a few of them—those dealing with the Rhine, the Moselle, Lake Constance or Lake Geneva—make provision for the existence of a special international body. These agreements have stipulated the setting up of special committees, made up of representatives of the contracting sides, of who conduct research to establish the origin and type of pollution and also may propose to the governments interested the introduction of absolutely necessary measures and the division of expenses for the implementation of joint ventures.

Such positive frontier agreements include those signed between socialist countries. They organize cooperation, make provision for consultations between the parties interested, through the intermediary of especially appointed plenipotentiaries for economic problems related to frontier waters. Any controversies are settled by means of negotiations between

⁵³ A Special Water Resource Development Centre was appointed in the UN headquarters in 1959 for these purposes.

⁵⁴ P. STAINOV, *Meždunarodnopravnata reglementacija...*, p. 133 ff.

the plenipotentiaries of the countries interested. There also exists the possibility of setting up special working groups for the solution of certain separate problems.

So far, international cooperation in the struggle against water pollution is based principally on bilateral agreements. This is quite understandable. But of the utmost importance for the problems under discussion would presumably, be the signing of multilateral agreements—universal or regional ones, which would more accurately define the rights and duties of States, and also define in detail the type and forms of responsibility. Only by means of multilateral agreements, will it be possible, in view of the economic consequences, to limit the use of certain substances, to prohibit the installation of certain appliances or technological processes.

A mi-chemin de la codification du droit international des conflits armés (Point de vue polonais)

par SŁAWOMIR DĄBROWA

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État actuel de codification

Depuis que l'Organisation des Nations Unies a largement entrepris les travaux sur la codification du droit international maritime dans les années 50, du droit diplomatique et consulaire dans les années 60, et récemment du droit des traités — le droit de la guerre a été un des domaines les plus codifiés du droit international. On le doit surtout aux réalisations de deux grandes conférences diplomatiques: conférence de la paix de La Haye en 1907¹, qui a voté plusieurs conventions relatives aux lois et coutumes de guerre², ainsi que conférence diplomatique de Genève de 1949³ qui a adopté quatre conventions relatives à la protection des victimes de guerre⁴.

En dehors de ces instruments internationaux il existe des accords importants tels que: protocole de Genève sur la prohibition d'emploi des

¹ V. S. NAHLIK, *Dorobek wielkiej kodyfikacji (w 60-lecie konferencji haskiej z 1907 r.)* [Les réalisations de la grande codification: à l'occasion du 60^e anniversaire de la conférence de La Haye en 1907], « Państwo i Prawo », 1967, n° 12, p. 937 et suiv.

² *Prawo międzynarodowe i historia dyplomatyczna. Wybór dokumentów* [Le droit international et l'histoire diplomatique. Recueil des documents], vol. I, Warszawa 1954, p. 234.

³ V. J. MAKOWSKI, *Nowe konwencje genewskie* [Les nouvelles conventions de Genève], « Państwo i Prawo », 1953, n° 5/6, p. 716 et suiv.

⁴ *Dziennik Ustaw* [Journal des Lois], 1956, n° 38, texte 171.

armes chimiques et bactériologiques de 1925⁵, statut du Tribunal International Militaire de 1945⁶, convention relative à la prévention et la punition du crime de génocide de 1948⁷ et autres⁸.

En somme ces actes précités ont institué l'ensemble des normes du droit international de la guerre dont le but essentiel est de limiter la liberté d'agir des combattants, de diminuer les effets destructifs de la guerre et d'améliorer le sort de ses victimes⁹.

Pourtant, il est facile de remarquer que premièrement il existe toujours des domaines réglés essentiellement par le droit coutumier et non pas par les normes conventionnelles (p. ex. les règles de la guerre aérienne), et deuxièmement la plupart des normes conventionnelles sont nées dans la période où du point de vue technique on appliquait une technique militaire entièrement différente de celle qui règne aujourd'hui, et du point de vue juridique la guerre n'a pas été interdite en tant que moyen de résoudre les différends internationaux, ce qui existe de notre temps.

C'est pourquoi dans la dernière décennie des tentatives ont été maintes fois entreprises pour la reprise du processus de la codification du droit de la guerre¹⁰. Là où elles portaient sur une étendue relativement restreinte de questions, elles ont été couronnées de succès sous forme par exemple de la convention de La Haye de 1954 pour la protection des biens culturels en cas de conflit armé¹¹, de la convention de 1968 sur l'imprescriptibilité des crimes de guerre et des crimes contre l'humanité¹² ou de la convention de 1971 sur l'interdiction des armes biologiques et toxiques¹³ (n.b. la Pologne a été l'instigatrice de ces deux dernières conventions). Les tentatives de la reprise de la codification à une échelle plus grande n'ont pas été appuyées par un nombre suffisant d'États.

⁵ *Prawo międzynarodowe i historia dyplomatyczna. Wybór dokumentów* [Le droit internationale et l'histoire diplomatique. Recueil des documents], vol. II, Warszawa 1958, p. 260.

⁶ *Ibid.*, vol. III, Warszawa 1960, p. 203.

⁷ *Ibid.*, p. 331.

⁸ La liste chronologique de tous les actes est donnée par A. KŁAFKOWSKI (*Prawo międzynarodowe publiczne* [Le droit international public], éd. IV, Warszawa 1971, pp. 351 - 354).

⁹ V. W. MORAWIECKI, *Środki zwalczania wojny. Prawa i zwyczaje wojenne. Zakończenie i likwidacja skutków wojny* [Les moyens de la lutte contre la guerre. Lois et coutumes de guerre. La fin et la liquidation des effets de la guerre], Warszawa 1957, p. 127.

¹⁰ V. J. SUTOR, *ONZ a rozwój międzynarodowego prawa wojennego* [L'ONU et l'évolution du droit international de la guerre], « Państwo i Prawo », 1964, n° 1, p. 36 et suiv.

¹¹ *Journal des Lois*, 1957, n° 46, texte 212.

¹² *Journal des Lois*, 1970, n° 26, texte 208.

¹³ *Resolutions Adopted by the General Assembly During its XXVI Session*, doc. A/8429, p. 30 (res. n° 2826/XXVI).

Reprise des travaux de codification

Ce ne sont que les énormes souffrances des victimes de guerre, surtout de la population civile, au Vietnam, au Moyen-Orient et au cours d'autres conflits contemporains qui ont contribué à la naissance des conditions favorables à la reprise du processus de codification du droit de la guerre à une échelle plus grande que jusqu'à présent. Il a commencé au cours de la XXI-ème Conférence Internationale de la Croix-Rouge à Istanbul, en septembre 1969¹⁴, et il a été poursuivi en 1971, lors de la conférence des experts des sociétés nationales de la Croix-Rouge à La Haye¹⁵ ainsi qu'à la conférence des experts gouvernementaux tenue à Genève¹⁶.

Le titre officiel des travaux menés a été conçu en ces termes: « Conférence sur la réaffirmation et le développement du droit international humanitaire appliqué dans les conflits armés ». L'expression « droit humanitaire » indique le but principal qui se révèle comme la protection des victimes de guerre. Par contre, l'expression « le droit appliqué dans les conflits armés » reflète l'aversion de la société internationale pour l'emploi de la notion « le droit de la guerre » (*ius in bello*) dans la période où en vertu de la Charte des Nations Unies la guerre (*ius ad bellum*) a été mise hors la loi.

L'expression « la réaffirmation et le développement » indique que les travaux menés ne peuvent pas avoir pour effet ni l'atténuation des conventions actuellement en vigueur¹⁷ ni l'attribution aux parties belli-

¹⁴ V. R. BIERZANEK, *Nowe koncepcje w dziedzinie poszanowania praw człowieka w czasie konfliktów zbrojnych* [Les nouvelles conceptions dans le domaine du respect des droits de l'homme au cours des conflits armés], « Wojskowy Przegląd Prawniczy », 1970, n° 3, p. 355 et suiv.; S. DĄBROWA, *Prace MKCK nad rozwojem prawa wojennego* [Les travaux du Comité International de la Croix-Rouge sur le développement du droit de la guerre], « Wojskowy Przegląd Prawniczy », 1971, n° 3, p. 345 et suiv.; M. PETITPIERRE, *A Contemporary Look at the ICRC*, « International Review of the Red Cross », February 1971, p. 63 et suiv.; J. PICTET, *La XXI^e Conférence Internationale de la Croix-Rouge et ses résultats dans le domaine du droit humanitaire*, « Revue de droit de l'homme », 1970, n° 1, p. 141 et suiv.

¹⁵ *Conference of Red Cross Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (The Hague, 1-6 March, 1971), Report on the Work of the Conference.*

¹⁶ *Conference of Government Experts on the Reaffirmation...* (Geneva, 24 May - 12 June, 1971), *Report on the Work of the Conference.* Les deux conférences de 1971 ont été présentées dans l'article: S. DĄBROWA, *Rozwój prawa wojennego* [Le développement du droit de la guerre], « Sprawy Międzynarodowe », 1971, n° 9, p. 109 et suiv.

¹⁷ A titre d'exemple: 134 États sont actuellement les parties aux conventions de Genève de 1949. Il n'existe aucun accord international qui ait obtenu plus de ratifications ou d'adhésions. Cela est preuve d'une grande importance que les États attachent à ces conventions.

gérantes d'une liberté plus grande dans le choix des méthodes et moyens de la lutte que celle admise par les lois et coutumes de guerre actuellement en vigueur. Au contraire — le but de ladite codification devrait être la limitation successive de la liberté d'agir des combattants. Lorsque, par exemple, une nouvelle arme ne permet pas de respecter la règle de la distinction au cours d'une attaque entre les objectifs militaires et objets non militaires, règle qui existe dans le droit international en vigueur, il faut renoncer non pas à la règle de droit précitée, mais à l'emploi de telle arme. L'existence d'une telle règle constitue un facteur accessoire militant pour la prohibition d'emploi de l'arme en question.

Au début de 1972, le Comité International de la Croix-Rouge a élaboré des projets des actes juridiques nouveaux qui ont été discutés lors de deux conférences successives.

La première d'entre elles, conférence des experts de la Croix-Rouge, s'est tenue à Vienne en mars 1972 avec la participation d'environ 80 experts venus de 36 sociétés nationales de la Croix-Rouge et du Croissant Rouge¹⁸.

La seconde, conférence des experts gouvernementaux, s'est tenue à Genève en mai 1972¹⁹. Y participaient environ 400 experts venus de 77 États, donc deux fois plus qu'au cours de la même conférence en 1971. Aux deux conférences ont activement participé les experts polonais²⁰, présentant plusieurs propositions constructives concernant tous les problèmes essentiels.

Projets des nouveaux documents

L'objet des travaux des conférences de Vienne et de Genève en 1972 était d'examiner les projets de deux protocoles élaborés par le Comité International de la Croix-Rouge²¹.

¹⁸ *Conference of Red Cross Experts on the Reaffirmation...* (Vienna, 20 - 24 March, 1972), *Report on the Work of the Conference*. V. aussi: *Conférence d'experts de la Croix-Rouge. Analyse des débats de la seconde session*, « *Revue Internationale de la Croix-Rouge* », mai 1972, p. 304 et suiv.

¹⁹ *Conference of Government Experts on the Reaffirmation...* (Geneva, 3 May - 3 June, 1971), *Report on the Work of the Conference*.

²⁰ A l'une ou à l'autre des deux conférences de 1972 ont participé en qualité d'experts polonais: dr J. Rutkiewicz (président de la Croix-Rouge Polonaise), T. Malik, dr M. Flemming (ministère de la Défense nationale), D. Zys (Croix-Rouge Polonaise) et S. Dąbrowa (ministère des Affaires étrangères). Lors de la conférence d'experts gouvernementaux de délégué polonais a présidé la commission qui avait examiné les questions de la protection de la population civile et du statut des combattants.

²¹ *Conference of Government Experts on the Reaffirmation...* (Geneva 1972), vol. I: Basic Texts.

Le premier d'eux est le projet du protocole additionnel aux quatre conventions relatives à la protection des victimes de guerre signées à Genève le 12 août 1949. C'est le protocole additionnel commun à la convention pour l'amélioration du sort des blessés et des malades dans les forces armées en campagne, à la convention sur l'amélioration du sort des blessés, des malades et des naufragés des forces armées sur mer, à la convention relative au traitement des prisonniers de guerre et à la convention relative à la protection des personnes civiles en temps de guerre. Il se compose de 88 articles. Il a pour but d'augmenter l'étendue personnelle et portant sur le fond de la protection des droits de l'homme en temps de guerre.

Le second est le projet du protocole additionnel à l'article 3 commun dans les quatre conventions de Genève. Comme on le sait, l'art. 3 des conventions de Genève porte sur les conflits armés ne présentant pas un caractère *sensu stricto* international. Ce projet dudit protocole additionnel compte 48 articles. Il a pour but d'étendre sur les conflits armés non internationaux des règles régissant les conflits internationaux dans un nombre considérablement plus grand que cela a lieu actuellement en vertu de l'art. 3, conformément aux demandes généralement formulées dans les derniers temps²².

Les projets préparés par le Comité International de la Croix-Rouge ont généralement obtenu l'appui de la plupart des experts, dont aussi des experts polonais. Néanmoins on a présenté de nombreux amendements et propositions à l'égard de ces projets. Dans certaines questions on peut remarquer une évolution des opinions formulées par les experts et le Comité International de la Croix-Rouge entre 1971 et 1972.

Les problèmes essentiels discutés lors des conférences de Vienne et de Genève de 1972 ainsi que la position des experts polonais vis-à-vis de ces problèmes sont présentés ci-dessous.

Structure des protocoles

En 1971, le Comité International de la Croix-Rouge a proposé d'élaborer quelques protocoles particuliers: relatif aux victimes des conflits ne présentant pas un caractère international, relatif aux blessés et malades,

²² V. J. PICTET, *The Need to Restore the Laws and Customs Relating to Armed Conflicts*, « Review of the International Commission of Jurists », March 1969, p. 22 et suiv.; Ch. ZORGBIBE, *Pour une réaffirmation du droit humanitaire des conflits armés internes*, « Journal du Droit International », 1970, n° 3, p. 658 et suiv.

relatif à la protection de la population civile, relatif aux prisonniers de guerre, relatif aux partisans, etc.

Sur la proposition, entre autres, des experts polonais, la structure a été simplifiée en 1972 et le Comité International de la Croix-Rouge a présenté deux protocoles: l'un portant sur les conflits armés internationaux, l'autre concernant les conflits armés non internationaux.

La majeure partie des experts s'est prononcée pour une telle structure. Certains experts ont demandé de s'avancer encore plus et joindre dans un acte juridique les dispositions concernant les deux sortes des conflits. Les experts polonais se sont prononcés contre cette proposition, parce qu'elle signifierait l'effacement de la différence juridique entre les conflits armés internationaux, dans lesquels s'appliquent toutes les règles du droit international et les conflits armés ne présentant pas un caractère international *sensu stricto*, dans lesquels ne s'appliquent que certaines règles du droit international, expressément prévues pour ces circonstances ²³.

Qualification juridique d'un conflit

Les experts polonais comme beaucoup d'autres, se sont prononcés contre l'introduction des éléments *iuris in bello* dans les états de tension intérieure ou émeutes internes ne portant pas un caractère de conflit armé, parce que cela pourrait mener à l'ingérence dans les affaires intérieures de l'État. Les garanties suffisantes de la protection des droits de l'homme dans ces situations sont contenues dans les pactes internationaux des droits de l'homme votés par l'Assemblée Générale de l'ONU en 1966 ²⁴. Il n'est pas donc nécessaire d'étendre des conventions de Genève de 1949 sur la protection des victimes de guerre aux situations n'étant ni la guerre internationale ni la guerre civile ²⁵.

Cela a rapport au problème difficile de la qualification juridique d'un conflit. D'après les experts polonais, elle devait être basée sur la définition comprenant des critères objectifs d'appréciation. La définition du conflit armé international est contenue dans l'art. 2 commun aux quatre

²³ Cette question est largement présentée par I. P. BlišČENKO (*Vooružonnyj konflikt i sovremennoje meždunarodnoje pravo*, « Sovetskoje Gosudarstvo i Pravo », 1971, n° 9, p. 61 et suiv.).

²⁴ *Resolutions Adopted by the General Assembly During its XXI Session* (doc. A/6316, p. 49; résolution n° 2200/XXI).

²⁵ V. S. DĄBROWA, *Pakty praw człowieka a konwencje genewskie o ochronie ofiar wojny* [Les pactes des droits de l'homme et les conventions de Genève sur la protection des victimes de la guerre], « Państwo i Prawo », 1971, n° 8/9, p. 311 et suiv.

conventions de Genève de 1949. A présent, le Comité International de la Croix-Rouge a élaboré un projet de la définition du conflit armé présentant un caractère non international. C'est une « situation où, sur le territoire d'une des hautes parties contractantes, des hostilités de caractère collectif mettent aux prises des forces armées organisées et dirigées par un commandement responsable ». Les experts polonais ont apprécié ladite définition comme une bonne base de discussion.

Certains experts sont d'avis qu'un organe international comme le Conseil de Sécurité ou l'Assemblée Générale de l'ONU, le Comité International de la Croix-Rouge ou bien un nouvel organe international spécialement appelé à ce but, devrait décider du caractère d'un conflit donné

Guerres de libération nationale

Conformément à la doctrine socialiste du droit international²⁶, les experts polonais ont pris la position suivante: les guerres de libération nationale, et, en particulier, les guerres contre le joug colonial et d'autres formes de la réalisation armée du droit à l'autodétermination des peuples, ont un caractère international quoique non interétatique; par conséquent, elles devraient être régies par toutes les règles du droit international concernant les conflits armés internationaux.

Certains experts expriment l'opinion que les guerres anticoloniales sont des conflits armés ayant un caractère non international, et par conséquent elles ne devraient être régies que par certaines règles concernant les conflits armés.

La position extrême a été prise par des experts représentant les États qui se sont engagés actuellement dans les guerres néo-coloniales. Selon eux c'est une affaire entièrement intérieure de l'État. Cela est complètement contesté par une série de résolutions de différents organes de l'ONU²⁷.

Statut des partisans

Peu nombreux sont les experts qui sont d'avis que doivent être maintenues toutes les conditions qui, sur la base des règles actuellement en

²⁶ Les opinions exprimées à ce sujet sont présentées par Z. PIETRAS, *Wojna narodowowyzwoleńcza a prawo międzynarodowe* [La guerre de libération nationale et le droit international], « Sprawy Międzynarodowe », 1971, n° 3, p. 81 et suiv.

²⁷ V. *Respects for Human Rights in Armed Conflicts, Report of the Secretary General* (doc. A/8052, 1970, notamment § 195 - 237).

vigueur, doivent être remplies par des combattants irréguliers, c'est-à-dire par des partisans, pour qu'ils puissent bénéficier du statut de combattants, et, en cas de capture, celui de prisonniers de guerre. Ces conditions ont été répétées dans l'art. 4 de la III^e convention de Genève de 1949 sur le traitement des prisonniers de guerre après l'art. 1 du règlement de La Haye de 1907 sur les lois et coutumes de la guerre sur terre.

La plupart des experts se prononcent en faveur de l'adoucissement de ces conditions et la divergence d'opinion n'existe que quant aux limites dudit adoucissement. La tendance actuelle confirme la justesse de l'attitude des auteurs polonais qui, à la lumière des luttes des partisans au cours de la Seconde Guerre mondiale, ont considéré, depuis longtemps, ces conditions comme trop rigoureuses²⁸.

Les experts polonais ont proposé que soit maintenue, parmi les quatre conditions, l'exigence de respecter par les partisans les lois et coutumes de guerre. L'exigence de posséder un commandant responsable pour ses subalternes, selon eux, doit être remplacée par l'exigence, plus générale, d'appartenance à une organisation de caractère militaire²⁹. Par contre, les exigences de porter les armes ouvertement et d'avoir un signe distinctif fixe et reconnaissable à distance, difficiles ou bien impossibles à remplir par les partisans (p. ex. dans les conditions de guérilla urbaine) devraient être remplacées par l'exigence plus élastique de se faire distinguer de la population civile pendant les opérations de combat³⁰. Cette condition a pour but de ne pas exposer la population civile à une contre-attaque des troupes ennemies sous prétexte de combattre les partisans, mais elle n'a pas pour conséquence la perte du statut des combattants par les partisans qui — comme cela a lieu, en règle générale, dans les guerres de partisans contemporaines — à part le moment lui-même de la lutte, se mêlent à la population civile.

²⁸ V. p.ex.: R. BIERZANEK, *Status międzynarodowy partyzantów i członków ruchu oporu* [Le statut international des partisans et des membres du mouvement de la résistance], « Sprawy Międzynarodowe », 1967, n° 5, p. 35 et suiv.; M. FLEMMING, *Kilka uwag do statusu prawnego partyzantów i ludności cywilnej terytorium okupowanego* [Quelques observations sur le statut juridique des partisans et de la population civile du territoire occupé], « Wojskowy Przegląd Prawniczy », 1971, n° 4, p. 468 et suiv.; A. GÓRBIEL, *Wojna partyzancka a prawo międzynarodowe* [La guerre de partisans et le droit international], « Wojskowy Przegląd Prawniczy », 1960, n° 4, p. 504 et suiv.

²⁹ L'opinion pareille est exprimée par M. VEUTHEY, *La guérilla — le problème du traitement des prisonniers*, « Annales d'Études Internationales », 1972, p. 133.

³⁰ A. KŁAFKOWSKI (*op. cit.*, p. 358), fait encore un pas en avant, en reconnaissant pour suffisant l'accomplissement par les partisans de deux conditions: la possession du commandement responsable et le respect des lois et coutumes de la guerre.

Les armes assujetties à la prohibition

Cette question a rapport plus aux conventions de La Haye, et, en particulier, au règlement des lois et coutumes de la guerre sur terre ainsi qu'au protocole de Genève portant sur la prohibition d'emploi des armes chimiques et bactériologiques, qu'aux conventions de Genève. Il a été pourtant décidé, sur demande de la plupart des experts, de s'en préoccuper dans les protocoles additionnels aux conventions de Genève, parce qu'il est impossible d'assurer la protection efficace de la population civile sans confirmer en même temps la prohibition d'emploi des armes ne permettant pas de faire la distinction entre les objectifs militaires et objets non militaires.

Le projet de l'article concernant les armes prohibées fut l'objet d'une vive discussion lors de la conférence des experts gouvernementaux. Étant donné son rapport à la question des armes de destruction massive, et notamment des armes nucléaires, il est devenu le problème clé de la conférence.

Au sein de la conférence ont été présentées différentes conceptions de traiter, dans les protocoles additionnels, la question des armes assujetties à la prohibition, à savoir:

- a) énumération de toutes les catégories d'armes, dont l'emploi est prohibé, y compris les armes nucléaires;
- b) énumération de certaines catégories d'armes prohibées (p. ex. napalm, bombes à bille, etc.), mais sans les armes nucléaires;
- c) détermination des critères généraux des moyens et méthodes interdits dans la lutte, sans énumérer les catégories concrètes d'armes;
- d) omission de cette question dans les protocoles.

Les experts polonais se sont trouvés dans un groupe demandant la détermination des critères généraux sans énumérer les armes concrètes. Ils ont reconnu, que l'omission de cette question pourrait être interprétée comme l'affaiblissement de la prohibition d'emploi des armes de destruction massive existant dans le droit international, prohibition qui résulte à l'égard des armes chimiques et bactériologiques du protocole de Genève de 1925, et à l'égard des armes nucléaires, entre autres de la résolution de l'Assemblée Générale de l'ONU n° 1653/XVI de 1961³¹.

A son tour la seule énumération de certaines catégories d'armes constitue un danger, parce qu'elle permet l'interprétation que l'emploi d'armes non énumérées est licite indépendamment de leurs effets. Enfin l'énumération de toutes les armes prohibées, y compris les armes nu-

³¹ *Resolutions Adopted by the General Assembly during its XVI Session*, doc. A/5100, p. 4.

cléaires, bien qu'elle réponde à une attitude de principe exprimée par les experts polonais, est peu réelle à effectuer.

En effet il est difficile de s'attendre, que la question de la prohibition d'emploi des armes nucléaires — l'une des questions politiques et juridiques les plus difficiles dans la période après la Deuxième Guerre mondiale — soit réglée à l'occasion de la codification du droit des conflits armés, si les organes compétents qui s'en occupent depuis de longues années, comme l'Assemblée Générale de l'ONU et le Comité de Désarmement de Genève, ne sont pas arrivés jusqu'à présent à un accord.

Pour les raisons ci-dessus mentionnées, selon l'avis des experts polonais, la solution la plus appropriée est de déterminer les critères généraux des armes prohibées. Les experts polonais ont présenté une proposition qu'ils soient reconnus comme prohibés des méthodes et moyens de la lutte qui:

- a) ne permettent pas de faire une distinction entre les objectifs militaires et la population civile ou les objets civils,
- b) causent des souffrances inutiles ou sont particulièrement cruels,
- c) détruisent l'environnement naturel de l'homme.

Le premier critère est une formulation de la règle existante déjà dans le droit coutumier³². Le deuxième critère est une répétition *grosso modo* de la prohibition contenue dans l'art. 23 du règlement de La Haye relatif aux lois et coutumes de la guerre sur terre, de 1907. Le troisième critère constitue un élément nouveau et il est motivé, entre autres, par le besoin de la prohibition des méthodes de destruction des terres cultivables, sources d'eau, forêts et autres éléments de l'environnement naturel de l'homme, méthodes appliquées par les troupes américaines au Vietnam, ce qui trouble l'équilibre biologique du milieu humain.

La détermination des critères généraux militerait d'une manière indirecte pour la prohibition d'emploi des armes nucléaires lesquelles ne permettent pas de faire de distinction entre les objectifs militaires et la population civile ou les objets civils, provoquent des souffrances inutiles, constitue un moyen particulièrement cruel et détruit l'environnement naturel de l'homme. En même temps, l'adoption de la convention sur la prohibition d'emploi des armes nucléaires serait laissée à la disposition des organes compétents, c'est-à-dire de l'ONU et du Comité de Désarmement à Genève. La Pologne et d'autres États socialistes se sont

³² V. la résolution n° 28 adoptée par la XX^e Conférence Internationale de la Croix-Rouge (*XX International Conference of the Red Cross, Vienna 1965, Resolutions*, p. 21) et la résolution n° 2444 (XXIII) adoptée par la Session de l'Assemblée Générale de l'ONU en 1968 (*Resolutions Adopted by the General Assembly during its XXIII Session*, doc. A/7218, p. 50).

à plusieurs reprises prononcés au sein de ces organes pour la prohibition d'emploi des armes nucléaires par voie de conclusion d'un accord approprié.

Le problème controversé des méthodes et moyens prohibés de la lutte dans le contexte de la prohibition des armes nucléaires attend une solution au cours des travaux ultérieurs, parce que lors de la conférence tenue à Genève des experts ne sont pas arrivés à prendre une attitude unanime. Il ne faut pas oublier que précisément ce problème a rendu impossible d'assurer le succès dans la tentative précédente de la codification du droit des conflits armés entreprise par le Comité International de la Croix-Rouge en 1956.

Statut du personnel médical

Presque tous les experts se prononcent pour l'extension de la protection du personnel médical par l'attribution à l'ensemble du personnel médical civil de la même protection dont jouit, au cours du conflit armé en vertu des conventions de Genève, le personnel médical militaire.

Les experts polonais étant guidés par les motifs humanitaires, ont demandé l'attribution du droit d'emploi du signe de la Croix-Rouge et de la protection qui en résulte non seulement au personnel médical et sanitaire permanent ainsi qu'aux équipements médicaux, mais aussi au personnel engagé *ad hoc* et aux installations provisoires, par exemple aux postes du premier secours et au personnel médical et sanitaire de l'organisation de la protection civile et des sociétés nationales de la Croix-Rouge.

Les experts polonais sont également coauteurs du projet d'une disposition sur l'octroi par les États aux sociétés nationales de la Croix-Rouge et aux organes internationaux de la Croix-Rouge des facilités, de l'assistance et de la protection dans leurs activités humanitaires en faveur des victimes du conflit et ils ont postulé le renforcement de la prohibition d'effectuer les expériences pseudo-médicales sur les personnes sous le contrôle d'une partie adverse ainsi que la reconnaissance du droit du médecin à ne pas révéler aux autorités d'occupation des personnes auxquelles il a prêté assistance médicale.

Désignation des puissances protectrices

On a consacré beaucoup d'attention à l'examen des moyens du renforcement du contrôle du respect par les parties belligérantes des lois et coutumes de guerre. Parmi celles-ci le renforcement du rôle de la

puissance protectrice se met au premier plan. Cette institution connue depuis longtemps dans le droit coutumier et confirmée par les conventions de Genève est pourtant peu employée dans les conflits contemporains. La cause en est l'aversion des États à la reconnaissance formelle de l'état de guerre et à cela se ramène la désignation d'une puissance protectrice représentant les intérêts d'une partie belligérante à l'égard de l'autre. Pour remédier à une telle situation, presque tous les experts ont appuyé la proposition du Comité International de la Croix-Rouge visant à insérer dans les protocoles une disposition que la désignation d'une puissance protectrice n'a aucune influence sur la nature juridique du conflit et sur le statut des parties belligérantes, et en particulier, elle ne signifie pas la reconnaissance de l'autre partie, mais par conséquent, elle est obligatoire dès le début du conflit. Cette partie de la proposition du Comité International de la Croix-Rouge a été appuyée par les experts polonais.

La seconde partie de la proposition du Comité International de la Croix-Rouge selon laquelle une acceptation sur son territoire de l'activité d'une puissance protectrice désignée par la partie adverse serait obligatoire, a obtenu le moindre appui. Les experts polonais se sont trouvés dans le groupe d'experts qui ont exprimé leur doute à son égard, parce que l'activité d'une puissance protectrice doit être basée sur la confiance de deux parties en conflit, donc aucune puissance protectrice ne doit pas être imposée à une partie sans son consentement.

Les experts polonais ont donné leur appui à la proposition du Comité International de la Croix-Rouge pour que les États instruisent chez eux les équipes spéciales en ce qui concerne la connaissance du droit humanitaire. C'est parmi ces équipes que serait recruté le personnel désigné à exercer des fonctions liées à l'activité d'une puissance protectrice, en cas où l'État donné serait appelé à agir en cette qualité.

Substitution des puissances protectrices

Des propositions au sujet de la substitution d'une puissance protectrice par un organe international ont provoqué beaucoup de controverses. Elles reposent sur ceci que, étant donné la non-désignation d'une puissance protectrice par l'État belligérant dès le début du conflit armé, les attributions et les devoirs d'une puissance protectrice passent automatiquement au Comité International de la Croix-Rouge, à l'ONU ou à un autre organe international désigné, déjà existant ou spécialement créé à ce but.

Selon l'avis des experts polonais les fonctions d'une puissance protectrice, en dehors de la mission humanitaire, concernent également les

questions de caractère politique et diplomatique et aucune organisation internationale n'est capable de les exercer. C'est pourquoi plusieurs experts se sont prononcés contre la substitution automatique des puissances protectrices par un organe international, laissant aux parties une possibilité de faire appel à cette mesure avec un consentement mutuel; de même ils se sont prononcés contre la création d'une nouvelle organisation internationale pour le contrôle du respect du droit humanitaire. Au lieu de cela, les experts polonais ont proposé le renforcement des sanctions pénales contre les auteurs des crimes de guerre.

Protection des journalistes

A la suite de l'évolution du droit des conflits armés, l'Assemblée Générale de l'ONU, au cours de sa 25^e session tenue en 1970, a décidé d'élaborer une convention internationale relative à la protection des journalistes qui exercent leurs dangereux devoirs professionnels sur les territoires où a lieu un conflit armé. Les travaux sur cette convention se déroulent dans le cadre de l'ONU ³³ en même temps avec les travaux sur l'évolution de l'ensemble du droit des conflits armés, menés sous les auspices du Comité International de la Croix-Rouge.

La Commission des Droits de l'Homme de l'ONU lors de sa 28^e session tenue en 1972 a élaboré le projet d'une convention comprenant 14 articles ³⁴. Il a été renvoyé à l'examen des experts gouvernementaux.

La discussion qui s'est déroulée au cours de la conférence de Genève a révélé que la plupart des experts acceptent le projet de ladite convention. Ce projet tient compte d'une manière suffisante du respect de la législation intérieure des États relative aux journalistes et il ne porte pas atteinte aux dispositions des conventions de Genève. La protection des journalistes consiste surtout à faciliter leur identification par la délivrance des cartes d'identité uniformes et à octroyer le droit de porter le signe distinctif sous forme de brassard avec la lettre « J » qui provient du terme « journaliste ». Les cartes d'identité selon le modèle déterminé par le Comité International des Journalistes, serait délivrées par les autorités nationales à leurs journalistes. Le signe distinctif revêtu de la lettre « J » n'aurait pas un caractère de signe de protection, par lequel se caractérise le signe de la Croix-Rouge.

³³ V. C. PILLOUD, *Protection des journalistes en mission périlleuse dans les zones de conflit armé*, « Revue Internationale de la Croix-Rouge », janvier 1971, p. 5 et suiv.

³⁴ Doc. ONU n° E/CN. 4 (XXVIII) CRP. 5/Add. 1 (manuscrit polycopié).

Les critiques exprimées à l'égard de la convention relative à la protection des journalistes portaient du principe qu'ils ne doivent pas être bénéficiaires d'une protection plus grande que celle de la population civile, dont ils font partie.

Il y a tout lieu de croire que le projet de ladite convention sera voté par l'Assemblée Générale de l'ONU encore avant la fin des travaux sur les protocoles additionnels aux conventions de Genève.

Perspectives de la codification

La conférence des experts gouvernementaux qui s'est tenue en 1972 à Genève se situait à mi-chemin de l'étape actuelle des travaux sur la codification du droit des conflits armés. Il y a tout lieu de croire que ces travaux aboutiront au succès sous forme du vote, dans un avenir très proche, de nouveaux instruments internationaux — deux protocoles additionnels aux conventions de Genève de 1949 sur la protection des victimes de guerre. Ils portent sur le large éventail des questions ayant trait au droit des conflits armés³⁵: la protection de la population civile, des blessés et malades, des victimes des conflits armés ne présentant pas un caractère international, le statut des partisans, du personnel médical, des organisations de la protection civile, les rapports entre les combattants, les armes et les méthodes de la lutte prohibées, mesures ayant pour but de renforcer le contrôle de respecter les droits humanitaires et autres (en principe ne sont pas omis que les questions relatives à la guerre navale). L'adoption de ces protocoles constituerait la contribution essentielle au développement du droit international.

Tenant compte des résultats obtenus à la suite des conférences déjà tenues, le Comité International de la Croix-Rouge élaborera encore une fois les projets de deux protocoles additionnels. Ils seront envoyés aux gouvernements des États — parties aux conventions de Genève pour qu'ils puissent prendre leur position. La première étape d'une discussion sur les nouveaux projets sera la XXII^e Conférence Internationale de la Croix-Rouge qui se tiendra à Téhéran en automne de 1973. Par contre, la seconde étape sera la conférence diplomatique consacrée à l'adoption des nouveaux protocoles³⁶. La Suisse est prête à organiser

³⁵ Dans le présent article, étant donné ses cadres limités, on n'a discuté que certains de ces problèmes.

³⁶ La conférence diplomatique est mentionnée par la résolution n° 13 adoptée par la XXI^e Conférence Internationale de la Croix-Rouge (*XXI International Conference on the Red Cross, Istanbul 1969, Resolutions*, p. 10).

une telle conférence diplomatique. La convocation en est prévue pour 1974.

A la codification du droit des conflits armés s'intéresse également l'Assemblée Générale de l'ONU, qui lors de ses sessions successives — indépendamment des travaux au-dessus mentionnés sur la convention relative à la protection des journalistes — dans le cadre du point de l'ordre du jour intitulé « Respect des droits de l'homme dans les conflits armés » — fait une appréciation générale des travaux et trace les questions prioritaires et surtout ne cesse pas d'appeler au respect des conventions en vigueur.

Lorsqu'on procède à la codification du droit des conflits armés il faut en effet, avoir toujours à l'esprit trois aspects du processus en question.

Premièrement — l'élaboration des textes, même les plus parfaits, des conventions ne signifie pas qu'ils seront automatiquement appliqués dans la pratique. C'est pourquoi tous les travaux sur le développement du droit international en cette matière doivent s'accompagner des efforts incessants en faveur d'assurer le respect le plus complet des lois et coutumes actuellement en vigueur concernant les conflits armés.

Deuxièmement — les nombreux faits de violation des conventions internationales, qu'on observe presque dans tous les conflits armés ne devraient pas mettre en doute la nécessité et l'opportunité de l'évolution ultérieure du droit des conflits armés. Une autre opinion signifierait la négation du besoin d'existence du droit en général. La simple analogie s'impose ici avec le droit intérieure de l'État: du fait qu'on commet des infractions passibles des sévères sanctions définies par le code pénal personne ne tire la conclusion que ce code pénal est inutile.

Troisièmement — la codification du droit des conflits armés ne signifie pas le retour à la légalité des guerres, qui sont toujours interdites par le droit international, et elle ne peut pas non plus être traitée comme l'affaiblissement de cette interdiction. Pourtant, tant que la communauté internationale n'est pas capable d'assurer le respect général de l'interdiction du recours à l'emploi de la force dans les relations internationales, il sera nécessaire de codifier le droit qui règle les relations entre les parties belligérantes et qui contribue à la protection des victimes des conflits armés.

Human Rights in the United Nations System (Development Trends)

by ANDRZEJ NARTOWSKI

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I

A good many controversial views exist in literature on the question of the origin and history of international protection of human rights. The modest space of this essay does not permit a properly documented polemic or a penetrating presentation of the various standpoints in this controversy. Even though it abounds in various works, literature on human rights does not play any great practical role, for the whole of the problem has been from the very beginning under the pressure of certain political interests of various countries, not excluding the big Powers, and of the variable resultants of the world alignment of forces. Theory expresses in its various currents reflections of deeper quarrels on world outlook and ideological conflicts, it supplies ancillary arguments for use in political dispute, but it exerts no direct influence on the essence of the various endeavours. In spite of the opinion of some authors,¹ the origin of contemporary institutions of the international protection of human rights cannot be found

¹ M. GANGJI, *International Protection of Human Rights*, Geneva 1962; E. ARO-NEANU, *L'intervention d'humanité et la Déclaration Universelle des Droits de l'Homme*, "Revue de Droit International, des Sciences Diplomatiques et Politiques," 1955, No. 2, pp. 126 - 133; M. SLUSNY, *Quelques observations sur les systèmes de protection internationale des droits de l'homme*, in: *Problèmes de droit de gens (Mélanges offerts à Henri Rollin)*, Paris 1964, p. 384; H. PETZOLD, *Der Schutz der Menschenrechte nach traditionellen Völkerrecht und nach der Europäischen Menschenrechts-Konvention*, "Internationales Colloquium über Menschenrechte," Berlin 1968, pp. 67 - 70 ff.

in the doctrine and practice of the so-called "*l'intervention d'humanité*," questioning in their very assumption the principle of State sovereignty,² that is the real foundation-stone of the contemporary international legal order. The conception of the "*l'intervention d'humanité*" brings to mind, moreover, some too sinister reminiscences of the apologia of Poland's partitions for it to be possible to be treated seriously at all.³ Neither is it possible to look for the primary sources of the protection of human rights in the development of humanitarian tendencies of the law of war,⁴ because war is by its very nature an absolute negation of the rights of the human individual and an active denial of the postulate that it should be treated justly. Irrespective, therefore, of the fact that the contemporary system of international law has evolved precisely from the law of war, the principle of a complex protection of human rights appeared after all only on the stage of *ius contra bellum*⁵ in the wake of the institution of ban on war, strictly corresponding to it. It was only in the course of the 'forties, as a direct effect of the experience of World War II,⁶ that this extremely correct conviction that harmonious international cooperation is the fundamental condition of a full implementation of human rights (being on its part one of the elementary safeguards of peace and security in international relations) has matured for universal acceptance.

The conception of human rights, whose roots are sunk somewhere in immemorial past, was unfolded towards the close of the 18th century, at the time of the early modern national and social revolutions. It has been

² This is particularly obvious on the military intervention of the United States in the Dominican Republic in 1965, excused as a "humanitarian intervention"—R. B. BILDER, *Rethinking International Human Rights: Some Basic Questions*, "Revue des Droits de l'Homme—Human Rights Journal," 1969, No. 2, 589, note 47.

³ K. KOCOT, *Powszechna Deklaracja Praw Człowieka* [*Universal Declaration of Human Rights*], "Sprawy Międzynarodowe," 1959, No. 2, pp. 67 - 68.

⁴ H. COURSIER, *Études sur la formation du droit humanitaire*, Genève 1952, (excerpts from "Revue Internationale de la Croix-Rouge"); M. GRZEGORCZYK, *Pakty Praw Człowieka* [*Covenants of Human Rights*], "Życie i Myśl," 1967 No. 7/8, pp. 151 - 152. S. McBRIDE ascribes to the "Martens clause" (IV Hague Convention 1907) the character of a broadly conceived definition of common law with regard to human rights: *Human Rights in National and International Law* (ed. by A. H. Robertson), Manchester 1968, p. 66, and the SAME AUTHOR: *International Protection of Human Rights, Problèmes de protection internationale de droits de l'homme* (Réné Cassin *Amicorum Discipulorumque Liber I*), Paris 1969, p. 154.

⁵ This all but perfect term was coined by L. KOTZSCH, *The Concept of War in Contemporary History and International Law*, Geneva 1956.

⁶ H. ANDRZEJCZAK, *Problem międzynarodowej ochrony praw człowieka w procesie powstawania systemu Narodów Zjednoczonych* [*Problem of International Protection of Human Rights in the Process of the Formation of the United Nations System*], "Zeszyty Naukowe KUL," Vol. 8 1965, No. 4, pp. 15 - 25; B. GRAEDRATH, *Die Vereinten Nationen und die Menschenrechte*, Berlin 1956, pp. 13 - 16, 118.

developing ever since in the soil of liberal political doctrine of the young bourgeoisie, amidst the dense fumes of the philosophy of the law of nature, turning its edge against the interference of the State and of any apparatus of power in the sphere of certain (never exhaustingly and concretely defined) fundamental and unalienable citizens' rights. The portfolio of the peace proposals of the anti-fascist coalition contained under the cover of traditional formulations completely new principles in this case. The breakthrough in the years of World War II consisted not only in the fact that it unveiled and exposed economic, social and cultural elements of the concept of human rights. What was most important was the replacement of the former extremely individualistic approach to the problem by a look at the individual through the prism of the whole of the existing social relations. This resulted in bringing to the fore the principle of self-determination and in recognizing its complete implementation as a material safeguard of the respect of human rights in all and any of their aspects.⁷ The breakthrough consisted also to a large extent in the fact that the question of the universal protection of human rights, belonging formerly in the sphere of unrestricted activity of the State, was transferred (not without resistance and fargoing limitations dictated by it) to the sphere of international cooperation within the institutionalized framework of the United Nations. Accompanying the endeavours aimed at the formation of the United Nations, the idea of international protection of human rights stimulated the authors of this undertaking to laborious but fruitful quests after a suitably rational formula of international relations of the epoch of coexistence and cooperation. It was a canvas of projects aimed at the establishment of just conditions of peace, and it produced a new image of the aims and tasks of cooperation of an organized international community.

The awareness of the need of forming a universal international organization with general goals matured, it is true, earlier and it was tried with varying success to bring it to fruition in the inter-war period. But the conception of the system of the League of Nations was unluckily pressed into the, as it appeared later, too narrow framework of the principles of "Wilson's fourteenth point," limiting (even more in practice than in the Covenant itself) its activity to purely political problems.⁸ And even where this barrier was passed—in the area of the protection of minorities and the mandate system—the League of Nations did not pass its examination.

⁷ A comprehensive and valuable analysis of this problem is given by L. DEMBIŃSKI, *Samostanowienie w prawie i praktyce ONZ* [*Self-Determination in Law and United Nations practice*], Warszawa 1969.

⁸ R. B. RUSSEL, *A History of the United Nations Charter*, Washington D. C., 1958, pp. 303 - 305.

And it was precisely the balance-sheet of its failures that finally determined the character of the new institutional solutions of a completely different model of international cooperation. The idea of international protection of human rights was born and developed during World War II on the universal wave of peaceful and democratic strivings of the societies and governments of the States of the anti-fascist coalition. Coupled from the very first to the idea of the United Nations it imparted to it a new social and political content, and charged the soon-founded organization with a new, important task. Immeasurably stronger emphasis has been laid on economic and social problems in the system of the United Nations which is more of an anti-thesis than a continuator of its predecessor.⁹ While paving the way for contemporaneity, it became necessary to reject mandates and the protection of minorities—rudiments of the political doctrine of the 19th century¹⁰—replacing them with new institutions: self-determination of nations and universal protection of human rights, institutions whose origins went even farther back but which have been filled with a new substance.

II

The starting point was the Atlantic Charter; a turning point was when it was joined by the Soviet Union. The formula of the sixth point of the Charter—abstract and enigmatic, similarly as the class-limited principles of the “New Deal” from which it was drawn¹¹—contained just a nucleus of the modern conception of human rights, but for all that it was a step forward, breaking through the traditional barriers of the bourgeois catalogues of rights. Soviet diplomacy, on the other hand, lending its full support to proposals concerning protection of the rights of the individual, gave on its part priority to the question of safeguarding the rights of the nations.¹² This attitude resulted transparently from the fundamental canons

⁹ V. OUTRATA, *Some Notes on the Implementation of the Covenant on Human Rights and Its Control*, “Bulletin of Czechoslovak Law,” 1967, p. 293.

¹⁰ A. ROSS, *The United Nations. Peace and Progress*, Totowa—New Jersey 1966, pp. 16–18.

¹¹ Cf. President F. D. Roosevelt’s Message to Congress on the State of the Nation, January 6, 1941, “International Conciliation,” No. 367, February 1941, p. 83. The borrowings made by the Atlantic Charter from this document are indicated among others by J. T. SHOTWELL, *The Long Way to Freedom*, New York 1960, p. 571.

¹² Cf. S. BORATYŃSKI, *Dyplomacja okresu drugiej wojny światowej. Konferencje międzynarodowe 1941–1945* [Diplomacy of the Period of World War II. International Conferences 1941–1945], Warszawa 1957, p. 78 ff.

of the Leninist political doctrine,¹³ and was justified moreover by the sum of experience gained on the battlefield. Because it must be borne in mind that on the eastern front, in the war against Poland and later the Soviet Union, Nazi Germany pursued with particular atrocity her criminal policy of the extermination of entire nations. It must be remembered that the genocidal plans of the Third Reich were preparing for them not simply slavery but complete biological annihilation. It is, therefore, perfectly obvious that the principle of self-determination and the universal recognition of the sovereign equality of nations were seen as a barrier to the threat of a revival of fascism. The same intention was behind the conclusion—and subsequently execution—of inter-allied agreements on the responsibility of war criminals for crimes committed by the Axis Powers.

Rigours of bitter political struggle were forced from the very first on the process of the formulation of concrete activity programmes, of translating general slogans into the language of normative formulations, of establishing binding principles of international law in regard to the universal protection of fundamental human rights. However, in spite of the numerous difficulties encountered by the development of international cooperation, in spite of controversies between allies and temporary crises of confidence—the contours of a compromise began to emerge gradually from the war years, ever more real and ever nearer. An amazingly brief time period separated the Washington Declaration of the 26 members of the anti-fascist coalition of 1 January, 1942, which made the terms “human rights” and “the United Nations” internationally applicable, from the Charter of San Francisco operating with the term of human rights not only in the sphere of postulates, but also—for the first time ever!—in the sphere of norms of positive law and in the context of the basic functions of an international organization. The adoption of the United Nations Charter opened up practical prospects for a peaceful confrontation of opposing political systems and regardless of the whole of the controversies, abundantly amassed around nearly all its provisions, was after all in the final account an epoch-making victory of the forces of progress.

III

Phraseology counts least when it comes to a settlement of accounts from a distance of twenty-five years, because its frequent abuses cause

¹³ More about this A. S. NARTOWSKI, *Samostanowienie narodów w leninowskiej koncepcji współistnienia* [Self-Determination of Nations in the Leninist Conception of Coexistence], in: *Państwo, naród i demokracja socjalistyczna* [The State, the Nation and Socialist Democracy], collective work ed. by J. Kowalski and L. Lisiaiewicz, Warszawa 1970, pp. 80–110.

understandable distrust. The high-falutin' chords of the Preamble of the Charter could appeal at most to the imagination of people of good will, but if one were to look in that document for pointers to the interpretation of the intentions of the authors of the text, then considering the co-authorship of field marshal Smuts (a noteworthy paradox of the whimsy history) and his racist world outlook, it would be possible to question even the moral value of those programme formulations. Luckily, from the first moment of its adoption the Charter began to live its own life and, irrespective of legal aspects, revealed its extremely valuable purely political properties. It proved to have been a dialectic, soberly calculated compromise, ever capable to be applicated in the course of quickly changing circumstances.¹⁴ The normative value of its provisions is beyond all dispute, but phenomena relative by their very nature must not be treated juridically: international law develops on the soil of concrete empirical situations and is more susceptible than other systems of law to the impact of realities.¹⁵ It is necessary in scientific research to break at last through the barrier of simply excessive dogmatism in favour of the cognitively more effective method of functional analysis.¹⁶ For the Charter has created—and this is what counts most!—proper institutional forms for a further struggle for the implementation of its provisions on an international level. Without basing on the practical possibilities of operation of the many organs in the United Nations system the principle of the international protection of human rights—although accepted already in the sphere of general endeavours and abstract normative postulates—would have been an undertaking impossible of implementation, even to such a limited extent as today.

This means that the practical significance of the Charter has two dimensions: on the one hand it introduced in the international legal order the idea of a universal and complex protection of human rights (concretizing at the same time this idea, though within certain limits, in a number of detailed provisions), on the other hand it opened a new chapter of international cooperation. Behind the scene of the comparatively constant

¹⁴ R. A. FALK points out: "The Charter is a dynamic treaty instrument, an organic law, developing legal norms in response to the changing needs and values of the organized international community" (*The Status of Law in International Society*, Princeton 1970, p. 147).

¹⁵ L. EHRLICH, *Prawo międzynarodowe* [*International Law*], 4th edition, Warszawa 1958, p. 151; P. MODINOS, *Droits de l'homme. Notes et observations*, in: *Problèmes des protection...*, p. 167.

¹⁶ Methodological bases of a functional approach to the international organization are presented by W. MORAWIECKI, *Funkcje organizacji międzynarodowej* [*Functions of International Organization*], Warszawa 1971; cf. the SAME AUTHOR, *Narody Zjednoczone. Zamierzenia i rzeczywistość* [*The United Nations. Intentions and Reality*], (2nd edition), Warszawa 1970.

organizational structure of the United Nations system there goes on—within a framework that is as elastic as it is stable—a complicated political struggle (of varying intensity so far). Traditional endeavours aimed at the achievement of egoistic and immediate goals are accompanied in this struggle by ever more universal quests after a common denominator to which it would be possible to reduce, by way of a rational compromise, the interests of the individual member States. The preservation and respect of an elementary minimum of convergence of political strivings fulfill in fact a condition without which no organ of peaceful cooperation could function properly after all.¹⁷ And it is worth bearing in mind that the protection of fundamental human rights is precisely such a goal of the organized international community, which mightily few member States dare oppose openly.

As a consequence of all these factors taken together, the process of the development of the institution and idea of human rights, liberated by the provisions of the Charter, runs above all in the United Nations forum and in the system of its specialized agencies, although this is frequently stimulated by the normative regulations of the internal law of the member States.¹⁸ In the course of the last 25 years the Organization proved not only a suitable platform for a creative exchange of views, or usually sterile polemics, but above all a functional tool of cooperation: initiator and coordinator of extremely useful actions and a staunch champion of compromise that can always prevail over divergencies. And although there had been no dearth of disappointments and setbacks, were we to disregard the achievements in this field, the picture of the to-date achievements of the United Nations would remain mutilated and incomplete.

IV

In spite of the goodly number and considerable specific gravity of the controversies and misunderstandings accumulated already in Dumbarton Oaks and later—in a broader forum—in San Francisco, the authors of the United Nations system did not foresee after all in 1945, at the close of the world war, the early disintegration of the coalition, the increase of tension in the years of the cold war and the atomic armaments race. The impenetrable curtain of history, sealing the future tightly from the eyes of

¹⁷ W. MORAWIECKI, *Funkcje organizacji międzynarodowej* [Functions of International Organization], *passim*.

¹⁸ This shows that the development of the system of human rights with regard to the complex of economic and social rights and inspired first and foremost by the earlier provisions of the constitutions of the socialist States. Cf., e.g., A. Ross, *op. cit.*, p. 350; J. A. OSTROVSKI, *OON i prava čeloveka*, Moskva 1968, p. 4 ff.

contemporaries, had rendered in this case an extremely useful service, because faced with the alternative of such a development of events which was really to take place in the following years, the idea of the foundation of an organization equipped with such broad tasks (and corresponding practical functions) would have probably misfired. As a consequence, the cold war caused a serious crisis of the young, still insufficiently solidified at that time, organizational structure of the United Nations system, and deformed its character for many years to come. Under conditions of mutual distrust among the partners, in face of the seriously aggravated relations between the opposed political groupings, approaching the brink of a military confrontation, the United Nations was in no position to implement its tasks with success, or to fulfil the expectations connected with its foundations. But the first fruits of cooperation in the sector of the formulation of the principles of international protection of human rights ripened comparatively early; one might say today, from a perspective of years and experience, that they ripened amazingly soon.¹⁹ The Commission on Human Rights, consisting at first of 18 members (the number increased successively to 32 at present), began its activity as early as January 1947 under the enlightened chairmanship of Mrs. Franklin D. Roosevelt. It began then the laborious work of preparing an International Bill of Human Rights.²⁰ Elementary differences in standpoints appeared here from the very beginning: some preferred solutions of a declaratory character, proposing the adoption of a manifesto; others came forth rather for the adoption of a universally binding agreement. It was decided, therefore—as a realistic compromise—that the intended Bill would contain three integral component parts: a Declaration proclaiming generally recognized principles, the Covenant on Human Rights proper, and measures of implementation as a set of procedural forms supplementing the matter-of-fact provisions. Soon the draft Declaration found its way to the agenda of the III Session of the UN General Assembly and was adopted finally on 10 December, 1948. One day earlier, the Assembly had adopted unanimously the text of a Convention on the Prevention and Punishment of the Crime of Genocide, thus fulfilling—as the successor to the traditions of the coalition of the United Nations—the moral obligation, contracted for in numerous declaration of the Allies, towards

¹⁹ J. P. HUMPHREY, *The UN Charter and the Universal Declaration of Human Rights*, in: *International Protection of Human Rights* (ed. by E. Luard), London 1967, p. 48.

²⁰ An interesting presentation of the forms and methods of the work of the Commission on Human Rights in the early period of its activity is contained in the article of Mrs. Franklin D. ROOSEVELT, *The Promise of Human Rights*, "Foreign Affairs," 1948 No. 3, pp. 470 - 477.

the cruelly war-tried mankind. At that time, the draft Covenant on Human Rights was only starting on its pilgrimage among the various organs concerned, painstakingly discussed, modified and supplemented, or even questioned in general all the time. Regardless of its further destinies, the adoption of the Universal Declaration marked a natural caesura: the undertaking closed the first, still preliminary and, so to say, starting stage of a progressive development and codification of human rights.²¹

Both the above-mentioned documents proved to be precedents for the two basic methods of the activity of the United Nations in this field. The Universal Declaration of Human Rights (together with the intention of the adoption of the Covenant, which accompanied it from the very first) expressed a long-range striving for the establishment of universally binding principles of international law, regulating in a uniform manner general problems of a broadly conceived protection of human rights. Perhaps the principles of universalism, as well as the practical requirements of the legislative technique of codification, imparted to the formulations worked out in this manner too synthetic a character. But on its part, the Genocide Convention inaugurated a series of "problem conventions", narrower if one were to compare the reach of the objective legal regulation, but more detailed and probably more useful in their prospects of practical application.

V

The Universal Declaration of Human Rights came to fruition in the form of a resolution of the UN General Assembly, adopted, without a single dissenting vote, by an overwhelming majority of 48 member States. In the United Nations practice resolutions passed without an opposing vote are treated, with some exaggeration, as "unanimous," though the term "*nomine contradicente*" would have been probably more suitable.²² In the case of the Universal Declaration, however, the final result of the voting does not depict adequately the range of the real acceptance. Although as many as 8 members abstained,²³ the socialist

²¹ J. F. GREEN, *The United Nations and Human Rights*, Washington D.C., 1956, p. 98.

²² J. F. GREEN, *op. cit.*, suggests here the use of the term applied in the British parliamentary procedure—"nemine contradicente" as a "more accurate phrase."

²³ The Byelorussian SSR, Czechoslovakia, Yugoslavia, Poland, the Ukrainian SSR, the Soviet Union and the Union of South Africa (at present the Republic of South Africa) and Saudi Arabia. The fact that the last two delegations were guided by totally different reasons in this respect is usually omitted by the literature of western countries, which delight, however, in quoting the list of these countries without any comment whatsoever.

States which belonged to them documented in this manner only their criticism of the half-measure nature of some solutions and the glaringly incomplete collection of the separate principles concerning the rights of the individual in the economic and social sphere. But for all this, these States expressed as a rule—both in discussion and in the voting on the text of the successive articles—their real support for that which was in fact obtained in spite of all the limitations.²⁴

General Assembly resolutions do not give birth to obligations binding either on all the member States as a whole, or even as regards members who had voted in favour of their adoption.²⁵ They are political decisions expressing the attitude of the majority of member States, conditioned by the scale of the compromise actually reached by the international community. Their contents reflect (though not always directly and legibly) the essence of the actual configuration of the general alignment of forces,²⁶ and it is impossible to ascribe to them the character of sources of international law. Their practical importance, measured by the strength of the moral pressure on the policy of the member States (and as a consequence of the Organization itself), depends above all on what political forces had given them their support, and on the other hand—what political forces were against them.²⁷

However, the problem of the binding force of the resolutions of the UN General Assembly, and particularly the problem of the binding force of the provisions of the Universal Declaration, has not been solved by lawyers in a uniform manner.²⁸ Theory refrains as a rule from granting *expressis verbis* an obligatory character to the provisions of the Declaration,²⁹ but the views of the individual authors oscillate between two ex-

²⁴ More about this I. A. OSTROVSKI, *op. cit.*, p. 46 ff.

²⁵ G. EZEJIOFOR, *Protection of Human Rights under the Law*, London 1964, p. 89.

²⁶ M. MOSKOVITZ, *Human Rights and World Order. The Struggle for Human Rights in the United Nations*, New York 1958, p. 35.

²⁷ W. MORAWIECKI, *op. cit.*, pp. 67 - 68.

²⁸ A survey of the standpoints of doctrine on the question of the binding force of the resolutions of the UN General Assembly is made by R. BIERZANEK, *Zasady prawne pokojowego współistnienia i ich kodyfikacja* [*Legal Principles of Peaceful Coexistence and Their Codification*], Warszawa 1968, p. 213 ff.; with regard to the Universal Declaration of Human Rights see N. ROBINSON, *The Universal Declaration of Human Rights. Its Origin, Significance, Application and Interpretation*, New York 1958, pp. 57 - 63; J. CASTANEDA, *Valor juridico de las resoluciones de las Naciones Unidas*, Mexico 1967, pp. 200 - 203; O. Y. ASAMOAH, *The Legal Significance of the Declarations of the General Assembly of the United Nations*, the Hague 1966, *passim*.

²⁹ A compilation of arguments in support of the binding character of the norms formulated in the Universal Declaration of Human Rights is given by J. J. LADOR-LEDERER, *International Group Protection. Aims and Methods in Human Rights*, Leyden 1968, pp. 177 - 178.

treme poles: the first raise the Declaration to the rank of a "limited" international agreement,³⁰ while the second emphasize its declaratory character and place it outside the framework of the contemporary system of international law altogether.³¹

What, then, is in fact the position of the Universal Declaration in the hierarchy of acts adopted in the quarter-century of the United Nations activity? Where—if not in its legal validity—is the source of its authority and undeniable influence it exerts all the time on the mechanism of the establishment of principles and the making of decisions with regard to any aspect of human rights? Professor Louis B. Sohn, backed by the attitude of a large group of recognized specialists in the problem, expresses the hypothesis that the Declaration contains a authoritative interpretation of the respective provisions of the Charter, and by their concretization enhances the power of obligations imposed in this respect by the Charter on the United Nations member States.³² In my opinion, this construction operates with an erroneous assumption. Quite apart from the sterile controversial question whether the interpretation of the Charter, made almost unanimously by the supreme and most representative organ in the United Nations system, that is precisely by the General Assembly, is a authoritative interpretation,³³ one must say that in this case it would be an interpretation not so much broadening as simply and completely arbitrary. The Declaration went in this field much farther than the Charter. In order to formulate preliminary proposals of new principles the Assembly did not need at all to resort to the pretext of an interpretation of already existing principles, because it was enough to utilize the flexible form of resolution. Regardless of this, there exist dialectic connections between the contents of the two documents:

³⁰ A. VERDROSS, in: *Human Rights in National and International Law*, (ed. by A. H. Robertson), pp. 70 - 71.

³¹ E. THORNEYCROFT, *Personal Responsibility and the Law of Nations*, The Hague 1961, pp. 63 - 64.

³² L. B. SOHN, *A Short History of the United Nations' Documents on Human Rights*, (Supplementary Paper), in: *The United Nations and Human Rights. Eighteenth Report of the Commission to Study the Organization of Peace*, New York 1968, p. 78: "As the Declaration was adopted unanimously, without a dissenting vote, it can be considered as an authoritative interpretation of the Charter of the highest order. While the Declaration is not directly binding on UN members, it strengthens their obligations by making them more precise."

³³ On this subject see, e.g., O. SCHACHTER, *Interpretation of the Charter in the Political Organs of the United Nations*, in: *Law, State and International Legal Order. Essays in Honor of Hans Kelsen*, (ed. by S. Engel), Knoxville 1964, pp. 270 - 283 and G. PIOTROWSKI, *Les résolutions de l'Assemblée Générale des Nations Unies et la portée du Droit conventionnel*, "Revue de Droit International, des Sciences Diplomatiques et Politiques," 1955, No. 2, p. 120 and 1955, No. 3, pp. 226 - 230.

the Declaration must be viewed against the concrete background of the tasks of the Organization contained in the Charter, similarly as the general clauses of human rights contained in the Charter must be viewed through the prism of their further development. There is no doubt, nevertheless, that the view that the importance of the Universal Declaration goes beyond the framework of the "normal" General Assembly resolutions³⁴ is correct. This is due to a large number of phenomena. Rarely did any programme of international cooperation draw upon as many sources as the Declaration. It went back to the tradition of the bourgeois catalogues of rights, borrowing from them an abundance of ready-made stereotypes of formulations. In the realm of economic and social rights it based itself on the achievements of the constitutions of the socialist States. It took into consideration the lasting achievements of the coalition of the United Nations. It brought into a single focus, like a lens, an unprecedented wealth of different points of view, skilfully enucleating convergencies between ideological reasons that were opposed to one another by the very nature of things, and between premises of various currents of philosophy and political doctrine. Its importance, crucial in comparison with the preceding documents proclaiming the separate human rights and fundamental freedoms,³⁵ resided not only in the range of the provisions (broader than ever before) contained in the text of the Declaration, loaded with a strong charge of progressive political slogans, and not only in the novel conception of their international application. Its lasting value was added to it in the final account by the compromise nature of its provisions, meeting at least the elementary requirements necessary for its being accepted by the member States, both those that participated in the work on its adoption and those that joined the Organization later. The Declaration is the first ever historical manifesto on the question of human rights, that was not inspired directly by victorious social upheavals or national liberation movements, the first manifesto to emerge in discussion at the table of an international conference.³⁶ It was put together with no small effort, over minute bridgeheads of points of contact. But it was precisely this Declaration, like none of its predecessors, that succeeded in making humanity realize the integral community of fates, in spite of the after all totally different heritage of the forms of civilization.³⁷ This means

³⁴ I. A. OSTROVSKI, *op. cit.*, p. 68.

³⁵ A list of these documents is given by F. M. VAN ASBECK, *The Universal Declaration of Human Rights and Its Predecessors*, Leiden 1949.

³⁶ M. MOSKOVITZ, *The Politics and Dynamics of Human Rights*, New York 1968, p. 102.

³⁷ C. MALIK, *Human Rights in the United Nations*, "International Journal," 1951, No. 4, pp. 276 - 277.

that the adoption of the Universal Declaration was not at all a manifestation of an alleged interpenetration and uniformization of ideas.³⁸ It was simply the growing interdependence of the phenomena of international life that imposed this irresistible compromise.³⁹

If, therefore, the Universal Declaration is not even in general a peak achievement, it belongs, when all is said and done, to the most lasting achievements of the United Nations.⁴⁰ As a totally exceptional phenomenon, without precedent in the history of international relations,⁴¹ it remained for nearly a quarter of a century the most rational and universal agreement on human rights, and it continues no doubt to play an important role.⁴² All the subsequent resolutions and decisions of any organ in the entire system of the United Nations (and not only in it), connected in any way with the problems of human rights, quote the Declaration to the same extent as the provisions of the United Nations Charter.⁴³ It is quoted also by States which charge other States with its non-observance, although with regard to themselves they are in no way inclined to recognize its binding force. This means that the Declaration is a document functioning quite independently, and that it has its own, extremely important aims to achieve.⁴⁴ The view that predominates in this respect in Polish science, namely that the Declaration is binding at least in *foro interno*, that it is binding (as a specific normative accomplished fact) on the particular organs within the United Nations system in the course of the performance of their statutory tasks⁴⁵ is not only convincing on the plane

³⁸ J. ZAKRZEWSKA, M. SOBOLEWSKI, *O prawach obywatelskich* [On Citizens' Rights], "Kultura i Społeczeństwo," 1967, No. 4, p. 159.

³⁹ Cf. C. W. JENKS, *Interdependence as the Basic Concept of Contemporary International Law*, in: *Law, Freedom and Welfare*, London 1963.

⁴⁰ A basic monograph of this document in literature is the work of A. VERDOOT, *Naissance et signification de la Déclaration Universelle des Droits de l'Homme*, Louvain 1965. A comprehensive description of the philosophical foundations of the Declaration is contained in: *Human Rights. Comments and Interpretation*, (ed. by J. Maritain), London 1949.

⁴¹ S. HOARE, *The UN Commission on Human Rights*, in: *The International Protection of Human Rights*, (ed. by E. Luard), p. 66.

⁴² J. BLAUSTEIN, *Human Rights: A Challenge to the United Nations and to Our Generation*, in: *The Quest for Peace. The Dag Hammarskjöld Memorial Lectures*, (ed. by A. W. Cordier and W. Foote), New York 1965, p. 321.

⁴³ Cf. Measures taken within the United Nations in the Field of Human Rights. Report of the Secretary General. U.N.Doc. A/CONF. 32/5. 20 VII 1967, paras 27 - 42.

⁴⁴ A. P. MOVČAN, *Meždunarodnaja zaštita prav človeka*, Moskva 1958, p. 149.

⁴⁵ Z. RESICH, *Ochrona praw człowieka a Polska* [Protection of Human Rights and Poland], in: *20 lat polityki zagranicznej Polski Ludowej* [20 Years of the Foreign Policy of People's Poland], Materials from a scientific session of the Polish Institute of International Affairs, Warszawa 1954, p. 279.

of theoretical considerations, but has also strong points of support in the real practice of the Organization.⁴⁶ As a consequence, the Universal Declaration of Human Rights and its derivatives (the Declaration of the Rights of the Child, the Declaration on the Elimination of the Discrimination Against Women) base on the quasi-constitutional role they play within the United Nations system.

But the impact of the declarations on human rights on the development of international law is not limited to norms regulating the internal activity of the Organization. Similarly as the founders of the United Nations underestimated the importance of the resolutions of the General Assembly, the drafters of the Universal Declaration of Human Rights foresaw at first neither the role it was really to play in future, nor the strength of its influence.⁴⁷ It is possible, therefore, to formulate on the example of the Universal Declaration the hypothesis that General Assembly resolutions constitute an exponent of the developmental tendencies of contemporary international law and perform quite an essential "promotional function" in the process of its codification.⁴⁸ They formulate certain aims, inspiring international community to cooperation for their achievement. They establish also, on the basis of understanding reached among the UN member States, certain standards of conduct, circumvallated by moral and political pressures. General Assembly resolutions are at present the most valuable instrument of developing cooperation of the UN member States, since they are an elastic and uncumbersome instrument. For after all, the effectiveness of the international protection of human rights is based not on compulsion, but on the voluntary preparedness of sovereign States to cooperate in this domain. General Assembly resolutions are an expression of such preparedness, and although they impose no formal legal obligations on the member States, they establish certain end standards at whose achievement the law aims in the course of its development. When suitable conditions are created in future, their general provisions may be transformed successively into

⁴⁶ The importance assumed in time by the Universal Declaration of Human Rights is described accurately by W. KOREY, *The Key to Human Rights—Implementation*, "International Conciliation," No. 570, November 1968, p. 7: "In the course of time, however, the Universal Declaration has come to be more than a 'statement of basic principles'. [...] In the legislative work of the United Nations, it has become a final arbiter and standard of reference to which every new text must conform."

⁴⁷ L. di QUAL, *Les effets des résolutions des Nations Unies*, Paris 1967, *passim*; C. W. JENKS, *A New World of Law? A Study of the Creative Imagination in International Law*, London 1969, p. 44.

⁴⁸ A. S. NARTOWSKI, *Ochrona praw człowieka a postęp nauki i techniki* (Protection of human rights and progress of science and technique), "Zeszyty Naukowe UJ—Prace z nauk politycznych," No. 3, Kraków 1972.

detailed treaty norms (the so-called "problem conventions" are an expression of such a tendency in the field of human rights).

This means that declarations of human rights offer a material basis for the development of international cooperation, and are at the same time a projection of the principles of the international law of the future.

To-date experience in this matter permits the thesis that similarly as the Universal Declaration of Human Rights performed this promotional function in the first quarter-century of the activity of the United Nations, at present the function of inspirer of the progressive development and the process of codification of international law—particularly in the field of the international protection of human rights—will be assumed first of all by another extremely important document: the Declaration on Social Progress and Development.⁴⁹

VI

It must be conceded that the Organization has worked out already a variety of forms of exerting influence on the process of progressive development and codification of human rights. The most valuable of all these various methods proved to be the one which—in theory at least—had least to offer: the method of initiating and coordinating international cooperation for consultation on, and practical introduction of, loose, mutually independent, but materially supplementing one another "problem conventions." They are multilateral agreements whose provisions cover a comparatively modest fragment of the whole of the problems of human rights. They differentiate the degree of protection of the separate categories of rights or lay down special procedures intended to ensure their implementation. They came to fruition as a rule under the auspices of the United Nations, but their conclusion and observance are also to some extent in the hands of the specialized agencies, among which the International Labour Organization has achievements and experience going as far back as the inter-war period.⁵⁰ These conventions develop various aspects of the protection of human rights in a much more detailed manner than could be done by a large-scale codification of this problem.⁵¹

⁴⁹ A. S. NARTOWSKI, *Prawa człowieka a ochrona prawna środowiska naturalnego—referat przedstawiony na konferencji naukowej "Międzynarodowa ochrona środowiska człowieka w Krakowie w grudniu 1971"* [Human Rights and the Protection of Natural Environment—paper read at a scientific conference "International Protection of Human Environment" in Cracow, December 1971].

⁵⁰ C. W. JENKS, *Social Justice in the Law of Nations. The ILO Impact After Fifty Years*, Oxford 1970, *passim*.

⁵¹ Compare on this subject H. BOKOR, *Human Rights and International Law*, in: *Socialist Concept of Human Rights*, (ed. by W. Halasz), Budapest 1966, p. 298 ff.

The future belongs probably to this form of international cooperation. Some "problem conventions," whose number is quite considerable and which supplement one another, have come into force already, while others are awaiting ratification, others still are at the stage of preparatory work. However, the network of multilateral conventions that have already come into binding force is undergoing dynamic expansion, embracing an ever larger number of agreements and ever larger number of States which have solemnly undertaken to observe them.⁵² Political realism prefers concrete partial ("step by step") solutions in this field, as much more effective, than ambitious but little operative, sluggish codifications.

VII

The idea of the adoption of the Covenant on Human Rights was maturing for over a dozen years, while the draft itself was worried many a time in extremely protracted and constantly quarrel-ridden disputes, until little indeed was left from the original form. In fact, the disputes over the draft were frequently put into reverse, and it was only with great difficulty that one succeeded in getting a little more than had been said earlier either in the text of the Universal Declaration of Human Rights⁵³ or in the separate normative acts of partial normative regulation of this subject ("problem covenants").⁵⁴ Changes were introduced at that not only in the content of provisions but also in the structure of the undertaking. Two Covenants were adopted in the end: the first pertains to human rights in the economic, social and cultural sphere, while the second, together with a separate optional protocol annexed to it, is devoted to human rights in the traditional ("civic") political aspect.⁵⁵ The very

⁵² Cf. *International Protection of Human Rights. Background Paper and Proceedings of the Twelfth Hammarskjöld Forum*, (ed. by J. Carey), New York 1968, p. 37.

⁵³ *The United Nations and Human Rights*, op. cit., pp. 101 - 168.

⁵⁴ For more see M. MATEY, *Pakt Narodów Zjednoczonych w sprawie społecznych i ekonomicznych praw człowieka a prawo pracy w PRL* [The United Nations Covenant in the Matter of Social and Economic Rights of Man, and Labour Law in the Polish People's Republic], "Państwo i Prawo," 1970, No. 10, pp. 499 - 500. The authoress comes to the conclusion that in the matter she deals with "[...] the provisions of the Covenant do not constitute a turning point [...], but carry only a recapitulation of earlier international norms of a specialized nature."

⁵⁵ On the subject of Covenants on Human Rights in Polish literature see S. DĄBROWA, *Międzynarodowe Pakty Praw Człowieka* [International Covenants on Human Rights], "Państwo i Prawo" 1967, No. 4/5; IDEM., *Międzynarodowe środki ochrony praw człowieka w świetle Paktów Praw Człowieka* [International Means for the Protection of Human Rights in the Light of the Covenants on Human Rights], "Pań-

division, in defiance of the opinions expressed at one time in the socialist doctrine,⁵⁶ is materially inessential, politically quite neutral, but formally has quite a few virtues.⁵⁷ This marked a framework of a purely ordinal classification grouping the various elements of an integrated concept of human rights in two rather fluid, materially connected and dialectically correlated categories. The implementation of human rights depends in fact on economic conditions and results from a proper observance in this field not only of the rights of the individual but also of whole societies.⁵⁸ This assertion is expressed in the form of a clear-cut tendency appearing within the United Nations, because the point of gravity of its activity has been moving over the years towards the solution of burning social and economic questions. However, the above-mentioned distinction was due first of all to reasons of a pragmatic nature: the point was to enable States firmly reluctant to accept a certain group of provisions to agree to at least other provisions, which would contribute to a strengthening of the universal character of the international legal order.⁵⁹ Only a visioner strives for uniformism; a politician who is a realist must tolerate diversity, which in fact, is sometimes creative.

VIII

Although several years have passed since their adoption the Covenants did not come into legal force as yet. In the light of to-date experience

stwo i Prawo," 1967, No. 10; Z. RESICH, *Pakty Praw Człowieka* [*The Covenants on Human Rights*], "Nowe Prawo," 1967, No. 3; J. BAFIA, *Kodyfikacja prawa karnego PRL a Międzynarodowy Pakt Praw Obywatelskich i Politycznych* [*Codification of Penal Law in the Polish People's Republic and the International Covenant on Human Citizens' and Political Rights*], "Państwo i Prawo," 1969, No. 7, as well as the works of M. Matey and M. Grzegorzczak quoted above.

⁵⁶ J. MACHOWSKI, *Prawa człowieka. Zagadnienia współpracy międzynarodowej* [*Human Rights. Problems of International Cooperation*], Warszawa 1968, p. 52 ff.; A. P. MOVČAN, *op. cit.*, p. 56 ff.

⁵⁷ Differences in the implementation of the two Covenants are accurately indicated by Z. RESICH, *Bilans prac ONZ w dziedzinie praw człowieka* [*A Balance-Sheet of United Nations Work in the Field of Human Rights*], "Sprawy Międzynarodowe," 1970, No. 8, p. 39.

⁵⁸ M. LACHS, *Równość i prawa gospodarcze. Przyczynek do rozważań nad prawami człowieka* [*Equality and Economic Rights. Contribution to Contemplation of Human Rights*], "Państwo i Prawo," 1947, No. 12, p. 14; E. KAMENOV, *Bases économiques des droits de l'homme*, in: *La République Populaire de Bulgarie et les Droits de l'Homme*, Sofia 1970, pp. 9 - 23.

⁵⁹ Cf. W. MORAWIECKI, *Rola ONZ w tworzeniu norm prawa międzynarodowego* [*The Role of the United Nations in the Creation of Norms of International Law*], "Państwo i Prawo," 1970, No. 10, pp. 478 - 479; J. BLAUSTEIN, *op. cit.*, p. 322.

their prospects are rather unclear.⁶⁰ For although the United Nations has considerable achievements in the field of codification and development of normative regulations of human rights, a second aspect of its activity, parallel in principle, namely the effective protection of human rights through an operative solution of concrete current problems, has yielded much more modest results. The contemporary development phase is marked by a deep asymmetry between the establishment of principles and the practical exploitation of the possibility of their effective implementation.⁶¹ In spite of the many declarations and conventions, in spite of the hundreds of volumes of documentation on this problem, it would be no doubt difficult to answer here the question of what really did the United Nations do effectively for improving the lot of men in the various parts of the terrestrial globe. The consistent atrocities of the policy of apartheid have shown with a ruthless clarity the complete impotence of international organization, while an objective helplessness of the public opinion of almost entire world accompanying its efforts. This is only one out of very many examples.

Efforts are multiplying at the same time not so much for expanding the existing executive procedure, but even aimed at complicating it in a way that would drown it in a structural impasse. The international protection of human rights, such as it is today, functions first of all on the basis of purely political instruments, nevertheless it creates a proper basis for positive cooperation. The point is to realize that cooperation. And since only some of the means are suitable for practical application, they should be consistently applied, and it is they that should be given priority.⁶²

We should avoid the creation of superfluous bodies. What is the point in setting up another additional organ, namely the office of High Commissioner for Human Rights, if the forcing of this conception in face of numerous and justified hesitations unnecessarily aggravates the situation? It should be possible after all within the framework of the already func-

⁶⁰ If one were to accept as a point of reference the length of the drafting of the text which took over a dozen years, it would be still too early for extreme pessimistic generalizations as to the future of the Covenants. It is worth it, nevertheless, to consider the view of W. MORAWIECKI: "It might emerge that the United Nations covenants on human rights, which tried to impart to the more flexible moral-political norms the rigid character of norms of international law, were too ambitious a venture under conditions of the contemporary reality of the world"—*Rola ONZ...* [*The Role of the United Nations...*], p. 479.

⁶¹ Cf. W. KOREY, *A Global Ombudsman*, "Saturday Review," 12. Aug. 1967, p. 20.

⁶² J. E. S. FAWCETT, *The Protection of Human Rights on a Universal Basis: Recent Experience and Proposals*, in: *Human Rights in National and International Law*, (ed. by H. A. Robertson), p. 299.

tioning organs—and with the help of more realistic and more widely accepted methods—to move the matter successfully forward. The contemporary development tendency still unfortunately gives rise to the anxiety that if the principles of international protection of human rights receive a universally binding character, it would not solve the existing problems at all, but only contribute markedly to an increase in tension by creating a formal legal basis for accusations and institutionalized charges which would not be in the least a manifestation of concern for a real observance of human rights, but solely one of the elements of the world strategy of rival rying groupings.⁶³ The alleged duty of our times to establish and introduce ever new standards of international protection of human rights would be thus completely entangled in the whirlpools of a bitter political struggle.

One cannot unilaterally put the whole blame for the imperfections of the present state of affairs on the allegedly faulty procedure. The source of the crisis and the danger of its getting deeper is immanently inherent in the nature of the policy pursued by certain countries. For the whole point is not to codify paper ideals but really to propagate them in the every-day practice of international life; not to contemplate human rights, but fight for their full implementation. Experience demolishes irrefutably the popular western cant that while the capitalist countries occupy in this matter a stand of pragmatic realism, the socialist States hide behind a dam of dogmato-ideological prejudice. Exactly the reverse proved true: in the Commission on Human Rights, in the Third Committee, in the forum of the General Assembly of the United Nations and in other appropriate organs (and outside them too)—it was precisely the capitalist States that endeavoured with a stubbornness worthy of a better cause to impose everywhere their own narrow point of view, for the sole reason probably of departing later from their own, so perseveringly advertized principles, of avoiding the ratification, and as a consequence of not implementing the provisions of a given agreement.⁶⁴ And lo and behold! When in the course of preparations for the International Year for Human Rights it was tried to draw up a balance-sheet of current achievements it came out that—not counting the United Nations

⁶³ Cf. report by W. MORAWIECKI at the All-Poland Session on Human Rights in Toruń in 1968—report in: “3rd Polish Round Table,” 1969, pp. 188 - 192.

⁶⁴ The phenomenon was described extremely well by E. B. HASS, *The Web of Interdependence. The United States and International Organization*, Englewood Cliffs, N.J. 1970, p. 84: “American policy in the United Nations with regard to the international protection of human rights was largely propagandistic in style and anti-communist in substance during the bipolar period.”

Charter—the only post-war instrument on human rights ratified by the United States of America was a quite secondary Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery of 7 September, 1956. And even this ratification came only after a lag of ten years.⁶⁵ The reflections of such a policy are projected, of course, on the views of some western authors and on the polemical methods they use.⁶⁶

A diametrically different attitude, on the other hand, is represented in this matter by the socialist States.⁶⁷ Active participation in actions in support of practical progress is accompanied in this instance by the formulation of concrete and far-going proposals on the development of cooperation. Poland distinguishes herself especially in this group by the boldness of her initiatives; she is—if one may use the term—a highly valued exporter of sober political thinking. Polish diplomacy and doctrine have gained considerable prestige thanks to having worked out a clear-cut and crystallized programme to which so many momentous documents are indebted for being born, that it is reflected in no mean measure in the evaluation of the whole of the achievements of the United Nations in the field of the international protection of human rights.⁶⁸

⁶⁵ Cf. B. BITKER, *Some Remarks on US Policy on the Ratification of the International Human Rights Conventions*, "Revue des Droits de l'Homme—Human Rights Journal," 1969, No. 4, pp. 653 - 657.

⁶⁶ Two examples of nonsensical (out of many others circulating in the literature of the West) charges against the socialist States. One A. VILLEFONSE (*Géographie de la Liberté. Les droits de l'homme dans le monde 1953 - 1964*, Paris 1965, p. 13) laments that the Soviet Union did not ratify... the Universal Declaration of Human Rights, while S. McBRIDGE (*International Protection of Human Rights*,—ed. by J. Carey, p. 53) sees the source of the reluctance of socialist authors towards the international law conception of the subjectivity of the individual in their attachment to obsolete textbooks: "This has been particularly evident in the case of international law textbooks in use in Russia and Eastern Europe; most of these are copies from old Tsarist textbooks or are translations from old German textbooks"!

⁶⁷ For more see J. A. OSTROVSKI, *op. cit.*, p. 78 ff. It is worth adding that two socialist States have already ratified the Covenants on Human Rights: Bulgaria—21 Sept. 1970, and Yugoslavia—2 June 1971. See on the same subject U. BAKHNEV, *La ratification des pactes internationaux relatifs aux droits de l'homme*, in: *La République Populaire de Bulgarie et les droits de l'homme*, pp. 165 - 172.

⁶⁸ Z. RESICH, *Polska w obronie praw człowieka* [Poland in the Defence of Human Rights], "Sprawy Międzynarodowe," 1967, No. 7/8; the SAME AUTHOR: *Polska w obronie praw człowieka na forum ONZ* [Poland in the Defence of Human Rights in the United Nations Forum], "Sprawy Międzynarodowe," 1969, No. 7/8; J. MACHOWSKI, *Wkład Polski w dziedzinę współpracy międzynarodowej w zakresie praw człowieka* [Poland's Contribution to International Cooperation in the Field of Human Rights], "Nowe Prawo," 1969, No. 3.

IX

Two main intertwined developmental trends of human rights supplementing each other have appeared so far in the course of the activity of the United Nations system. The first of them aims from the very beginning at imparting the most universal character possible to the standards of conduct accepted in this field; the aim of the second is to ensure their effectiveness. The former is achieved with the help of instruments that are general but declarative in character, and which treat the question of protection of human rights in a manner that is as complex as it is general; the latter gave priority to binding "problem conventions," narrower in their scope of normative regulation and frequently even in their range of acceptance. Requirements of universalism were to a considerable extent fulfilled, while the implementation of the postulates of effectiveness of protection of human rights is still so to speak at a starting stage: it is easier after all in a divided world to achieve agreement, which even so is only a seeming one, with regard to superficial formulations, than to adopt and apply uniform guidelines as regards their interpretation.⁶⁹ The first really large-scale attempt at bridging these two currents, an attempt at a simultaneous practical introduction of principles both of universalism and effectiveness, are the Covenants on Human Rights. And although Egon Schwelb was right to a certain extent when he said at one time that in contemporary international practice differences between a binding treaty and a resolution whose force is at most political and moral were still not very essential⁷⁰—the dynamic development of the system of international law intensifies these differences consistently and all the time. If, therefore, we assess the importance of the Covenants on Human Rights from this point of view, they will prove a venture conceived with an eye to tomorrow, when in view of the development of the norms of treaty law the postulates of the Universal Declaration of Human Rights might lose their present significance. However, the universal implementation of the Covenants on Human Rights depends wholly on the general political situation, because even the most soberly calculated agreement on this issue will function properly only in an atmosphere of détente.

⁶⁹ V. OUTRATA, *op. cit.*, p. 298.

⁷⁰ E. SCHWELB, *International Conventions on Human Rights*, "The International and Comparative Law Quarterly," Vol. 9, 1960, No. 4, p. 675.

Extradition of Criminals in Bilateral Agreements Concluded by Poland

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I

Poland is introducing ever greater facilities for the international traffic of persons, which creates favourable opportunities for criminals of various types wishing to avoid penal responsibility in their own country. It is timely, therefore, to make a closer study of problems connected with the extradition of criminals, and especially an analysis of bilateral agreements on extradition concluded by Poland.

The present article is confined to problems of the extradition of criminals in the light of bilateral agreements concluded by Poland. The article does not deal, therefore, with the problem of the extradition of criminals regulated by multilateral international treaties (pertaining to the problem of illicit drug traffic, pornographic publications, etc.) Neither does it treat on problems of the extradition of Nazi war criminals, which have been regulated differently by separate acts of international law. The extradition of criminals in the light of Polish internal law has been treated marginally only, solely for a better illustration of the problems raised in the article.

II

Extradition of criminals takes place on the basis of legal norms contained in international agreements. In the absence of appropriate treaty obligations, States may extradite criminals solely on the basis of their

own internal laws, as there is no universal norm of international law ordering extradition, just as there is no such norm forbidding extradition because of the lack of an extradition treaty.¹

Poland is bound at present by seven extradition agreements concluded before the war with capitalist States and seven agreements concluded after the war with socialist States.²

It results from the provisions contained in these agreements that they are based in their essence on the generally recognized principles of international law. The most important of them are:

¹ L. EHRLICH, *Prawo międzynarodowe [International Law]*, Warszawa 1958, p. 633. Poland has no special extradition law. Rules pertaining to extradition are contained in the Code of Penal Procedure (Arts. 523 - 541) and in the Penal Code (Arts. 113 - 119).

² These are the following agreements: Convention on extradition and court assistance in penal cases between the Polish Republic and the Kingdom of Belgium, signed in Brussels on 13 May, 1931 ("Dziennik Ustaw" — *Journal of Laws* of 1932, No. 59, item 564); Treaty between the Polish Republic and Great Britain on the extradition of escaped criminals, signed in Warsaw on 11 Jan., 1932 ("Dziennik Ustaw" of 1934, No. 17, item 135); Extradition treaty between the Polish Republic and the French Republic, signed in Paris on 30 Dec., 1925 ("Dziennik Ustaw" of 1929, No. 63, item 491). Extradition treaty between the Polish Republic and the United States of America, signed in Warsaw on 22 Nov., 1927 ("Dziennik Ustaw" of 1929, No. 45, item 372); Additional extradition treaty between the Polish Republic and the United States of America, signed in Warsaw on 5 Apr., 1935 ("Dziennik Ustaw" of 1936, No. 43, item 319); Convention between the Polish Republic and the Grand Duchy of Luxemburg on extradition and court assistance, signed in Luxemburg on 22 Jan., 1934 ("Dziennik Ustaw" of 1936, No. 16, item 145); Treaty on extradition and court assistance in penal cases between the Polish Republic and the Swiss Federation, signed in Bern on 19 Nov., 1937 ("Dziennik Ustaw" of 1939, No. 4, item 19); Agreement between the Polish People's Republic and the German Democratic Republic on legal relations in civil, family and penal cases signed in Warsaw on 1 Feb., 1957 ("Dziennik Ustaw" of 1958, No. 27, item 114); Agreement between the Polish People's Republic and the Union of Soviet Socialist Republics on legal assistance and legal relations in civil, family and penal cases signed in Warsaw on 28 Dec., 1957 ("Dziennik Ustaw" of 1958, No. 32, item 147); Agreement between the PPR and the Hungarian People's Republic on legal relations in civil, family and penal cases, signed in Budapest on 6 March, 1959 ("Dziennik Ustaw" of 1960, No. 8, item 54); Agreement between the PPR and the Federative People's Republic of Yugoslavia on legal relations in civil and penal cases, signed in Warsaw on 6 Feb., 1960 ("Dziennik Ustaw" of 1963, No. 27, item 162); Agreement between the PPR and the Czechoslovak Socialist Republic on the regulation of legal relations in civil, family and penal cases, signed in Warsaw on 4 July, 1961 ("Dziennik Ustaw" of 1962, No. 23, item 103); Agreement between the PPR and the People's Republic of Bulgaria on legal assistance and relations in civil, family and penal cases, signed in Warsaw on 4 Dec., 1961 ("Dziennik Ustaw" of 1963, No. 17, item 88); Agreement between the PPR and the Rumanian People's Republic on legal assistance and relations in civil, family and penal cases, signed in Bucharest on 25 Jan., 1962 ("Dziennik Ustaw" of 1962, No. 63, item 301).

- the principle of non-extradition of political offenders,
- the principle of non-extradition of one's own citizens,
- the principle of two-sided punishability and the principle of speciality, called the principle of limited prosecution.

The principle of non-extradition of political offenders is contained in all bilateral extradition agreements concluded by Poland with capitalist States (pre-war agreements).³ According to these agreements, the evaluation of the character of the offence (that is whether it is a political offence or not) is left to the discretion of the State called upon to extradite an offender. This is expressly stipulated in Article 3, point 1 of the Polish-Swiss agreement. Article 7 of the Polish-British agreement goes even farther. It says that an escaped offender has the right of proving that the motion for his extradition was made in fact for the purpose of bringing him to trial or for the execution of a sentence for an offence of a political nature.

The agreements concluded by Poland with socialist States do not contain a clause excluding extradition of political offenders.⁴ Subject to extradition may be, therefore, all persons irrespective of the character of their offence, provided conditions for extradition are fulfilled. This kind of regulation, diametrically different from the provisions of Polish bilateral agreements concluded with capitalist States, is the consequence of the fact that the States of the socialist community have identical socio-political systems. This identity is expressed also in the identical treatment of offences and in the definition of the right of asylum in the constitutions of all socialist States.

People's Poland grants asylum to citizens of other States (that is recognizes them as "political offenders" in accordance with the nomenclature used in the general international law) persecuted for defending the interests of the working masses, struggle for social progress, activity in the defence of peace, national liberation struggle or scientific activity.⁵ For the same reasons, other States of the socialist community also grant asylum to citizens of other States. This means that the socialist States hold unanimously that foreigners who have committed in other countries acts considered as punishable there, but which are in fact an expression of their activity in the interest of the working masses, social

³ See agreements with Belgium and Luxemburg (Art. 6), France (Art. 4, item 5), the United States (Art. III), Switzerland (Art. 3) and Great Britain (Art. 7).

⁴ Cf. I. A. SHEARER, *Extradition in International Law*, Manchester 1971, p. 66.

⁵ Art. 75 of the Constitution of the Polish People's Republic. According to Art. 119 of the Penal Code and Art. 534 para. 1 of the Code of Penal Procedure, persons prosecuted abroad for acts enumerated in Art. 75 of the Constitution cannot be extradited.

and scientific progress, struggle for peace and national liberation, benefit from legal protection are exempt from extradition.⁶ Looking at the problems of extradition from the point of view of international law, these constitutional conditions of the grant of asylum may be said to arise from the definition of a "political offence."

The fact that the socialist States hold an identical view with regard to "political offences" makes it pointless for them to introduce in their extradition agreements between them the additional clause that such offenders cannot be extradited. For it is absurd that these States should grant asylum for the perpetrators of such acts committed in other countries, and at the same time prosecute their own citizens for the commitment of such acts. This is why the principle of non-extradition of political offenders is applicable between States which differ in their interpretation of the definition of a "political offender." It is applicable, therefore, above all in relations between States of the socialist community on the one hand and the capitalist States on the other.

The indication for what acts do the States of the socialist community grant asylum is an expression not only of the international solidarity of the working class, but also a unanimous indication that from the point of view of the interests of the socialist States acts of other kind are socially dangerous in their mutual relations, that is they are prohibited, are subject to prosecution and are not treated as "political offences" for purposes of extradition.⁷

The perpetrators of such acts, particularly of acts aimed at the foundations of the social system of the States of the socialist community—even if they have a political motivation—are not and cannot be regarded in any of those States as "political offenders" deserving protection, because their acts, dangerous for a single socialist State, are equally dangerous for the other States of the socialist community. Since, then, the evaluation of prohibited acts is in principle identical in all States of the socialist community it is impossible for one socialist State to grant legal protection to an offender hitting out at the system and legal order of

⁶ See Art. 84 of the Bulgarian constitution, Art. 33 of the Czechoslovak constitution, Art. 65 of the Yugoslav constitution, Art. 10 of the GDR constitution, Art. 38 of the Rumanian constitution, Art. 58 of the Hungarian constitution, and Art. 129 of the USSR constitution—*Konstytucje europejskich państw socjalistycznych* [Constitutions of the European Socialist States]. A collection of texts edited by Andrzej Burda, Wrocław 1967.

⁷ Cf. W. MORAWIECKI, *Zagadnienie prawa azylu w świetle projektu Konstytucji Polskiej Rzeczypospolitej Ludowej* [Problem of the Right of Asylum in the Light of the Draft Constitution of the Polish People's Republic], "Państwo i Prawo," 1952, No. 4, pp. 577 and 590.

another State of that community. As a result, in relations between the States of the socialist community, the perpetrators of acts other than those described in Article 75 of the Constitution of the Polish People's Republic and analogous articles of the constitutions of the other States of the socialist community are not and cannot be regarded as not being subject to extradition.⁸

This does not mean at all, however, that international agreements on extradition concluded by the socialist States cannot broaden the list of offences which are not subject to extradition—in other words the meaning of the term “political offence.”

The principle of non-extradition of one's own citizens has been clearly expressed in the bilateral extradition agreements, with the exception of the Polish-British agreement and the agreement with the United States.⁹ For the law of Great Britain and the United States does not foresee in principle responsibility for offences committed abroad, and it does not contain, therefore, norms forbidding the extradition of their own citizens for offences committed outside the frontiers of their country.¹⁰ Hence in the Polish-British agreement (Art. 4) and the agreement with the United States (Art. VIII) each of the parties reserves the right of refusing or expressing consent to the extradition of its own citizens.

The question of the citizenship of an offender, similarly as other circumstances on which extradition depends, are examined by the State asked for extradition, and it adopts its decision on the basis of its own internal laws.¹¹

The non-extradition of one's own citizens who committed an offence in another State is not tantamount to their impunity. Such persons are prosecuted by the State whose citizens they are. The duty of instituting penal proceedings against such persons results clearly from the bilateral agreements concluded by Poland with the socialist States (except the agreement with Yugoslavia), as well as with France and Switzerland.¹²

⁸ *Ibid.*, p. 590.

⁹ Cf. also Art. 6 point 1a of the European Convention on Extradition of 13 Dec., 1957 (published in English, French and German in *Bundesgesetzblatt*, Teil II, Ausgabe zu Bonn am 6. Nov., 1964, No. 51, which states facultatively that each of the contracting parties is entitled to refuse the extradition of its citizens.

¹⁰ L. EHRLICH, *op. cit.*, p. 633.

¹¹ In Poland the organ conducting extradition proceedings acts in this case on the basis of the regulations on Polish citizenship of 15 Feb., 1962 (“*Dziennik Ustaw*” of 1962, No. 10, item 49).

¹² The remaining agreements with capitalist States do not provide for taking over of prosecution. This does not mean that these States cannot prosecute their citizens for acts committed abroad on the basis of their own internal regulations.

In these agreements the contracting parties commit themselves to instituting penal proceedings, according to their own law, against their citizens who committed an extraditable offence in the territory of the other contracting party.

All the binding bilateral extradition agreements concluded by Poland are based on the principle of two-sided punishability. This means that an escaped offender may be extradited only if his act is recognized as an offence in the State demanding extradition and the State asked for it.¹³

The definition of the category of offences constituting a basis of extradition in the above agreements is made by:

1. Taxative enumeration of offences (*casuistic method*); this method is used in the agreements with Great Britain (Art. 3), Belgium (Art. 2), Luxemburg (Art. 2) and the United States (Art. II).

2. Indication of the limits of penalty or an actual penalty for the offence which is the basis of the demand for extradition (*general clause*). This clause is contained in all the agreements concluded with the socialist States. Except the agreement with Yugoslavia, the agreements provide that an offence punishable for one year's imprisonment is an extraditable offence. The agreements with the Soviet Union, Rumania, Bulgaria and Hungary contain also the expression "above one year or a more severe penalty," while the agreement with Czechoslovakia and the German Democratic Republic read "at least one year."

If a demand for extradition is made for the purpose of the execution of a penalty, then according to agreements with Bulgaria, Rumania and Hungary the penalty pronounced must be above one year's imprisonment, and according to the agreement with Czechoslovakia "at least one year or a more severe penalty." The agreements with the Soviet Union and the German Democratic Republic do not set any penalty limits.

The agreement with Yugoslavia provides that an extraditable offence is an act liable in both countries to a penalty of at least two years' deprivation of liberty or a more severe penalty. On the other hand, the extradition of a person sentenced by a valid court verdict can take place according to the agreement only if the perpetrator had been sentenced to at least six months' deprivation of liberty (Art. 74 and 75).

As regards still binding pre-war agreements, a general clause is contained in the agreement with Switzerland. The clause says that an extraditable offence is an act liable to a penalty of at least one year, or

¹³ Compare, for example, Art. 65, point 2 of the agreement with Bulgaria and Art. 2 of the agreement with Belgium.

an act for which the offender had been sentenced to at least six months' deprivation of liberty or to a more severe penalty.¹⁴

3. Simultaneous enumeration of offences and setting of penalty limits (mixed system).

This method for the definition of extraditable offences is used in the Polish-French agreement (Art. 3 and Art. 4, points 1, 2).

The bilateral extradition agreements concluded by Poland are based also on the principle of "speciality,"¹⁵ called otherwise the principle of limited prosecution. This means that an extradited person cannot be prosecuted, sentenced or extradited to a third State in connection with another criminal act committed before the extradition, if the extradition was not done because of that act.

The bilateral extradition agreements concluded by Poland limit the prosecution of the extradited person by defining:

(1) limits of prosecution and punishment (express provision that only the act which caused the extradition can serve at the basis of prosecution and punishment);

(2) limits of verdicts (definition of the kinds of penalty);

(3) prohibition of the possibility of re-extradition to a third country;

(4) prohibition of the application of emergency procedure.

All the above extradition agreements contain the definition of the limits of the prosecution and punishment of the extradited person. All of them, except for the agreements with the United States and Great Britain, prohibit the re-extradition of the offender to a third State.¹⁶

¹⁴ It is worth pointing out that the Polish Code of Penal Procedure also uses a general clause. It is said *a contrario* in Art. 534, para. 2, point 3 that perpetrators of acts liable to a punishment above one year or person sentenced to such a penalty are subject to extradition.

¹⁵ A formulation taken literally from the agreement with the GDR (Art. 76). The agreements with Bulgaria (Art. 78), Czechoslovakia (Art. 71), Rumania (Art. 73), Hungary (Art. 78) and the Soviet Union (Art. 76) use only the formulation of "limitation of the prosecution of the extradited person." The agreement with Yugoslavia and pre-war agreements, on the other hand, contain no definition of this principle, even though it is contained in them.

¹⁶ Compare agreements with Bulgaria (Art. 78, point 1 in connection with Art. 65, point 2), Czechoslovakia (Art. 71, point 1 in connection with Art. 58, point 2), Yugoslavia (Art. 86, point 1 in connection with Art. 74, point 1), the GDR (Art. 76, point 1 in connection with Art. 64, point 2), Rumania (Art. 73, point 1 in connection with Art. 59, point 2), Hungary (Art. 78, point 1 in connection with Art. 66, point 2), the Soviet Union (Art. 76 in connection with Art. 62, point 2), Belgium (Art. 13 in connection with Art. 2), France (Art. 5 in connection with Art. 3), Luxemburg (Art. 13 in connection with Art. 2) and Switzerland (Art. 11 in connection with Art. 1). With regard to the definition of prosecution and punishment compare the agreements with the United States (Art. IV in connection with Art. II) and Great Britain (Art. 8 in connection with Art. 3).

Limitation with regard to the kinds of penalties and prohibition of the application of emergency procedure are contained only in the agreement with Switzerland.¹⁷

There are, however, exceptions to the principle of limited prosecution. With the consent of the extraditing State it is always possible to punish the extradited person for an offence other than that for which the offender had been extradited (such a possibility is not foreseen solely in the agreements with the United States and Great Britain).¹⁸

The agreements with Yugoslavia, Hungary, the German Democratic Republic, Belgium, Luxemburg and Switzerland emphasize that the extraditing State cannot refuse its consent to the punishment for another offence if, according to the provisions of those agreements, it would be bound to extradite a person for an offence of this kind.

The broadening of the limits of prosecution and punishment according to agreements with the German Democratic Republic (Art. 76, point 3), Hungary (Art. 78, point 2, letter c), Belgium (Art. 13, point 2) and Luxemburg (Art. 13, point 2) is possible without the consent of the extraditing State if the person extradited consents to this. The agreements with Belgium and Luxemburg add that the consent cannot apply to offences of a political nature. According to the agreement with France (Art. 5, point 1), no consent of a State is required if the person extradited itself "had asked punishment or the execution of penalty" for an offence other than that for which extradition had taken place. An extradited person may be prosecuted without any limitations and without the consent of the extraditing State if after the termination of penal proceedings or the execution of penalty for the offence for which he had been extradited, did not leave, in spite of its possibility, by a set date the territory of the State to which he had been extradited, or returned to that territory later.¹⁹

¹⁷ See the concluding protocol of the Polish-Swiss agreement: "1. [...] extradition will always take place with the reservation that the extradited person shall not be prosecuted by an emergency court; 2. [...] penal legislation of the two Contracting Parties does not provide for bodily punishment; 3. [...] the Governments of the two States may express the wish, if the death penalty is applicable in the asking State, that it shall not be pronounced, or should it be already pronounced, for it to be changed for a penalty of deprivation of liberty [...]".

¹⁸ Compare agreements with Bulgaria (Art. 78, point 1), Czechoslovakia (Art. 71, point 1), Yugoslavia (Art. 86, point 1), the GDR (Art. 76, point 1), Rumania (Art. 73, point 1), Hungary (Art. 78, point 1), the Soviet Union (Art. 76), Belgium (Art. 13, point 1), France (Art. 5, point 3), Luxemburg (Art. 13, point 1) and Switzerland (Art. 11, point a).

¹⁹ Compare with the text of articles cited in footnote 18. The principle of limited prosecution contained in Polish bilateral extradition agreements is concretized in the Code of Penal Procedure in Art. 526, para. 1 and para. 2 and in Art. 527.

III

The institution of extradition proceedings, its conduct and the actual extradition of an offender depends on the fulfillment of certain conditions contained in the individual extradition agreements under review.

Poland extradits offenders on the basis of international agreements binding on her, or in the absence of such agreements, on the basis of municipal law.²⁰ In the latter case, the extradition of an offender is not a legal duty but stems from the principle of reciprocity. If the asking State does not guarantee reciprocity, the extradition of an offender depends on the free decision of our State.²¹

Duty of Extradition. This arises at the moment when a formal and justified request for the extradition of a person suspected or sentenced for an extraditable offence committed in the territory of the asking State and sometimes in the territory of a third State has been submitted by a proper authority of the asking State in accordance with a given agreement. Extradition takes place when the court authority of the asked State is not proper for punishing the offender, or when it is proper but may waive its jurisdiction in favour of the State asking for the extradition.²²

Refusal of Extradition. In some cases, in spite of the fact that the asking State has fulfilled all conditions of extradition (that is the emergence of positive premises) extradition will not take place if there emerge obstacles to extradition (that is negative premises of extradition). Negative premises constitute a basis for refusing the extradition of an offender.

An analysis of the bilateral agreements concluded by Poland with regard to extradition shows that they contain provisions permitting the refusal of extradition, even though the asking State has fulfilled the conditions of extradition. This type of grounds for the refusal of extradition may be found in all the agreements under review. Some of them are contained in all agreements, while others are typical of agreements concluded with capitalist countries or of agreements concluded with

²⁰ The mutual relationship between the provisions contained in the international agreements under review and provisions contained in the Code of Penal Procedure is defined by Art. 541 of the CPP which says that its provisions are inapplicable if an international agreement provides otherwise.

²¹ Compare Art. 541, para. 2 of the CPP—"The provisions of the present section may not be applied to a foreign State with which there is no agreement in this respect, and if that State does not guarantee reciprocity."

²² Compare the agreement with Belgium (Art. 3 point 1), France (Art. 4, point 3), Luxemburg (Art. 3, point 1) and Switzerland (Art. 3, point 5).

socialist States only. There are also grounds which are contained in one or two agreements only.²³ Viz.:

1. All agreements stipulate that extradition takes place on request and because of strictly defined acts. This means that extradition cannot take place if the act constituting the basis for the extradition request is not an extraditable offence, or if the extradition request is improper for formal reasons, and was not completed at the demand of the extraditing State.

2. In accordance with the above principle, all agreements stipulate that a State does not extradite its own citizens. This ban is not formulated categorically only in the agreement with the United States (Art. VIII) and Great Britain (Art. 4).

3. The ban on extradition is binding if according to the law of the extraditing State the penal proceedings or the execution of sentence is inadmissible because of the applicability of the statute of limitations or other circumstance excluding prosecution or execution of the sentence. This ban is contained in all agreements. There are, however, differences pertaining to the criterion of the applicability of the law according to which these obstacles are determined.

4. In accordance with all agreements, no extradition will take place if proceedings for the act constituting the basis of extradition had been conducted in the asked State, and legally terminated. Moreover, according to the agreement with Bulgaria (Art. 67, point 3), Czechoslovakia (Art. 60, point c), Rumania (Art. 61, point c), France (Art. 4, point 4), the United States (Art. V), Great Britain (Art. 5) and Switzerland (Art. 3, point 6), no extradition will take place if penal proceedings for that act are still under way. On the other hand, according to the agreement with Belgium (Art. 4) and Luxemburg (Art. 4), a State may "refuse extradition" if penal proceedings are still under way. The agreement with Yugoslavia provides that the other side may refuse extradition for an act committed in the territory of a third State, when penal proceedings had been legally terminated there (Art. 76, point b).

The agreements with Belgium (Art. 3 point 3), Luxemburg (Art. 3, point 3), Great Britain (Art. 5) and Switzerland (Art. 3, point 6) provide additionally that an acquittal or discontinuation of proceedings do not constitute an extradition obstacle, if such decisions had been adopted because the offence had been committed outside the frontiers of the extraditing State. And according to the agreement with Yugoslavia (Art.

²³ Bases for the refusal of extradition have been formulated in the Polish internal law in a similar but not fully identical manner as in the agreements under review. Compare Art. 115, 118 and 119 of the Penal Code and Art. 534 para. 1 and 2 of the PPC.

77, point b), extradition may take place in spite of a valid sentence, if the law of the extraditing State offers a basis for re-opening proceedings because of the offence for which the valid sentence had been pronounced.

5. Extradition does not take place for acts recognized in the asked State as political offences or for acts connected with such offences.²⁴

6. Agreements concluded with socialist States (except Yugoslavia) contain the reservation that extradition does not take place in cases of persons guilty of offences prosecuted on the basis of a private indictment, unless, as stipulated in the agreement with Bulgaria (Art. 67, point 4) and Hungary (Art. 67, point e), the indictment is taken over by the public prosecutor. The agreement with Yugoslavia (Art. 77, point d) provides only that no request for extradition will be accepted if "no motion or charge for penal prosecution had been submitted in cases in which the start of proceedings for extradition depends on it according to the law of either Party."

7. A negative premise justifying an obligatory refusal provided for in agreements with socialist States, except Yugoslavia, is the circumstance that the offence had been committed in the territory of the extraditing State. On the other hand, in agreements with capitalist countries the circumstance that the offence had been committed in the territory of the extraditing country does not constitute an absolute negative premise.

8. The agreements with Belgium (Art. 3, point 1), France (Art. 4, point 3), Luxemburg (Art. 3, point 1) and Switzerland (Art. 3, point 5) provide that no extradition will take place if the extraditing country possesses jurisdictional propriety and cannot waive it in favour of the requesting State.

9. According to the agreements with the United States (Art. 1) and Great Britain (Art. 12) no extradition will take place if the guilt of the person involved had not been properly proved.

10. According to the agreement with Belgium (Art. 1) and Luxemburg (Art. 1) no extradition will take place if the person involved was under 18 at the moment of the commitment of the offence.

11. Only the agreement with Switzerland (Art. 3, items 2 and 3) provides that no extradition will take place if the offence committed was of a purely military, fiscal or journalistic character.

Postponement of Extradition. The extradition of an offender may be postponed in certain cases in spite of the fulfillment of all necessary conditions. A circumstance justifying a postponement of extradition is

²⁴ The agreements concluded with socialist States contain no regulation whatever in this respect. See "principle of the non-extradition of political offenders."

if preparatory or executive proceedings for an act other than that serving as the basis for the extradition request is under way against the same person in the extraditing State. Postponement of extradition is provided for in all bilateral extradition agreements concluded by Poland.²⁵

Temporary Extradition. If a postponement of the extradition of an offender could lead to the application of the statute of limitations or to other effects negative for the penal proceedings in the asking State, the offender may be extradited for a certain period of time on the motion of the State involved.²⁶ A temporarily extradited person should be sent back to the extraditing State upon the completion of the operation for which it had been extradited. Temporary extradition is provided for in all the agreements with socialist States, and in the Polish-Swiss agreement.

Repeated Extradition. This takes place when an extradited offender escapes back to the territory of the extraditing State before the completion of penal proceedings or execution of penalty in the State to which he had been extradited. Repeated extradition is provided for in all agreements with socialist States and in the agreement with Switzerland.

Repeated extradition takes place on the request of the State involved. No new request is required only by the agreement with Bulgaria (Art. 76) and Hungary (Art. 80). Agreements providing for request for a repeated extradition do not require, however, new documents justifying extradition. The agreement with Yugoslavia (Art. 89) says even expressly that the person will be extradited for a second time without any extradition proceedings.

IV

Extradition procedure is regulated by all the bilateral extradition agreements concluded by Poland. The regulation is, however, of a general character and applies to the most important problems. Detailed regulation is left by the agreements to the municipal law of the States concerned.²⁷

Extradition Request. As has been said above, extradition can take place solely on the request of the State concerned. The request should

²⁵ The postponement of extradition is regulated in a similar manner in Art. 534, para. 3 of the PPC.

²⁶ Compare, e.g., the agreement with Bulgaria (Art. 74, point 1) and Switzerland (Art. 9).

²⁷ Compare chapters 55, 56 and 57 of the CPP, which contain appropriate regulations pertaining to this question.

meet certain formal requirements, and should be sent by proper procedure by the competent organs of the asking State.²⁸

In the agreements discussed above, except for the agreement with Bulgaria, there is no precise definition what the extradition request should contain. The other agreements stipulate expressly what should be annexed to a request as its justification.

According to Article 68 of the Agreement with Bulgaria, the request should contain the names of the asking and the asked organs, the name and surname of the person whose extradition is requested, his citizenship, information on his place of residence or sojourn, as well as his particulars, and indication of the offence; if the offence caused a material loss, its value should be given. The agreements under review require the following enclosures to an extradition request: certified copies of decisions on the commencement of penal proceedings and temporary detention, a certified copy of the valid sentence (if the offender had been already sentenced for an extraditable offence), information on the execution of penalty if the extradition request is made for a person that has already served a part of the sentence.

The above documents should contain data about the actual commitment of the offence, and the time and place of its commission. Also enclosed to the extradition request should be the text of penal rules of the asking State applicable to the offence and justifying extradition. As far as possible, the request should also include data permitting the identification of the person involved, such as: description, photograph, fingerprints.²⁹ The asking States do not need to submit any other documents, in particular proof of the guilt of the person whose extradition is requested.³⁰

Supplementation of an Extradition Request. If the data supplied are insufficient for dealing with the extradition request, the State asked may demand their supplementation by a certain date. Nearly all extradition agreements concluded by Poland regulate this question in a similar manner. The only difference consists in fact in the setting of various

²⁸ See, e.g., the agreement with Czechoslovakia (Art. 58, point 1 in connection with Art. 62 and 76) and the United States (Art. I in connection with Art. X).

²⁹ See details in the agreements with Bulgaria (Art. 68, point 2), Czechoslovakia (Art. 62), Yugoslavia (Art. 74, point 2, 75 and 81 point 2), the GDR (Art. 68), Rumania (Art. 62), Hungary (Art. 70), the Soviet Union (Art. 66), Belgium (Art. 9), France (Art. 7), Luxemburg (Art. 9), the United States (Art. X), Great Britain (Art. 13) and Switzerland (Art. 4).

³⁰ An exception from this principle is the agreement with the United States (Art. X) and Great Britain (Art. 9). It is worth noting that the Code of Penal Procedure does not regulate the form of an extradition request. Art. 524 of the CPP, similarly as the agreements under review, indicates documents which should be enclosed to such a request.

dates by which the supplementary data are to be supplied. Only the agreements with Belgium, Luxemburg and the United States do not provide expressly for it. On the other hand, they do not exclude the possibility of a request for supplementing an extradition request.

Coincidence of Extradition Requests. The extradition of an offender is the act of a State exercising its sovereign powers. Hence when a State receives several extradition requests pertaining to the same person, it is left to its discretion which one of the requests is to be fulfilled. This appears clearly from all extradition agreements concluded by Poland, except for the agreement with the United States. Article VII of that agreement says that in case of coincidence of extradition requests, the received earlier is to be fulfilled. However, the asked State may depart from this principle and give priority to another State, if it were obliged to do this on the strength of the agreement concluded with that State.

Manner of Communication. The agreements concluded by Poland with capitalist States and Yugoslavia provide that extradition requests are sent by diplomatic channels. The other agreements concluded with socialist States, on the other hand, provide that communication on extradition matters is made directly between the Ministry of Justice or the General Prosecutor's Office of the Polish People's Republic and their counterparts in the other States.³¹

Extradition Detention. Preventive measures are applied to the persons subject to extradition in the course of extradition proceedings in order to guarantee their effectiveness. All the agreements concluded with socialist States (except the agreement with Yugoslavia) and the agreement with Great Britain provide for a preventive measure exclusively in the form of temporary detention. According to these agreements, the application of this measure is the duty of the State concerned, provided all extradition requirements have been met. The agreement with Yugoslavia permits also other measures. It says, among other things, that the asked State "will order the application of temporary preventive measures, including arrest, to the person whose extradition is requested" (Art. 83, point 1), and that temporary detention will be ordered only "in case of need" (Art. 82, point 1). The agreement with Switzerland (Art. 6) also provides that upon the receipt of the request, the State will order "everything necessary to secure the person whose extradition is requested, and to prevent its escape [...]," and that the person whose extradition is requested should be arrested "only in principle [...]."

The agreements with France, Luxemburg and the United States do

³¹ Procedure with regard to an extradition request is also regulated by the CPP in Art. 540.

not describe the type of preventive measures, but it is apparent from their text that it will be also temporary detention.

In cases which brook no delay it is permitted to detain the person involved even before the arrival of the extradition request, if this had been demanded by the asking State, provided the latter referred to an arrest warrant or a valid sentence, and made the assurance that a formal extradition request will be sent. A request for detention may be sent in such cases by courts or prosecutor's offices to proper organs of the asked State by mail, telegraph, telephone, radio or a different way. Detention may be also ordered on the initiative of the State concerned if it has sufficient proof that a certain person staying in its territory had committed an extraditable offence in the territory of another State.³² The State concerned should be immediately advised of the arrest.

The duration of the extradition detention in such cases differs depending on a given agreement, and it may last, for example, from a fortnight to three months. The person detained will be or may be released if the asking State does not send an extradition request or does not supplement the extradition request, or does not notify that such a request will be sent.

Extradition arrest is always ordered according to the law of the extraditing State.

Delivery. Extradition proceedings end with the actual delivery of the offender to the asking State. For this purpose the State concerned advises the asking State of its consent to the extradition request, and sets the time and place where the offender will be delivered.³³ The asking State is then in duty bound to receive the person involved at the given time and place.

The manner of counting the time set for the reception of the extraditee and its duration are fixed in the agreements within the limits of three days and one month. Some of the agreements do not set this duration, leaving it to direct consultation between the States.³⁴ If the person subject to extradition is not received at the given date, the extradition arrest will be immediately terminated or may be terminated.

³² Compare the agreements with Bulgaria (Art. 71 point 2), Czechoslovakia (Art. 65, point 2), Yugoslavia (Art. 83, point 4), Hungary (Art. 73, point 2), the Soviet Union (Art. 69, point 2). The other Polish agreements do not provide for such a possibility.

³³ No provisions in this respect at all are contained in the agreements with France, the United States and Great Britain.

³⁴ Compare the agreements with Belgium (Art. 12), Luxemburg (Art. 12) and Switzerland (Art. 12).

Some of the agreements contain detailed provisions describing the manner in which the extraditee is delivered.⁸⁵ Most frequently, however, international agreements leave details of this kind to be agreed upon in each individual case.

Delivery of Objects. Bilateral extradition agreements concluded by Poland regulate also the question of the delivery by the asked State of the objects obtained from the offence, or objects which may serve in the future penal proceedings against the extradited person. These objects are delivered as a rule on the request of the State concerned and, as far as possible, together with the offender.⁸⁶

The asked State may temporarily keep the objects subject to extradition, if they are indispensable for the conduct of penal proceedings in that State. The delivery of the objects must not infringe the rights of third persons. In other words, the private law situation with regard to the objects delivered cannot be changed by the very fact of delivery. In this connection such objects should be returned free of charge to the persons entitled after they are used in the penal proceedings.⁸⁷

It appears from an analysis of the agreements under review that it is solely up to the asking State to say whether the demanded objects are necessary for the penal proceedings.

Transit. The agreements under review regulate also the problem of transit. According to the agreement, each of the contracting parties will permit the transit through its territory of a person extradited by a third State.⁸⁸ There is no duty to grant a transit permission if in accordance with these agreements there would have been no duty to extradite an offender. Requests for a transit permission are sent and dealt with on the same principles as extradition requests.

Notification of the Results of the Penal Proceedings. The purpose of this notification is to enable the extraditing State to control the strict observance of duties arising for the asking State from the extradition agreements in connection with the delivery of an offender (e.g. duties arising from the principle of limited prosecution).

⁸⁵ Compare the agreements with Belgium (art. 12) and Luxemburg (Art. 12).

⁸⁶ Compare the agreements with Bulgaria (Art. 85), Czechoslovakia (Art. 77), Yugoslavia (Art. 88), the GDR (Art. 83), the Soviet Union (Art. 83), Belgium (Art. 11), France (Art. 12), Luxemburg (Art. 11), the United States (Art. IX), Great Britain (Art. 16) and Switzerland (Art. 16).

⁸⁷ Compare, e.g., Art. 85, point 4 of the agreement with Bulgaria, Art. 88, point 3 of the agreement with Yugoslavia and Art. 11 of the agreement with Belgium.

⁸⁸ Compare the agreements with Bulgaria (Art. 80), Czechoslovakia (Art. 72), Yugoslavia (Art. 90), the GDR (Art. 79), Rumania (Art. 76), Belgium (Art. 14), France (Art. 14), Luxemburg (Art. 14), Switzerland (Art. 15). The agreements with the United States and Great Britain contain no provisions on transit.

All post-war agreements contain provisions on the duty to notify the extraditing State of the results of the penal proceedings against the extradited person.³⁹ If a sentence is pronounced, States are in duty bound to supply a copy of the verdict.⁴⁰

Costs. Extradition proceedings necessitate costs connected with the arrest, upkeep and transport of the person prosecuted, as well as costs connected with the transport and storage of proof exhibits and objects obtained by the offence.

The extradition agreements under review, except the agreement with the United States (and agreements with the German Democratic Republic and the Soviet Union, which do not contain any provisions about costs), the costs are charged to that State in whose territory they originated. On the other hand, according to Article XIII of the agreement with the United States the costs of arrest, detention, interrogation and transport are borne by the asking State.

In all agreements, transit costs are borne by the State which had requested extradition.⁴¹

V

It should be emphasized in conclusion that the above review of bilateral agreements concluded by Poland was made solely for the purpose of drawing attention to some of the problems connected with the extradition of offenders from the point of view of Polish practice. Attention should be drawn first of all to the fact that the agreements have many common characteristics, but differ essentially at the same time in regard to the regulation of certain questions.

It may be said in general that the common characteristic of all these agreements, irrespective of what group they belong to, is that they are based on the same principles. The only difference in this respect concerns the non-extradition of political offenders. This provision is contained only in agreements concluded by Poland with capitalist countries, for reasons described above. Other common characteristics concern such questions as the requirement of submitting formal extradition requests, universal use of certain grounds for refusing extradition, or finally the application of preventive measures in extradition proceedings.

³⁹ The agreements with capitalist States do not regulate this question.

⁴⁰ This duty is contained in all agreements concluded by Poland with socialist States.

⁴¹ Otherwise the agreement with Czechoslovakia in Art. 73: "The costs of extradition and transit are borne by the Contracting Party in whose territory they originated."

When one analyzes, however, the agreements concluded by Poland with capitalist States (pre-war agreements) and with socialist States (post-war agreements), one receives the impression that the latter are better adapted to the contemporary requirements of the liquidation of criminality through international cooperation. This is *inter alia* the result of the fact that the latter avoid casuistics in favour of general, more flexible solutions, leaving the detailed settlement to the municipal law of the contracting parties. One may quote here as an example the more accurate definition of an extraditable offence. Another essential value of the agreements concluded with socialist countries, except the agreement with Yugoslavia, is the simplification of the extradition procedure.

This is expressed above all in the method of communication on questions connected with the extradition of offenders. The agreements with socialist States do not require communication by diplomatic channels.

One must agree here with the English author who has expressed the following view illustrating the differences between the extradition agreements concluded between socialist States and analogous agreements from before World War II: "[...] the new conventions on legal assistance present a series of novel and superior features which are the expression of the evolution of the internal law of Socialist States on the one hand, and on the other hand of the specific traits which characterize the new kind of relationship between the Socialist States [...]"⁴²

It seems, therefore, justified *de lege ferenda* to modernize in an early future the pre-war extradition agreements now still in force, concluded by Poland, for the purpose of a more effective international control of such socially dangerous offences as: offences hitting out at peaceful relations between States, economic offences or road offences.

⁴² I. A. SHEARER, *op. cit.*, p. 66.

Les fonctions des organisations internationales*

par WOJCIECH MORAWIECKI

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Les relations internationales contemporaines sont avant tout des relations entre États souverains. Ce sont justement les États et leurs relations mutuelles qui constituent le milieu social de l'organisation internationale: elle est le produit de ce milieu et, en même temps, est appelée à influencer sur ce milieu. De là proviennent aussi bien les possibilités que les essentielles limitations du rôle de l'organisation internationale. Ce rôle constitue la résultante de deux tendances objectives différentes. L'une de celles-ci réside dans le besoin grandissant d'organiser la coopération entre les États, coopération sans laquelle il devient aujourd'hui de plus en plus difficile, sinon impossible de résoudre leurs problèmes. La seconde tendance consiste en la volonté, qui ne faiblit pour le moins pas, de conserver le degré de souveraineté indispensable pour assurer aux nations l'influence nécessaire afin qu'elles puissent résoudre leurs problèmes vitaux conformément à leurs intérêts.

L'organisation internationale est créée par les États dans le but de satisfaire aux besoins découlant de processus de leurs relations mutuelles,

* L'article contient les hypothèses générales avancées dans l'ouvrage de l'auteur intitulé: *Funkcje organizacji międzynarodowych* [Les fonctions des organisations internationales], Warszawa 1971, 459 pp.

qui exigent le fonctionnement d'un mécanisme permanent de coopération. Pourtant, ces besoins ne sont pas satisfaits par le seul fait de la constitution d'un tel mécanisme. Celui-là n'est qu'un instrument mis à la disposition des pays membres. Ce n'est que par l'accomplissement des fonctions adéquates que l'organisation internationale peut plus ou moins satisfaire aux besoins d'une coopération organisée.

Selon ces principes, on doit considérer l'organisation internationale comme un processus de forme particulière de coopération entre États. Son trait fondamental est l'existence d'organes permanents qui prennent des décisions concernant les tâches communes et les moyens de les réaliser. Ce processus politique, dans lequel les membres cherchent à donner aux décisions des organes une teneur répondant à leurs intérêts, doit être considéré comme l'essence même de l'organisation internationale.

De la notion du caractère des relations internationales découle la conception réaliste de l'organisation internationale. Conformément à cette conception, les possibilités d'une activité positive de l'organisation internationale sont limitées par le degré de conformité des intérêts des pays membres. La conformité des intérêts des membres constitue la base sociale objective de leur coopération organisée. L'organisation ne peut se détacher de cette base ou même par trop s'éloigner du dénominateur commun des intérêts de ses membres; car le danger qui la menacerait alors serait de la voir perdre son caractère de mécanisme de coopération entre les membres et de se transformer en instrument de leur rivalité. Un danger beaucoup plus concret menacerait alors les membres qui ne seraient pas en état de remédier à l'activité de l'organisation qui porterait atteinte à leurs intérêts vitaux. Cela peut entraîner la perte de l'équilibre interne, des crises politiques ou même l'organisation pourrait se décomposer.

Les paramètres structurels adéquats selon lesquels sont adoptées les décisions — tels que la composition des organes et la procédure du vote — peuvent garantir que l'organisation jouera un rôle conforme à ses buts en tant que mécanisme de coopération entre États. Mais le meilleur moyen pour y parvenir c'est que tous les participants au processus de prise des décisions respectent des règles politiques adéquates du jeu, règles consistant surtout à tenir compte mutuellement de leurs intérêts vitaux et des avantages mutuels, autrement dit, qu'ils adoptent les principes de la coexistence pacifique.

Cette conception réaliste de l'organisation internationale amène donc à conclure que les décisions de tous ses organes dans les questions de quelque importance devraient être le résultat de l'accord le plus large de ses membres, et en particulier de l'accord des puissances qui jouent le principal rôle dans l'organisation, ainsi que des principaux groupements des pays membres.

Conformément à ces principes, on doit considérer que la fonction fondamentale de toute organisation internationale est aujourd'hui un processus politique consistant à: 1) dégager l'étendue de la conformité d'intérêts des pays membres; 2) parvenir à un accord général sur les tâches communes répondant à l'étendue de la conformité d'intérêts; 3) arriver à un accord sur les moyens de réaliser ces tâches communes.

Cette fonction est fondamentale car c'est de sa réalisation que dépend l'efficacité pratique de l'organisation internationale. C'est aussi de cette fonction fondamentale que devraient dépendre les fonctions particulières de l'organisation internationale ainsi que sa structure.

Par fonction, il faut entendre en général le processus d'activité de l'organisation dans l'accomplissement de ses tâches. Pour classer les fonctions particulières de l'organisation internationale, il faut procéder, non pas selon le critère du genre des tâches, mais en différenciant les méthodes d'activité ou, autrement dit, les types du processus politique de réalisation des tâches de l'organisation. Ce critère nous permet de distinguer trois principaux types de fonction de l'organisation internationale: 1) les fonctions régulatrices consistant à promulguer des normes de caractère moral, politique ou juridique, qui doivent régler de façon appropriée le comportement des partenaires des relations internationales; 2) les fonctions de contrôle consistant à établir l'état de fait et à le confronter avec les normes et les modèles dans le but d'ajuster le comportement des partenaires des relations internationales à ces normes et à ces modèles; 3) les fonctions opérationnelles consistant en une prestation directe de divers services par l'organisation internationale d'après ses propres décisions et à l'aide des ressources humaines et matérielles dont elle dispose.

Les consultations réciproques des pays membres constituent le processus politique le plus adéquat de réalisation de la fonction fondamentale de l'organisation internationale. C'est aussi la principale méthode d'agir et la plus répandue qui imprègne toutes les fonctions particulières des organisations internationales d'aujourd'hui.

On peut distinguer trois phases dans le processus consultatif: 1) la phase de confrontation dans laquelle les gouvernements des pays membres s'informent mutuellement de leur attitude, opinion et appréciation, permettant de déterminer l'étendue et le degré de conformité d'intérêts; 2) la phase de négociations dans laquelle les gouvernements se persuadent mutuellement et font des concessions dans le but d'arriver à un accord; 3) la phase d'adoption de recommandations correspondant à l'étendue et au degré de l'accord auquel on est parvenu et qui indiquent aux États un comportement défini.

La phase des négociations constitue le gros du processus consultatif. Du succès du processus de négociations entre ces membres dépend l'effet

de l'activité de l'organisation internationale et cela non seulement dans la sphère des fonctions de caractère consultatif, mais aussi dans le cas de la réalisation des fonctions débordant ce caractère et qui prennent par exemple l'aspect de décisions obligatoires.

Les fonctions débordant le cadre du processus consultatif constituent plutôt un phénomène rare dans les organisations internationales d'aujourd'hui. Cette constatation ne concerne pourtant que la sphère d'activité extérieure de l'organisation: exercer une influence sur son milieu social, c'est-à-dire surtout sur les pays membres et leurs relations mutuelles.

Dans la sphère du fonctionnement interne de l'organisation internationale, autrement dit dans la sphère de sa « vie interne », l'affaire se présente tout autrement et cette sphère est régie par des règles distinctes.

Dans cette sphère apparaît la nécessité absolue d'assurer le fonctionnement normal de l'organisation en tant que mécanisme permanent et stable. C'est pourquoi dans la sphère des affaires intérieures, le droit de l'organisation internationale à exercer certaines fonctions peut avoir un caractère implicite et ces fonctions prennent alors une forme très avancée, par exemple de décisions de caractère obligatoire adoptées à la majorité des voix ou d'activités opérationnelles.

La présomption que, dans le domaine de ses affaires intérieures, l'organisation internationale peut exercer des fonctions débordant le caractère consultatif ne peut être justifiée que lorsque ce domaine n'englobe pas les affaires concernant les intérêts importants des États. Dans le cas contraire, les pays membres encourraient des risques sérieux. Nous avons affaire à une situation de ce genre par exemple dans le cas de la création d'agences spéciales, ayant le caractère d'organes subsidiaires, chargées de la réalisation des fonctions opérationnelles de grande portée. C'est pourquoi les organes subsidiaires importants devraient être créés sur la base d'un accord général des membres des organes principaux compétents.

Les fonctions régulatrices de l'organisation internationale, traitées en tant que processus ont plusieurs phases et degrés d'avancement. Dans les phases inférieures du processus régulateur, les plus fréquemment rencontrées, l'organisation se borne à recommander des règles de conduite déterminées.

Désirant donner à ces règles le caractère de normes juridiques obligatoires, l'organisation peut jouer des rôles différents. Elle peut se borner à recommander aux États d'entamer des négociations dans le but d'établir le texte d'une convention internationale adéquate. Elle peut, par ses organes, servir de *forum* pour élaborer le projet de convention. Elle peut enfin adopter le texte de la convention. Pourtant, les normes de la convention n'entrent en vigueur qu'après avoir été additionnellement accep-

tées par les États et seulement dans les relations entre les pays qui les ont acceptées.

Les organisations internationales peuvent également être les cocréateurs directs du droit international conventionnel, en agissant en tant que parties dans les accords internationaux. Ce genre d'accord est conclu avec d'autres États ou d'autres organisations internationales. En pratique, le droit qu'ont ces organisations de conclure des accords est fondé sur la nécessité fonctionnelle de réaliser les tâches qui leur incombent. Ce droit implicite ne peut être justifié que s'il se rapporte à des accords qui n'engagent pas les intérêts importants des États qui n'en seraient directement pas parties.

Le genre le plus avancé des fonctions régulatrices de l'organisation internationale peut être la fixation des normes ayant un caractère obligatoire pour tous les membres de l'organisation et qui entrent en vigueur sans acceptation complémentaire. Cela équivaldrait pourtant à un très haut degré du pouvoir de l'organisation à l'égard des pays membres. C'est pourquoi les statuts des organisations reconnaissent rarement à ces dernières de telles prérogatives pour fixer des normes définies sous le terme de « réglementation externe ». Cela est toujours accompagné d'une protection adéquate des intérêts des pays membres sous forme de: 1) limitation de la réglementation externe à des questions peu importantes de caractère technique; 2) reconnaissance aux pays de la possibilité de se dégager entièrement ou en partie d'une telle réglementation en y faisant formellement opposition (*contracting-out*); 3) application du principe de l'unanimité lors de l'établissement de cette réglementation.

Les fonctions de contrôle de l'organisation internationale doivent également être examinées comme un processus possédant différentes phases transitoires et divers éléments composants. C'est un processus politique, car aussi bien l'établissement de l'état de fait, que l'interprétation de l'état normatif et ensuite la confrontation de ces deux états entre eux, laissent une grande liberté d'appréciation aux organes qui évaluent et qui prennent la décision. Il en découle que, pour le processus de contrôle, des paramètres de prise de décision, tels que la procédure de vote et la composition des organes, qui doivent en définitive préjuger de la responsabilité des pays pour les infractions aux normes de comportement, possèdent une grande importance.

L'appréciation du comportement des États sur la base d'une confrontation de l'état de fait avec différents modèles de comportement est effectuée surtout par des organes intergouvernementaux. Le plus souvent, elle ne prend pas la forme d'une condamnation sévère ni d'autant plus celle de sanctions, mais a le caractère d'une recommandation, incitant les pays à modifier leur comportement dans une situation concrète. Elle constitue

donc un moyen d'influer sur les États à l'aide d'une pression politique appropriée.

Les fonctions de contrôle de l'organisation internationale ont un caractère politiquement délicat pour les pays envers lesquels elles sont exercées. La susceptibilité augmente avec l'importance des questions qui font l'objet du contrôle et avec le degré d'ingérence de moyens appropriés et du genre de contrôle dans la sphère de la souveraineté territoriale des États.

Parmi les divers moyens et genres de contrôle international, ce sont les moyens ayant le caractère d'une pression politique modérée exercée sur le comportement des États qui peuvent, dans la pratique des organisations internationales d'aujourd'hui, être appliqués le plus largement. Des moyens de contrôle — tels que la fourniture d'informations ou de comptes rendus systématiques concernant l'observation des modèles de comportement; les méthodes conciliatrices de régler les situations conflictueuses et les différends concernant le respect des normes de comportement, et non pas la prononciation de condamnations ou de sanctions — sont les genres de fonctions de contrôle qui répondent le mieux au caractère des relations internationales contemporaines et à la fonction fondamentale de l'organisation internationale. Malgré leur inefficacité apparente et leur modération, il n'est pas possible de sous-estimer ce genre de moyens de former le comportement des États. Leur qualité principale est qu'ils sont accessibles à l'organisation internationale et qu'ils sont largement applicables.

Par contre, on ne peut le dire des moyens tels que les pétitions, les visites, les missions d'observation ou les commissions internationales d'enquête.

Les pétitions et les missions de visitation n'ont été appliquées en pratique que dans les contrées où la souveraineté territoriale des États avait un caractère limité. Il s'agit ici de territoires sous tutelle ou coloniaux qui ont été soumis après la Deuxième Guerre mondiale au contrôle plus ou moins formel de l'ONU. Pourtant, dans les conditions normales de la souveraineté territoriale, ce genre de contrôle international ne peut être largement appliqué. Il ne faut donc pas compter qu'il joue un rôle important dans le domaine de la protection internationale des droits de l'homme.

On peut avoir recours aux missions d'observation et aux commissions d'enquête dans le cas de conflits internationaux et, en particulier, dans les situations où la paix est menacée ou violée. C'est l'organisation responsable du maintien de la paix et de la sécurité internationales qui doit décider de leur emploi selon une procédure adéquate.

Les inspections constituent le moyen de contrôle international le plus efficace. Ce moyen de contrôle représente la plus grande ingérence dans la sphère de la souveraineté territoriale des États. Aussi seules des raisons d'une importance exceptionnelle — telles que le désir d'éviter des consé-

quences extrêmement graves ou celui d'obtenir de très grands profits peuvent convaincre les États de la nécessité de se soumettre à une inspection internationale. Ces raisons apparaissent de nos temps dans le domaine du désarmement et de l'utilisation de l'énergie atomique uniquement à des fins pacifiques.

Pourtant, des mesures de désarmement partielles importantes, telles que l'accord de Moscou de 1963 sur l'interdiction des essais nucléaires, ont pu être prises sans application du contrôle international. Le « contrôle mutuel » à l'aide des moyens dont disposent les partenaires de l'accord s'est avéré possible et suffisant. Les progrès continus en matière de technique donnent des possibilités de plus en plus étendues d'un « contrôle mutuel » du désarmement, limitant considérablement la nécessité d'avoir recours à l'inspection internationale.

Pratiquement, le seul système sérieux d'inspection internationale qui ait été créé est celui de l'Agence Internationale de l'Énergie Atomique. Après l'entrée en vigueur, le 4 III 1970, de l'accord sur la non-dissémination des armes nucléaires, c'est à cette organisation qu'incombera la tâche de contrôler si les pays qui ne possèdent pas d'armement nucléaire remplissent leurs obligations d'exploiter l'énergie atomique uniquement à des fins pacifiques. Le système de contrôle de l'AIEA, dans lequel l'inspection joue un rôle clé, englobera dans ces pays toutes les installations utilisant l'énergie atomique. Le développement de l'inspection en tant que forme de contrôle international accompagnera le développement de l'exploitation de cette énergie à des fins pacifiques.

Le contrôle judiciaire international consistant à trancher les différends au moyen de jugements de caractère obligatoire est, dans les conditions actuelles, un phénomène exceptionnel, car les États ne sont pas enclins à confier aux juges la solution des questions dans lesquelles seraient engagés leurs intérêts de quelque importance. Dans cette situation, le contrôle judiciaire qui constitue un moyen de contrôle techniquement très avancé, ne peut éventuellement être largement appliqué que dans des questions d'importance minime pour les États.

L'expérience de la Cour Internationale de Justice de l'ONU démontre également que la solution des différends par voie judiciaire n'est pas un moyen très efficace d'apprécier le comportement des États dans les conditions actuelles des relations internationales.

Les fonctions opérationnelles traitées en tant que processus, se composent de deux éléments essentiels: a) du processus de l'adoption de décisions ayant le caractère de dispositions exécutoires; b) du processus de mise en application de ces décisions par l'organisation internationale elle-même avec l'aide de son propre personnel et des ressources matérielles dont elle dispose. N'ayant à sa disposition que des réserves matérielles

très restreintes et un personnel limité, les organisations internationales ne peuvent exercer de fonctions opérationnelles que dans des cas particuliers et dans un domaine restreint.

Les fonctions opérationnelles internes, consistant à servir les organes intergouvernementaux, étaient depuis longtemps exercées par les organes administratifs. Pourtant, elles grandissent avec le développement de l'activité de l'organisation internationale et, dans le domaine des études et de l'information, elles font actuellement plus que satisfaire à ses besoins internes.

Les fonctions opérationnelles extérieures, consistant en une prestation de services directs aux pays ou aux personnes et institutions à l'intérieur des pays, n'apparaissent, à vrai dire, qu'après la Seconde Guerre mondiale, mais leur développement semble porter le caractère d'une tendance continue.

Les fonctions opérationnelles de l'organisation internationale dans le domaine de la sécurité sont liées aux fonctions de contrôle — exercées au moyen de commissions d'enquête, de missions d'observation, de missions de visitation et d'équipes d'inspection internationale — lorsque ces organes sont composés de fonctionnaires nommés par les organes correspondants de l'organisation internationale et que celle-ci couvre les frais de l'opération.

Les opérations militaires de l'ONU peuvent avoir une très grande importance. Jusqu'à présent, dans la pratique de l'ONU, elles ont pris la forme d'opérations pour le maintien de la paix (*peace-keeping*), dont le devoir principal était de séparer les antagonistes afin d'éviter que le conflit ne prenne une forme plus aiguë.

Toutes les opérations militaires sont de la compétence exclusive du Conseil de Sécurité. L'unanimité des cinq puissances, membres permanents du conseil, est la condition de la validité de ses décisions dans les questions de fond. C'est ainsi que toutes les actions ayant pour but de maintenir la paix — entreprises par l'ONU ou au nom de l'ONU sur la base de décisions ou de recommandations — sont l'expression d'un accord entre les puissances représentant les principaux systèmes sociaux et les groupements politiques du monde. Ainsi sont assurées les conditions formelles indispensables à l'exercice de la fonction fondamentale de l'organisation internationale. L'expérience d'opérations de l'ONU pour le maintien de la paix — telles que les Forces d'Urgence des Nations Unies au Proche-Orient, les opérations des Nations Unies au Congo et les Forces des Nations Unies à Chypre — démontre qu'il reste encore beaucoup à faire pour résoudre de manière adéquate des questions telles que la composition des forces armées de l'ONU et de leur direction opérationnelle.

La nécessité de confier à l'organisation internationale des fonctions opérationnelles en matière de paiements internationaux est devenue évidente. Le Fonds Monétaire International joue un très grand rôle dans ce domaine surtout sous forme d'une réserve commune de moyens de paiements, d'où les membres peuvent puiser des crédits en cas de déséquilibre de leur balance de paiements. Des organisations régionales telles que l'Union Européenne des Paiements ou la Banque Internationale de Coopération Économique qui exercent des fonctions de *clearing* et de fonds monétaire, constituent aussi une expérience positive.

On assiste à un grand développement d'un ensemble d'organisations internationales qui procèdent à des opérations dans le domaine des crédits d'investissement. Ce sont surtout la Banque Internationale pour la Reconstruction et le Développement et l'Association Internationale de Développement qui constituent un modèle pour les banques régionales de développement en Amérique et en Asie. Malheureusement, les principes d'activité de ces organisations de crédit font que le pouvoir y est concentré entre les mains des principaux actionnaires, c'est-à-dire des puissances capitalistes. Dans ces organisations, il y a une division choquante entre donneurs et preneurs et entre gouvernants et gouvernés.

Pourtant, l'envergure des opérations des organisations internationales dans le domaine des crédits d'investissement demeure toujours peu importante par rapport à l'ensemble des transactions internationales dans ce domaine.

Dans les organisations faisant partie du système des Nations Unies, on a adopté de nombreuses solutions nouvelles dans le secteur des fonctions opérationnelles consistant à réaliser les programmes d'aide technique.

Le nombre des instituts internationaux déployant une activité opérationnelle dans le domaine de la recherche scientifique et de la formation, croît constamment. Il convient de mentionner ici surtout les laboratoires internationaux et les instituts communs de recherche de physique atomique. Auprès des différentes organisations, on ouvre également des instituts qui sont chargés de l'étude des problèmes généraux de ces organisations ainsi que de la formation des cadres pour les secrétariats de ces organisations et les organes nationaux correspondants.

On doit considérer que le développement des fonctions opérationnelles des organisations internationales dans le domaine des paiements internationaux, des crédits d'investissement, de l'aide technique et de la recherche scientifique correspond à une tendance générale, découlant des besoins à long terme de la coopération internationale.

Dans de nombreux cas, au cours de la réalisation des fonctions opérationnelles, ce sont les intérêts du groupement des puissances occidentales qui étaient principalement ou même exclusivement pris en considération.

Ce groupement avait la possibilité de s'assurer une influence décisive sur la direction de ces opérations, soit au moyen d'une majorité correspondante des voix au sein de ces organes qui décidaient de la mise en application de ces mesures, soit grâce au pouvoir d'exploiter le fait qu'il fournissait une partie importante des moyens matériels, soit enfin en confiant la direction de ces opérations à un organe administratif qui dépendait de ce groupement.

Dans le processus de réalisation de tout genre de fonctions opérationnelles un rôle particulièrement important est imparti aux organes administratifs: à la direction des secrétariats ou à des organes subsidiaires et agences spécialement constitués dans ce but. Dans la gamme des fonctions opérationnelles internes, cela est évident et ne fait naître aucun doute. Pourtant on peut observer une nette tendance à reconnaître dans les statuts ou à attribuer aux organes administratifs par les organes intergouvernementaux l'exercice de fonctions opérationnelles extérieures. Évidemment, ils n'établissent pas et ne réalisent pas les programmes opérationnels dans le vide politique, mais dans le contexte des intérêts concrets et souvent très importants des États.

C'est ainsi qu'apparaît dans toute son étendue le problème du risque lié à l'exécution des fonctions opérationnelles par les organes administratifs. Ce risque consiste en ceci que les opérations réalisées sous l'égide de l'organisation servent alors les intérêts d'un certain groupe de membres et entrent en contradiction avec les intérêts des autres membres de l'organisation.

Une assurance convenable contre un tel risque doit consister surtout à baser l'établissement et l'orientation des programmes opérationnels sur un accord général des pays membres de l'organisation.

Le principe que la fourniture des moyens matériels de réalisation des programmes opérationnels est facultative doit constituer une assurance incomplète mais indispensable pour les intérêts des pays membres de l'organisation devant le risque mentionné. Il serait absurde de faire supporter les frais de ces programmes par ceux des pays membres qui les estimeraient dirigés contre leurs intérêts et protesteraient contre leur mode de réalisation.

Un moyen essentiel de diminuer le risque découlant de la direction administrative des programmes opérationnels peut être de limiter la liberté d'action de l'organe administratif correspondant. Cela est possible au moyen d'une stricte réglementation à l'aide de dispositions émises par les organes intergouvernementaux, des conditions dans lesquelles les organes administratifs peuvent prendre des décisions.

Enfin, le moyen le plus pratique d'assurer la bonne direction des opérations de l'organisation internationale serait la composition adéquate de

l'organe administratif responsable de leur réalisation. Une direction collégiale de l'organe administratif pourrait constituer l'un des moyens d'obtenir cette assurance. Mais avant tout, le respect du principe universellement reconnu de la répartition équitable des postes peut contribuer à assurer une bonne influence équilibrée de la part des principaux groupements des pays membres sur l'activité de ses organes.

Une assurance structurelle adéquate de la bonne réalisation des fonctions opérationnelles a pour but de remplir les mêmes conditions politiques de succès de l'organisation internationale que dans les cas des autres fonctions. Il s'agit de baser l'exercice de ces fonctions sur un accord général, de façon à ce que leur réalisation réponde aux intérêts de l'ensemble des pays membres et en particulier à ceux de tous les principaux groupements. C'est en effet la conséquence de la fonction fondamentale de l'organisation internationale contemporaine en tant que mécanisme de la coopération pacifique des pays membres.

La création d'organes subsidiaires et les statuts des organisations internationales

par JERZY MAKARCZYK

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Dans la documentation présentée à la Cour Internationale de Justice par le Secrétariat de l'ONU en 1954, il est question de plus de cent organes subsidiaires créés par les Nations Unies au cours des dix premières années de leur existence¹. Durant les quinze années suivantes d'activité de l'ONU, le processus de fondation de ces organes a été intensifié; cependant il ne s'agit pas seulement de leur nombre, mais surtout du fait de la naissance d'organes de plus en plus complexes, dotés de compétences de plus en plus larges. A côté des simples commissions d'études, on assiste à la naissance d'organes subsidiaires tels que la Conférence des Nations Unies pour le Commerce et le Développement (UNCTAD) ou l'Organisation des Nations Unies pour le Développement Industriel (UNIDO) qui, en ce qui concerne l'étendue des compétences et les formes d'activité, ne se différencient pas des organisations internationales générales. Tout le programme d'aide technique de l'ONU est réalisé par des organes subsidiaires et c'est par leur intermédiaire que l'ONU a mené jusqu'à présent toutes les opérations de paix. A divers degrés, ce processus caractérise toutes les organisations internationales. C'est à juste titre que Tammes écrit que la « capacité de reproduction » des organisations internationales est illimitée en pratique². La création d'organes subsidiaires par des organes subsidiaires est un phénomène général échappant à tout contrôle.

Jusqu'à présent, la doctrine n'a consacré que relativement peu d'atten-

¹ *International Court of Justice Pleadings, UN Administrative Tribunal*, New York 1954, p. 259.

² A. J. P. TAMMES, *Decisions of International Organs as a Source of International Law*, dans: *Recueil des Cours de l'Académie de Droit International [RCADI]*, vol. II, 1958, p. 314.

tion à ce phénomène, quoiqu'on reconnaisse son importance dans l'activité des organisations internationales³. Toute tentative de procéder à une synthèse des problèmes des organes subsidiaires doit d'ailleurs se heurter à de sérieuses difficultés. Cela découle d'une part de la grande variété des organes subsidiaires et, d'autre part, de leur continuelle évolution. Il y a aussi des obstacles de nature technique, en particulier l'accès à la documentation d'une série d'organes subsidiaires est pratiquement très difficile.

Dans le présent exposé, on va tenter de procéder à une analyse préliminaire de deux problèmes seulement des organes subsidiaires, concernant la connexion qui existe entre la faculté de créer ces organes et les statuts des organisations internationales. Il s'agit d'établir quelle est la base légale permettant la constitution d'organes subsidiaires par les organes principaux et quelles sont les limites des pouvoirs des organes principaux dans ce domaine. Il semble aussi opportun d'étudier l'influence que peut exercer la création et l'activité des organes subsidiaires sur l'ordre légal de l'organisation défini dans les statuts. Ces questions font naître de nombreux doutes; la doctrine s'est souvent occupé d'elles, mais en règle générale elle ne l'a fait qu'incidemment, en liaison avec des conflits concrets nés de l'activité des organisations, en particulier de l'ONU⁴. Si l'on a choisi justement ces questions parmi tous les problèmes complexes des organes subsidiaires, c'est à cause de la conviction que leur analyse devrait précéder les autres travaux sur les organes subsidiaires, leur systématique, leur définition, etc. Étant donné le rôle croissant que jouent ces organes dans les relations internationales organisées, l'utilité de ces travaux ne semble faire aucun doute.

³ Parmi les textes consacrés aux organes subsidiaires, on peut citer: P. REUTER, *Les organes subsidiaires des organisations internationales*, dans: *Hommage d'une génération de juristes au Président Basdevant*, Paris 1960, p. 415 - 440; E. KORNAŚ, *Zagadnienia kompetencyjne dotyczące organów pomocniczych ONZ* [Les problèmes de compétence concernant les organes subsidiaires de l'ONU], « *Zeszyty Naukowe UJ* », 1968, n° 37, pp. 57 - 75. Dans la littérature polonaise, ces problèmes ont aussi été traités par W. MORAWIECKI, *Prawo wewnętrzne organizacji międzynarodowej* [Le droit interne de l'organisation internationale], « *Państwo i Prawo* », 1969, n° 1, ainsi que J. KOLASA, *Rules of Procedure of the United Nations General Assembly*, Wrocław 1967.

⁴ De la littérature très riche dans ce domaine, on peut citer ici: L. di QUAL, *Les effets des résolutions des Nations Unies*, Paris 1967, p. 183 et suiv.; K. SKUBISZEWSKI, *Uchwały prawotwórcze organizacji międzynarodowych* [Les résolutions législatives des organisations internationales], Poznań 1965, p. 25 et suiv.; *idem*: *A new Source of the Law of Nations: Resolutions of International Organisations*, dans: *Recueil d'Études de Droit International en hommage à P. Guggenheim*, Genève 1969, p. 510 et suiv.; A. J. P. TAMMES, *op. cit.*, p. 310 et suiv.; F. A. VALLAT, *The Competence of the United Nations General Assembly*, dans: *RCADI*, vol. II, 1959, p. 203 et suiv.

I. La base juridique de la constitution d'organes subsidiaires

1. Les dispositions statutaires et la théorie des compétences implicites

Les dispositions statutaires en matière de création d'organes subsidiaires peuvent être divisées d'une manière générale en deux catégories. Dans la première, on doit compter les dispositions qui restreignent ces compétences de l'organisation, en déterminant d'une manière plus ou moins précise le genre d'organes subsidiaires qui peuvent être constitués⁵. C'est ainsi que l'art. 16 du traité sur la CECA stipule que la Haute Autorité peut former des comités d'études. Ces dispositions impliquent que l'organe principal n'est pas autorisé à créer des organismes subsidiaires d'un autre genre. Du fait que le traité les définit précisément, on manque de fondement pour présumer que les États signataires prévoyaient la nécessité de constituer à l'avenir des organes subsidiaires de la Haute Autorité qui auraient des compétences plus étendues; ces États auraient pu alors employer les formules de la deuxième catégorie selon lesquelles on peut créer les organes « indispensables à la bonne exécution des fonctions de l'organe principal »⁶, « qu'on estimera utile »⁷ ou « indispensable au travail de l'organisation »⁸.

Ces formules de caractère général prévalent dans les statuts des organisations internationales qui règlent globalement le problème de la création des organes subsidiaires. Parfois, on constate d'une manière préliminaire que l'organisation a le droit de créer de tels organes, et ensuite on attribue ces droits séparément et dans différente mesure aux divers organes principaux⁹.

⁵ La Charte de l'Organisation des États Américains contient des dispositions originales. Là, la création d'organes subsidiaires par le Conseil est soumise à l'accord préalable de l'Assemblée Générale de l'OEA. Lorsque, l'Assemblée ne siège pas, de tels organes peuvent être créés temporairement et ne subsistent que si l'accord prévu est obtenu (art. 75). C'est l'un des rares cas où l'on assure un certain contrôle de l'activité reproductrice des organes — à vrai dire hiérarchiquement inférieurs. Cf. également par exemple l'art. 4 du pacte de la Ligue des États Arabes, l'art. 8 pt 4 de la convention de l'Union Internationale des Télécommunications, l'art. 55 des statuts de l'Organisation Internationale de l'Aviation Civile, l'art. 24 des statuts du Conseil de l'Europe.

⁶ Cf. par ex. les articles 22, 29 de la Charte des Nations Unies, l'art. 11 de la constitution de l'UNESCO.

⁷ Par ex. l'art. 17 des statuts du Conseil de l'Europe, l'art. 8 pt 2 du traité de Bruxelles amendé (Union de l'Europe occidentale).

⁸ Par ex. l'art. 18 pt d des statuts de l'Organisation Mondiale de la Santé, l'art. 12 des statuts de l'Organisation Maritime Consultative Internationale, l'art. 9 de l'OTAN.

⁹ Par ex. l'art. 7 pt 2 de la Charte des Nations Unies, l'art. 43 des statuts de l'ICAO. Parfois les statuts prévoient expressément la constitution d'un organe con-

Ces stipulations, qu'on rencontre le plus souvent dans les statuts, soit qu'elles formulent un principe général, soit qu'elles concernent les différents organes principaux, constituent en substance la preuve de la volonté des États fondateurs de laisser à l'organisation la plus large autonomie dans le domaine de la création d'organes subsidiaires. Le vague de ces formules permet d'admettre que nous avons affaire ici à des normes de traités de caractère purement déclaratif. Le plus souvent, ces normes ne déterminent rien, sinon qu'elles constatent l'existence du droit en question. Il semble que la seule indication concrète est contenue dans la disposition sur la création d'organes « indispensables à la bonne exécution des fonctions de l'organe principal ». Cela signifie que les statuts n'admettent pas qu'on attribue aux organes subsidiaires, créés d'après ces dispositions, des compétences objectivement plus étendues ou d'un autre genre que celles qu'exerce l'organe principal. Les autres formules n'impliquent pas directement de telles restrictions.

Il semble justifié d'admettre que l'absence de dispositions concernant la constitution d'organes subsidiaires dans les statuts de l'organisation ne prive pas cette dernière de la possibilité ou même du droit de créer de tels organes¹⁰. Selon la théorie des compétences implicites, admise par la justice internationale et ensuite par la majorité de la doctrine, on estime que l'organisation, en tant qu'unité distincte, a été dotée par les États fondateurs des compétences indispensables à la réalisation de ses buts statutaires¹¹. Pratiquement tous les auteurs limitent l'application de cette théorie aux questions intérieures, excluant justement la possibilité de la présomption, dans la question du fond de l'activité de l'organisation, de toute compétence plus étendue que celle qui découle directement des dispositions statutaires.

Quoique la possibilité qu'a l'organisation d'appliquer la théorie des compétences implicites dans le cas où les statuts sont muets dans ce domaine semble évidente, il faut se poser la question, si et dans quelle

cret aux fonctions auxiliaires, en réglant sa structure et ses compétences (par ex. le Comité Militaire d'État-Major, art. 47 de la Charte). Cependant, c'est un problème qui n'entre pas dans le cadre de ces considérations.

¹⁰ En ce qui concerne le droit interne de l'organisation, la question est formulée d'une façon plus large par K. SKUBISZEWSKI: « *The organisation need not have an express competence formulated in its constitution to make its own internal law* » (*A New Source...*, p. 510). Cf. également W. MORAWIECKI, *op. cit.*, p. 40 et suiv. — on y trouve une classification intéressante du droit interne de l'organisation.

¹¹ *Implied powers*, compétences implicites. Malgré les doutes qui avaient été exprimés dans le passé (entre autres par Verdross et Kelsen), cette théorie, appuyée par les opinions de la Cour Internationale de Justice, est de plus en plus largement reconnue par la doctrine et est largement appliquée en pratique. On traite au point 2, du problème des limites d'application de cette théorie.

mesure cette théorie peut être appliquée là où un accord règle de lui-même la question de l'extension de la structure de l'organisation.

S'il s'agit des dispositions de la première catégorie, c'est-à-dire de celles qui définissent clairement le genre d'organes subsidiaires que peuvent créer les organes principaux, il n'y a pas de place, ainsi qu'on l'a constaté, pour les compétences implicites. Pourtant ces dispositions ne figurent que rarement dans les statuts.

La question se présente autrement lorsque nous avons affaire à des formules générales. Ainsi qu'on l'a constaté, les plus détaillées d'entre elles limitent la possibilité d'attribuer à l'organe subsidiaire des compétences plus étendues que celles dont est doté l'organe qui lui a donné naissance. Les autres formules n'imposent pratiquement aucune restriction; il serait donc vain de débattre la question si l'on peut parallèlement appliquer la théorie des compétences implicites.

Ainsi, lorsqu'il s'agit de la formule sur « les organes indispensables à la bonne exécution des fonctions de l'organe principal », l'exemple du Tribunal Administratif des Nations Unies est intéressant.

On peut considérer que malgré le fait de s'être basé sur les dispositions correspondantes de la Charte, l'Assemblée Générale, en constituant le Tribunal Administratif par une décision interne, a appliqué la théorie des compétences implicites passant en quelque sorte outre à l'art. 22 de la Charte. Cela a du reste été confirmé par la Cour Internationale de Justice dans l'avis consultatif qu'elle a émis au sujet de l'effet des jugements en matière d'indemnités prononcés par cet organe subsidiaire de l'Assemblée¹². En effet, ne possédant d'après la Charte aucune compétence judiciaire, l'Assemblée ne pouvait pas la déléguer à qui que ce soit. Pourtant, la création du Tribunal s'est avérée indispensable dans l'activité de l'organisation, sans entraîner par là de violation de la Charte, mais débordant seulement des dispositions qu'elle contient et ceci strictement dans les limites de l'utilité. L'application de la théorie des compétences implicites a permis d'attribuer à l'Assemblée Générale des droits objectivement plus larges que cela n'est formulé dans la Charte¹³.

¹² Dès 1949, la Cour Internationale de Justice a reconnu que l'organisation doit nécessairement posséder les compétences indispensables à la bonne exécution de ses fonctions statutaires (ICJ, *Reports*, 1949, p. 179). Dans un avis consultatif du 13 VII 1954 au sujet des effets des jugements sur les indemnités prononcées par le Tribunal Administratif de l'ONU, la Cour a clairement constaté, à part ses références aux articles 7, 22 et 101 pt 1 de la Charte, qu'en constituant le Tribunal, l'Assemblée Générale a débordé considérablement, à l'avis de la Cour, les dispositions de la Charte elle-même (ICJ, *Reports*, 1954, p. 47).

¹³ Cet exemple prouve la faible utilité de la « théorie de délégation » qu'on avance parfois. Cf. P. REUTER, *op. cit.*, p. 426. Cette théorie est critiquée à juste titre par E. KORNAS, *op. cit.*, p. 63.

Il est évident que cet exemple ne nous autorise pas à tirer des conclusions plus générales quant à l'application de la théorie des compétences implicites par les organes dépendants de la formule ci-dessus. Mais cet exemple peut être de quelque utilité pour tirer certaines conclusions en ce qui concerne les bases juridiques de la création des organes subsidiaires, en particulier à cause des controverses qu'on rencontre également dans la littérature polonaise, sur le rôle réciproque des dispositions statutaires et de la théorie des compétences implicites. K. Skubiszewski exprime notamment l'opinion que « là où les statuts n'accordent pas *expressis verbis* à l'organisation de compétence pour légiférer dans le domaine de son fonctionnement interne, on peut présumer que l'organisation possède ces compétences »¹⁴. Au point 6, l'auteur énumère les dispositions concernant la constitution et le fonctionnement des nouveaux organes comme celles qui peuvent être émises par l'organisation elle-même sur la base de la théorie des compétences implicites. Cette opinion est critiquée par un autre auteur, qui exprime des doutes « si effectivement le principe des compétences présumées peut avoir des effets au cas où les statuts de l'organisation n'autorisent pas *expressis verbis* à créer un droit interne et surtout à constituer de nouveaux organes de l'organisation » et constate qu'« il semble que l'auteur a dépassé les limites de la théorie des compétences implicites »¹⁵.

Il faut constater que cette critique découle d'un malentendu provoqué par la formulation peut-être trop lapidaire que contient l'ouvrage de K. Skubiszewski et dont on pourrait conclure que la théorie des compétences implicites fait que toutes les dispositions contractuelles sont superflues dans ce domaine¹⁶. En effet, si l'on peut reprocher quelque chose à l'opinion critiquée, ce n'est que le fait qu'elle n'englobe pas les cas, où cette théorie peut être appliquée, malgré les dispositions correspondantes contenues dans les statuts, comme dans le cas de l'art. 22 de la Charte. Par conséquent, cette théorie peut trouver une application plus large que ne le formule K. Skubiszewski.

Soulignant que ce sont les questions de compétence qui sont déterminantes, comme on le verra, pour savoir si un organe principal donné peut, sur la base des statuts ou de la théorie précitée, créer un organe subsidiaire concret — on peut formuler les conclusions suivantes en ce qui concer-

¹⁴ K. SKUBISZEWSKI, *Uchwały prawotwórcze...* [Les résolutions législatives...], pp. 26 - 27.

¹⁵ E. KORNAŚ, *op. cit.*, p. 61 - 62.

¹⁶ Cette conclusion peut découler encore plus clairement de l'opinion exprimée par K. SKUBISZEWSKI (cité au pt 10), qui malgré sa pertinence, suggère que les normes contractuelles manquent de signification à cet égard; elles peuvent cependant limiter, au moins théoriquement les possibilités d'application des *implied powers* par l'organisation.

ne les fondements juridiques généraux pour la création des organes subsidiaires: 1) là où le statut détermine le type d'organe subsidiaire que peut créer l'organe principal, il n'y a pas lieu d'appliquer la présomption; 2) dans le cas de formulations générales déclaratives, il n'est pas nécessaire d'appliquer en pratique cette théorie; 3) il est possible d'appliquer la présomption dans la mesure où cela est indispensable à l'activité de l'organisation, au cas où les statuts renferment une formule sur le droit de créer des organes subsidiaires dans la mesure où cela est « indispensable à la bonne exécution des fonctions de l'organe principal »; 4) dans l'état juridique actuel, il ne serait pas fondé d'exprimer l'opinion qu'au cas où les statuts seraient muets, l'organisation ne puisse avoir recours à la théorie des compétences implicites. Cela reviendrait aussi à nier la pratique devenue générale ¹⁷.

Le droit que possèdent les organes principaux à constituer des organes subsidiaires est réalisé en règle générale ¹⁸, par voie d'une simple décision majoritaire. Cette décision, prise en vertu des autorisations contenues dans les statuts ou de la théorie des compétences implicites, détermine au préalable la création de l'organe, quoiqu'on connaisse des cas où ce sont les statuts eux-mêmes que la déterminent ¹⁹. Ensuite, cette décision règle l'ensemble des questions de structure et de compétence du nouvel organe ²⁰. On peut admettre que les clauses de ces décisions sont, pour les organes subsidiaires, ce que sont les clauses des statuts de l'organisation pour les organes principaux. Il est donc évident que la teneur de la décision est d'une importance fondamentale pour apprécier la légalité des activités des organes principaux.

2. Les décisions des organes principaux

En créant des organes subsidiaires, en étendant par conséquent la structure des organisations internationales, les organes principaux légifèrent. Il est incontestable que cette activité ne peut être discrétionnaire, mais doit

¹⁷ La question de la formation d'un usage international, soulevée sur cette base, semble prématurée. Cf. S. BASTID, *De quelques problèmes juridiques posés par le développement des organisations internationales*, dans: *Festschrift für J. Spiropoulos*, Bonn 1967, p. 36. Cf. P. CAHIER, *Le droit interne des organisations internationales*, dans: *RGDIP*, vol. 67, pp. 581 - 582.

¹⁸ En ce qui concerne l'utilité et la pratique pour parvenir à une unanimité de fait lors de la création d'organes subsidiaires importants, cf. W. MORAWIECKI, *Prawo wewnętrzne...* [*Le droit interne...*], p. 46.

¹⁹ Nous avons alors affaire, pas tellement, à une décision autonome de l'organisation, qu'à l'exécution d'une disposition de l'accord international.

²⁰ En ce qui concerne la participation des pays membres de l'organisation au processus de définition du statut juridique de l'organe subsidiaire, voir ci-dessous II^e partie, pt 3.

être soumise à des limitations concrètes²¹. On peut formuler le principe, que les organes principaux ne peuvent déborder le cadre des compétences qui leur sont attribuées par les statuts, ou bien les questions ayant un caractère interne. Pourtant, ce principe entrerait en contradiction flagrante avec la pratique, ce qu'on peut voir clairement d'après l'exemple du Tribunal Administratif et si l'on voulait le faire admettre à tout prix, cela rendrait douteux le rôle des organes subsidiaires en tant que facteur d'extension de l'activité de l'organisation.

Les limites dans lesquelles peuvent légiférer les organes principaux dans ce domaine devraient découler des statuts de l'organisation, des pouvoirs des autres organes, des pouvoirs des États membres, ainsi que des personnes physiques et morales pour autant que l'activité des organes subsidiaires les concerne directement.

Comme on le voit, il a été possible d'admettre la présomption que l'Assemblée Générale était habilitée à créer un organe judiciaire, ne disposant pas elle-même de pouvoirs de ce genre, parce qu'il n'y a pas eu d'infraction aux droits des autres organes ou des États membres dans l'organisation. La création du Tribunal administratif était sans effet sur leurs intérêts fondamentaux dans l'organisation, étant donné le caractère et l'étendue des compétences attribuées au Tribunal par l'Assemblée Générale. En légiférant, l'Assemblée ne faisait, dans ce cas, qu'introduire des éléments nouveaux dans l'ordre légal de l'organisation. Il a été possible d'admettre cette conclusion après avoir examiné, d'une part, les compétences de l'organe subsidiaire créé et, d'autre part, l'ensemble des dispositions statutaires.

Il semble que ce soit là l'unique voie pour déterminer dans chaque cas concret, si la création d'un organe subsidiaire donné d'après les autorisations statutaires générales ou d'après la théorie des compétences implicites est conforme à l'accord international qui a donné naissance à l'organisation. C'est justement cette voie qu'a suivie la Cour de Justice de la CECA lors de l'examen de la plainte de la maison Meroni contre la Haute Autorité qui avait constitué certains organismes financiers en les autorisant à agir en son nom sur le territoire des États membres²².

Ayant procédé à l'interprétation d'une série de dispositions de fond du Traité de Paris, la Cour a démontré que la décision de créer ces organes

²¹ Ici, c'est l'art. 7, pt 2 de la Charte des NU qui formule le principe général: « *Such subsidiary organs as may be found necessary may be established in accordance* [souligné par J.M.] *with the present Charter* ».

²² Décision 14/55 de la Haute Autorité. Ces organismes ont été habilités à fixer le montant et percevoir les « prélèvements » que le traité de Paris imposait aux entreprises charbonnières et sidérurgiques des États membres; ces versements constituaient la base du budget de la Haute Autorité — cf. l'art. 49 du traité.

subsidiaries menait à « liquider le système de garanties découlant du traité pour les États et les entreprises »²³, ainsi qu'à limiter les compétences de contrôle de l'activité de la Haute Autorité attribuées par le traité à l'Assemblée de la CECA. En conséquence, la Cour ordonna de liquider ces organes, estimant que leur existence et leur activité sont contraires au traité de Paris²⁴.

Maintenant se pose la question de savoir qui, dans les organisations internationales autres que les communautés européennes qui disposent d'un organe judiciaire (qui « assume le respect du droit dans l'interprétation et l'application du traité et des dispositions d'exécution »)²⁵, est habilité dans chaque cas particulier à apprécier si une décision donnée sur la création d'un organe subsidiaire enfreint les dispositions statutaires de l'organisation ou si elle est conforme aux statuts.

Sans aucun doute, dans l'état actuel, seuls les États membres peuvent donner une telle appréciation. En pratique, cela se ramène à la liberté des États majoritaires au sein dudit organe à imposer au reste des États leur interprétation des statuts, conforme souvent à leurs buts immédiats politiques ou économiques.

Cette situation doit être certainement appréciée de façon négative. Elle peut en effet provoquer *de facto* des infractions aux droits fondamentaux des États dans l'organisation ainsi que des modifications de l'ordre établi par le traité dans la question de situation réciproque des organes principaux²⁶. Bien plus, cette situation peut donner lieu en pratique au remplacement des dispositions de l'accord international par des normes de rang inférieur, telles que sont incontestablement les décisions des organes, en particulier celles qui ont été adoptées à la majorité des voix²⁷.

On peut proposer une série de méthodes pour changer cette situation. Elles doivent cependant toutes mener à une limitation des libertés des organes principaux dans l'extension de la structure de l'organisation,

²³ *Recueil de la Jurisprudence de la Cour*, vol. IV, p. 44.

²⁴ La Cour a constaté expressément, que la création d'organes subsidiaires ne peut porter atteinte aux droits d'un autre organe principal; il faut respecter « l'équilibre des pouvoirs caractéristique de la structure institutionnelle de la Communauté » (*op. cit.*, p. 45).

²⁵ « La Cour de Justice assure le respect du droit dans l'interprétation et l'application du présent Traité », art. 164 du traité de la C.E.E.; il faut souligner que la Cour est aussi seule compétente dans les questions d'interprétation des décisions des organes de la C.E.E. — art. 177.

²⁶ Voir ci-dessous II^e partie, pt 2.

²⁷ Cf. W. JENKS, *Coordination — A New Problem of International Organisation*, dans: *RCADI*, 1950, p. 267 et suiv.; D. H. N. JOHNSON, *The Effects of the Resolutions of the General Assembly of the United Nations*, « *British Yearbook of International Law* » [BYIL], 1955/1956, p. 97.

dont le maintien est justifié dans la grande majorité des cas. La méthode extrême serait d'exiger une unanimité formelle, ce qui pourtant dans les organes pléniers des organisations générales ne semble pas possible; cela constituerait aussi incontestablement un pas en arrière dans l'évolution des organisations internationales d'aujourd'hui. On peut aussi demander que, pour la constitution des organes subsidiaires importants, la décision soit prise à une majorité qualifiée, ou bien, comme le propose W. Morawiecki, tendre sciemment à parvenir à une unanimité de fait malgré la possibilité d'adopter une solution à la majorité simple²⁸. Cette méthode a été appliquée avec succès notamment lors de la création de l'UNCTAD et de l'UNIDO, quand les décisions de l'Assemblée Générale, prises d'après l'art. 22 de la Charte, ont été unanimes, à la suite d'un accord auquel on était parvenu précédemment au cours des conférences internationales spéciales. Pourtant ce système n'apporte qu'une solution partielle du problème. En effet, il assure une protection politique des intérêts des États membres, mais ne protège pas les autres organes principaux contre les infractions aux droits qui leur sont attribués par le traité.

II. L'influence des décisions de créer des organes subsidiaires sur l'ordre juridique de l'organisation

Il est évident que la constitution d'un nouvel organe dans le cadre de toute organisation internationale doit entraîner des changements dans son ordre juridique. Une nouvelle structure est créée, plus ou moins complexe; l'organe nouvellement formé commence à réaliser des tâches concrètes au sein de l'organisation, tendant souvent de sa propre initiative à étendre les limites de ces tâches et crée aussi fréquemment ses propres organes subsidiaires. Ainsi, seules les décisions concernant la formation des organes subsidiaires les plus simples peuvent être considérées comme internes, dans ce sens qu'elles ne porteraient que sur l'organisation du travail de l'organe principal qui les a prises. Évidemment, une décision telle que celle de l'exemple précité, tiré de la pratique de la CECA, quand l'acte de la Haute Autorité a porté atteinte simultanément aux droits d'un autre organe, à ceux des États et des entreprises, possède un caractère exceptionnel. Une partie importante des décisions ne fait que compléter les statuts de l'organisation d'une manière conforme aux intérêts des États et des organes. Voyons maintenant les aspects concrets de l'influence que la création d'organes subsidiaires peut exercer sur la situation des États et des organes principaux.

²⁸ W. MORAWIECKI, *op. cit.*, p. 46.

1. Les statuts de la majorité des organisations internationales contiennent des dispositions qui déterminent le genre et le caractère des actes qui peuvent être formulés à l'adresse des pays membres par les différents organes principaux. Quoique, dans certaines organisations, nous ayons déjà affaire avec le droit qu'ont les organes d'émettre à l'adresse des États des décisions obligatoires, dans l'énorme majorité des cas, ces actes ont un caractère de recommandation. Sur la base de certains statuts, les États ont accepté l'obligation d'informer l'organe qui a émis la recommandation sur la façon dont elle est exécutée; il s'agit en l'occurrence de ce qu'on nomme des recommandations qualifiées²⁹. Même dans ce cas le caractère facultatif de la recommandation n'est pas modifié. Quoique les États aient accepté l'obligation sus-mentionnée, ce sont eux qui décident d'eux-mêmes si la recommandation sera appliquée.

Les tentatives de changer cet état de choses, par attribution aux actes des organisations internationales une forme directement obligatoire, rencontrent et rencontreront certainement à l'avenir des obstacles, d'autant plus grands que le secteur des relations internationales qui est de la compétence de l'organisation possède plus d'importance pour les États. Cette initiative devrait d'ailleurs provenir des États, tout en conservant le principe de l'unanimité. Il s'agirait en effet du changement fondamental des accords eux-mêmes. Cela est actuellement impensable, en particulier, en ce qui concerne les relations politiques et, dans une grande mesure également, les relations économiques.

Dans le but d'accroître l'efficacité des actes émis, les organes de certaines organisations internationales ont donc commencé de leur propre initiative, avec l'appui de certains représentants de la doctrine, à chercher les voies menant, sinon au changement du caractère juridique des résolutions prises, du moins à leur plus large exécution par les États, et ceci au moyen de la création d'organes subsidiaires.

De même que dans le droit interne des États, le rôle des organisations subsidiaires dans les organisations internationales consistait principalement à préparer le matériel nécessaire pour que l'organe principal puisse prendre une décision. C'est dans ce but qu'ont été formés les premiers et les plus simples d'entre eux, tels que les groupes de travail, ou les commissions et les comités d'études. Pourtant, par la suite, on assista à une évolution caractéristique de la notion du rôle des organes créés³⁰.

²⁹ Cf. A. WASILKOWSKI, *Zalecenia Rady Wzajemnej Pomocy Gospodarczej* [Les recommandations du Conseil d'Assistance Économique Mutuelle], Warszawa 1969, p. 61 et suiv.

³⁰ Certains auteurs ne mentionnent même plus le rôle initial des organes subsidiaires. Par ex. L. di QUAL dans *Les effets des résolutions des Nations Unies*, traite de la question dans le chapitre sur les organes d'exécution. L'opinion présentée

L'opinion d'un auteur français est caractéristique dans ce cas. Selon cet auteur, malgré que ce sont les États qui décident de l'application d'une résolution, l'organe qui l'a adoptée, crée des organes subsidiaires pour « surveiller l'exécution de la recommandation ou provoquer son exécution ». L'auteur cite à cette place les nombreux organes subsidiaires créés par l'Assemblée Générale pour assurer l'exécution des déclarations d'indépendance³¹. Vallat dans un cours à la Haye répond affirmativement à la question de savoir si l'art. 22 de la Charte peut être interprété de telle sorte, qu'il reconnaisse à l'Assemblée le droit de créer des organes subsidiaires qui auraient pour but d'assurer l'exécution des recommandations adressées aux États. En soulignant qu'une telle interprétation « donne une signification inattendue à l'art. 22 », il la trouve fondée à la lumière de la pratique de l'organisation. Pourtant, la condition est ici de respecter les droits des autres organes principaux, découlant, de la Charte³².

Cette position fait naître des doutes. Cela découle surtout du fait que rien ne garantit que la possibilité d'influer sur les États membres, introduite de cette façon dans l'ordre juridique de l'organisation, puisse être limitée en pratique³³. Vallat lui-même, donne en référence une pratique qui, lorsqu'il s'agit de certaines opérations de paix, a enfreint aussi bien les droits des États, que ceux du Conseil de Sécurité. Une autorisation générale à émettre des décisions de ce type pourrait en pratique signifier le consentement de changer la teneur de l'accord international lui-même.

Cela ne signifie pour le moins pas qu'on devrait demander de réduire le rôle des organes subsidiaires uniquement à la préparation des résolutions des organes principaux. En reconnaissant aux nouveaux organes le droit d'influer sur les États pour qu'ils appliquent ces résolutions, débordant donc le cadre de l'accord même, il faut pourtant éviter des situations dans lesquelles la décision de l'organe impliquerait pour les États, malgré eux et sans leur consentement, des obligations plus grandes que

par E. KORNAS, selon lequel « le trait fondamental, caractérisant les compétences de l'organe subsidiaire, est son caractère consultatif, auxiliaire à l'égard de l'organe principal » (cf. *op. cit.* p. 63), ne semble également pas fondée.

³¹ L. di QUAL, *op. cit.*, p. 184.

³² F. A. VALLAT, *op. cit.*, p. 275. L'auteur introduit également le critère de l'accord des États; il ne découle pourtant pas clairement de son exposé, s'il s'agit des États directement intéressés par la recommandation de l'Assemblée Générale, ou seulement des destinataires de la recommandation (p. 276). Du reste la notion « pays intéressés » n'est pas claire — cela pourrait englober tous les membres de l'organisation.

³³ Ainsi que le fait remarquer à juste titre di QUAL, on peut craindre que « par le biais de l'organe subsidiaire, toutes les recommandations revêtiraient un caractère obligatoire » (*op. cit.*, p. 192).

celles que prévoient les statuts de l'organisation. Cela concerne aussi les obligations financières des États, problème qui n'est que trop connu dans la pratique de l'ONU ⁸⁴.

2. Les décisions sur la constitution des organes subsidiaires peuvent introduire de nouveaux éléments dans l'ordre juridique de l'organisation en ce qui concerne la position réciproque des différents organes principaux ⁸⁵. L'infraction au système constitutionnel de l'organisation n'a pas toujours lieu comme dans le cas de l'exemple déjà cité de la pratique de la CECA ou dans celui de certaines opérations de paix menées par l'Assemblée Générale.

Par exemple, lorsqu'au sein du Conseil de l'Europe se produisaient des conflits entre les organes principaux — l'Assemblée consultative et le Conseil des Ministres, ils ont formé conjointement un organe subsidiaire — le Joint Committee ⁸⁶. Son rôle est de coordonner les travaux des deux organes pour qu'ils exécutent mieux les tâches découlant des statuts. On connaît aussi des cas d'extension de la structure de l'organisation par un organe principal hiérarchiquement inférieur — sur motion de l'organe supérieur. Parfois les statuts prévoient une telle possibilité, comme dans le cas de l'Organisation Maritime Consultative Internationale (IMCO) ou de l'Organisation Mondiale de la Santé (WHO) ⁸⁷.

L'exemple de l'UNCTAD est intéressant. On peut émettre l'opinion qu'en créant cet organe, l'Assemblée Générale a considérablement limité les pouvoirs que la Charte attribuait au Conseil Économique et Social.

Le Conseil du Commerce et du Développement de l'UNCTAD, qui dans les intersessions possède toutes les compétences de la Conférence, remet chaque année un rapport d'activité à l'Assemblée Générale par l'intermédiaire du Conseil Économique et Social ⁸⁸. En vertu du § 22 de la résolution 1995 (XIX), le Conseil Économique et Social ne possède que le droit d'émettre un avis sur le rapport, mais les dispositions n'impliquent aucune prérogative lui permettant d'influer sur l'activité du Conseil de l'UNCTAD

⁸⁴ Cf. J. SAWICKI, *Operacje pokojowe ONZ w pięć lat po « kryzysie finansowym »* [Les opérations de paix du l'ONU cinq ans après la « crise financière »], « Sprawy Międzynarodowe », 1970, n° 5, p. 74 et suiv.

⁸⁵ Cf. W. MORAWIECKI, *op. cit.*, pp. 44 - 45.

⁸⁶ Mai 1951.

⁸⁷ Art. 16 de la Convention de l'IMCO, art. 36 des statuts du WHO.

⁸⁸ § 14 et 22 de la résolution 1995 (XIX) de l'Assemblée Générale. Cf. A. KARASZ, *La Conférence des Nations Unies sur le Commerce et le Développement*, « Annales de la Faculté de Droit de Toulouse », Vol. XIII, 1965, n° 1; J. MAKARCZYK, *Z problematyki prawnej UNCTAD* [De la problématique juridique de l'UNCTAD], « Studia Prawnicze », 1970, n° 24, p. 43 et suiv.

et encore moins de diriger cette activité³⁹. Prenant en considération l'étendue des compétences de l'UNCTAD⁴⁰, il faut reconnaître que cela mène à un affaiblissement considérable des dispositions de la Charte en matière de compétences du Conseil Économique et Social. Cette « substitution » d'un organe principal par un organe subsidiaire répond certainement aux intentions de nombreux pays qui, dans la passivité du Conseil Économique et Social voyaient l'une des principales causes des insuccès de l'ONU dans son activité en faveur du développement économique⁴¹. Pourtant, du point de vue de l'ordre juridique de l'organisation cette situation doit soulever des réserves et cela surtout pour des raisons pratiques. Elle peut en effet conduire à une plus grande stagnation de l'organe principal. Au cas où l'organe subsidiaire ferait fiasco et serait liquidé, ce qui peut intervenir sans aucun obstacle formel à la suite d'une résolution de l'Assemblée Générale adoptée à la majorité simple, cela pourrait entraîner de graves perturbations dans l'exécution par l'organisation de ses tâches statutaires dans ce domaine.

3. Pour terminer, il faut soulever le problème de la participation des États membres au processus de formation de l'organe subsidiaire par la conclusion d'accords complémentaires après la création de l'organe par l'organisation elle-même. On peut citer de nombreuses causes de ce phénomène; il s'agit surtout ici de l'accord formel de tous les États à entrer en coopération avec l'organe subsidiaire sur des bases contractuelles définies. Le problème des effets que ce phénomène peut avoir pour l'ordre juridique de l'organisation est intéressant.

Il semble qu'il s'agit d'un malentendu évident de parler d'organes subsidiaires lorsque, ainsi que l'écrit Tammes: « l'initiative de créer le nouvel organe est née au sein de l'organisation internationale; pourtant l'organe lui-même a été constitué non pas en vertu d'une décision interne, mais par la signature d'un traité initié par l'organisation »⁴². Malgré

³⁹ On peut plutôt tirer les conclusions contraires des résolutions de l'Assemblée Générale. Selon l'art. II § 3, pt F — l'UNCTAD constitue le centre d'harmonisation de la politique des gouvernements et des organisations économiques régionales dans le domaine du commerce et du développement. Selon le pt D — le Conseil Économique et Social est obligé de coopérer avec les organes de l'UNCTAD dans les questions qui lui sont soumises par ces organes.

⁴⁰ Voir — *Actes de la Conférence des Nations Unies sur le Commerce et le Développement*, vol. I; II, III, IV et VI parties.

⁴¹ Voir UN General Assembly Official Records, 1285 plenary meeting, 17 déc. 1963, les déclarations des représentants du Ghana, de l'Indonésie et de la R.A.E. On peut estimer que cette opinion est partagée par la majorité des pays en voie de développement, appartenant au « Groupe des 77 ».

⁴² A. J. P. TAMMES parle ici du « *indirect creative effect* » de la résolution initiale (op. cit., p. 314).

l'initiative de l'organisation qui peut se manifester par la convocation sous les auspices d'une conférence internationale ou par de nombreuses résolutions, c'est la volonté des États qui décide exclusivement. Ce sont les États qui peuvent définir les formes d'une coopération éventuelle avec l'organisation ou même déterminer la dépendance du corps créé de l'organisation qui l'a initié. Le résultat de ces négociations détermine l'influence que la constitution du nouvel organe international aura sur son ordre juridique.

Le problème devient beaucoup plus complexe au cas où les États membres concluent un accord international qui règle une série de questions de structure et de compétences de l'organe subsidiaire déjà constitué par cette organisation en vertu d'une décision. Comme exemple classique, on peut citer l'Agence Européenne de l'Énergie Atomique, créée comme organe subsidiaire par l'Organisation Européenne de Coopération Économique (OECE); ici, l'accord international règle la majorité des questions essentielles de fond ⁴³.

Ainsi, il devient douteux, si l'on peut considérer l'organe subsidiaire comme étant formé en vertu d'une décision de l'organisation, là où les normes conventionnelles déterminent le statut juridique de cet organe. Reuter écrit que l'accord ne fait qu'« enrichir l'organe subsidiaire » ⁴⁴, tandis qu'il semble créer en fait cet organe. Par conséquent, le problème qui nous intéresse, et notamment celui de l'influence de la décision interne sur l'ordre juridique de l'organisation, cède la place à celui du rapport réciproque de ses statuts et du nouvel accord, c'est-à-dire à un problème ressortissant du droit des traités. C'est par ce moyen que les États introduisent de nouvelles dispositions de structure et de compétences dans l'ordre juridique de l'organisation sans qu'il soit nécessaire de procéder à un amendement formel, parfois fastidieux, des statuts de l'organisation.

Ces considérations, nécessairement fort générales, ne permettent pas de tirer des conclusions faisant foi en ce qui concerne la relation existant entre la faculté de créer des organes subsidiaires et les statuts des organisations internationales. D'ailleurs il s'agissait ici plutôt de poser le problème dont la portée pratique ne cessera certainement pas de grandir.

Pourtant, à la lumière de ce qui a été dit, on peut affirmer en toute certitude que la problème de la création de nombreux organes subsidiaires ne peut être considéré comme une question de procédure. Mal-

⁴³ La décision de l'OECE et l'accord au sujet de l'Agence portent la même date du 20 XII 1957.

⁴⁴ P. REUTER, *op. cit.*, p. 423.

gré cela, c'est justement ainsi que les statuts des organisations internationales traitent la création des organes subsidiaires.

Ainsi qu'on le sait, la décision portant sur la création de l'organe, sa structure et l'étendue de ses compétences est prise pratiquement dans toutes les organisations à la majorité simple en vertu d'une autorisation déclarative contenue dans les statuts ou en vertu de la théorie des compétences implicites. A l'exclusion des Communautés Européennes, la réponse à la question de savoir si une décision donnée est conforme aux statuts appartient à l'organe qui a pris cette décision; en pratique elle appartient aux États qui composent sa majorité. Cela est valable aussi bien pour une simple commission d'études que pour la création par exemple de forces de police ou de forces armées. La création de l'un comme de l'autre organe subsidiaire constitue formellement une affaire de l'organe principal, quoique cette décision peut enfreindre les intérêts les plus vitaux d'autres États, malgré les garanties dont ils jouissent en vertu de l'accord international. La décision prise selon la procédure prévue pour résoudre les questions d'ordre interne remplace les dispositions des statuts.

Un changement de cette situation par des moyens juridiques entraînerait de grandes difficultés, si l'on ne veut pas renoncer à l'autonomie que doit posséder nécessairement l'organisation dans le développement de la structure. Fixer exactement le genre des organes subsidiaires que peut former l'organisation, c'est-à-dire limiter l'application de la théorie des compétences implicites, constituerait une opération efficace principalement sur le plan théorique. En effet, en l'absence d'un organe judiciaire adéquat, qui est-ce qui ordonnerait la liquidation d'un organe subsidiaire créé par la volonté de la majorité? Imposer le principe de l'unanimité, même si cela était pratiquement réalisable, constituerait incontestablement un pas en arrière, ainsi que nous l'avons constaté.

Il semble que le changement de cette situation ne peut intervenir que sur le plan politique, par la volonté consciente des États de respecter, dans leur propre intérêt, la suprématie des normes statutaires. Les changements intervenant dans le rapport des forces au sein des organisations générales semblent favoriser ce processus.

Liability of International Organizations for Space Activities

by ZDZISŁAW GALICKI

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1. The International Organization as a Subject of International Law

The fact that, under present conditions, not only States and non-governmental entities, subject to national laws, but also international governmental organizations are engaging in space activities, creates the problem of attaching liability to international organizations which conduct such space activities. The reference is to activities undertaken or initiatives developed within the framework of such regional or particular organizations as ELDO and ESRO,¹ or by universal organizations such as the United Nations itself, assisted and advised by its subsidiary organs

¹ The European Space Research Organization (ESRO) was established by the treaty signed on June 14, 1962, by ten States. The aim of this organization is only to develop cooperation between European States in the area of space research and technology. Six countries of Western Europe (Belgium, France, German Federal Republic, Italy, Netherlands and the United Kingdom) and Australia signed another convention on March 29, 1962, establishing the European Launcher Development Organization (ELDO). The aim of the latter organization is to develop and build space launchers and to equip them suitably for practical use and for delivery to possible users. The fundamental documents stress peaceful aims for this collaboration and its undertakings.

and specialized agencies. Although the direct sponsorship of space activities by the United Nations seems to be rather limited at the present time,² it may be possible to foresee that in the future some major space projects, requiring the broadest participation and the closest international cooperation of many States, may be promoted or implemented by this Organization. This would be in accordance with Article 1, paragraph 4 of the UN Charter which generally entitles the Organization to be: "[...] a center for harmonizing the actions of nations in the attainment of [...] common ends."

In consequence, the question arises whether an international organization — as distinct from its member States — which launches or participates in the launching of an object into outer space, should be regarded as liable for damage caused by such activity.

According to the majority of opinions in the theory of international law, international governmental organizations, and among them especially the United Nations, are considered *sui generis* subjects of international law, capable of possessing international rights and duties and even capable of maintaining their rights by advancing international claims.³ Further, the International Court of Justice in the Case of Reparation for Injuries Suffered in the Service of the United Nations (1949) confirmed this capacity of the United Nations, including the title for the presentation of its claims against States.⁴

This capacity, however, does not exist generally under international law for all international organizations. It must be deduced each time from their founding statutes. Consequently, an international organization may act as a subject of international law only within the limits of the powers agreed upon by its member States. Similarly, within the same limits in which international organizations enjoy their rights in exercising their powers and functions: "[...] they ought to be considered directly responsible to international persons which would be damaged by their activities. For many practical reasons, however, including a possible insolvency in the case of high reparation costs exceeding the budget of

² E.g. sounding rockets sites as "international facilities of the United Nations" have been established. The State, in which such facility has been constructed (e.g. India), is responsible for appropriate agreements with users, bearing operating costs apportioned on an "equitable basis." Such a host State is obliged to report periodically to the UN Committee on the Peaceful Uses of Outer Space on the operations of the facility. The UN sponsorship depends upon endorsement by the Committee—UN Doc. A/AC. 105/5 of 3 July, 1962.

³ L. F. L. OPPENHEIM, *International Law*, vol. 1, 8th ed. by H. Lauterpacht, London 1955, pp. 348 - 349.

⁴ Advisory Opinion of 11 April, 1949, ICJ Reports (1949), p. 179.

the organization, member States of the international organization, which had founded its powers and functions, should remain responsible besides the organization itself.”⁵

2. Development of the Concept of Liability of International Organizations

A. The Legal Sub-Committee of the UN Committee on the Peaceful Uses of Outer Space

As early as at the third session of the Sub-Committee,⁶ a considerable number of opinions on the subject of liability of international organizations was expressed, mainly in connection with the then United States proposal.⁷ Among other views expressed, it was said: “Should the Convention deal with international organizations, then two principles should be recognized: firstly, that of the subsidiary liability of its member States; secondly, the principle that if an international organization is to be subject to obligations, it should also be entitled to rights under the Convention.”⁸

There was also considered a possibility that for the purposes of the future convention, an “international organization” could perhaps be defined to include only the United Nations and its specialized agencies. In all other cases, the State in which the organization is situated, or the State or States which sponsor the launching, should be responsible. The convention would thus apply only to States parties to the convention, and the United Nations and its specialized agencies. This would avoid the difficulty of determining, in each case, whether or not a particular organization was international.⁹

However, at the next session in 1965, a general agreement was reached that all international organizations engaged in space activities should be liable under the future convention. An exchange of views took place in respect of the relationship of the liability of international organization

⁵ V. KOPAL, *Problems of Legal Responsibility for Space Activities*, “Studies in International Law,” Vol. 2, Prague 1966, p. 81.

⁶ For the short history of the development of legal regulation of liability for space activities, see: Z. GALICKI, *Nationality of Spacecraft and Liability for Space Activities*, “Polish Yearbook of International Law,” Vol. 4, 1970, p. 209. The present article is a continuation of that study, so some more detailed data presented previously are omitted.

⁷ Doc. A/AC. 105/C. 2/L. 8.

⁸ Doc. A/AC. 105/21, p. 9.

⁹ *Ibid.*, p. 10.

to that of its constituent members. One view was that the international organizations would become parties by accession; another opinion was that the appropriate provisions of the convention should be made to apply to an international organization which undertook by declaration to comply with the convention. It was also mentioned that the future convention should simply provide for liability of international organizations, but such organizations, not being on the same level as States, should not become parties to the convention nor accept it by a declaration.¹⁰

Finally, at the sixth session in 1967, provisional agreement was reached on only one point, namely: "International organizations that launch objects into outer space should be liable under the Convention for damage caused by such activities."¹¹

No agreement was reached on the question of the rights of international organizations under the future convention. It was also not agreed whether the liability of the States members of the international organization should arise at the same time as the liability of the organization or whether it should arise only in the event of default by the international organization.¹²

B. The Declaration of Legal Principles of 1963 and the Space Treaty of 1967

In an attempt probably to avoid difficult legal questions without precedents, the authors of the UN Declaration of Legal Principles of 1963 chose a compromise between conflicting views, both from the legal and political standpoints, formulating the final sentence of paragraph 5 as follows:

"When activities are carried on in outer space by an international organization, responsibility for compliance with the principles set forth in this declaration shall be borne by the international organization and by the States participating in it."

An almost identical provision is contained in Article VII of the Space Treaty of 1967:

"When activities are carried on in outer space, including the moon and other celestial bodies, by an international organization, responsibility for compliance with this Treaty shall be borne by the international organization and by the States Parties to the Treaty participating in such organization."

It should be also recalled that the Agreement on the Rescue of

¹⁰ Doc. A/AC. 105/29, p. 4.

¹¹ Doc. A/AC. 105/37, p. 6.

¹² *Ibid.*, p. 7. Nothing new was added to the above at the seventh session in 1968.

Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space of 1968 mentioned in Article 6 the possibility of a situation when "an international intergovernmental organization is responsible for launching," though without precisising the details of this responsibility. But as it has been justly pointed out: "[...] the essence remains that while the organization does not become a party to the Agreement formally, yet will acquire certain rights and assume obligations under the Agreement."¹³

The UN Declaration and the Space Treaty have recognized, in principle, the equal position of international organizations, which would carry on space activities, with or without them being constituted for this special purpose. Moreover, they have affirmed the principle of simultaneous responsibility of international organizations and their member States, without indicating, however, whether the participating States are to be held responsible on the same level as the organizations, or what should be the relation between them. In consequence, under these provisions more than one interpretation seems to be possible:

(1) The subject suffering damage ought to make the presentation of claim first to the organization and only after having failed to its member States.

(2) The claiming party is entitled to choose between directly approaching the organization or its members.¹⁴

Furthermore, another difficult problem arises in the extent to which member States should bear responsibility for the activities of their organization. As has been correctly remarked: "This question should be considered first with due regard to the Statutes of the organization concerned. It should be consulted especially as to the problem, whether those States, which would neither vote for, nor participate in the given activity, that would lead to the wrong done, should be held liable. Only in the lack of any internal provisions and if besides that it were impossible to find any other guiding rule, all members would be considered responsible severally and jointly with the possibility of a later recourse among themselves."¹⁵

¹³ G. GAL, *Space Law*, Budapest 1969, p. 240.

¹⁴ See the analogous remarks of Polish jurist, J. RAJSKI, in his works: *Liability for Damage Caused by Space Objects*, "Proceedings of the XIIth Colloquium on the Law of Outer Space — International Institute of Space Law," Davis (California), 1970, p. 69 ff.; *La responsabilité pour dommages causés par des engins spatiaux, y compris l'observation météorologique par satellites*, "Revue Française de Droit Aérien," 1970, No. 1, p. 41 ff.

¹⁵ V. KOPAL, *op. cit.*, p. 82.

3. The Draft Conventions on Liability

In so far as the principle of liability is concerned, all five draft conventions,¹⁶ though adopting different methods, provided for the liability of international organizations in the event of damage being caused by the launching of objects into outer space by such organizations. The drafts differed as far as the elaboration of this general principle in more detailed provisions was concerned.

The Hungarian proposal merely repeated the principle contained in the Space Treaty, adding that financial obligations:

"[...] shall be met by the international organization and by its member States jointly and severally."¹⁷

Similarly, the Indian proposal, although providing for the "acceptance of the rights and obligations provided for in this Convention,"¹⁸ left, as one to be inserted later into the text of the convention, a provision:

"[...] regarding mode of accession of international organizations to the Convention, their rights and duties and relationship with States parties to the Convention."¹⁹

On the other hand, the Belgian draft placed international organizations almost on the same footing as States by providing that:

"International organizations which undertake to comply with this Convention shall have the same rights and obligations as States."²⁰

However, such organizations would not have the possibility of becoming parties to this convention.²¹

According to the United States proposal, an international organization which intends to conduct space activities shall transmit to the UN

¹⁶ Belgian Proposal — A/AC. 105/C. 2/L. 7/Rev. 3 (based mainly on a Working Paper on the Unification of Certain Rules of Liability for Damages Caused by Space Vehicles, submitted at the second session on April 30, 1963 — Doc. A/AC. 105/C. 2/L. 7); United States Proposal — A/AC. 105/C. 2/L. 19; Hungarian Proposal — A/AC. 105/C. 2/L. 10/Rev. 1 and A/AC. 105/C. 2/L. 24; Indian Proposal — A/AC. 105/C. 2/L. 32; Italian Proposal — A/AC. 104/C. 2/L. 40. See also: K. HAILBRONNER, *Liability for Damage Caused by Spacecraft. Proposals of Belgium, U.S.A., Hungary, India and Italy*, "30 Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht," No. 1 April 1970, p. 125 - 141.

¹⁷ Art. VI.

¹⁸ Art. I.

¹⁹ Art. X.

²⁰ Art. VI.

²¹ It may be recalled that the previous Belgian proposal, according to its Art. 5, provided even for such organizations to become parties to the convention — Doc. A/AC. 105/C. 2/L. 7/Rev. 2 and Corr. 1, 2 and 3; and WG. II/27. On the other hand, however, in its very first proposal Belgium omitted to include any provision concerning liability of international organizations.

Secretary General a declaration that it accepts and undertakes to comply with provisions of the convention. As a result of such a declaration:

"[...] all the provisions, except Articles XII, XV, XVI and XVII,²² shall apply to the organization as they apply to a State which is a Contracting Party."²³

It seems that the American approach would enable international organizations to exercise their capacity to enter into international agreements by assimilating such organizations as far as possible to the States without placing them, however, on the same level. Furthermore, the United States draft placed primary responsibility on the international organization with subsidiary liability falling on the participating States. If the organization fails to pay within one year from the date on which compensation has been established, a State presenting the claim may proceed against any or all member States:

"[...] individually or jointly for the total amount of damages."²⁴

This subsidiary liability, falling on the member States only in the above-mentioned case, seems to be introduced in order to encourage smaller States to pool their resources for the purposes of space research through international organization without the threat of an enormous burden of responsibility.

There is, however, another question concerning the need for the existence of joint liability of all member States besides the organization itself. Such a solution may be suitable for a particular organization with limited number of members, all of them being capable of paying compensation and later asking for a contribution from their partners. However, this may be rather difficult to imagine in a case where space activities are undertaken by, or are under the auspices of, an universal organization (as, for example, the United Nations), each member of such organization being liable to pay the whole amount of damages arising from the activities.²⁵

The Italian draft, though almost identical to the American proposal, attempted to find a solution to this problem providing that, if the organization fails to pay compensation within one year, the member States shall be obligated to pay the amount of compensation:

²² These articles concerned such questions as the jurisdiction of International Court of Justice, parties to the agreement, signature, accession, ratification and entry into force of the convention.

²³ Art. V, p. 1.

²⁴ Art. III, p. 1.

²⁵ It may be compared, to some extent, with the serious difficulties, which existed in the United Nations, connected with the financing of the UN peace-keeping operations — see: Documents of the XIXth Session of the UN General Assembly.

"[...] each in proportion to its contribution to the budget of the organization; and if this contribution is not known, the member States shall be jointly liable for the entire compensation."²⁶

Consequently, it seemed that in the case of space activities carried on by international organizations a special instrument or decision would be advisable, which could apportion not only expenses but also possible compensation for damage caused by these activities.

4. The Convention on International Liability for Damage Caused by Space Objects

The said idea has been developed, at least partially, by the Convention on International Liability for Damage Caused by Space Objects of 1971. The Convention confirmed a general rule, expressed by the quoted five drafts, saying in Article XXII, paragraph 1 that:

"In this Convention [...] references to States shall be deemed to apply to any international intergovernmental organization which conducts space activities."

It may be done, however, under two conditions. The first one is that the organization declares its acceptance of the rights and obligations provided for in the Convention,²⁷ and the second condition requires a majority of members of the organization being States parties to this Convention and to the Space Treaty of 1967. It seems to be correctly aimed to maintain one uniform system of international rules of emerging space law.

There is another general rule, established by the Convention in Article XXII, paragraph 3, and concerning the situation when an international organization is liable for damage. In such a case the organization and those of its members which are States parties to this Convention "shall be jointly and severally liable;" with all consequences resulting from the rules provided by the Convention for the joint ventures.²⁸

²⁶ Art. XI.

²⁷ Such acceptance, however, does not give any right for the organization to become a party to the Convention, as the appropriate provisions of the Convention (Arts. XXIV to XXVII) are excluded from being applied to international organizations (Art. XXII para 1).

²⁸ For more details concerning these rules see: Z. GALICKI, *op. cit.*, pp. 227, 234. It may be worthy to notice that already in 1965 Canadian jurist, G. F. FITZGERALD, found six different ways in which the liability could be assumed by the organization and its members, among which the sixth one seems to be the most similar to the rule adopted by the Convention on International Liability—*The Participation of International Organizations in the Proposed International Agreement on Liability for Damage Caused Objects Launched into Outer Space*, "III Canadian Yearbook of International Law," 1965, p. 271.

However, there are some exceptions from the general rule of joint and several liability as it concerns the liability of international organization and its members.

Analogously with the quoted above American and Italian drafts, the Convention establishes primary liability of the organization, to which all the claims should be first presented. Only when the organization fails to pay within a period of six months, the claimant State may invoke the liability of the members. The number of such members, is restricted, however, to those which are simultaneously parties to the Convention on International Liability. On the other hand, only these members may present the claim in the name of the organization, in respect of damage caused to it.²⁹ It seems that such not-uniform treatment of members of international organizations may weak a practical possibility of the organization being liable and put the burden of liability mainly on those members which are parties to the Convention on International Liability.

There is no provision in the new Convention dealing with the apportionment of the amount of compensation between the members obliged to pay it, as it has been suggested, for example, by the Italian draft. It has been left, according to general rules contained in Article V, paragraph 2, to special agreements concluded between States concerned, providing however, that such agreement shall not prejudice the right of claimant State: "[...] to seek the entire compensation due under this Convention from any or all of the launching States which are jointly and severally liable."

Once more, the idea of preserving most of all the interests of any State suffering damage prevailed also in this case. There is, however, no doubt that the rules adopted by the Convention on International Liability seem to be the best and the only way of such preservation.

²⁹ Though, as it has been correctly pointed out by Soviet writers, a possibility of the organization suffering damage seems to be rather very rare—*Tendencii razvitiia kosmičeskogo prava*, ed. by A. S. Piradov, Moskva 1971, p. 200. Another well known Soviet author, G. P. Žukov, in his book edited in 1966, expressed a view that international organizations should not possess the right to claim compensation when suffering damage—*Kosmičeskoje pravo*, Moskva 1966, p. 149.

Trends of Development of the International Law of Carriage by Air

by JERZY RAJSKI

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I. Introductory Remarks

The dynamic development of international carriages by air made possible thanks to the enormous advance of modern science and technology which occurred over the last decades, and stimulated by the growing needs of transportation, has transformed them into the mass, modern and safe branch of transportation of persons and goods. This development has been achieved to a certain extent under the legal framework established in the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed in Warsaw on 12 October, 1929 (hereafter referred to as the Warsaw Convention). The modern, developed and highly organized system of international air transportation has remained to be subject to the provisions of the multilateral convention, worked out for the epoch of the initial phase of development of carriages by air. This is the reason why the legal regime established in the Warsaw Convention is characterized by a protectionistic towards the air carrier's interests attitude, which has become the source of a growing process of judicial disruption of the uniformity of the international law governing carriages by air. The rescue action taken up in 1955 during the Hague Conference brought up little results. The Protocol to Amend the Warsaw Convention done in The Hague on 28 September, 1955 (hereafter referred to as the Hague Protocol) introduced some minor amendments to the Warsaw system, the most im-

portant of them, being those which doubled the limits of compensation for damages and modified the provisions concerning compensation.

The Hague Protocol was followed by the signing of the Convention Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier signed at Guadalajara on 18 September, 1961 (hereafter referred to as the Guadalajara Convention).

In these circumstances the Warsaw Convention, though being the most widely accepted private-law convention, has been greatly criticized and, for a long time, there has been strong pressure for its revision. Therefore the problem of the revision of this convention has been studied in International Civil Aviation Organization (ICAO) as a matter of particular urgency and importance since 1965.¹ The situation has been aggravated by a threatened denunciation of the Warsaw Convention by the United States,² which was headed off by the negotiation, that lead to the conclusion of the so-called "Montreal Agreement" (of 4 May, 1966).³ The terms of this agreement differed substantially from the most important principles upon which the Warsaw Convention has been based. The lack of uniformity of the international law governing the international air transportation caused by the Montreal Agreement called for a quick action that would restore a uniform legal order in that particularly important for contemporary human and economic relations branch of transportation. It should be emphasized that the Montreal arrangement has been considered

¹ For an account of these activities see e.g. G. FITZGERALD, *Current Developments in the Revision of Rules Governing the Liability of the Aircraft in the Respect of the International Carriage of Passengers by Air*, "The Canadian Yearbook of International Law," 1968, p. 188 ff.; the SAME AUTHOR, *The Revision of the Warsaw Convention*, "The Canadian Yearbook of International Law," 1970, p. 284 ff.

² See e.g. L. S. KREINDLER, *The Denunciation of the Warsaw Convention*, "Journal of Air Law and Commerce," 1965, No. 3, p. 291 ff.; A. LOWENFELD, A. MENDELSON, *The United States and the Warsaw Convention*, "Harvard Law Review," 1967, No. 3, p. 497 ff.; G. FITZGERALD, *Liability Rules in the International Carriage of Passengers by Air and the Notice of Denunciation of the Warsaw Convention by the United States of America*, "The Canadian Yearbook of International Law," 1966, p. 194 ff.; R. H. MANKIEWICZ, *Pourquoi les États-Unis d'Amérique n'ont pas ratifié le Protocol de La Haye*, "Revue Générale de l'Air," 1967, No. 3, p. 349 ff.

³ This problem has been extensively discussed in Polish legal writings. Cf. e.g. the monograph written by the author of this contribution *Odpowiedzialność przewoźnika lotniczego w prawie międzynarodowym i krajowym* [Liability of an Air Carrier in International and Municipal Law], Warszawa 1968 and his article *Konieczność rewizji konwencji warszawskiej* [Necessity of a Revision of the Warsaw Convention], "Nowe Prawo," 1968, No. 4, p. 588 ff. See also M. ŻYLIĆZ, *Problem ograniczenia odpowiedzialności przewoźnika w międzynarodowym przewozie lotniczym* [The Problem of Limitation of Carrier's Liability in International Carriage by Air] "Państwo i Prawo," 1969, No. 10, p. 503 ff.

as an emergency interim measures, pending a formal amendment of the Warsaw Convention.

After a series of meetings of different bodies convened by ICAO appropriate draft amendments have been elaborated. They served as the basis for the work of the diplomatic Conference held at Guatemala City from 9 February to 8 March, 1971. This work resulted in the adoption of the Protocol to Amend the Warsaw Convention as amended by the Hague Protocol, signed at Guatemala City on 8 March, 1971 (hereafter referred to as the Guatemala Protocol). The Guatemala Protocol, being the result of negotiations between the United States of America and certain other parties to the Warsaw Convention provides for a far-reaching revision of the legal regime established in the Warsaw Convention and the Hague Protocol, that indicates certain directions in which the international rules governing the international carriages by air are being developed. It should be noted, however, that the work of the Guatemala Conference and consequently the scope of adopted by it Protocol has been limited to problems relating to the legal regime of carriage by air of persons and baggage. This has been the result of the ICAO interest being concentrated on achieving agreement on questions involving air carrier's liability for injury or death to passengers (the subsequently elaborated amendments to the provisions on baggage aimed at bringing them into line with the new provisions on passengers, since normally the baggage accompanies the passengers). The resulting gap of interest concerning the carriage of cargo has been fulfilled by newly undertaken works preparing the next revision of the Warsaw rules. This problem is of a great importance and certain urgency because of developments in procedures in the handling of cargo and modernization of its carriage by air.

The purpose of this contribution is to indicate some main directions in which the international rules governing the international carriage by air are being developed.

II. Evolution of the Basis of Air Carrier's Liability

1. The Warsaw Convention has established a uniform basis of air carrier's liability irrespective of the type of carriage (carriage of passengers, baggage or goods) and the character of damage caused (damage sustained in case of death or personal injury of a passenger or damage sustained in the event of the destruction or loss of, or of damage to baggage or any cargo). This has been expressed in Article, 20 paragraph 1 of the Convention in a vague formula which placed upon the carrier the burden of proving that he and his agents had taken all necessary measures to avoid the damage, or that it was impossible for him or them to take such measures.

The vague language of this provision has led to its various interpretation by the courts of different countries and caused widespread controversies in the legal doctrine.⁴ The relevant views have ranged from that which recognized it as being based on presumption of fault up to that treating it as expressing the rule of strict liability i.a. liability without fault. This provision has been criticized in the legal doctrine not only because of its vagueness, but also because it was recognized as not keeping pace with the development of international air transportation in our world.⁵ It has been replaced in the Guatemala Protocol by a new provision which expresses the novel, widely accepted⁶ concept of an almost absolute liability.

2. The new formulation of the basis of liability for damages sustained in case of death or personal injury of a passenger is a major indication of the general direction in which both domestic laws of particular States and the international law are evolving: they tend namely to severe the rules of liability for damages caused in connection with particularly dangerous activities. This evolution of law is determined by the socio-economic changes of contemporary world, accompanied by a rapid and enormous progress in science and technology, frequently named scientific and technical revolution. It has been expressed in the conventions on liability for nuclear damages⁷ and further developed in the Convention on International Liability for Damage Caused by Space Objects.⁸

⁴ See e.g. J. BONET CORREA, *La responsabilidad en el derecho aereo*, Madrid 1963, p. 78 ff.; M. LITVINE, *Droit Aérien*, Bruxelles 1970; N. MATEESCO MATTE, *Traité de droit aérien—aéronautique*, Paris 1964, p. 410 ff.; J. RAJSKI, *Odpowiedzialność przewoźnika...*, p. 53 ff.; J. SESSELI, *La notion de faute dans la Convention de Varsovie*, Thèse de doctorat, Lausanne 1961.

⁵ See e.g. J. RAJSKI, *op. cit.*, p.p. 55 - 71 and 112 - 115.

⁶ See e.g. H. CAPLAN and A. KEAN, *The Warsaw Convention and the Guatemala Protocol*, "The Journal of Business Law," 1971, No. 7, pp. 210 - 211; J. CONSTANTINOFF, *La révision de la Convention de Varsovie et la responsabilité du transporteur aérien*, "Revue Française de Droit Aérien," 1970, No. 4, p. 392 ff.; V. S. GRJASNOV, J. M. KOLOSOF, *Meždunarodno-pravovoe mnogostoronnee regulirovanie vozdušnyh soobščenij*, "Izvestija Vysših Učebnyh Zavedenij — Pravovedenie", Moskva 1969, No. 3, p. 133 ff.; R. H. MANKIEWICZ, *La responsabilité du transporteur aérien après Guatemala*, "European Transport Law," 1971, No. 6, p. 1 ff.; J. RAJSKI, *Protokół gwatemalski o międzynarodowych przewozach lotniczych [The Guatemala Protocol Concerning the International Carriage by Air]*, "Państwo i Prawo," 1971, No. 10, p. 569 ff.; Against this concept e.g. Lee S. KREINDLER, *A Plaintiff's View of Montreal*, "Journal of Air Law and Commerce," 1966, No. 3, p. 528 ff. and M. ŻYLICZ, *Problem ograniczenia...* [The Problem of Limitation...], p. 504 ff.

⁷ Cf. W. JENKS, *Liability for Ultra-Hazardous Activities in International Law*, "Receuil des Cours — Académie de Droit International," Vol. I, 1966, p. 127 ff.

⁸ Cf. e.g. J. RAJSKI, *Odpowiedzialność międzynarodowa za szkody wyrządzone przez obiekty kosmiczne [International Liability for Damages Caused by Space Objects]*, Warszawa 1974.

Manifold developments of science and technology which have completely transformed human life in our time have also profoundly modified the basic elements of international air transportation. In these new conditions preservation of the traditional concept of liability based upon the principle of fault could lead to unjustified results. This has been one of the reasons, why some national legislators departed from it adopting the rule of air carrier's liability based upon the principle of risk (strict or objective liability, i.e. liability without fault).⁹ An even more severe (for the carrier) type of liability has been established by the Guatemala Protocol.

According to the revised Article 17 paragraph 1 the carrier is liable for damage sustained in case of death or personal injury of a passenger upon condition only that the event which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking. However, the carrier is not liable if the death or injury resulted solely from the state of health of the passenger. The last formula covers the situations in which the legal causation exists exclusively between the state of health of passenger and the subsequent death or injury.

This is an almost absolute liability,¹⁰ the only exception from it being that of contributory negligence (which does not permit a person to profit from his own tortious or wilful acts). It is worth to note, that the Guatemala Protocol has established a uniform rule of contributory negligence, while the Warsaw Convention in its original text and as amended by the Hague Protocol subjects recognition of the contributory negligence and its legal effects to the law of the court seized with the case (*lex fori*). According to the revised Article 21, if the carrier proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation, the carrier shall be wholly or partly exonerated from his liability to such person to the extent that such

⁹ For a detailed analysis of these legislations see J. RAJSKI, *Odpowiedzialność przewoźnika lotniczego... [Liability of an Air Carrier...]*, Part II (comparative study of national systems of air carrier's liability) and also by the SAME AUTHOR, *La responsabilité du transporteur aérien dans la législation de quelques pays socialistes européens*, "Revue Française de Droit Aérien," 1971, No. 1, p. 1 ff.

¹⁰ Sometimes (generally in Anglo-American legal writings) called an "absolute" liability. See e.g. G. FITZGERALD, *The Revision of the Warsaw Convention...*, p. 292 ff.; G. TOMPKINS, *Limitation of Liability by Treaty and Statute*, "Journal of Air Law and Commerce," 1967, No. 3, p. 427 ff.; M. POURCELET, *L'accord du 4 mai 1966*, "Revue Générale de l'Air," 1966, No. 3, p. 253; N. MATEESCO-MATTE, *De Varsovie à Montréal*, "Revue Générale de l'Air," 1966, No. 4, p. 369. This expression used also in the text of the Guatemala Protocol does not seem sufficiently precise as it could lead to the conclusion that no exception to this liability exists at all.

negligence or wrongful act or omission caused or contributed to the damage. When by reason of the death or injury of a passenger compensation is claimed by a person other than the passenger, the carrier shall likewise be wholly or partly exonerated from his liability to the extent that he proves that the damage was caused or contributed by the negligence or other wrongful act or omission of that passenger.

Thus under the new provisions the carrier finds himself in a position of a guarantee of a safe carriage of a passenger to the point of destination, who is not permitted to relieve himself of the liability even upon proof that the damage was caused by armed conflict, sabotage or unlawful seizure of aircraft, the burden of risk of materializing of these exceptional events being placed entirely upon him. It is worth to note, that the idea that the carrier should not be liable in respect of the death or injury of the passenger in the case of armed conflict had been widely discussed and finally rejected by the Guatemala Conference.

The adoption of an almost absolute liability will probably lead to further development of the so called liability insurance, that will protect the victims against the risk of insolvency or limited solvency of the responsible air carrier and the latter against ruinous payments for covering damages.

3. An analogous type of liability has been adopted for damages sustained in case of destruction or loss of, or damage to, baggage. This liability has been based upon condition only that the event which caused the destruction, loss or damage took place on board the aircraft or in the course of any of the operations of embarking or disembarking or during any period within which the baggage was in charge of the carrier. However, the carrier is not liable if the damage resulted solely from the inherent defect, quality or vice of the baggage (revised Art. 17, para. 2). The only exception from this rule is also that of the contributory negligence, as established in Article 21 (revised).

This rather surprising and unknown to any other international or domestic legislation solution of the problem of the basis of air carrier's liability for damages caused to baggage has been adopted probably mainly for practical reasons. It tends to bring the provisions on baggage into line with the new provisions on passengers, taking into account the fact, that normally the baggage accompanies the passengers (there is a combined form of passenger ticket and baggage check issued to the passenger in international carriage by air) and that in almost all cases where an action has been brought in respect of the death of or injury to a passenger, then would probably be a claim in respect of loss or damage to baggage.

It should be noted, however, that the severity of this liability is tempered to a great extent by the establishment of relatively low and unbreak-

able in any circumstances limit of compensation that can be sought from the carrier.

4. No changes have been made concerning the basis of air carrier's liability in case of damage arising from delay in the carriage of passengers and baggage. The need for protecting passengers was not the same in the case of injury sustained by the passenger or his death as for delay. For the reason of security and safety, objective liability has not been adopted in cases of delay because of the fear that it could encourage the carriers to disregard the safety rules. The provisions of the original Article 19 read with Article 20 of the Warsaw Convention continue to apply to these cases. Thus the divergencies of doctrinal opinions and the differences of courts' interpretation concerning the meaning and the scope of delay, for which the carrier should be made responsible have not been solved.

III. The Increase of the Limits of Compensation

1. One of the fundamental principles of the, regime of air carrier's liability established in the Warsaw Convention is that of limited in amount compensation, that can be sought by the injured party.¹¹ The Convention has established different limits of compensation in regard of different types of damage, for which the air carrier is responsible:

a) 125,000 gold francs¹² (US \$8.300 approximately) for each passenger in the carriage of passengers;

b) 250 gold francs (US \$16.60 approximately) per kilogram in the carriage of registered luggage and goods;

c) 5.000 gold francs (US \$332 approximately) per passenger as regards objects of which the passenger takes charge himself.

These limits adopted in 1929 in order to help the infant air transport industry could no longer be justified with the great development of the international air transportation and world economy. The widespread dissatisfaction with "the passenger limit" in the late 1940's and early 1950's led to its doubling (to the sum of 250,000 gold francs) by the Hague Protocol (Art. XI amending Art. 22 para. 1 of the Warsaw Convention). The Protocol has not been ratified by the United States of America, as highly inadequate by the United States standards. This has been the main cause, why the United States on 15 November, 1965 gave notice of denunciation

¹¹ See e.g. H. DRION, *Limitation of Liabilities in International Air Law*, The Hague 1954.

¹² This is the so-called Poincaré gold franc, which is a currency unit consisting of sixty-five and a half milligrammes gold of millesimal fineness nine hundred.

of the Warsaw Convention to the Polish Government and a real danger grew up that this country with which the biggest number of international carriages by air is connected would definitely leave the Warsaw Convention. The last-minute agreement reached in May 1966 in Montreal caused the United States to withdraw its notice of denunciation.

Under the Montreal Agreement the carrier agrees that, as to all transportation by the Carrier as defined in the Warsaw Convention or the Convention as amended by the Hague Protocol which, according to the contract of carriage includes a point in the United States of America as a point of origin, point of destination, or agreed stopping place, (a) the limit of Liability for each passenger for death, wounding, or other bodily injury shall be the sum of US \$75,000 inclusive of legal fees and costs except that, in case of a claim brought in a State where provision is made for separate award of legal fees and costs, the limit shall be the sum of US \$58,000 exclusive of legal fees and costs.

2. The result of difficult negotiations on this point between the United States of America and other participants of the Guatemala Conference has been a further increase of this limit to the sum of 1,500,000 gold francs (US \$100,000 approximately). According to the revised Article 22, paragraph 1 (a) in the carriage of persons the liability of the carrier is limited to the sum of one million five hundred thousand francs for the aggregate of the claims, however founded, in respect of damage suffered as a result of the death or personal injury of each passenger. Where, in accordance with the law of the court seized of the case, damages may be awarded in the form of periodic payments, the equivalent capital value of the said payments shall not exceed one million five hundred thousand francs.

This limit has been approved by the majority of the States represented at the Guatemala Conference. It has been recognized by them as being just and equitable and so high as to enable full compensation to be paid to the vast majority of the passengers. It has been made unbreakable under any of the circumstances, which lead under the provisions of the original Warsaw Convention (and also as amended by the Hague Protocol) to the establishment of carrier's full (unlimited in amount) liability. This has been achieved through the deletion of:

(a) the last sentence of the Article 22, paragraph 1 of the Warsaw Convention which enables the carrier and the passenger to agree by a special contract a higher, than fixed in this article, limit of compensation;

(b) all other exceptions to the rule of limited in amount compensation provided for in Articles 23, 25 and 25A of the Warsaw Convention and of the Convention as amended by the Hague Protocol.

The first of the above mentioned provisions has been recognized as

fully justified only when the limit of compensation established in the Warsaw Convention was low.¹⁸

The most controversial it has appeared to be the deletion of Article 25 of the Convention providing for unlimited carrier's liability if the damage is caused by his wilful misconduct or by such default on his part as in accordance with the law of the Court seized of the case, is considered to be equivalent to wilful misconduct. In view of certain difficulties of interpretation of this article, it has been revised by the Hague Protocol. The Hague text of this provision provides for non-application of the limits specified in Article 22 of the Convention if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result (provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment.) The entire elimination of the rule of unlimited liability for wilful misconduct (or any other appropriate grave degree of fault) has been finally recognized as an essential part of the *quid pro quo* to which the carriers are entitled in return for imposing on them the heavy burden of an almost absolute (i.e. in a way automatic) liability plus the high limit of compensation, that would safeguard the certainty of the maximum amounts of claims raised against carriers, thereby facilitating them to insure themselves against the appropriate risks. This argument looses, however, much of its validity in respect of the air carrier's liability in the case of destruction, loss, damage or delay in the carriage of baggage. It has been also submitted that any limit-breaking provision in the Convention, no matter how restrictive, would in cases approaching the amount of the limit, inevitably be an open invitation to claimants' attorneys to attempt to break the limit, or at least to use it as a bargaining lever to obtain higher settlements. The deletion of Article 25 of the Convention would therefore avoid much unnecessary and costly litigation.

It is worth to note that the discussed solution adopted in the Guatemala Protocol is contrary to the well established in many domestic legal systems basic principle that the wrongdoer should be held fully responsible for damage resulting from his intentional act or omission.

The novelty of the solution adopted in the Guatemala Protocol is that it is endeavouring to develop a new system of an almost absolute liability coupled with high, but unbreakable limits of compensation. This solution appears to be more equitable in the great majority of cases than the traditional concept of liability based upon the principle of fault (even presumed).

¹⁸ The deletion of this provision of the Convention has been criticized by R. H. MANKIEWICZ, *La responsabilité du transporteur aérien après Guatemala*, p. 18.

In order to prevent any possibility of breaking the limits of compensation the revised Article 24, paragraph 2 states expressly that in the carriage of passengers and baggage any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and limits of liability set out in this Convention, without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. Such limits of liability constitute maximum limits and may not be exceeded whatever the circumstances which gave rise to the liability.

3. The Guatemala Protocol has introduced to the Warsaw Convention a new provision establishing a new limit of compensation due in the case of delay in the carriage of passengers. It has been fixed (after a wide discussion during which several different proposals have been defended) at the level of sixty-two thousand five hundred francs (US \$4,150 approximately) for each passenger (new Art. 22, para. 1b).

The Guatemala Protocol has also made some important changes in the system of limitation of compensation due in the case of destruction, loss, damage or delay in the carriage of baggage. Instead of depending on the weight of each package (as in the original Warsaw Convention and in the Hague Protocol) a new single limit of a global character has been established in the new Article 22, paragraph 1c. It has been fixed at the sum of 15,000 francs (US \$1,000 approximately) per passenger. Thereby the necessity for weighing the baggage, which takes much time during the preparation of the carriage by air of passengers is to be avoided. It is worth to note that the Guatemala Protocol has abandoned in this respect the traditional distinction between checked and unchecked baggage, which has become increasingly difficult to maintain in practice.

4. The limits of compensation fixed in Article 22, paragraph 1 and 2 do not exclude the possibility of awarding to the claimant the costs of litigation in addition to the damages. The solution of this problem had taken into consideration the fact that the laws of certain countries (i.a. of the United States of America) do not empower the courts to award costs of litigation in addition to damages. This results in the party winning his case having to pay these costs, so that considerable sums for lawyer's fees might be deducted from his compensation.¹⁴ Therefore a legal basis empowering courts to award such costs under the Convention has been established (Art. 22, para. 3). Its revised by the Guatemala Protocol text provides that the courts of the High Contracting Parties which are not author-

¹⁴ United States trial lawyers in accident cases work on a contingent fee basis; they take about one-third of the compensation recovered. See e.g. F. B. MacKINNON, *Contingent Fees for Legal Services*, Chicago 1964.

ized under their law to award the costs of the action, including lawyers' fees, shall, in actions to which this Convention applies, have the power to award, in their discretion, to the claimant, the whole or part of the costs of the action, including lawyers' fees which the court considers reasonable. The costs of the action including lawyers' fees shall be awarded, however, only if the claimant gives a written notice to the carrier of the amount claimed including the particulars of the calculation of that amount and the carrier does not make within a period of six months after his receipt of such notice, a written offer of settlement in an amount at least equal to the compensation awarded within the applicable limit. This period will be extended until the time of commencement of the action if that is later. This settlement inducement clause has been intended to assure prompt payment of an adequate compensation to the victim. To avoid any doubts it has been expressly stated in Article 22, paragraph 3 (c) that the costs of the action including lawyers' fees shall not be taken into account in applying the limits under Article 22 of the Convention.

5. The Guatemala Protocol has introduced to the Convention a rather complicated system of periodic revision of the limit established for the claims in respect of damage suffered as a result of the death or personal injury of a passenger to keep the limit in turn with times.

The question of founding a suitable method for a revision of the limits fixed in the Convention in future has been much debated in ICAO and during the Guatemala Conference. A plan whereby limits would be raised automatically according to a fixed formula adopted by the Legal Committee of ICAO has been rejected at the Conference. The Guatemala Protocol provides for conferences of the Parties to that Protocol to be convened during the fifth and tenth years respectively after the date of entry into force of the Protocol for the purpose of reviewing the limit established in Article 22 paragraph 1 (a) of the Convention as amended by that Protocol (new Art. 42). These conferences will not consider the base limit itself, but only the periodic increase by an amount not exceeding 187,500 francs (US \$12,500 approximately). Unless these conferences decide otherwise by a two-thirds majority vote of the Parties present and voting the above mentioned limit of compensation in force at the respective dates of these conferences shall be increased by 187,500 francs.

The applicable limit shall be that which, in accordance with these provisions, is in effect on the date of the event which caused the death or personal injury of the passenger.

It should be noted that, each Party to the Protocol, can request under the existing provisions of Article 41 of the Convention, that a conference be convened to consider the base limit. Indeed, through the joint application of the procedures contemplated in articles 41 and 42 of the Conven-

tion, the fifth-year conferences can also be empowered to examine the base limit as well as the question of the periodic increase.

6. The Guatemala Protocol has expressly confirmed the right of States to adopt supplemental systems to provide compensation to the victims of international aviation accidents in addition to the recoveries available from the carrier within the rules of liability established in the revised Convention. This was done at the demand of the United States of America delegation to the Guatemala Conference, which rather unexpectedly (at the second plenary meeting on 9 February) presented the proposal relating to the possibility of the establishment of national systems for the purpose of providing compensation to a claimant under the Warsaw Convention (as amended by the future Protocol) supplementary to the maximum compensation payable by the air carrier. The United States delegation insisted on the adoption of an appropriate solution of this problem, because it was not satisfied with the new limit of US \$100,000. Reasons adduced by the US in support of this proposal were that according to the data compiled by the U.S. Civil Aeronautics Board in the first half of 1970,¹⁵ 63 per cent of the judgements or settlements in non-Warsaw cases involving death of the passenger were for amounts greater than \$100,000. This data has also shown a trend of increasing recoveries. Therefore it was argued, that if States are to assure that their citizens and permanent residents who are victims of international air accidents receive recoveries for their losses that are adequate in domestic terms, they must be free to adopt a system providing compensation in addition to that available from the carrier within \$100,000 limit of compensation.¹⁶

After a long and controversial debate on this subjects (two working groups were established to study the appropriate proposals) a solution has been adopted, primarily to make the new Protocol more acceptable to the United States of America. It has been expressed in the new Article 35 A inserted to the Convention, which states that no provision contained in this Convention shall prevent a State from establishing and operating within its territory a system to supplement the compensation payable to claimants under the Convention in respect of death, or personal injury of passengers. Such system shall fulfil the following conditions:

¹⁵ See: Civil Aeronautics Board-Levels of Recoveries on Account of Passenger Deaths and Serious Injuries in Airline Accidents, ICAO Guatemala Conference 1972, W/H Doc. No. 15.

¹⁶ According to H. CAPLAN, W. KEAN (*The Warsaw Convention and the Guatemala Protocol*, p. 211) the United States authorities are said to have in mind a scheme under which passengers will pay a small sum (50 cents in a rumoured figure) in exchange for which their damages will be paid in full notwithstanding the limit of compensation enjoyed by the carrier. As yet, however, no scheme has been published though work on it is believed to be proceeding.

(a) It shall not in any circumstances impose upon the carrier, his servants or agents, any liability in addition to that provided under this Convention;

(b) It shall not impose upon the carrier any financial or administrative burden other than collecting in that State contributions from passengers if required so to do;

(c) It shall not give rise to any discrimination between carriers with regard to the passengers concerned and the benefits available to the said passengers under the system, shall be extended to them regardless of the carrier whose services they have used;

(d) If a passenger has contributed to the system, any person suffering damage as a consequence of death or personal injury of such passenger shall be entitled to the benefits of the system.

IV. Modernization and Simplification of the Provisions Concerning the Documents of Carriage

The Guatemala Protocol has introduced important changes to the provisions of the Convention concerning the documents of carriage in the carriage of passengers and baggage. The general directions of these changes indicate:

(a) A tendency towards simplification of forms and contents of such documents (reducing some formalities which were found not to be desirable) and their respective modernization, which takes into consideration the new needs of developing mass air transportation;

(b) A trend towards elimination of severe sanctions connected with the non-compliance with the provisions regarding delivery of such documents or some defects in their contents.

Under the original Warsaw Convention the acceptance by the carrier a passenger without a passenger ticket having been delivered has been sanctioned by his unlimited liability (according to Article 3 paragraph 2 of the Convention the carrier is not entitled in these circumstances to avail himself of those provisions of the Convention which exclude or limit his liability). The Hague Protocol has even extended the scope of this sanction, providing for loss of the carrier's privilege to limited in amount compensation not only in the case when passenger embarks without a passenger ticket having been delivered, but also if the ticket does not include a specific notice¹⁷ (Art. 3, para. 1 c). This provision has been rather arbi-

¹⁷ A notice to the effect that, if the passenger's journey involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers for death or personal injury and in respect of loss or damage to baggage.

trarily interpreted by the United States courts, which intended to bypass the limits of compensation established in the Warsaw Convention which they considered too low or otherwise unsatisfactory.¹⁸ These judgements rather voluntarily submitting the carrier to unlimited liability in spite of giving by him an adequate notice, which has been unjustifiably recognized as unsatisfactory, have been destructing the whole Warsaw system of air carrier's liability.

The Guatemala Protocol substantially reduces the number of formalities required in respect of passenger tickets. Instead of five particulars that should be contained in this ticket as required by the original Warsaw Convention and three by this Convention as amended by the Hague Protocol, it introduces only two. According to the revised Article 3, paragraph 1 the document of carriage of passengers should contain:

- (a) An indication of the places of departure and destination;
- (b) If the places of departure and destination are within the territory of a single High Contracting Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place.

Thus the controversial requirement of a specified notice have been eliminated.

The trend towards modernization and simplification of documents of carriage has been expressed in the provision, that allows the carrier to deliver individual as well as collective documents of carriage, which can be substituted by any other means which would preserve the record of information indicated above (revised Art. 3, para. 2). These amendments will facilitate the development of the present trend towards increasing automation of the procedure for ticketing.

The most important changes have been introduced in regard to the consequences of some irregularity in the issuance or in the contents of a ticket. Expressing the view that the carrier should not be deprived of the benefit of the limited in amount compensation merely by reason of such irregularity the revised Article 3, paragraph 3 expressly states that non-compliance with the above mentioned provision shall not affect the existence or the validity of the contract of carriage, which shall, none the less, be subject to the rules of this Convention including those relating to limitation of liability.

¹⁸ See e.g. the famous case of *Lisi v. Alitalia*, 253 F. Supp. 237 (S.D.N.Y. 1966); 370 F. 2D. 508 (2D Cir. 1966). See also the case of *Egan v. American Inc.* (10 Avi. 17, 651, 21 NY 2D 160 — New York Court of Appeal). For a brief description of the United States Courts decisions on this subject see e.g. G. FITZGERALD, *Current Developments of the Rules Governing the Liability of the Aircraft in the Respect of the International Carriage by Air*, pp. 202 - 203.

Analogous solution has been adopted in respect of the carriage of checked baggage. The revised Article 4, paragraph 1 provides for the delivery of a baggage check in that case, which unless combined with the above mentioned provisions of Article 3, paragraph 1, should contain analogous indications. The revised Article 4, paragraph 2 permits the carrier to substitute the delivery of the baggage check by any other means which would preserve a record of the required information. Any connections between the established limits of compensation and the defect in issuance or in the contents of the baggage check or any other means of documentation of the carriage of the baggage have been also eliminated.

V. Extending the Scope of Jurisdiction of National Courts

Article 28 of the Warsaw Convention (unchanged by the Hague Protocol) provides that an action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile¹⁹ of the carrier or of his principal place of business, or where he has an establishment²⁰ through which the contract has been made, or before the Court at the place of destination.

The Guatemala Protocol has added an additional forum to Article 28 (adding a second paragraph to it) in respect of actions for damages resulting from death, injury or delay of a passenger or the destruction, loss, damage or delay of baggage. According to this provision such an action may also be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties to the Warsaw Convention as amended by the Guatemala Protocol, before the Court within the jurisdiction of which the carrier has an establishment if the passenger has his domicile or permanent residence in the territory of the same High Contracting Party.

VI. Plurality of Legal Regulations. Possibilities of Conflicts

The coexistence of several different regimes of law applicable to international carriages by air results in lack of universal international unification of law in that respect and creates possibilities of conflicts between

¹⁹ The English translation, as contrasted with the American reads: "where the carrier is ordinarily resident."

²⁰ The American translation, as contrasted with the English reads: "where he has a place of business [...]," to which expression a wider meaning could be done, than to the word "establishment."

the different instruments. Some of these conflicts are inevitable, though much have been done to reduce them in number. This was done i.a. by adopting in the new instruments some measures which facilitate gradual disappearance of the old ones.

Along this line the solution has been adopted that both the Hague Protocol and the Guatemala Protocol are instruments which modify certain provisions of the original Warsaw Convention and are closely connected with each other.²¹ Therefore as between the Parties of these instruments they shall be read and interpreted as single instruments known as the Warsaw Convention as amended at the Hague, 1955 and as the Warsaw Convention as amended at the Hague, 1955 and at Guatemala City, 1971 respectively (see Art. XIX of the Hague Protocol and Art. XVII of the Guatemala Protocol). This way the material provisions of the Warsaw Convention and of the Hague Protocol, which have not been amended by the Guatemala Protocol have been incorporated in the new instrument.

Attention has been also paid to the Guadalajara Convention. According to art. XXV of the Guatemala Protocol as between the Parties to the Warsaw Convention as amended by this Protocol which are also Parties to the Guadalajara Convention, any reference to the Warsaw Convention contained in the Guadalajara Convention shall include reference to the Warsaw Convention as amended at the Hague 1955 and at Guatemala City 1971, in cases when the carriage under the agreement referred to in Article 1 paragraph b) of the Guadalajara Convention²² is governed by this Protocol. This provision provided in effect for an amendment of the Guadalajara Convention.

The Protocols do not place obligations on States to denounce the existing instruments when ratifying the appropriate protocol. This position seems to be justified, because of certain difficulties that would create imposing on States of a such obligation. It would complicate and prolong the process of ratification and it would lead to an open situation with regard to all member States which do not ratify the new instruments, multiplying the possibilities of conflicts.

Both Protocols, however, consist provisions that enable every State to denounce the existing instruments when ratifying the new instrument

²¹ A proposal that the new instrument elaborated during the Guatemala Conference should take the form of a new Convention was defeated.

²² This provision states, that "contracting carrier" means a person who as a principal makes an agreement for carriage governed by the Warsaw Convention with a passenger or consignor or with a person acting on behalf of the passenger or consignor.

in case they wanted to do so (Art. XXIV, para. 3 of the Hague Protocol and Art. XXII, para. 3 of the Guatemala Protocol²³).

When all States Parties to the Warsaw Convention and the Hague Protocol will ratify the Guatemala Protocol (this possibility could be, however, hardly predicted in time) they will cease to be applied even if they are not denounced.

The possibility of conflicts would be substantially increased if the Guatemala Protocol provided that it would enter into force on being ratified by relatively small number of States. The Guatemala Conference might so decide in order to expedite its entering in force. The Conference wanted, however, to avoid that, like the Hague Protocol, the new one would come into force, while the States the airlines of which represent major part of the total international scheduled air traffic, had not ratified it. Therefore Article XX provides that this Protocol shall enter into force on the ninetieth day after the deposit of the thirtieth instrument of ratification on the condition, however, that the total international scheduled air traffic, expressed in passenger-kilometers, according to the statistics for the year 1970 published by the ICAO, of the airlines of five States which have ratified this Protocol, represents at least 40 per cent of the total international scheduled air traffic of the member States of the ICAO in that year.²⁴ This formula could produce the result that more than thirty instruments of ratification would be required. Thus if, at the time of deposit of the thirtieth instrument of ratification, this condition has not been fulfilled, the Protocol shall not come into force until

²³ As between the Parties to this Protocol, denunciation by any of them of the Warsaw Convention in accordance with Art. 39 thereof or of the Hague Protocol in accordance with Art. XXIV thereof shall not be construed in any way as a denunciation of the Warsaw Convention as amended at the Hague 1955 and at Guatemala City, 1971.

²⁴ ICAO Statistics for 1970, calculated in millions of passenger—kilometers, taken from the *Draft Annual Report of the Council to the Assembly*:

<i>International Traffic</i>			
<i>Total</i>	162,840	=	100%
USA	37,925	=	23.27%
UK	17,179	=	10.56%
France	11,022	=	6.75%
German Fed. Rep.	7,525	=	4.60%
Canada	7,211	=	4.42%
Italy	7,120	=	4.36%
Japan	6,738	=	4.11%
Netherlands	5,980	=	3.68%
Switzerland	4,451	=	2.73%
Spain	4,192	=	2.57%
Australia	3,800	=	2.33%
Israel	2,451	=	1.50%
USSR	1,545	=	0.65%

the ninetieth day after this condition has been satisfied. This ratification requirement can be achievable only if the United States is among the ratifying States.

Contrary to this tendency towards promoting the universality of the international regime governing the carriage by air there has been adopted in Art. XVIII the artificial, restrictive Vienna formula,²⁵ which makes impossible for certain States (some of them Parties to the Warsaw Convention and the Hague Protocol) to sign and ratify, or to adhere to the Guatemala Protocol. This right has been given only to all States members to the United Nations or any of the Specialized Agencies or of the International Court of Justice, and by any other State invited by the General Assembly of the United Nations to become a Party to this Protocol (see also Art. XXI of the Protocol, according to which after its entry into force it shall be open for accession but only by any State referred to in the above mentioned Art. XVIII). Such a discriminatory provision, contrary to the concept of universality of the Warsaw Convention, as the most widely accepted private-law international convention can only but hamper the universal acceptance of the Guatemala Protocol. It should be therefore recognized as contrary to vital interests of the whole community of nations.

Contrary to the Warsaw Convention and the Hague Protocol which are deposited with the Polish Government, the Guatemala Protocol has been deposited with the International Civil Aviation Organization (Art. XIX).

Both Protocols contain rules which enable to solve the divergencies of interpretation resulting from the differences of their respective authentic texts, done in three, and in the case of the Guatemala Protocol in four languages: English, French, Spanish and Russian (according to the final provision of the Guatemala Protocol, the ICAO shall establish an authentic text of this Protocol in the Russian language). In the case of any inconsistency, the text in the French language, in which language the Warsaw Convention was drawn up, shall prevail.

Conclusions

The co-existence of different international legal regimes of carriage by air leads to the "disunification" of the system of air carriers' liability established over forty years in the Warsaw Convention.

The Warsaw Convention initially drafted in the late 1920's when international travel by air was starting to develop and flying was very

²⁵ See Art. 81 of the Vienna Convention on the Law of Treaties of 23 May, 1969.

hazardous does not meet the needs of the modern aviation, being the safest²⁶ branch of contemporary transportation. Hence the need to re-elaborate its rules in order to adapt them to the present conditions of aviation industry and newly developing social and economic needs.

This complex and difficult task has confronted the international legislators raising a lot of political, economic and social problems. Establishing an appropriate system of legal rules should be based on a just and equitable protection of the legitimate interests of the victims, while taking into account also the interests of all States Parties to the Warsaw Convention. This dilemma is very difficult to solve, because of the existing important differences in the economic development of different States. The solutions established in the Guatemala Protocol are, in my opinion, a good basis for the search for international consensus, which should be reached, as this is in the interests of further development of modern and safe international air transportation.

The main directions of development of the international law on the international carriage by air of passengers and baggage consist in my opinion in:

(a) a shift from a rule of liability based upon the principle of presumed fault to the rule of an almost absolute liability of the carrier (with the contributory negligence as the only available defence) coupled with unbreakable as a rule limits of due compensation;

(b) achieving a sufficient level of recovery for the great majority of victims (that has been achieved by the substantial increase of the existing "passenger" limits) and establishing an appropriate mechanism for a periodic revision of these limits, that would enable to adapt them to the changing social and economic realities;

(c) favouring prompt settlement of claims (especially through conciliation);

(d) simplifying the provisions concerning the documents of carriage in order to adapt them to the newly developed needs of mass air transportation, entering into the computerized era (automated ticketing, group ticketing, etc.) and the removal of anachronic in contemporary conditions severe sanctions for lack of certain formalities (exclusion of the possibility to break the limits of compensation on formalistic grounds such as lack of notice or the delivery of tickets);

²⁶ Amazing safety records have been made in the last decade, since the jet epoch began. Fatal accidents are considerably less per passenger mile than twenty years ago, although they are more and faster planes. According to the latest ICAO reports 1970 was the safest year in the history of commercial aviation to both domestic and international air travel. See: *Accidents with Passengers Fatalities on Scheduled Air Services 1950 - 1970*, "ICAO Bulletin," 1971, No. 5, p. 43.

(e) extending the scope of jurisdiction of national courts to permit a claimant to sue in his State of domicile or permanent residence;

(f) modernizing the relevant provisions on baggage and bringing them into line with the new regime of liability for damages caused to the health of the passenger or damages caused in the consequence of his death.

These principles tend to assure prompt, sufficient and certain recovery for victims of aviation accidents. They seem to be in line with the humanitarian tendency which characterises the process of development of the modern law on damages for death or injury of persons, which leads to the extension of the protection of the interests of the victims.

I would like to express the hope, that in spite of sharp differences existing between various States on some solutions adopted in the Guatemala Protocol a *modus vivendi* will be found to enable the Protocol to be universally accepted.²⁷ No effort should be spared to achieve this aim, to preserve the uniformity of the international legal regime of the international carriages by air. It is worth to emphasize the important role played by the ICAO in the process of elaboration of the new international rules concerning carriage by air of passengers and baggage. ICAO had during last twenty years devoted much effort to legal questions concerning the international carriage of passengers by air, thanks to which the elaboration of the necessary amendments to the Warsaw Convention embodied in the Guatemala Protocol has been made possible. The problems relating to air freight did not however receive all the attention they deserved within the ICAO, though their great importance appears to be self-evident. They have been a matter of minor importance when the Warsaw Convention was drafted, as international cargo carriage by air was virtually non-existent at that time. Since then, however, it has been in constant state of development, a new phase of which began with the introduction of the wide fuselage aircraft, which has opened up far-reaching prospects of the carriage of goods in the very future. In these circumstances it should be regretted that the Legal Committee of ICAO and subsequently the Guatemala Conference were unable to devote their attention to the problems of the air carriage of cargo. Every effort should be made now to fulfil this gap to adapt the internationally unified rules governing international carriage of cargo by air to the latest requirements of constantly developing international commerce and transport.

To conclude these remarks I would like to indicate, that the directions in which the international rules governing the carriage by air are being

²⁷ The Guatemala Protocol has been adopted by the Guatemala Conference by a vote of 36 for and 6 against with 4 abstentions. The delegations of the socialist countries voted against the adoption of the Protocol.

developed are generally in conformity with the socio-economic developments of contemporary world and the enormous advance of modern science and technology.

Because of different stages of development of particular countries and divergent political interests involved, it will be very hard to achieve unanimous agreement on all important matters in the discussed domain. The dedicated efforts of ICAO working constantly towards restoring the universal unification of international air transport law have brought some effects. The new rules governing the international carriage of passengers and baggage by air established in the Guatemala Protocol, though not yet universally accepted, indicate the humanitarian trend towards extending and strengthening protection of the interests of air passengers and appear at the same time being capable to meet the needs of modern air transportation, entering the new era of the jumbo and supersonic jets. The task of a wholesale revision of the outdated provisions established in the Warsaw Convention will be probably long and arduous, but the challenge must be met if international law of air carriage is to keep pace with socio-economic developments and the constant progress of technology in the contemporary world.

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Les opérations de l'aviation allemande en Pologne en 1939 à la lumière du droit international

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Plus de trente ans se sont écoulés depuis la campagne de Pologne de septembre 1939. C'est un laps de temps suffisant pour pouvoir, *sine ira ac studio*, se former une opinion du point de vue juridique sur les opérations menées par la *Luftwaffe*. Cela est d'autant plus nécessaire que le caractère incontestablement agressif de la guerre elle-même¹ n'exclut pas le respect par les deux adversaires du *iuris in bello*², et la faute de l'agresseur n'en est que plus grande s'il ne l'observe pas. C'est pourquoi il semble utile de déterminer si et dans quelle mesure la *Luftwaffe* a respecté les principes du droit de la guerre aérienne au cours des opérations. Toute la population polonaise est absolument convaincue que les agissements de l'aviation

¹ Cf. W. HOFER, *War premeditated—1939*, London 1955, p. 11: « One might say that in 1914 the angel of peace was killed by an accident or, possibly, by negligence. In 1939 it was murdered, in other words, killed consciously and deliberately ».

² Cf. J. BOWNLIE, *International Law and the Use of Force by States*, Oxford 1968, pp. 406 - 408. *Ibid.*, p. 406, n° 3 — ample bibliographie à ce sujet. Dans la littérature polonaise, cette opinion est représentée par K. SKUBISZEWSKI, *Prawo wojny i neutralności w świecie współczesnym* [Les lois de la guerre et la neutralité dans le monde d'aujourd'hui], « Ruch Prawniczy, Ekonomiczny i Socjologiczny », 1967, n° 1, pp. 109 - 111.

allemande en septembre 1939 étaient criminels. Malgré cette conviction, le problème n'est pas toujours apprécié de façon non équivoque, même par nos anciens alliés occidentaux et, de plus, on n'y consacre pas beaucoup de place et d'attention dans la littérature occidentale. Sans parler des opinions émises en Allemagne durant la guerre et en République Fédérale Allemande après 1945, selon lesquelles la *Luftwaffe* s'est comportée de façon chevaleresque et n'a pas terrorisé la population civile, on rencontre toujours des opinions du genre de celle de l'Anglais Liddel Hart ou du Français Hébrard³, qui estiment que l'aviation allemande a, en principe, respecté les règles du droit de la guerre aérienne. Par contre, ceux qui condamnent la *Luftwaffe*, le font d'une manière générale et laconique, sans que leur opinion soit étayée par les faits et sans procéder à une analyse juridique approfondie⁴.

C'est la même tendance qui est à l'origine du fait que la question de la responsabilité du maréchal Goering des agissements de la *Luftwaffe* en violation du droit au cours de la Seconde Guerre mondiale (entre autres en Pologne), a été passée sous silence dans le verdict de Nuremberg. Elle a aussi été à l'origine de la remise *ad infinitum* en 1948 par la Commission des Nations Unies à Londres de la plainte polonaise dans laquelle notre pays demandait des sanctions pénales contre les Allemands, auteurs des bombardements des objectifs non militaires et des massacres perpétrés du haut des airs sur la population civile sans défense au cours de l'agression contre la Pologne en septembre 1939⁵.

Il semble donc hautement indiqué d'examiner la pratique des opérations de la *Luftwaffe* au cours de la campagne de Pologne en 1939, sous l'angle de la légalité de ces opérations, en tenant compte des positions des deux parties et en les confrontant, de manière à obtenir un tableau objectif de la question.

³ Cf. L. HART, *The Revolution in Warfare*, London 1946, p. 72: « Turning to the German air operations during the earlier stages of the war, when the Germans had a great superiority of bombing force, it had to be recognized that their practice kept close to the conditions of their theory and of their pre-war proposal »; J. HÉBRARD, *Vingt-cinq années d'aviation militaire*, Paris 1945, vol. 1, p. XII: « Il est d'ailleurs très remarquable que l'Allemagne, lorsqu'elle lança sa première offensive contre la Pologne, fut loin de rechercher avant tout les effets de destruction à distance et de terreur auxquels beaucoup s'attendaient ».

⁴ Cf. H. LAUTERPACHT dans: L. OPPENHAIM, *International Law*, 7^e éd., vol. 2, London 1958 p. 527: « However, as early as September 23, by ordering indiscriminate aerial bombing of Warsaw, she clearly departed from that understanding ».

⁵ Cf. M. MUSZKAT, *Niektóre zagadnienia wojny powietrznej w świetle prawa narodów* [Certains problèmes de la guerre aérienne à la lumière du droit international], « Wojskowy Przegląd Prawniczy », 1948, n° 3/4, pp. 251 - 253.

I. Les opérations de la Luftwaffe — le point de vue allemand

Instructions, documents et déclarations officielles

Les instructions officielles données à la *Luftwaffe* avant 1939 reconnaissaient la validité des principes contenus dans le règlement de la guerre aérienne de la Haye de 1923. Elles prévoyaient donc de limiter les attaques aériennes aux objectifs strictement militaires, et interdisaient de bombarder les villes ouvertes ainsi que la population civile. C'est ainsi qu'en annexe à une étude datée du 20 VII 1939 et intitulée *Aufmarsch — und Kampfانweisung für die deutsche Luftwaffe*, on a émis une instruction comprenant 31 thèses commentées concernant la façon de mener la guerre aérienne et constituant la copie textuelle des règles de la Haye⁶. Ensuite, dans une instruction de service pour l'aviation (LDv 64/II) intitulée *Kriegsvölkerrecht. Sammlung zwischenstaatlicher Abkommen von Bedeutung für die höhere Führung* du 1^{er} octobre 1939, on a répété les règles de la Haye en y ajoutant le commentaire suivant: « Les règles de la Haye du droit de la guerre aérienne n'ont pas de force de loi, mais elles sont importantes du point de vue pratique car elles constituent une indication quant à la direction future du développement du droit de guerre aérien »⁷. De plus, ainsi que l'affirme Spetzler, peu avant le début des opérations militaires, on a donné de nouveau un ordre aux équipages des avions de la *Luftwaffe*, leur interdisant d'attaquer les villes et les agglomérations en violation du droit aérien, quoique cette interdiction leur ait été connue aussi bien par l'instruction LDv 64/II que des cours qu'ils avaient suivis pendant leur formation⁸.

De son côté, le maréchal Kesselring, qui était à l'époque chef d'État-major de l'aviation, écrit: « nous avons inclu dans l'instruction des règles morales qui, conformément aux exigences de notre conscience, devaient également être respectées par nos aviateurs. C'est à eux qu'il appartenait de limiter les attaques aux objectifs strictement militaires. Il était interdit d'attaquer les villes ouvertes ou la population civile »⁹.

De même, dans les tâches générales attribuées à la *Luftwaffe* dans le *Fall Weiss* du 3 IV 1939, il n'est pas question ni de bombarder les objectifs

⁶ Cf. E. SPETZLER, *Luftkrieg und Menschlichkeit*, Göttingen 1956, p. 221, n° 351.

⁷ *Ibid.*, p. 221.

⁸ *Ibid.*, p. 231.

⁹ Cf. A. KESSELRING, *Soldat bis zum letzten Tag*, Bonn 1953, pp. 54 - 55. *Ibid.*, p. 429: « Das Reichsluftfahrtministerium hatte in Anlehnung an die Haager Luftkriegsordnung sinngemässe Regeln für den Luftkrieg entworfen ». En ce sens également N. NEUGEBAUER, *The Defence of Poland, September 1939*, London 1942, p. 44: « The final principles of aerial warfare were laid down in the Air Force Regulations in 1938 - 39 ».

non militaires ni d'autant plus la population civile. Après avoir détruit aussi rapidement que possible l'aviation polonaise, la *Luftwaffe* devait en effet: a) perturber la mobilisation et empêcher le déploiement prévu des armées polonaises, b) appuyer directement les armées de terre, surtout les unités avancées dès qu'elles auraient franchi la frontière. D'autre part, dans le plan opérationnel de la *Wehrmacht* du début de juillet 1939, on peut lire ce qui suit sur la coopération de l'aviation avec l'armée de terre: « Dès le premier jour des opérations, la *Lufwaffe* attaquera et détruira l'aviation polonaise et ses installations terrestres. De plus, elle s'efforcera de: a) perturber la mobilisation par l'attaque des centres polonais de mobilisation, b) empêcher la formation des groupes de combat en Galicie occidentale et à l'ouest de la Vistule devant le front de la 10^e Armée en attaquant le réseau ferroviaire polonais et c) arrêter la création d'un front défensif sur la Vistule et la Drwęca ainsi que sur la Narew face au groupe d'armées Nord » ¹⁰.

Le premier jour de la guerre, le 1^{er} IX, le président F. D. Roosevelt adresse un appel aux gouvernements de Pologne, de France, de Grande-Bretagne, d'Allemagne et d'Italie pour que chacun d'entre eux « publicly affirm its determination that its armed forces shall in no event and under no circumstances undertake bombardment from the air of civilian population of unfortified cities, upon the understanding that the same rules of warfare will be scrupulously observed by all their opponents ». Dans sa réponse du même jour, le gouvernement polonais déclara qu'il était « in complete agreement with the principles expressed and with the sentiments dictating them. Governed by these principles, the supreme military authorities in Poland have issued the formal order of abstention, in the case of war, from bombing open cities and from similar actions constituting an immediate danger to the civilian population ». Après la réponse de la France et de la Grande-Bretagne en date du 2 septembre, confirmant l'intention des deux gouvernements de mener la guerre « with a firm desire to spare the civilian population by confining aerial bombardment to strictly military objectives in the narrowest sense of the word, on September 2 Germany took note of that Declaration and announced her intention to adhere to the same policy subject to reciprocity » ¹¹.

¹⁰ Cf. N. von VORMANN, *Der Feldzug 1939 in Polen*, Weissenburg 1958, p. 59.

¹¹ Voir les textes des réponses dans: « Revue Internationale de la Croix Rouge », septembre 1939, pp. 730 - 735. La réponse polonaise dans: *The German Invasion of Poland*, London 1940, p. 15 et dans: *Polskie Siły Zbrojne w drugiej wojnie światowej* [Les forces armées polonaises dans la Seconde Guerre mondiale], London 1951, vol. 1, part 2, p. 3. De même dans sa réponse à une lettre du 7 septembre du ministère des Affaires étrangères français concernant l'humanisation de la

Simultanément, le 1^{er} septembre à 20⁰⁰ heures, on a remis à l'ambassadeur Lipski à Berlin, la note suivante:

« Auswärtiges Amt, RM-433-II — Note verbale — The Minister for Foreign Affairs has the honour to communicate to the Polish Embassy the following: The German air force has received the order to limit its action, during the hostilities in Poland, to military objectives. It is apparent that this order will be upheld only on condition that the Polish air force adheres to the same rule. Should this not be the cause, the most severe reprisals will be taken on the German side »¹².

Les discours que Hitler prononça durant la campagne de Pologne contiennent également des assurances sur le désir de respecter les principes du droit de la guerre aérienne, mais ils sont prononcés sur un ton brutal et ne sont pas dépourvus de menaces et de mensonges. C'est ainsi qu'il parla devant le Reichstag le 1^{er} septembre: « [...] the necessary mesures will be taken so that the war is not directed against and does not affect, women and children. The German air force has received the order to limit its actions, during the hostilities in Poland to military objectives. But if the enemy thinks he can from that draw carte blanche on his side to acts as he wills, he will receive a reply which will deprive him of hearing and seeing »¹³. C'est sur le même ton qu'est prononcé le discours du 19 septembre à Gdańsk, dans lequel il dit notamment: « J'ai donné l'ordre à l'aviation allemande de mener cette guerre d'une façon humanitaire, c'est-à-dire uniquement contre les armées combattantes [...] J'ai donné l'ordre d'épargner les villes autant que possible. Évidemment, quand une colonne militaire traverse une place et que l'aviation l'attaque, il se peut malheureusement qu'il y ait d'autres victimes. Pourtant, nous avons maintenu ce principe en général et, dans les localités dans lesquelles nous n'avons pas rencontré de résistance de la part d'éléments irresponsables ou de bandits, pas une seule vitre n'a été cassée. Mais, par contre, lorsqu'à Varsovie com-

guerre, Joachim von Ribbentrop déclara entre autres: « Les forces armées allemandes seront également à l'avenir fidèles aux principes émis par le Führer sur la façon chevaleresque et humanitaire de mener la guerre » — cité dans: A. RZEPNIEWSKI, *Wojna powietrzna w Polsce w 1939* [La guerre aérienne en Pologne en 1939], Warszawa 1970, p. 182.

¹² Cité dans: *The German Invasion...*, pp. 17-18. Il importait tellement aux Allemands que cette note soit transmise au ministre des Affaires étrangères polonais qu'ils ont permis à l'ambassadeur de Pologne à Berlin — Lipski d'en communiquer le texte par téléphone à Varsovie le 2 septembre à 2 h. du matin. Elle a été aussi remise le 2 septembre au ministre Beck par l'intermédiaire de l'envoyé des Pays-Bas à Varsovie, ainsi que par le ministère des Affaires étrangères hollandais, à l'envoyé de Pologne à la Haye — Wacław Babiński, *op. cit.*, pp. 18-20.

¹³ Cf. *Der Grossdeutsche Freiheitskampf* (reden Adolf Hitlers vom 1 September 1939 bis 10 März 1940), München 1940, p. 25.

mence une guerre menée par la population civile dans toutes les rues, toutes les maisons, il est clair que les opérations militaires englobent toute la ville »¹⁴. Enfin, on trouve le passage suivant dans le discours de Hitler prononcé le 6 octobre devant le Reichstag, discours dans lequel il fait le point de la campagne de Pologne: « Je me suis efforcé dans cette guerre avec les Polonais de n'utiliser l'aviation que contre ce qu'on appelle les objectifs militaires, et éventuellement là, où nous avons rencontré une résistance »¹⁵. Mais ses discours ne sont pas dépourvus également de calomnies grossières et d'insinuations à l'adresse de nos troupes et de la population civile, dans le but évident de provoquer chez les soldats allemands la haine et la soif de vengeance, ainsi que de trouver une justification pour ses propres cruautés. Par exemple, dans son discours du 19 septembre, il prétend que « les Polonais ont souillé leur honneur militaire [...] assassinant honteusement les aviateurs qui sautaient en parachute », puis il affirme le 6 octobre que « la légende doit immortaliser les magnifiques aviateurs héroïques qui, sachant que chaque pilote abattu, si la mort ne survient pas dans les airs, devra périr, massacré à terre d'une façon horrible après la descente en parachute [...] »¹⁶.

Vers la mi-septembre (le 13 IX) paraît une déclaration caractéristique de l'OKW qui donne nettement l'impression de chercher à justifier d'avance les crimes commis. On peut y lire que « les égards dont font preuve l'artillerie et l'aviation allemandes pour les villes ouvertes, les places ou les villages sont liés à la condition de ne pas voir ces localités transformées en champs de bataille par l'adversaire. Étant donné que les Polonais rejettent ce principe, sans égards pour la population civile, les forces armées allemandes briseront dorénavant la résistance dans ces localités par tous les moyens dont elles disposent. L'aviation allemande et l'artillerie mèneront toutes les activités militaires indispensables à démontrer au plus vite à ces agglomérations l'inanité de leur résistance. C'est uniquement le gouvernement polonais qui devra être rendu responsable des suites que cela entraînera pour la population durement éprouvée [...] »¹⁷.

¹⁴ *Ibid.*, pp. 51 - 52 et E. R. UDERSTÄDT, *18 Tage Weltgeschichte, Der Feldzug gegen Polen*, Berlin 1940, p. 83.

¹⁵ Cf. *Der Grossdeutsche...*, p. 98.

¹⁶ *Ibid.*, p. 58 et 70.

¹⁷ Voir E. SPETZLER, *op. cit.*, p. 232, n. 72 et E. R. UDERSTÄDT, *op. cit.*, p. 65. Un jour après cette déclaration, M. Chamberlain constata à la Chambre des Communes que de cette façon les Allemands avaient eux-mêmes rompu leurs propres engagements de ne pas bombarder les villes ouvertes, ce qui à l'avis de E. SPETZLER (*op. cit.* p. 232, n. 72) n'est pas juste, car il ne s'agissait selon lui que de donner un « Warnung an die polnische Führung, den Bandeneinsatz einzustellen ».

Par contre, les communiqués de l'OKW de septembre 1939, passent ce genre d'activité sous silence. Les opérations de la *Luftwaffe* se concentreraient selon eux sur l'attaque des *militärisch wichtige Ziele*. C'est pourquoi, on y parle constamment d'attaques d'aérodromes, de gares, de voies ferrées, de transports de troupes et d'appui aux unités combattantes de l'armée de terre, ainsi que de bateaux de guerre coulés dans les ports. On y mentionne aussi souvent des attaques contre des objectifs militaires importants à Varsovie, tout en affirmant qu'on s'est efforcé d'éliminer dans la mesure du possible les conséquences pénibles de ces attaques pour la population civile (OKW — Bericht du 24 IX). On peut dire en général, que dans les communiqués de l'OKW, il n'y a pas la moindre trace d'une activité de la *Luftwaffe* contraire au droit.

De même dans les ordres du jour du maréchal Goering, commandant cette formation, il n'est question que de « détruire l'ennemi en quelque endroit qu'il se trouve ou batte en retraite » (1 IX), de « conquérir la maîtrise des airs et de participer activement à la progression rapide des armées » (7 IX), ainsi que de « ne pas permettre à l'aviation polonaise d'apparaître dans le ciel allemand » (27 IX). Évidemment, dans les *Tagesbefehle*, il n'y a pas l'ombre d'un doute, quant à la justesse du choix des objectifs et la légalité des attaques¹⁸.

La littérature hitlérienne de 1939 à 1942

Le tendance dominante dans cette littérature peut être formulée en deux points. Premièrement, la *Luftwaffe* a lutté d'une façon chevaleresque et deuxièmement, elle n'a attaqué que des objectifs militaires à l'exclusion de tout autre. C'est ainsi qu'on peut lire dans le livre de Eichelbaum qu'un aérodrome a été détruit, mais que les maisons du voisinage et les rues sont demeurées intactes, ce qui constitue « une preuve évidente que les aviateurs allemands n'attaquaient que les objectifs militaires »¹⁹. Hadamovsky prétend qu'on a « interdit les attaques nocturnes [...] afin d'épargner dans la mesure du possible les objectifs non militaires et éviter les pertes parmi la population innocente », et qu'on a interdit de faire usage des armes de bord au cours des raids de bombardement, afin de « ne pas blesser des femmes et des enfants innocents »²⁰. Supf décrit l'attaque de la gare de Brest sur Bug, au cours de laquelle les aviateurs, voyant qu'il y avait beaucoup de maisons d'habitation du côté d'où ils arrivaient, virè-

¹⁸ Voir P. GOLDNER, *Der Feldzug in Polen 1939*, Berlin 1939, pp. 18 et 60; E. R. UDERSTADT, *op. cit.*, p. 99; P. SUPF, *Luftwaffe schlägt zu*, Berlin 1939, p. 97 et A. KESSELRING, *op. cit.*, pp. 21, 52.

¹⁹ Cf. H. EICHELBAUM, *Schlag auf Schlag*, Berlin 1939, p. 24.

²⁰ E. HADAMOVSKY, *Blitzmarsch nach Warschau*, München 1940, p. 190 et 240.

rent et attaquèrent la gare de l'autre côté où il y avait beaucoup d'espace libre et cite les paroles d'un sergent d'aviation qui affirme avoir reçu « l'ordre exprès d'épargner la population civile qui fuyait sur les routes avec les colonnes de l'armée. Pour ne pas commettre d'erreur, il ne pouvait attaquer qu'en rase-mottes »²¹. On peut aussi lire des récits lyriques dans lesquels l'aviateur allemand fait un signe amical de la main au pilote polonais qui descend en parachute ou craint de voir l'épave de l'avion qui tombe blesser le pilote qui a sauté en parachute car « on ne souhaite aucun mal à l'ennemi vaincu »²².

En ce qui concerne Varsovie, selon les affirmations hitlériennes, elle était traitée comme une ville ouverte et épargnée à dessein. Seuls les objectifs militaires tels que les aérodromes, les casernes, les gares et les ponts étaient attaqués par la *Luftwaffe*. Il n'était pas question de s'en prendre à la population civile et seule l'artillerie polonaise qui tirait sur les quartiers habités, provoquait des incendies²³. Par contre, l'attaque du 25 septembre a été conduite sans merci, pour « abrégé les souffrances sans nom de la population civile »²⁴. Du reste, son objectif était de détruire l'adduction d'eau potable, l'usine à gaz, la centrale électrique, les gares, les casernes, les installations industrielles et le dispositif de défense. Par contre les quartiers qui n'avaient pas été transformés par les Polonais en ligne de front, ont été épargnés par l'aviation allemande²⁵. Bien plus, le communiqué diffusé par la radio de Varsovie sur les attaques de l'aviation allemande contre un hôpital au cours desquelles des centaines de malades et de blessés auraient péri, n'est que pur mensonge, c'est de la *Greuelpropaganda* déjà pratiquée au cours de la Première Guerre mondiale²⁶.

D'autre part, on lit que l'adversaire est fanatique et enclin à la cruauté; c'est pourquoi chaque équipage abattu au-dessus de son territoire risque de trouver la mort dans des tortures. « Il vaut donc mieux subir les plus grands sacrifices et les plus grands dangers [...] pour ne pas tomber vivant en tant que pilote aux mains des bandes polonaises »²⁷. On trouve aussi des histoires selon lesquelles les avions polonais seraient marqués aux couleurs allemandes; on aurait tiré sur des aviateurs allemands descendant

²¹ Cf. P. SUPF, *op. cit.*, pp. 35, 80.

²² *Ibid.* p. 78 et P. SUPF, *Flieger, Kämpfer, Kameraden*, Stuttgart 1941, p. 28.

²³ Cf. E. KALISCH, *Deutscher Siegeszug in Polen*, Stuttgart 1941, p. 13; P. SUPF, *Luftwaffe...*, p. 89; P. SUPF, *Flieger...*, p. 82; E. R. UDERSTÄDT, *op. cit.*, p. 59.

²⁴ Cf. P. SUPF, *Luftwaffe...*, p. 91.

²⁵ Cf. H. EICHELBAUM, *op. cit.*, p. 100 et O. DIETRICH, *Auf den Strassen des Sieges*, München 1940, p. 173.

²⁶ Cf. P. SUPF, *Luftwaffe...*, p. 108.

²⁷ Cf. A. KESSELRING, *op. cit.*, p. 55 et E. HADAMOVSKY, *op. cit.*, pp. 131, 202.

en parachute; on emploierait des balles dum-dum; des réfugiés auraient tiré à mitrailleuse sur des avions allemands ou bien on aurait édifié sur la route Lublin - Chełm des barrages anti-tanks avec les dépouilles des *Volksdeutsch* assassinés²⁸. Devant ces « atrocités polonaises » il n'est pas étonnant que le pilote de la *Luftwaffe* rentrant d'une mission de combat, fredonne le poème de Walter Flex: « Wir stossen unsere Schwerter || Nach Polen tief hinein || Die Hand wird hart und härter || Das Herz wird hart wie Stein »²⁹.

L'appréciation des opérations aériennes pendant la campagne de Pologne émise en République Fédérale Allemande après 1945

On trouve les premières énonciations intéressantes à l'époque du procès de Nuremberg, quand les chefs allemands, inculpés de crimes de guerre, déposent au cours de l'instruction ou du procès même.

C'est ainsi que le général Walter von Brauchitsch engage le dialogue suivant avec le procureur polonais Sawicki qui l'interroge: « S.: Que savez-vous des opérations de l'aviation allemande au cours de la campagne de Pologne? B.: Je sais seulement que l'aviation appuyait les opérations de l'armée de terre en attaquant les voies de communication. S.: Ne savez-vous rien des bombardements des villes ouvertes? B.: Je ne sais rien. Nous n'avons jamais rien demandé d'autre que la destruction des voies ferrées, pour entraver les mouvements de troupes polonaises. S.: Et vous ne savez assurément pas qu'on tirait sur les réfugiés en exode sur les routes? B.: Je n'ai rien entendu de semblable. S.: Des milliers de personnes sont tombées sur les routes de Pologne. B.: Peut-être les aviateurs les avaient-ils pris pour la troupe. S.: Vous souvenez-vous de ce magnifique mois de septembre 1939, quand la visibilité était parfaite et que ces gens étaient attaqués à la mitrailleuse. B.: Je dois dire en toute honnêteté que je ne sais rien de tout cela, car je ne l'ai pas vu et à part les missions purement militaires demandées, dont j'ai déjà parlé, je n'avais qu'un contact très lâche avec l'aviation »³⁰.

De son côté, le maréchal Goering dans sa déposition du 13 III 1946, devant le procureur polonais, affirmait qu'il avait donné à la *Luftwaffe* l'ordre de détruire l'aviation polonaise et d'attaquer les noeuds ferroviaires d'importance vitale pour le transport d'unités militaires. C'est pourquoi l'aviation allemande n'a attaqué que les objectifs militaires en Pologne

²⁸ Cf. O. DIETRICH, *op. cit.*, p. 91; *Unsere Flieger über Polen*, Berlin 1939, p. 103; P. SUPF, *Luftwaffe...*, p. 79; E. HADAMOVSKY, *op. cit.*, p. 187.

²⁹ Cf. P. SUPF, *Luftwaffe...*, p. 36.

³⁰ Voir J. SAWICKI, *Zburzenie Warszawy* [La destruction de Varsovie], Warszawa 1949, pp. 172 - 174 et J. SAWICKI, *Przed polskim prokuratorem* [Devant le procureur polonais], Warszawa 1968, p. 113.

à l'exclusion de tout autre. A Varsovie, on a attaqué au début l'aérodrome d'Okęcie et les gares. La ville a été attaquée le 25 septembre au cours d'un raid décisif, après qu'ait été rejetée la demande de reddition. Les autorités de Varsovie avaient été prévenues qu'en cas de refus la ville subirait l'attaque la plus violente. D'ailleurs, on a d'abord attaqué les forts, ensuite les batteries d'artillerie se trouvant dans la ville et les formations militaires ³¹.

Le maréchal Kesselring, témoin cité par la défense de Goering a défendu la légalité des attaques de la *Luftwaffe* en Pologne et a protesté énergiquement contre l'affirmation de l'accusateur principal Maxwell Fife que les Allemands, contrairement au droit avait attaqué de nombreuses villes polonaises ³². Dans ses Mémoires, il prétend que le bombardement de Varsovie en tant que ville défendue était admissible, car cela correspondait à l'usage tactique de l'artillerie. A son avis d'ailleurs, on s'est borné dans la première phase à attaquer le noeud de communication et les objectifs militaires ce qui n'excluait pas que des maisons d'habitation situées à proximité aient été atteintes à cause de la dispersion des bombes. Ensuite, à cause des incendies et de la fumée, il n'était pas possible de viser d'une manière précise ce qui, avec l'effet de dispersion des bombes, a entraîné la destruction de quartiers qui n'avaient pas été fixés comme objectifs des attaques aériennes. Pour résumer, il déclare qu'il se porte personnellement garant de ce que la guerre a été menée par les Allemands d'une manière chevaleresque et humanitaire, évidemment pour autant que la guerre puisse être quelque chose de chevaleresque et d'humanitaire ³³.

Par contre, chez le général Galland, on trouve l'opinion que le *Gross-einsatz der Luftwaffe* sur Varsovie avait non seulement pour objectif d'atteindre un but stratégique au cours de la campagne de Pologne, mais qu'il devait surtout servir d'exemple et effrayer les Alliés. C'est dans ce sens, à son avis, que la propagande allemande a fait autant de bruit ³⁴.

De son côté, le général Vormann, estime que Hitler épargnait la ville et les gens mais que, lorsqu'on refusa de capituler, eut lieu l'attaque à la suite de laquelle « des incendies se sont étendus et la majorité des installations de défense ont été détruites » ³⁵.

Ensuite, on peut lire chez Bekker que la *Luftwaffe* n'a jamais mené d'opérations terroristes, tandis que Feuchter, dans son ouvrage sur la guerre aérienne comptant 400 pages, n'en consacre que 3 à la campagne

³¹ Cf. T. CYPRIAN, J. SAWICKI, *Przed trybunałem świata* [Devant le tribunal du monde], vol. 1., Warszawa 1962, pp. 304 - 305.

³² Cf. A. KESSELRING, *op. cit.*, p. 430.

³³ *Ibid.*, pp. 57, 59, 61, 77, 106, 107.

³⁴ Cf. A. GALLAND, *Die ersten und die letzten*, Darmstadt 1953, p. 63.

³⁵ Cf. N. VON VORMANN, *op. cit.*, p. 176.

de Pologne, n'en parlant d'ailleurs que du point de vue de la stratégie aérienne. Pour lui, la première phase des opérations de la *Luftwaffe* était stratégique (attaque de l'aviation polonaise et des voies de communication) et ensuite, jusqu'à la fin des hostilités, les raids avaient un caractère tactique (appui aux armées de terre engagées). C'est parmi cette seconde catégorie d'opérations qu'il compte l'attaque aérienne de Varsovie au cours de laquelle, les bombardements de la *Luftwaffe* ont joué un rôle d'une *vertikaler Artillerie*. Évidemment pour lui, la légalité de ces opérations ne fait aucun doute³⁶.

C'est Spetzler³⁷ qui fournit l'analyse la plus étendue des opérations de la *Luftwaffe* en Pologne. Il affirme, qu'au cours de la première phase, l'aviation allemande a lutté pour acquérir la suprématie dans les airs et qu'ensuite elle est passée à l'appui des opérations de l'armée de terre au bombardement des voies ferrées, des gares, des ponts et des routes pour entraver la liberté de mouvement de l'ennemi. Le danger encouru par la population était minime du fait que ces attaques n'avaient lieu que le jour et, lorsque les objectifs étaient situés dans des lieux habités, on utilisait des appareils du type Ju-87 et Me-110 dont la précision de bombardement en piqué était remarquable. Les attaques directes contre la population civile étaient strictement interdites et les effets indirects, impossibles à éviter au cours des opérations militaires, étaient limités au minimum. C'est pourquoi, on ne peut reprocher à l'aviation aucune négligence en cette matière. Seule la population civile de Varsovie a sérieusement souffert, mais les attaques avaient pour but d'appuyer l'armée assiégeant la ville et étaient admises selon l'art. 25 du règlement de la Haye de 1907. De plus, avant la plus grande attaque aérienne, on a demandé cinq fois au commandement de Varsovie de rendre la ville, appliquant ainsi l'art. 26 du même règlement qui n'était pas obligatoire pour l'aviation. Dans cette situation, seuls les objectifs prévus à l'art. 27 du règlement de la Haye de 1907 ne pouvaient être attaqués. Pourtant, dans la première phase des opérations, les unités allemandes dirigeaient leurs attaques uniquement contre des objectifs militaires, ce qui témoignait clairement de l'intention de préserver le plus possible la population. C'est au même but que tendaient les appels à la population pour qu'elle quitte la ville. Mais par la suite, il devint impossible d'épargner la population, étant donné le retrécissement du territoire assiégé sur lequel 100 000 soldats édifiaient des défenses qui constituaient des objectifs admis pour les attaques aériennes. Par contre, l'auteur estime qu'il n'y a pas lieu de pré-

³⁶ Voir C. BEKKER, *Angriffshöhe 4000-ein Kriegstagebuch der deutschen Luftwaffe*, Oldenburg 1964, cité par A. RZEPNIEWSKI, *op. cit.*, p. 9 et W. FEUCHTER, *Der Luftkrieg*, Frankfurt a/Main 1964, pp. 112 - 114.

³⁷ Cf. E. SPETZLER, *op. cit.*, pp. 234 - 238.

tendre que la *Luftwaffe* ne s'est pas suffisamment efforcée de préserver de la destruction les objectifs prévus à l'art. 27; reprochant aux Polonais de ne pas les avoir marqués de façon adéquate et de les avoir exploités à des fins militaires. Les Polonais sont donc en partie eux-mêmes coupables de ces destructions.

En conclusion, Spetzler estime que la guerre en Pologne a été menée de manière chevaleresque et humanitaire, et que durant toute la campagne, la *Luftwaffe* s'est efforcée avec succès de respecter les lois de la guerre, la clause Martens ainsi que les règles de la Haye. Évidemment, selon lui, il est arrivé que des bombes atteignent des objectifs non militaires, en raison de quoi, comme dans chaque guerre, la population civile a subi des pertes. Cela était dû à la dispersion des bombes, ou bien à des erreurs humaines ou matérielles, mais cela n'a pas été intentionnel et ne résultait d'aucune négligence ³⁸.

Ce n'est qu'en République Démocratique Allemande qu'on peut rencontrer une autre appréciation des événements. Par exemple, dans l'ouvrage collectif, intitulé *Septembre 1939*, parlant de la *Luftwaffe*, Helmert constate qu'elle « bombardait sans aucun égard les villages et les villes ouvertes et attaquait la population en exode » et, parlant de Varsovie, il souligne qu'on « réduisait en cendres surtout les quartiers ouvriers de la ville; en même temps les attaques aériennes et le feu de l'artillerie détruisaient des monuments uniques de la culture » ³⁹.

Cette exception ne fait que confirmer la règle; aussi faut-il opposer les faits aux opinions allemandes et confronter celles-ci avec le règlement de la Haye de 1923 sur la guerre aérienne. En effet, ces règles, selon les instructions allemandes, devaient être respectées, ou pour le moins, servir d'indication pour la ligne de conduite de la *Luftwaffe*. D'après l'opinion générale, elles constituaient aussi la meilleure tentative de codifier ce droit. Ce n'est qu'après cette confrontation que nous pourrions répondre objectivement à la question de savoir ce qui s'est réellement passé en septembre 1939 en ce qui concerne la légalité des opérations aériennes allemandes.

II. Les opérations de la *Luftwaffe* — le point de vue polonais

Les opérations aériennes autonomes

Conformément à l'art. 24 des règles de la Haye de 1923 sur la guerre aérienne.

« 1. Aerial bombardment is legitimate only when directed at a military objective, that is to say, an object of which the destruction or injury would constitute a distinct military advantage to the belligerent.

³⁸ *Ibid.*, p. 238.

³⁹ Cf. B. SPIRU, *September 1939*, Berlin 1959, pp. 98 et 103.

2. Such bombardment is legitimate only when dictated exclusively at the following objectives: military forces: military works: military establishments or depots: factories constituting important and well known centers engaged in the manufacture of arms, ammunition or distinctively military supplies: lines of communication or transportation used for military purposes.

3. The bombardment of cities, towns, villages, dwellings or buildings not in the immediate neighbourhood of the operations of land forces is prohibited. In cases where the objectives specified in paragraph 2 are so situated that they cannot be bombarded without the indiscriminate bombardment of the civilian population, the aircraft must abstain from bombardment⁴⁰ ».

Pourtant, dès le premier jour de la guerre, la *Luftwaffe* n'a tenu aucun compte de ces règles. Des groupes plus ou moins importants de bombardiers sillonnaient le ciel de toute la Pologne et jetaient, ne fut-ce que quelques bombes sur de nombreuses localités, comme s'ils voulaient marquer partout leur présence. Ces activités avaient un caractère éminemment terroriste surtout du fait qu'elles prenaient pour cible en particulier les quartiers d'habitation dépourvus de tout objectif militaire. On peut se faire une idée de l'étendue du phénomène en lisant le rapport du ministère de l'Intérieur en date du 3 septembre 1939⁴¹, qui établit les effets des raids aériens pour la seule journée du 1^{er} septembre. Si l'on excepte les bombardements des localités, contre lesquelles un raid aurait pu être justifié par l'existence d'objectifs militaires, tels que des aérodromes, des noeuds de communication, des casernes, des ponts, etc., on trouve dans le rapport 63 cas de bombardements d'agglomérations de diverse importance, parmi lesquelles des stations thermales comme Otwock ou des lieux de villégiature comme Anin, Augustów ou Białowieża, des cités résidentielles comme Jabłonna-Legionowo, ainsi que des cités historiques telles que Jabłonowo, Wilanów ou Płock. A Puck, par contre, au lieu de bombarder l'objectif militaire qu'était la base d'hydravions, on a détruit la localité, provoquant de grands incendies et tuant de nombreux civils⁴². C'est pourquoi le ministre Beck envoya dès le 2 sep-

⁴⁰ Voir également E. SPETZLER, *op. cit.*, p. 222, selon lequel le droit de la guerre aérienne en 1939 interdisait « Mittelbare Beeinträchtigung friedlicher Personen und Sachen anlässlich erlaubter Angriffe auf militärische Ziele, soweit sie vermeidbar ist oder in keinerlei Verhältnis zum Erfolg an den militärischen Objekten steht ». De même E. CASTREN, *The present Law of War and Neutrality*, Helsinki 1954, p. 405 et E. CASTREN, *La protection juridique de la population civile dans la guerre moderne*, RGDIP, janvier - mars 1955, n° 1, p. 134.

⁴¹ Cf. *The German Invasion...*, pp. 24 - 32.

⁴² Cf. *The German Invasion...*, p. 30 et W. TYM, *Łądowa obrona polskiego wybrzeża morskiego 1 - 19 września 1939* [La défense côtière polonaise 1 - 19 septembre 1939], « Wojskowy Przegląd Historyczny », 1957 n° 4, p. 201. Voir également P. SUPP, *Luftwaffe...*, p. 19 - 20 et J. GRABLER, *Mit Bomben und MGs über Polen*, Gütersloh 1942, pp. 27 - 29.

tembre une dépêche à Paris et à Londres, dans laquelle il déclarait que: « Depuis deux jours les Allemands procèdent en Pologne au bombardement méthodique des villes ouvertes sur les profonds arrières des armées combattantes. La méthode tendant à paralyser la vie intérieure du pays ne fait aucun doute. Entre autres, les villes de Lublin, Janów, Zamość, Chełm, Kowel, Łuck, ont été bombardées à basse altitude et les bombes ont été lancées sur le centre de ces villes. J'ai informé les ambassadeurs ici accrédités et j'ai protesté officiellement auprès du gouvernement hollandais, en constatant la violation des déclarations allemandes »⁴³.

Cela n'a pas servi à grand-chose, car dès le 3, les victimes sont nombreuses à Konstancin (où notamment la villa de l'ambassadeur des États-Unis A. J. Drexel-Biddle est endommagée), à Otwock, Grodzisk, Pruszków et Legionów et le 6 — ce sont les villes de Siedlce et de Łuków qui sont bombardées et tombent la proie des flammes⁴⁴. Cette pratique, continuée sans interruption jusqu'à la fin de la guerre a fait que selon des données incomplètes, 160 villes et cités, sans compter les villages, ont été bombardées⁴⁵.

En ce qui concerne le réseau ferroviaire, l'art. 24 pt 2 autorise qu'on l'attaque lorsqu'il est « utilisé à des fins militaires » (*used for military purposes*). Comment peut-on déterminer ce critère en pratique? On admet généralement que peuvent être l'objet d'attaques les lignes de chemin de fer qui servent surtout au transport des troupes et qui ont une importance fondamentale pour ce genre de convois (c'est-à-dire, lorsqu'on ne peut y suppléer par des changements d'itinéraire ou des détournements). Quant aux gares, ce seront celles dans lesquelles se concentrent d'importants mouvements de troupes (ce ne seront donc pas seulement des stations de passage). En outre, les attaques ayant pour but de détruire les voies de chemin de fer devraient avoir lieu en dehors des lieux habités, donc en principe en dehors des gares. La liberté d'action de l'aviation augmente dans la mesure où diminue l'éloignement des voies de chemin

⁴³ Voir *The Polish White Book*, n° 142, p. 139, cité dans: *Polskie Siły Zbrojne w drugiej wojnie światowej* [Les forces armées polonaises dans la Seconde Guerre mondiale], London 1959, vol. 1, part. 3, p. 7.

⁴⁴ Voir W. BARTOSZEWSKI, *Wrzesień Warszawy 1939* [Septembre 1939 à Varsovie], « *Warszawski Kalendarz Ilustrowany* », 1959, p. 100 et *The German Invasion...*, pp. 58, 59.

⁴⁵ Voir T. RAWSKI, Z. STĘPOR, J. ZAMOJSKI, *Wojna wyzwolenicza narodu polskiego w latach 1939 - 45* [La guerre de libération du peuple polonais en 1939 - 45], Warszawa 1966, p. 178; S. DATNER (*Zbrodnie Wehrmachtu w Polsce w czasie kampanii wrześniowej 1 IX - 25 IX 1939* [Les crimes de guerre de la Wehrmacht au cours de la campagne de Pologne 1er - 25 septembre 1939], Poznań 1962, pp. 22 - 23) énumère 158 villes ouvertes et villages bombardés en 1939, en soulignant que cette liste n'est pas complète.

de fer de la ligne du front; par contre, sur les arrières — surtout lointains, on traite de manière plus restrictive la notion d'usage à des fins militaires »⁴⁶.

Dès les premiers moments, la *Luftwaffe* a traité d'une façon très large l'utilisation des chemins de fer polonais *for military purposes*. Selon l'interprétation allemande et dans la pratique, tout le réseau ferroviaire polonais, avec le matériel roulant et les gares, constituait un objectif militaire, qu'on attaqua sans pitié. On ne faisait aucune distinction entre les transports de troupes et les trains évacuant la population civile; on attaquait les trains de passagers et l'on détruisait les voies sans égard pour leur destination et leur situation géographique.

En pratique, chaque train de marchandises devenait un objectif militaire nonobstant son chargement et sa destination⁴⁷. De plus, la destruction des locomotives de tous types devint en fait une compétition sportive⁴⁸. On faisait sauter les voies dans l'enceinte des gares quel que soit le danger que cela représentait pour les maisons et la population des alentours⁴⁹. De même, on détruisait les gares, même si ce n'étaient que de petites stations, sans aucune importance pour le transport des troupes,

⁴⁶ Voir RÖHRIG, *Die Ziele Selbständiger Luftangriffe*, Berlin 1938, pp. 60 - 66; J. M. SPAIGHT, *Air Power and the Cities*, London 1930, p. 213; J. M. SPAIGHT, *Air Power and War Rights*, London 1933, p. 227; P. W. WILLIAMS, *Legitimate Targets in Aerial Bombardment*, « A. J. », Vol. 23, July 1929, n° 3, p. 579, qui dans le code qu'il propose permet seulement à l'art. 24 pt 2 de bombarder les « lines of communication and transportation used primarily to transport armed forces, to convey supplies thereto or to communicate therewith » et les directives polonaises concernant le bombardement aérien en 1939 (*Polish principles of the aerial bombardment*, 1939) selon lesquelles « les trains [...] ne doivent être attaqués qu'au cas où il y a une raison fondée de croire qu'ils ont un caractère militaire ». C'est dans le même sens qu'après la Seconde Guerre mondiale se prononce E. CASTREN, *La protection...*, p. 128: « En ce qui concerne tout particulièrement les réseaux et le matériel de transport on ne saurait accorder aux belligérants le droit de les détruire partout. », et E. SPETZLER, *op. cit.*, pp. 174 - 175, 194 - 195. Par contre J. KROELL (*Traité de droit international public aérien*, Paris 1936, vol. 2, p. 100) estime que « La seule garantie résiderait dans la loyauté et l'honneur des combattants qui dans le doute s'abstiendraient du bombardement ».

⁴⁷ Cf. P. SUPF, *Luftwaffe...*, p. 41; P. SUPF, *Flieger...*, p. 30; H. EICHELBAUM, *op. cit.*, p. 98; *Unsere Flieger über Polen*, pp. 64, 18, 99, 102 et E. HADAMOVSKY, *op. cit.*, p. 218: « Der rechts auf einem Nebengleis stehende Güterzug, der mit Koks beladen war, war von den Schienen gehoben und beiseite gekippt worden ».

⁴⁸ P. SUPF, *Luftwaffe...*, p. 41: « zu einer besonderen Spezialität entwickelte sich bei uns das Abschiessen von Lokomotiven ».

⁴⁹ E. HADAMOVSKY, *op. cit.*, p. 195 et *The German Invasion...*, pp. 35, 218. Ce n'est que pour l'attaque de Łuniniec qu'on peut lire dans: E. HADAMOVSKY, *op. cit.*, p. 197: « Die Sprengung soll nicht in der Stadt erfolgen, um unnötige Verluste der Bevölkerung zu vermeiden. Weit draussen, wo sich die Bahn durch die endlosen Sümpfe zieht, da wollen wir unsere Bomben werfen [...] ».

situées loin à l'arrière, y compris les ateliers de réparation⁵⁰. On attaquait les trains de passagers, qu'on pouvait facilement identifier, provoquant des victimes civiles parmi les gens se rendant à leur travail ou évacués vers l'Est. L'une de ces attaques eut lieu déjà le 1^{er} septembre à 7 heures du matin sur la ligne Kutno - Łódź près du village de Boża Wola. Le train allant à Łódź, transportant uniquement des civils a été attaqué par les avions allemands que les passagers avaient pris pour des appareils polonais et avaient manifesté leur sympathie en agitant des mouchoirs. Les appareils allemands lancèrent 14 bombes dont 2 atteignirent le train provoquant la mort de 12 passagers⁵¹. Mais ce n'était que le début de ce genre d'actions. Par exemple, entre le 5 et le 9 septembre, des trains évacuant la population de Silésie et de Cracovie ont été bombardés à maintes reprises alors qu'ils stationnaient dans la gare de Sambor. Il y eut environ 100 morts. Un train de réfugiés a été attaqué le 8 à Demby Wielkie, tandis que le 13, un train semblable subissait le même sort à Rejowiec où l'on compta 15 morts. Un autre convoi de réfugiés fut bombardé et attaqué à la mitrailleuse dans la gare de Radziwiłłów. En résultat, on dénombra 50 morts et plusieurs centaines de blessés⁵². Même les trains sanitaires marqués de la croix rouge n'étaient pas épargnés. C'est ainsi que le train sanitaire n° 9 a été attaqué à deux reprises (le 7 à 14 heures et le 8 vers 3 heures du matin) à Radom. Malgré la destruction de 13 wagons, ont n'eut à déplorer aucune victime, car le train était vide. Auparavant, le 4 septembre, on avait bombardé le train sanitaire n° 25 à Szydłowiec. Par contre, le train sanitaire n° 311 a été bombardé le 12 septembre à Żabinka (Brześć sur le Bug) et une seconde fois, 15 kilo-

⁵⁰ H. EICHELBAUM (*op. cit.*, p. 51) décrit l'attaque de la gare de Zduńska Wola et E. HADAMOVSKY (*op. cit.*) à la page 222: « Ubrigens griff die nächste Sturzkampfmaschine noch das dreihundert Meter südlich gelegene Werkstat — und Reparaturgebäude an [...] ».

⁵¹ Cf. *The German Invasion...*, p. 28; S. DATNER, *op. cit.*, pp. 26 - 27 cite la déposition du chef du service de santé du district de Kutno, le docteur B. Jądraszko, en date du 19 II 1949, qui prit part à l'action de sauvetage des passagers du train bombardé. Selon le témoin, il y eut 30 morts et plusieurs dizaines de blessés.

⁵² Cf. *The German Invasion...*, pp. 65 - 66. Voir également A. KUROWSKI, *Lotnictwo polskie w 1939 r.* [*L'armée de l'air polonaise en 1939*], Warszawa 1962, p. 160, où l'on peut lire des relations des activités de l'aviation allemande dans la voïvodie de Cracovie: « 1 IX 5 heures 30 — Tunel — Kalety — trains mitrillés, nombreux morts et blessés, 15⁰⁰ heures — Czudek — trains mitrillés, nombreux morts et blessés ». Voir aussi E. KALISCH, *op. cit.*, p. 15: « Mit der Eisenbahn fortzukommen war für Zivilisten nur noch selten möglich. Wenn es gelang, war es sehr ungemütlich. Auf der Fahrt nach Lemberg haben Reisende [...] unterwegs zweiundsiebzig mal aussteigen müssen, um Schutz vor den Bombenangriffen deutscher Flieger zu suchen [...] ». Photographie d'un train de voyageurs bombardé publiée dans: *Der grosse deutsche Feldzug gegen Polen*, p. 110, cité dans: A. RZEPNIEWSKI, *op. cit.*, p. 89, n° 5.

mètres plus loin en direction de Baranowicze. Lors de la première attaque, 8 des blessés transportés ont été tués et 30 autres reçurent de nouvelles blessures (2 wagons ont été détruits). Au cours de la seconde attaque, on lança 15 bombes, mais le convoi ne fut pas atteint. Enfin, le 14 septembre, 3 bombardiers légers ont tiré à la mitrailleuse sur le train sanitaire stationnant dans la gare de Berezownica Wielka ⁵³.

Les hôpitaux de l'arrière n'ont également pas été épargnés. Le 16 septembre, la *Luftwaffe* bombarda l'hôpital de Brody qui fut entièrement détruit par l'incendie. Il y eut 78 morts, dont 3 médecins, 15 infirmières et 60 malades en traitement.

On attaquait pareillement, sans égard pour la sécurité de la population, toutes les localités qui abritaient les services évacués des ministères ou même le corps diplomatique. Ce dernier ayant été évacué à Krzemieniec après le 10 septembre avec le ministère des Affaires étrangères, la *Luftwaffe* bombarda la localité le 12 à 10 heures trente sans égard pour la sécurité de la population et pour l'immunité des membres du corps diplomatique. Ce fait est relaté par l'ambassadeur Drexel-Biddle dans un télégramme adressé à son gouvernement en date du 13 septembre: « This place (Krzemieniec), an open and defenceless village, has been bombed at 11 a.m. by four German planes, who have dropped at least 12 bombs, not only on the outskirts, but also along the main street of the place, at 300 yards from the Embassy of the United States, and still nearer to the other foreign missions and to the ministry for Foreign Affairs which are likewise installed there. Judging by the cases that have been verified up till now, eleven people were killed, forty severely wounded, and many shops seriously damaged. The population is panic stricken by the suddenness and the unexpected nature of the attack » ⁵⁴.

C'est ainsi que dans le cadre des opérations aériennes sur les arrières du front, la *Luftwaffe* a délibérément violé d'une façon flagrante les dispositions de l'art. 24 pt 1, 2 et 3 des Règles de la Haye de 1923 sur la guerre aérienne.

Les opérations tactiques de la *Luftwaffe*

Le cadre du bombardement tactique est délimité par l'art. 24 pt 4 des règles de la Haye de 1923, qui stipule que:

« In the immediate neighbourhood of the operations of land forces, the bombardment of cities, towns, villages, dwellings or buildings is legitimate provided that there exists a reasonable presumption, that the military concentration is sufficiently

⁵³ *The German Invasion...*, pp. 67 - 68, voir également S. ORDON, *Fire over Warsaw*, Glasgow 1942, p. 10: « Red Cross trains taking the wounded from Warsaw to Brześć have twice been bombed on the way ».

⁵⁴ *The German Invasion...*, p. 106.

important to justify such bombardment, having regard to the danger thus caused to the civilian population ».

Au cours de la campagne de Pologne, les Allemands attaquèrent sans merci les villes situées près du front, quoique il n'y avait là aucune concentration de troupes de quelque importance et ne prenaient absolument pas garde aux dangers qu'ils faisaient ainsi courir à la population civile. Ces attaques criminelles ont été initiées le 1^{er} septembre à 5 heures du matin par le raid sur Wieluń, raid suivi de plusieurs autres jusqu'à 14 heures. Dans cette petite ville de 16 000 habitants, située à une vingtaine de kilomètres de la frontière, il n'y avait aucun soldat ni aucun objectif militaire. Les avions allemands lancèrent leurs bombes puis, volant à basse altitude, attaquaient avec les armes de bord la population qui fuyait. Environ 1 200 personnes périrent dans les rues et sous les décombres et 70% des bâtiments de la ville furent complètement détruits. L'hôpital ne fut également pas épargné et l'on eut à déplorer la mort de 26 malades, 2 religieuses et 4 femmes de salle. C'est le centre de Wieluń qui fut particulièrement visé avec les places du Vieux et du Nouveau Marché. L'église paroissiale fut aussi endommagée ⁵⁵.

On procéda pareillement sur l'axe principal des opérations militaires Częstochowa - Piotrków. C'est ainsi que les 1^{er} et 2 septembre, la ville de Działoszyn subit un violent bombardement. On y dénombra 150 morts. Le 2, vers 13 heures, commença le bombardement de Kamieńsk, où il n'y avait aucun soldat et aucun objectif militaire, par contre, la ville était pleine de réfugiés venus de Radomsko. Au cours des deux raids du 2 septembre et du troisième du 3 septembre qui dura de 8 à 12 heures, avec de courts intervalles, environ 90% des bâtiments furent détruits et 150 personnes tuées. Il y eut relativement peu de morts car, après les alertes du 2 septembre, la population avait quitté Kamieńsk ⁵⁶. Ensuite, le village

⁵⁵ B. BOJARSKA, *Zniszczenie miasta Wielunia w dniu 1 września 1939* [La destruction de la ville de Wieluń le 1^{er} septembre 1939], « Przegląd Zachodni », 1962, n° 2, pp. 305 - 317. Voir également *Ein Jahr-Aufbau des Kreises Wieluń*, Herausgeber NSDAP Kreisleitung, 1941, pp. 16, 18, 19, 20, 24, 26, 28, 45, et A. RZEPNIEWSKI, *op. cit.*, p. 179. Description de l'attaque de Wieluń par l'aviation allemande, par le commandant Oskar Dienort dans: *Unsere Flieger...*, pp. 117 - 118: « Jetzt ist der Ortseingang zu Wieluń gerade unter mir. Ich mache mich fertig zum Stürzen. Mein erster Angriff auf lebende Ziele! In Bruchteil einer Sekunde hatscht's durch den Schädel. Da unten ist eine lebendige Stadt, eine Stadt voller Menschen — Allerdings, sind es Soldaten und ich greife nur die Soldaten an [...] Zurück! Die letzte Ladung, die schwerste, saust auf den Marktplatz hinab. Eine Fontäne von Flammen, Rauche und Splittern, höher als der Turm der kleinen Kirche [...] ».

⁵⁶ Voir B. BOJARSKA, *Zbrodnie Wehrmachtu na szlaku inwazji lewego skrzydła 10 Armii niemieckiej w wojnie 1939 r.* [Les crimes de guerre de la Wehrmacht sur le chemin de l'invasion de l'aile gauche de la 10^e Armée allemande en Pologne en 1939], « Przegląd Zachodni », 1964, n° 5 - 6, pp. 222 - 227 et S. DATNER, *op. cit.*, p. 24, où l'on cite la déposition du maire de la commune de Kamieńsk, Stanisław Sowiński.

de Grzędów, dans le district de Piotrków fut détruit le 3 septembre, par sept avions de la *Luftwaffe* qui lancèrent des bombes incendiaires et à fragmentation. Enfin, la ville de Piotrków a été bombardée sans répit du 1^{er} au 5 septembre, quoiqu'elle ait été dépourvue de tout objectif militaire et qu'il n'y ait pas eu de soldats, du moins les premiers jours de la guerre. Plusieurs centaines de personnes périrent sous les bombes et environ 200 maisons furent détruites⁵⁷.

Les suites des raids sur Sulejów ont été encore plus tragiques. La localité fut bombardée pour la première fois le 4 septembre vers 18 heures, puis le 5 et le 6, il y eut plusieurs autres bombardements précédant l'entrée des Allemands dans la localité le 7 septembre. Dans Sulejów même, il n'y avait aucune concentration militaire, tout au plus de petits groupes isolés de soldats en retraite qui venaient quémander du fourrage pour les chevaux. La Brigade de Cavalerie de Wilno qui passa par la localité le 3 septembre, pris ses quartiers loin de Sulejów, à la lisière des bois de Lubień près de Przedbórz. Il n'y avait évidemment aucun objectif militaire et même aucune voie ferrée ne passait par là. Le seul objectif qui aurait pu être considéré comme militaire était un pont sur la Pilica, qui n'a d'ailleurs pas été détruit par la *Luftwaffe*. Par contre, Sulejów subit un bombardement aérien et la population civile fut mitraillée par les aviateurs. En résultat, 70% des constructions de la petite ville furent détruites parmi lesquelles l'école, la municipalité, l'établissement de bains, la centrale électrique, les abattoirs. On estime à 600 le nombre de morts⁵⁸. Une autre action du même genre, cette fois sur les arrières de la bataille de la Bzura, a été l'attaque de la ville de Kutno qui eut lieu le 10 septembre. Ce dimanche, à l'heure où la population civile sortait des églises et qu'il y avait une foule dans la rue principale, des avions volant très bas firent leur apparition et lancèrent des bombes. L'une d'elles explosa sur le trottoir tout près de la mairie et tua 23 personnes, en blessant plusieurs dizaines. De nombreux civils périrent dans

⁵⁷ Cf. S. DATNER, *op. cit.*, p. 24; J. ROMMEL, *Za honor i ojczyznę* [Pour l'honneur et la patrie], Warszawa 1958, p. 95 et W. ZACZKIEWICZ *Lotnictwo polskie w kampanii wrześniowej 1939* [L'armée de l'air polonaise au cours de la campagne de Pologne — septembre 1939], Warszawa 1947, pp. 172 - 173.

⁵⁸ Cf. B. BOJARSKA, *Nalot na Sulejów w dniu 4 września 1939* [Le bombardement aérien de Sulejów le 4 septembre 1939], «Przegląd Zachodni», 1963, n° 3, pp. 126 - 129; A. RZEPNIEWSKI, *op. cit.* p. 181 et S. DATNER, *op. cit.*, p. 23. Description allemande de la destruction de Sulejów par le commandant Oskar Dienort dans: *Unsere Flieger...*, pp. 145 - 146: «Nein sie lässt sich nicht beschreiben, die Wirkung unserer Waffen, und auch Bilder geben nur einen schwachen Eindruck von dem, was wir sahen, Haus neben Haus zerstört bis auf die Grundmauern, die Dächer abgerissen, die Zwischengeschosse zerschlagen. Haus neben Haus, wie ausgeweidete Tiere liegen sie da [...]».

les immeubles en flammes⁵⁹. Rawa, située sur la route de Varsovie, subit le même sort. Selon Dietrich: « A Rawa [...] tous les objectifs ayant une importance militaire ne sont plus qu'un amas de pierres et de ferraille tordue. Là, les bombes allemandes ont fait tout le travail »⁶⁰. Celui qui connaît Rawa, sait très bien ce qu'il faut penser des « objectifs militaires » de ce petit bourg de province. Si l'on ajoute qu'il n'y avait aucune concentration de troupe et qu'on ne faisait aucun préparatif pour défendre l'agglomération, on y trouvera un autre exemple de destruction d'une ville par la *Luftwaffe* en violation des principes énoncés dans l'art. 24 pt 4 des règles de la Haye de 1923 et avec une désinvolture flagrante devant le devoir d'épargner la population civile.

La terreur pratiquée sur la population civile

Ce problème est réglé par l'art. 22 des règles de la Haye de 1923, stipulant que:

« Aerial bombardment for the purpose of terrorizing the civilian population of destroying or damaging private property not of military character, or of injuring non-combatants is prohibited »⁶¹.

Pourtant la *Luftwaffe* ne tenait absolument pas compte de l'interdiction catégorique et mettait pleinement en pratique la thèse de Douhet sur la nécessité « d'agir sur le moral de l'adversaire ». En résultat, cela entraîna au cours de la campagne de Pologne une terreur effrénée dirigée contre la population civile avec l'intention de provoquer la panique. En raison des moyens de défense plus que modestes dont disposait l'armée polonaise, ces activités pouvaient être menées en toute impunité⁶².

Depuis le premier jour de la guerre, les équipages des bombardiers et des chasseurs rentrant des missions, délestés de leur chargement de bombes et des réserves de carburant, descendaient en rase-mottes et fauchaient à la mitrailleuse les routes encombrées des régions frontalières. Ensuite, jusqu'au 9 septembre environ, les attaques se concentraient

⁵⁹ Cf. S. DATNER, *op. cit.*, p. 100.

⁶⁰ Cf. O. DIETRICH, *op. cit.*, p. 84.

⁶¹ Voir *Polskie wytyczne...* [Directives polonaises...], IIa: « Le bombardement des populations civiles est contraire au droit international ». Voir également P. GUGGENHEIM, *Traité de droit international public*, Genève 1954, vol. 2, p. 431; E. CASTREN, *La protection...*, p. 133: « Les bombardements exécutés par les avions pour inspirer la terreur en cherchant à atteindre la population civile et ses biens non militaires doivent également être jugés illégitimes. »; E. SPETZLER, *op. cit.*, pp. 191 - 192; L. OPPENHEIM, *op. cit.*, vol. 2, pp. 523 - 527 et A. VERDROSS, *Völkerrecht*, Wien 1959, pp. 396 - 397.

⁶² Voir J. BYRAN, *Warsaw 1939 — Siege, 1959 Warsaw Revisited*, Warszawa 1959, p. 35: « But the surprise weapon of the Germans was the mass air attack on the civilian population. Its purpose appears to have been a deliberate plan to demoralize the entire population and to force a quick surrender! ».

à l'ouest et au nord de la ligne du San, de la Vistule et du Bug, avec une intensité particulière dans l'axe Silésie - Łódź - Varsovie. Pendant la bataille de la Bzura, l'aviation faisait des ravages parmi les convois civils et la population qui reflueait en un flot ininterrompu vers l'est. Surtout la route Kutno - Varsovie était littéralement jonchée de cadavres d'hommes, de femmes et d'enfants. Enfin, au cours de la dernière phase des opérations, on attaqua la population dans les régions situées à l'est de la Vistule et du San.

L'aviation allemande n'attaquait pas seulement les attelages et les groupes de gens sur les routes, mais elle pourchassait même les personnes isolées. On tuait les enfants de campagnes allant à l'école, les bergers qui faisaient paître leurs troupeaux; on tirait sur les vaches; on attaquait les paysans travaillant aux champs⁶³. Les hameaux, les villages et les forêts étaient bombardés et incendiés, même les bâtiments isolés étaient attaqués. Bien plus, on tirait à la mitrailleuse sur les gens qui faisaient la queue pour l'eau ou la nourriture. Mais en premier lieu, ce sont les réfugiés qui ont le plus souffert de ces attaques. Toutes les routes menant vers l'est en étaient pleines. Contrairement à ce que prétend le sergent cité par Supf, qui dit: « Je devais faire très attention, car j'avais reçu l'ordre exprès d'épargner la population civile qui fuyait par les mêmes routes. Pour éviter toute erreur, je ne pouvais attaquer qu'en rase-mottes »⁶⁴ — les aviateurs allemands ne se donnaient pas cette peine et piquaient sur tout ce qui bougeait sur les routes. D'ailleurs, dans les situations où ils n'avaient pas affaire avec l'armée, mais avec une foule de réfugiés sans défense, les aviateurs se comportaient de la même façon. Par exemple, à Płock on attaquait à basse altitude la foule des réfugiés qui s'écoulait par le pont débouchant sur la rue Mostowa. Il y eut une quinzaine de morts. Près de Chełm, le 2 septembre, les bombes massacrèrent la foule sans défense groupée sur la rive ouest, ainsi que ceux qui

⁶³ Cf. A. KUROWSKI, *op. cit.*, p. 288; I. KRZYWOBŁOCKA, *Warszawski wrzesień* [Septembre 1939 à Varsovie], Warszawa 1966, p. 10; W. KRÓL, *Dywizjon Poznański* [Escadrille de Poznań], Warszawa 1970, p. 59; A. RZEPNIEWSKI, *op. cit.*, pp. 37, 42, 143 - 144; A. KUROWSKI, *Na marginesie wypowiedzi niemieckich o działaniach Luftwaffe w Polsce w 1939 r.* [En marge des déclarations allemandes sur les activités de la Luftwaffe en Pologne en 1939], « Wojskowy Przegląd Lotniczy », 1959, n° 12, p. 40 et A. KUROWSKI, *Kraksy i wzloty* [Les bas et les hauts], Warszawa 1965, p. 28. On trouve aussi des exemples d'assassinat de la population rurale dans les champs chez S. DATNER, *op. cit.*, pp. 25, 26; voir également W. ZACZKIEWICZ, *op. cit.*, p. 177.

⁶⁴ Cf. P. SUPF, *Luftwaffe...*, p. 80. Récits sur les attaques de la population civile sur les routes chez J. RÖMMEL, *op. cit.*, pp. 36, 48, 134; L. LANDAU, *Kronika lat wojny i okupacji* [Chronique des années de guerre et d'occupation], Warszawa 1962, pp. 7, 10; N. NEUGEBAUER, *op. cit.*, p. 95 et T. CYPRIAN, *Komisja stwierdziła...* [La commission d'enquête a établi...], Warszawa 1960, p. 377.

traversaient la Vistule sur les deux bacs en service⁶⁵. Même à Sulejów, les aviateurs organisaient des parties de chasse à l'homme, quoique cette localité ne présentait aucun intérêt du point de vue militaire⁶⁶. En somme, cela donne un tableau non équivoque de la terreur aérienne que la *Luftwaffe* faisait régner, voulant abattre le moral de la population polonaise, sans aucune considération pour les lois de la guerre aérienne.

Le mitraillage des aviateurs sautant en parachute et des naufragés en mer

Ce problème est résolu clairement par l'art. 20 des règles de la Haye de 1923, stipulant:

« When an aircraft has been disabled, the occupants, when endeavoring to escape by means of a parachute, must not be attacked in the course of their descend »⁶⁷.

Pourtant, au cours des combats aériens, les aviateurs polonais sautant en parachute ont été mitraillés très souvent par la *Luftwaffe*. Cela était surtout pratiqué par les pilotes des Messerschmitt Me-110 de la 1^{ère} escadrille du 1^{er} régiment-école du Commandant Grobman. Déjà le 1^{er} septembre l'après-midi, au cours des combats que menaient dans le ciel de Varsovie les chasseurs de la brigade d'interception, le lieutenant-pilote Gabszewicz de la 114^e escadrille de chasse, sauta de son appareil en flammes et, descendant en parachute fut mitraillé par un Me-110. L'Allemand tira quelques rafales qui manquèrent leur cible et fut obligé à fuir par le sergent Kiedrzyński de la même escadrille. Gabszewicz brûlé au visage et aux mains réussit à se poser vivant sur le sol dans les environs de Poniatowo⁶⁸. Au cours des mêmes combats, l'appareil du sous-

⁶⁵ S. DATNER, *op. cit.*, p. 25 et J. KIRCHMAYER, *Kampania wrześniowa* [La campagne de Pologne — septembre 1939], Warszawa 1946, p. 87, n° 2.

⁶⁶ Voir *Unsere Flieger...*, cité par M. MUSZKAT, *op. cit.*, p. 253. Voir également S. ORDON, *op. cit.*, p. 11: « The young German airman so much enjoys machine-gunning unarmed crews and animals in a power-dive so that he can gain experience for more difficult raids ».

⁶⁷ Voir E. RIESCH, *L'attaque pendant la descente en parachute*, « Revue générale de droit aérien », 1932, p. 245: « Une telle attaque qui est condamnée par le droit et la morale, ne peut être considérée que comme un meurtre commis avec sang-froid ». De même, J. KROELL, *op. cit.*, vol. 2, p. 117; E. CASTREN, *The present...*, p. 400; L. OPPENHEIM, *op. cit.*, vol. 2, p. 521 et F. A. von der HEYDTE, *Luftkriegsrecht*, dans: *Wörterbuch des Völkerrechts*, vol. 2, Berlin 1961, p. 440. L'interdiction d'attaquer un pilote pendant la descente en parachute était également prévue à l'art. 35, pt 3, de la *Legge di guerra* italienne de 1938.

⁶⁸ Cf. A. KUROWSKI, *Lotnictwo polskie...* [L'armée de l'air polonaise...], pp. 128 - 129; A. KUROWSKI, *Na marginesie...* [En marge...], p. 40; W. ZACZKIEWICZ, *op. cit.*, p. 52; A. RZEPNIEWSKI, *op. cit.*, p. 76 et L. GŁOWACKI, *Obrona Warszawy i Modlina, na tle kampanii wrześniowej* [La défense de Varsovie et de Modlin dans la campagne de Pologne — septembre 1939], Warszawa 1969, p. 38.

lieutenant Feliks Szyszka fut atteint. Tandis que l'aviateur descendait en parachute, il fut attaqué et mitraillé par un Me-109. Lorsqu'il toucha terre à Poniatowo, il portait dix-sept blessures de balles aux jambes⁶⁹.

La même chose se produisit aux environs de Łódź. Le sous-lieutenant Jan Dzwonek, de la 6^e escadrille de chasse, revenant à l'aérodrome de Widzew après un combat qu'il avait livré au-dessus de Zduńska Wola, vit que ses camarades étaient aux prises avec des Me-110. Il se porta à leur secours malgré les blessures qu'il avait à la main et à la jambe. A un certain moment, son appareil fut la proie des flammes et lui, tandis qu'il tentait de se sauver en parachute, fut mitraillé par les Allemands. Il ne dut son salut qu'à l'intervention du pilote Malinowski qui attaqua les Me-110 qui mitraillaient son camarade⁷⁰. Dans la même région (au-dessus de Pabianice), un bombardier polonais « Łoś » a été abattu. Deux des hommes de l'équipage (Danielak et Gołębiowski) qui sautèrent en parachute furent mitraillés par des Messerschmitt pendant la descente⁷¹. Par contre le lieutenant-observateur Gorecki de la 34^e escadrille d'observation de l'armée « Poznań » trouva une fin tragique. Il prit l'air dans l'après-midi du 5 septembre, sur son appareil « Karaś », mais fut attaqué par des Messerschmitt à quelques kilomètres de l'aérodrome de Sempolno. Le « Karaś » fut atteint et commença à brûler. Le lieutenant Gorecki sauta en parachute d'une altitude de 1 000 mètres et fut attaqué par les Allemands. C'est un cadavre criblé de balles qui toucha terre⁷². Ces exemples démontrent que les attaques d'aviateurs sautant en parachute n'étaient pas fortuites, mais pratiquées très fréquemment par les aviateurs de la *Luftwaffe* en septembre 1939.

On attaquait également les naufragés en mer. C'est ainsi que le 1^{er} septembre dans l'avant-port de Hel, l'équipage d'un hydravion du type Cant Z-506-B tombé dans la mer fut mitraillé et le 3 septembre, les naufragés du destroyer « Wicher » subirent le même sort⁷³.

De même, le 2 septembre vers 13 heures, après avoir bombardé dans

⁶⁹ Cf. L. GŁOWACKI, *op. cit.*, p. 39; W. KRÓL, *op. cit.*, pp. 62, 151; A. RZEPNIEWSKI, *op. cit.*, p. 76 et A. KUROWSKI, *Lotnictwo polskie...* [*L'armée de l'air polonaise...*], p. 129.

⁷⁰ A. KUROWSKI, *Bijcie się z nami Messerschmitty* [*Luttez avec nous Messerschmitts*], Warszawa 1969, p. 155 et A. KUROWSKI, *Lotnictwo polskie...* [*L'armée de l'air polonaise...*], p. 157.

⁷¹ Voir les mémoires du colonel Aleksander Danielak dans « *Dziennik Łódzki* » de 18 VI 1971 et 19 VI 1971.

⁷² Cf. A. KUROWSKI, *Lotnictwo polskie...* [*L'armée de l'air polonaise...*], p. 213, A. KUROWSKI, *Kraksy...* [*Les bas...*], p. 253; A. KUROWSKI, *Na marginesie...* [*En marge...*], p. 40 et W. ZACZKIEWICZ, *op. cit.*, p. 153.

⁷³ Cf. J. PERTEK, *Wielkie dni małej floty* [*Les grands jours de la petite flotte*], Poznań 1958, pp. 49, 67.

la baie de Puck les bateaux de navigation côtière S/S Gdynia et S/S Gdańsk, réquisitionnés, mais non armés, les avions de la *Luftwaffe* organisant une chasse à l'homme ont mitraillé les naufragés. Des 120 hommes d'équipage du « Gdynia », 22 seulement parvinrent à se sauver, tandis que du « Gdańsk », une seule chaloupe avec 11 marins arriva à la côte. Cette dernière fut attaquée à la mitrailleuse par un avion allemand alors qu'elle abordait et il y eut 2 marins blessés⁷⁴. C'était une violation flagrante de l'art. 23 du Règlement de la Haye de 1907, qui n'a évidemment rien de commun avec l'esprit chevaleresque de la *Luftwaffe*, tant vanté par les Allemands.

La Luftwaffe au cours du siège de Varsovie

Du point de vue du droit international, en septembre 1939, la situation de Varsovie évolua depuis: 1) le statut d'une ville se trouvant sur les arrières du front (1 - 7 IX), passant par 2) le statut d'une ville se trouvant à proximité immédiate du théâtre des opérations militaires (8 - 16 IX) jusqu'à 3) le statut d'une ville assiégée (17 - 27 IX). Dans chacun de ces stades, on doit évaluer séparément les activités de la *Luftwaffe*, car les règles du droit de la guerre aérienne sont différentes dans chaque cas. Ce sont les principes régissant le bombardement stratégique qui doivent être appliqués au premier stade; dans le second, il s'agira de l'appui tactique des forces terrestres et dans le troisième on aura affaire au bombardement d'une ville assiégée. C'est dans cet ordre que nous allons l'examiner:

Ad 1. Au moment où la guerre éclata, Varsovie était le principal centre politique et administratif de l'État. C'était aussi le plus grand noeud de communication et un grand centre industriel. Elle constituait une base indispensable pour mener les opérations à l'ouest de la Vistule. Aussi prévoyait-on la possibilité de raids aériens allemands et on dota la ville d'une aviation de chasse relativement importante (54 appareils), ainsi que d'une artillerie antiaérienne. Selon l'art. 24, pt 1, 2 et 3 des règles de la Haye, de 1923, la ville constituait un objectif dans lequel la *Luftwaffe* pouvait attaquer exclusivement les buts d'importance militaire, mais non si cela devait entraîner de trop grands risques pour la population civile du voisinage.

Effectivement, durant cette période, l'aviation allemande attaqua à Varsovie les objectifs d'importance militaire, c'est-à-dire le complexe d'Okęcie (le 1^{er} régiment de l'Armée de l'air, la base aérienne militaire, l'Institut des recherches techniques aéronautiques, la fabrique d'avions

⁷⁴ Cf. A. RZEPNIEWSKI, *Obrona wybrzeża w 1939 r.* [La défense de la côte en 1939], Warszawa 1970, p. 324 et W. TYM, *op. cit.*, p. 208.

PZL et LWD, la fabrique de moteurs n° 1 (Skoda) et l'aérodrome civil, les ponts, les gares de chemin de fer et les voies d'accès à la ville (surtout la route de Lublin). Malheureusement, dès la première heure, on ne prit pas garde à la population des alentours et, au contraire, on attaqua les quartiers d'habitation, provoquant de grands dégâts par l'emploi des bombes incendiaires. Dans le cadre de ces activités illégales, dès le 1^{er} septembre des maisons sont détruites dans les cités de Rakowiec et de Koło, dans la cité de Czerniaków-Miasto-Ogród à Ulrychów et à Praga. Le 2 septembre, ce sont les maisons de Powązki qui brûlent et le 3, celles de Mokotów; le palais de Łazienki (situé dans un grand parc) et le palais du Belvédère sont atteints. Le 4 septembre, les Allemands attaquent Praga, provoquant des incendies dans les immeubles des rues Jagiellońska et Zygmuntowska et bombardent le quartier de Grochów. Au cours de cette dernière opération, procédant à l'attaque des routes menant à l'est, les Allemands bombardèrent d'une façon barbare les maisons voisines. De même, le 5 septembre, lors de l'attaque de la gare de l'Est — objectif qui avait en principe une importance militaire, les Allemands ne prirent pas en considération qu'elle était bondée de réfugiés et que le raid doit entraîner un danger inadmissible pour un grand nombre de civils. Au cours des bombardements du 6 et du 7, de nouveau de nombreuses maisons de Praga et de Targówek sont la proie des flammes et le siège de la Banque de Pologne — rue Bielańska est touché⁷⁵. Bien plus, les aviateurs allemands attaquent et mitraillent les pompiers qui se rendent sur les lieux des sinistres. Par exemple, on peut lire dans le compte rendu du Corps des Pompiers de Varsovie, que le 1^{er} et le 4, lorsqu'ils allaient à Okęcie, un détachement de pompiers a été mitraillé par les avions et la même chose se produisit le 6, quand les voitures des pompiers revenaient de Palmiry. Enfin, le 7 septembre à Praga, les aviateurs allemands mitraillèrent les pompiers les obligeant à interrompre leurs travaux de sauvetage⁷⁶.

C'est à ce moment également qu'apparaissent les premiers indices de la volonté des Allemands de ne pas respecter les monuments historiques

⁷⁵ Selon J. M. SPAIGHT, *Air Power and War Rights*, London 1947, pp. 264 - 265, depuis le premier jour de la guerre les raids aériens contre Varsovie n'avaient aucun objectif militaire en vue, mais seulement de terroriser la population de manière criminelle. Voir également E. CASTREN, *The Present...*, p. 403: « Reassuring statements were, made in response to this appeal, but Warsaw was bombed soon after in a way which caused President Roosevelt to make a protest ».

⁷⁶ Cf. *Warszawska Straż Ogniowa — Fragmenty sprawozdania o działalności Straży we wrześniu 1939* [Les sapeurs-pompiers de Varsovie — Extraits des rapports d'activité en septembre 1939], dans: *Cywilna obrona Warszawy we wrześniu 1939* [La défense civile de la ville en septembre 1939], Warszawa 1965, pp. 425 - 427, 430, 432 - 433.

et les hôpitaux. Ainsi les premières bombes tombent sur le Château Royal de Varsovie dès le 1^{er} septembre. L'hôpital de l'Enfant-Jésus — rue Oczki, malgré les drapeaux à croix rouge bien visibles est bombardé le 3 et le 4, et le 7 septembre tout le bâtiment d'administration y est détruit. L'hôpital Saint-Lazare a aussi été bombardé à plusieurs reprises dès les premiers jours⁷⁷.

En somme durant cette période, on voit se dessiner nettement les directions des futurs raids criminels de la *Luftwaffe*, mais en raison de l'activité de l'aviation et de l'artillerie antiaérienne polonaises, ces raids ne constituent pas encore de menace trop sérieuse pour la population de la capitale.

Ad 2. Durant cette période, Varsovie est privée de sa protection aérienne (la brigade aérienne est déplacée le 6 septembre) et perd environ les $\frac{2}{3}$ de son artillerie antiaérienne (retirée le 5). La ville est donc presque sans défense devant les attaques de la *Luftwaffe*. A ce stade, le trait caractéristique est l'approche des unités de l'armée de terre allemande qui arrivent le 8 septembre aux abords sud-ouest de la ville. Dès lors, Varsovie fait partie de la zone du front et les activités de la *Luftwaffe* sont soumises aux dispositions des art. 24 pt 4 et 25 des règles de la Haye de 1923. L'art. 24 pt 4 que nous connaissons déjà, délimite le cadre du bombardement tactique et l'art. 25 stipule que:

« In bombardment by aircraft, all necessary steps must be taken by the commander to spare as far as possible buildings dedicated to public worship, art, science, or charitable purposes, historic monuments, hospital ships and other places where the sick and wounded are collected, provided such buildings, objects or places are not at the time used for military purposes. Such buildings, objects and places must by day be indicated by marks visible to aircraft ».

Par bonheur, les attaques terrestres sont interrompues le 9 septembre et les troupes allemandes refluent depuis le 10 vers la Bzura. A l'ouest de Varsovie, il ne reste plus alors que la 31^e Division d'Infanterie qui ne déploie pas une grande activité. Simultanément, le gros de la *Luftwaffe* concentre ses attaques sur les armées polonaises entre la Bzura et la Vistule. C'est pourquoi les Allemands n'intensifient pas les raids aériens ayant pour mission d'appuyer les forces terrestres aux abords ouest de Varsovie. Ainsi, est modifiée la situation théorique existante, dans laquelle la *Luftwaffe* peut bombarder la ville dans le cadre d'un appui tactique aux forces attaquant la ville. En raison de la cessation des opérations terrestres, on en revient donc en pratique à la première va-

⁷⁷ Cf. L. GŁOWACKI, *op. cit.*, p. 46, S. DATNER, *op. cit.*, p. 26 et *Biuletyn Wojskowej Akademii Medycznej* [Bulletin de l'Académie de Médecine Militaire], Łódź 1967, Supplement I, n° 6, pp. 123, 129.

riante, celle d'une ville située à l'arrière, où l'on ne peut bombarder que les objectifs militaires à condition de ne pas provoquer de pertes trop importantes parmi la population civile.

En fait, les raids aériens allemands contre la ville, sont menés de la même manière que durant la première période, mais ont une envergure plus réduite (sauf les bombardements des 10 et 16 septembre).

La *Luftwaffe* continue donc à bombarder, avec des effectifs restreints, les ponts sur la Vistule, les grandes voies de communication (l'avenue Washington, la rue Grochowska), ainsi que les positions d'artillerie (le parc Skaryszewski, le ZOO) et effectue des raids terroristes sur les quartiers d'habitation de la ville. Ils visent Praga (du 8 au 11 septembre), où éclatent de nombreux incendies, dont les plus grands seront ceux du quartier de Targówek habité par la population pauvre. L'attaque du 10 septembre, jour qui fut appelé le « dimanche sanglant », fut particulièrement violente. Les bombes à fragmentation et incendiaires pleuvèrent alors sur les quartiers de Targówek, Bródno, Kamionki, Szmulcowizna et Grochów. On n'épargna également pas le centre de la ville, attaqué les 9, 10 et 13 septembre. Le 10 septembre les rues Krakowskie Przedmieście, Królewska et la place Piłsudski, furent aussi la cible des bombes. Particulièrement violents furent les bombardements des quartiers juifs, aux rues étroites, où la densité de construction et de population étaient les plus fortes. Au cours du raid du 13 septembre, les bâtiments des rues Żelazna, Miedziana, Złota, Sienna et Pańska, souffrent de grands dommages. Le 16, le jour de la fête juive du Jugement Dernier, les environs du quartier Nalewki sont à nouveau bombardés. Les Juifs hassidiques qui s'enfuient visibles dans leurs vêtements blancs, sont mitraillés⁷⁸. Les pompiers, dont les casques brillants semblaient attirer les rafales de mitrailleuses, sont à nouveau victimes des attaques des aviateurs. Aussi donna-t-on l'ordre de peindre les casques d'une couleur de camouflage⁷⁹.

La *Luftwaffe* continue à mitrailler la population civile. Par exemple, le 10 septembre, les aviateurs attaquant les artères d'accès à la ville dans les environs de l'avenue Washington et à Grochów, descendent jusqu'à une altitude de 100 mètres pour tirer sur les réfugiés. Les 11 et 12, on mitraille la population civile de Praga qui tente de sauver le mobilier des maisons en flammes. Mais le comble a été d'attaquer les pauvres qui ramassaient des pommes de terre et des légumes dans les champs

⁷⁸ Cf. R. JARS, *La campagne de Pologne*, Paris 1949, p. 184 et S. ORDON, *op. cit.*, p. 28.

⁷⁹ Cf. *Warszawska Straż...* [*Les sapeurs-pompiers de Varsovie...*], pp. 434, 436, 438, 441, 442 et 446. Sur le changement de couleur des casques. *Ibid.*, p. 442.

suburbains, comme cela a eu lieu à Praga au cours du « dimanche sanglant », le 10 septembre⁸⁰.

On a également poursuivi les attaques contre les objectifs protégés par l'art. 25 des règles de la Haye de 1923. Après le raid du 7, un incendie se déclara au Musée national qui fut systématiquement visé à l'aide de bombes incendiaires. Le personnel qui tentait d'éteindre le feu qui s'était déclaré sur le toit, fut mitraillé⁸¹. Le 9 septembre, c'est l'hôtel particulier Staszic et le théâtre d'été du parc Saski qui brûlent. Les attaques contre les hôpitaux continuent. Les 8 et 9 septembre l'hôpital de Praga est atteint et le 12, au cours d'un nouveau raid, l'un des pavillons de l'établissement est rasé. Les 8 et 9 également, l'hôpital régional J. Piłsudski, rue 6go Sierpnia est attaqué et le 10 septembre, la section de chirurgie y est détruite. Les toits de ces deux hôpitaux étaient marqués de croix rouges qui ne pouvaient passer inaperçues des aviateurs allemands⁸². En somme l'aviation allemande poursuit ses activités criminelles durant cette période, mais la bataille de Kutno affaiblit dans une certaine mesure la force de ses attaques et donne un moment de répit à Varsovie.

Ad 3. Dans cette phase, les forces allemandes entourent la ville de toutes parts et, lorsque le général Rómmel refuse de déposer les armes le 16 septembre, commence le siège effectif de la capitale⁸³.

Depuis ce moment-là, ce sont les règles de l'art. 25 du règlement de la Haye de 1907 qui entre en ligne de compte. Elles reconnaissent implicitement le bombardement et l'attaque de toute la ville défendue, mais avec les restrictions prévues à l'art. 27 qui stipule que:

« In sieges and bombardments, all necessary measures must be taken to spare as far as possible all edifices consecrated to the cults, the arts, the sciences or the

⁸⁰ Cf. M. PORWIT, *Obrona Warszawy — wrzesień 1939* [La défense de Varsovie — septembre 1939], Warszawa 1969, pp. 109, 182 et A. RZEPNIEWSKI, *op. cit.*, p. 182.

⁸¹ Voir prof. dr S. LORENTZ dans: *Cywilna obrona...* [La défense civile...], p. 267. *Ibid.*, p. 266: « Nous avons veillé à ce que la troupe, l'artillerie ou les convois militaires ne stationnent pas dans le voisinage immédiat du Musée, pensant que l'édifice ne pouvait être atteint qu'accidentellement par des bombes ou des obus d'artillerie. C'est ainsi par exemple que lorsqu'un détachement important de troupes s'arrêta pour un laps de temps prolongé dans l'une des petites rues voisines, nommée Barokowa, je suis intervenu auprès des hautes autorités militaires et l'ordre fut donné de ne faire stationner aucune troupe aux abords immédiats du musée ».

⁸² Cf. *Biuletyn...* [Bulletin...], p. 64; M. PORWIT, *op. cit.*, p. 30; W. BARTOSZEWSKI, *op. cit.*, p. 103 et J. RÓMMEL, *op. cit.*, p. 326.

⁸³ Dans l'ordre de l'*Oberkommando der Wehrmacht* au commandant du groupe d'armées « Nord », signé par le maréchal Keitel, il était prévu que: 3. Au cas où l'ordre de capitulation serait rejeté, on donnera l'ordre de bombarder et de faire intervenir l'artillerie contre la ville. — cité par M. CIEPIELEWICZ, *Obrona Warszawy w 1939 r. — Wybór dokumentów wojskowych* [La défense de Varsovie en 1939 — Choix de documents militaires], Warszawa 1968, p. 565.

social services, the historical monuments, the hospitals, and collecting stations of the sick and wounded on condition that these places be not simultaneously used for a military purpose ».

Dans cette situation, la *Luftwaffe* n'hésite pas et commence dès le 20 septembre à diriger ses attaques surtout sur les quartiers d'habitation. La ville eut particulièrement à souffrir du bombardement qui dura toute la journée du 25 septembre, lorsque les 300 appareils qui y prirent part dirigèrent leurs coups surtout contre le centre. Ce jour-là, on comptait par centaines les maisons qui brûlaient et les pompiers étaient impuissants, car on manquait d'eau.

Que doit-on penser de cette manière de lutter? Il est vrai que les représentants de la doctrine sont en majorité d'accord avec l'opinion de Lauterpacht, selon laquelle: « no legal duty compels the attacking forces to restrict bombardment to fortifications only. On the contrary, destruction of private and public buildings though bombardment has always been, and is still, considered lawful, as it is one of the means of impressing upon the authorities the advisability of surrender »⁸⁴, mais il ne semble pas qu'il ait raison.

Ces méthodes inhumaines de mener la guerre, tendant à terroriser la population civile et d'en faire le but principal des opérations militaires, contrairement à la distinction fondamentale qu'on fait dans les lois de la guerre entre combattants et non-combattants, ne semblent pas justifiées, d'autant plus qu'on s'efforce de préserver ces derniers de toute attaque. Ces méthodes constituent une violation des principes humanitaires, qui dans ce cas doivent prendre le pas sur les nécessités militaires, d'autant plus que dans ce cas concret, l'assiégeant avait tous les atouts en mains et n'était même pas obligé d'attaquer la ville pour la prendre. Il suffisait de détruire l'usine de distillation d'eau et attendre quelques jours. On peut ajouter également que le principe de la proportionnalité entre ici en ligne de compte en restreignant la liberté du choix des moyens d'attaque, car il est inadmissible de sacrifier la vie de dizaines de milliers d'habitants d'une ville pour obtenir un avantage militaire qu'on atteindrait immanquablement sans cela. De plus, il semble qu'il est juste de considérer que l'assiégeant devrait s'efforcer en premier lieu de prendre la ville en attaquant ses défenses et non pas en terrorisant la population civile. C'est pourquoi, lorsqu'on ne bombarde pas Mokotów, Żoliborz ou Saska Kępa situés après des lignes de défense, mais qu'on attaque les quartiers du centre fortement peuplés, il est évident qu'on le fait dans

⁸⁴ Cf. L. OPPENHEIM, *op. cit.*, vol. 2, p. 421. Contre le bombardement de la population dans une telle situation J. KROELL, *op. cit.*, vol. 2, p. 101; E. CASTREN, *La protection...*, p. 129 et N. SLOUTZKY, *Le bombardement aérien des objectifs militaires*, « RGDIP », juillet-septembre 1957, n° 3, p. 375.

le but de terroriser la population civile et qu'on ne fait pas la guerre selon des méthodes chevaleresques⁸⁵.

C'est bien pourquoi dans leurs récits, les Allemands s'efforcent de convaincre que ces raids massifs avaient surtout pour but de détruire le système de défense et non pas de massacrer la population. C'est ainsi que Bekker écrivait: « le bombardement continue. Le bombardement dirigé, non pas contre la ville, mais contre la forteresse de Varsovie assiégée. Non pas contre les quartiers d'habitation, mais contre le système de défense en profondeur, établi par les 100 000 soldats de la capitale »⁸⁶. Évidemment, l'invraisemblance de cette énonciation témoigne clairement, que ce thuriféraire de la *Luftwaffe* n'a pas la conscience tranquille. En effet, même si l'on pouvait admettre avec la majorité des auteurs que *stricto iure*, l'aviation allemande pouvait attaquer tout le territoire de la ville défendue, il faut reconnaître que si l'on n'attaque pas les défenses, mais qu'on concentre ses efforts uniquement sur les maisons et la population civile, cela n'est certainement pas une manière chevaleresque de faire la guerre.

D'autre part, dans le but de terroriser la population, les aviateurs allemands mitraillaient les civils lorsqu'ils tentaient d'éteindre les incendies ou de sauver leur mobilier. Ils tiraient également sur les volontaires qui tentaient de dégager les gens ensevelis sous les décombres. Ils n'ont pas hésité non plus à tirer sur les femmes et les enfants qui ramassaient des pommes de terre dans les champs de Czerniaków, ainsi que sur les gens qui faisaient la queue devant les puits et les magasins d'alimentation. Ils le faisaient en volant aussi bas que le permettaient les constructions. C'est ainsi que Głowacki écrit que le 25 septembre « les aviateurs allemands, profitant du rideau de fumée, étaient descendus à une altitude plus basse au-dessus de certaines rues, pour mitrailler les habitants qui tentaient d'éteindre les incendies, qui transportaient les blessés et les morts ou qui essayaient de sauver les enfants et le mobilier »⁸⁷.

Quant aux pompiers, ils continuaient à être la cible préférée des attaques aériennes. Dans les comptes rendus de l'activité du corps des pompiers, on peut lire que lorsqu'ils étaient en train d'éteindre l'incendie de l'hôpital du Saint-Esprit, rue Elektoralna « deux avions sont apparus; l'un lança des bombes incendiaires sur le bâtiment en flammes, l'autre des bombes à fragmentation et fit feu de ses mitrailleuses sur l'hôpital ». Le même jour, l'auto-pompe qui s'approchait de la Poste centrale en

⁸⁵ Se sont prononcés pour cette obligation: Pillet, Bluntschli, Mérignac et Vattel, cité par L. OPPENHEIM, *op. cit.*, vol. 2, p. 421, n° 2.

⁸⁶ Cf. C. BEKKER, *op. cit.*, p. 63.

⁸⁷ Cf. L. GŁOWACKI, *op. cit.*, p. 281.

flammes fut également mitraillée⁸⁸. Ce sont là, tout comme le tir contre la population civile, des preuves flagrantes de violation du principe fondamental des lois de la guerre qui est de distinguer les combattants des non-combattants et qui interdit formellement d'attaquer ces derniers.

La question du respect des interdits découlant de l'art. 27 du règlement de la Haye de 1907 ne se présente pas mieux. Cela est d'autant plus choquant que la restriction qu'il prévoit à savoir qu'il faut protéger les objectifs sus-mentionnés « dans la mesure du possible », ne peut servir d'échappatoire au commandement allemand dans le cas de Varsovie assiégée. En effet, les circonstances suivantes donnaient aux aviateurs de la *Luftwaffe* la pleine possibilité d'épargner les objectifs énumérés dans cet article: a) étant donné l'absence d'avions ennemis et d'une défense antiaérienne très réduite, les pilotes pouvaient voler à très basse altitude sans crainte d'être abattus, b) le ciel était sans nuages et les attaques étaient effectuées de jour, la visibilité étant parfaite et c) les aviateurs allemands connaissaient bien la ville, car nombreux avaient été ceux qui, en tant que pilotes civils, avaient volé sur la ligne Varsovie-Berlin. Et malgré cela, ces objectifs ont été détruits par les bombardements aériens.

Le 23 septembre, l'Université de Varsovie commença à brûler. Le feu s'étendit au Palais Kazimierzowski et aux bâtiments voisins abritant les facultés de chimie, de pharmacie et les installations d'autopsie. Les bombes détruisirent le bâtiment du musée et de la médecine théorique⁸⁹. Le Château Royal fut l'objet des attaques aériennes le 17 septembre, en résultat desquelles le feu détruisit les toitures et la tour Zygmuntowska. Les gens des alentours qui tentaient de sauver le Château ont été mitraillés. Au cours des raids suivants des 20 et 24 septembre, le Château subit d'autres dommages et il y eut plus de morts dans son enceinte. Par suite des bombardements, tout le toit, ainsi que les coupoles des deux tours ont brûlé⁹⁰. Les églises ne furent également pas épargnées. Le 17, la cathédrale Saint-Jean fut incendiée et les sauveteurs mitraillés. Au cours du même bombardement fut touchée l'église Saint-Alexandre sur la place des Trois Croix et le 23 septembre, ce fut le tour des églises de la Sainte Trinité et du Saint-Sauveur.

Le sort des hôpitaux fut plus atroce encore, malgré qu'ils aient été marqués de croix rouges visibles. C'est ainsi que le 20 septembre, l'hôpital Ujazdowski, rue Górnosłaska subit un violent bombardement à la suite duquel une partie des bâtiments furent détruits. Il y eut des morts et des

⁸⁸ Cf. *Cywilna Obrona...* [La défense civile...], p. 472.

⁸⁹ Cf. T. MANTEUFFEL, *Uniwersytet Warszawski w latach okupacji* [L'Université de Varsovie durant l'occupation], Warszawa 1948, p. 8.

⁹⁰ Cf. « Trybuna Ludu » de 16 IX 1971; M. CIEPIELEWICZ, *op. cit.*, p. 452; W. BARTOSZEWSKI, *op. cit.*, p. 110 et *Cywilna obrona...* [La défense civile...], p. 270.

blessés parmi le personnel hospitalier et les malades en traitement⁹¹. Le 25, les bombes incendiaires y provoquèrent de nouveau un incendie. Le 24, ce sont les pavillons de l'hôpital militaire, rue Bagatela qui sont abattus par les bombes et mitraillés; le même jour l'hôpital de l'École des Infirmières de Varsovie, rue Pius XI est la proie des flammes. Le 25 au matin, les avions allemands arrivant en plusieurs vagues lancent des bombes incendiaires sur l'hôpital du Saint-Esprit. L'établissement est de nouveau bombardé à midi. Le pavillon central a été rasé. Environ 100 personnes ont été brûlées vives et 200 autres, blessés hospitalisés ou appartenant au personnel de l'hôpital, périrent sous les décombres. L'action des sauveteurs était entravée par les aviateurs allemands qui mitraillaient le terrain de l'hôpital⁹². L'hôpital de l'Enfant-Jésus, rue Oczki, eut également à souffrir. Le 25 septembre, il subit un bombardement d'une heure et demie, au cours duquel 5 bâtiments ont été détruits, parmi les tués on compta 5 médecins, 26 infirmières, une quinzaine de personnes des services auxiliaires et environ 260 malades. Les avions mitraillèrent les médecins et le personnel hospitalier qui transportaient les malades, ainsi que ceux de ces derniers qui se cachaient dans les tranchées-abris. L'hôpital Wolski a été attaqué également et reçut 9 bombes⁹³.

En définitive, par suite des raids de l'aviation allemande et avec la participation de l'artillerie, ont été complètement détruits: l'hôpital du Saint-Esprit, la filiale de l'hôpital régional, rue Zakroczymska, la clinique Saint-Antoine, rue Topiel, plusieurs pavillons de l'hôpital de l'Enfant-Jésus. Gravement endommagés ont été les hôpitaux: Saint-Lazare, Ujazdowski, Saint-Stanislas, l'hôpital juif, celui de Praga, des Élisabéthaines, celui des chemins de fer, les bâtiments de l'Institut d'Hygiène et les établissements sanitaires. De nombreux hôpitaux auxiliaires créés durant les opérations militaires ont été détruits ou endommagés⁹⁴.

On peut donc constater que les Allemands n'ont pas fait le moindre effort pour préserver les monuments de la science, de la culture, les églises et les hôpitaux de Varsovie. On ne peut donc prendre au sérieux l'argument avancé par Spetzler, selon lequel on doit avant tout établir dans quelle mesure les Polonais ont rempli dans ce cas l'obligation de démilitariser et de marquer ces objectifs et dans quelle mesure les des-

⁹¹ Voir S. S., *Z dziejów obrony Warszawy, wrzesień 1939* [Faits de la défense de Varsovie — septembre 1939], « Bellona », 1941, n° 11, pp. 20 - 21.

⁹² Cf. S. DATNER, *op. cit.*, p. 26 et *Biuletyn...* [Biuletyn...], pp. 127 - 128.

⁹³ Cf. S. DATNER, *op. cit.*, p. 26; M. M. DROZDOWSKI, *Alarm dla Warszawy* [Alerte à Varsovie], Warszawa 1969, pp. 279, 281 et *Biuletyn...* [Bulletin...], pp. 128, 130.

⁹⁴ Cf. *Biuletyn...* [Bulletin...], p. 137.

tructions ont été causées par la négligence de ces obligations⁹⁵. Une accusation de cette portée doit être prouvée, ce que l'auteur ne fait pas, car il n'est pas en état de le faire. Dans ce cas, ce n'est qu'un exemple classique d'application de la méthode selon laquelle, ce n'est pas le meurtrier, mais la victime qui est coupable.

Conclusion

En définitive, on peut constater que la *Luftwaffe* a violé sérieusement les dispositions du droit de la guerre aérienne au cours de la campagne de Pologne en septembre 1939.

Dans le cadre des opérations sur les arrières profonds du front, elle bombardait les villes, les cités et les villages où il n'y avait aucun objectif militaire, ou même s'il y en avait, le bombardement a entraîné une attaque *indiscriminate* de la population civile et a entraîné pour cette dernière des pertes disproportionnées en comparaison avec l'avantage militaire acquis. Le réseau ferroviaire a été attaqué sans aucun égard pour le genre de convois, ni l'éloignement de la ligne du front. Les trains de voyageurs et ceux de la Croix-Rouge ont été bombardés et mitraillés. Chaque station de chemin de fer était l'objet d'attaques indépendamment du fait si elle servait aux mouvements des troupes ou non, et sans aucune considération pour les effets qu'une telle attaque aurait pour la population civile. On attaquait aussi les hôpitaux situés loin du front.

Au cours des opérations tactiques, on réduisait en cendres les villes où il n'y avait aucune concentration de troupes ni aucun objectif militaire et qui n'étaient pas défendues. Ces raids avaient un caractère ouvertement terroriste. C'est ainsi qu'on bombardait et mitraillait la population civile dans les villes, les villages et sur les routes. On ne se donnait pas la peine de faire une différence entre les colonnes militaires et les réfugiés civils, de même qu'on n'épargnait pas la population qui se trouvait sur les routes par lesquelles l'armée battait en retraite.

Au cours des combats aériens, on tirait sur les aviateurs qui sautaient en parachute, ainsi que sur les naufragés en mer.

⁹⁵ Voir E. SPETZLER, *op. cit.*, p. 237, n° 103. C'est à juste titre que J. M. SPAIGHT (*Air Power and War Rights*, London 1947, pp. 265 et 286), reconnaît que l'attaque de Varsovie par la *Luftwaffe*, constitue un exemple de la violation des dispositions de l'art. 27 du règlement de la Haye de 1907 et le début d'une guerre aérienne sans merci. De même H. SCHILLING, *Die Rechtsprechung der Nürnberger Militärtribunals*, Göttingen 1952, p. 123 et L. OPPENHEIM, *op. cit.*, vol. 2, p. 527. Par contre sont sceptiques quant aux possibilités de respecter ces dispositions: E. CASTREN, *The Present...*, p. 407, E. SPETZLER, *op. cit.*, p. 46 et S. NAHLIK, *Grabież dzieł sztuki [Le pillage des oeuvres d'art]*, Wrocław 1958, p. 282.

Au cours du siège de Varsovie, on mitraillait systématiquement la population civile et les pompiers pendant les opérations de sauvetage. On n'a rien fait pour épargner les monuments qui auraient dû être particulièrement protégés; et la destruction barbare des bâtiments d'habitation, ainsi que les attaques contre la population étaient, sinon illégales, du moins aussi peu chevaleresque que possible.

Il est en effet difficile de trouver une justification quelconque pour les pilotes de la *Luftwaffe*, car toutes les circonstances leur étaient favorables pour pouvoir combattre selon les règles du droit de la guerre aérienne et les principes chevaleresques et humanitaires. Durant toute la campagne de Pologne, le temps fut magnifique, sans aucun nuage dans le ciel. Les conditions atmosphériques étaient idéales pour l'observation et le choix des objectifs. D'autre part, la maîtrise absolue dans les airs qu'avaient les Allemands et la faiblesse de l'artillerie antiaérienne polonaise rendait possible d'attaquer calmement et efficacement ces objectifs, d'autant plus que les raids n'avaient lieu que de jour.

Pour conclure, on peut affirmer que l'opinion unanime des milieux militaires et des juristes allemands jusqu'en 1945, puis en République Fédérale Allemande après la Seconde Guerre mondiale, selon laquelle la *Luftwaffe* combattit en septembre 1939 en Pologne d'une manière chevaleresque, sans violer le droit de la guerre aérienne, n'est pas conforme à la vérité. En effet, la réalité est, ainsi que nous l'avons démontré, tout à fait autre, et même, pourrait-on dire diamétralement différente ⁹⁶.

⁹⁶ Voir A. KUROWSKI, *Na marginesie...* [En marge...], p. 40, S. DATNER, *op. cit.*, p. 22 et N. NEUGEBAUER, *op. cit.*, p. 21: « The attack was directed [...] primarily against the civilian population, it was directed not only against war potential but against the whole life of the country, to break it morally and materially. Poland was to serve as a warning to all other countries ».

Consular Protection with the Participation of a Third State in Polish Practice *

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The institution of consuls has been established mainly¹ to protect the interests of the sending State (home State) and of its nationals. However, in accordance with international law, a consul may also exercise his

* The article deals with Polish practice since the rebirth of the Polish State in 1918. This by no means signifies the absence of such a practice—although less instructing in comparison with the Polish inter-war experiences—in the period up to 1795. Thus, for example, in the period of the partitioning of Poland by its three neighbouring States (Prussia, Austria, and Russia), according to Art. XIII and XIV of the Treaty of 1793, in States lacking representatives of the collapsing Polish elective Monarchy, the Russian representatives were taking over the representation of Polish interests. See, "Korespondent Krajowy i Zagraniczny", 1793, No. 84, and J. ŁOJEK, *Ostatni rok działalności polskiej służby dyplomatycznej*, w: *Z dziejów wojny i polityki. Księga pamiątkowa ku uczczeniu 70-tej rocznicy urodzin J. Wolińskiego* [*The Last Year of Polish Diplomatic Activities*, in: *From the History of War and Politics in Festschrift for the 70th Anniversary of J. Woliński's Birth*], Warszawa 1964, p. 125. On the other hand, the recent Polish practice has—in view of a limited for the time being access to the post-war archives of the Ministry of Foreign Affairs in Warsaw—been showed in a rather fragmentarily, though sufficiently comprehensive for a general evaluation.

¹ The scope of consular functions as defined in the Vienna Convention on Consular Relations (*United Nations Conference on Consular Relations, Vienna March 4—April 22, 1963, "Official Records"*, Vol. 2, Annexes, Vienna Convention on Consular Relations Doc. A/CONF. 25/16 Add. 1) is very extensive but Art. 5 mentions in the first place the protection of the interests of sending State and of its nationals. As

functions on behalf and at the request of other states. In that his functions have either a permanent or temporary character.²

Thus a State A, not maintaining consular relations with another State B, has the possibility of approaching a third State C with the request that its consular posts in that second State B also exercise consular functions on behalf of the requesting State A. Afterwards, following an appropriate notification to the receiving State B, and unless the receiving State objects, the consular post of that third State may, in accordance with the request, exercise consular functions in the receiving State B on behalf of the requesting State C.³

A different situation arises in the event when one and the same person, with the consent of the receiving State, is appointed as a consular officer by two or more States, as well as in the event when an official, who is not the head of a consular post,⁴ is appointed to act as a consular officer. In the first case the person in question is officially subordinated to each of the sending States, and thus his appointment follows the usual course (letter of commission, *exequatur*). In the second case, however, his appointment requires no such procedure.

to foreign literature describing various kinds of protection in different circumstances see, for example, G. H. STUART, *American Diplomatic and Consular Practice*, 2nd ed., New York 1952, p. 322 ff., and S. TORRES BERNARDEZ, *La Conférence des Nations Unies sur les relations consulaires*, "Annuaire Français de Droit International," Vol. 9, 1963, p. 84 ff. See also in Polish literature, in particular, J. MAKOWSKI, *O konsulach i konsulatach* [On Consuls and Consulates], Warszawa 1918; K. POZNAŃSKI, *Polskie konwencje konsularne* [Polish Consular Conventions], "Sprawy Obce", 1931, No. 8; K. BERTONI, *Konsularne prawo* [Consular Law], in: *Encyklopedia nauk politycznych*, Warszawa 1938; L. BABIŃSKI, *Technika konsularna* [Consular Practice], Szczecin 1949; W. NAMYSŁOWSKI, *System prawa konsularnego* [The System of Consular Law], Warszawa 1949; K. LIBERA, *Zasady międzynarodowego prawa konsularnego* [Principles of International Consular Law], Warszawa 1960; E. J. PAŁYGA, *Stosunki konsularne Drugiej Rzeczypospolitej* [Consular Relations of the Polish Second Republic], Warszawa 1970.

² Such a solution is also envisaged by certain bilateral conventions. Here as an example of the Polish Second Republic practice could serve Art. 23, para. 4 of the Trade Agreement concluded between Poland and France and signed in Paris on 9 December, 1924. It reads: "The high contracting parties agree that in cases when certificates of identity of transshipment goods cannot be issued by their consular representatives, the latter would be able to transfer their authority in this respect to consular officers of another State or to any other person properly authorized (subject to consent of the other party), "Dziennik Ustaw" ["Journal of Laws"], 1925, No. 67, item 468.

³ This principle has been confirmed by Art. 8 of the Vienna Convention on Consular Relations.

⁴ Such a situation is dealt with in Art. 18 of the Vienna Convention on Consular Relations.

The last half-century of Polish practice with regard to the aforesaid kind of consular protection has proved to be relatively rich, hence our further considerations will be devoted to its various aspects.

I. Protection of the Interests of Third States and of their Nationals on the Polish Territory

From the inter-war period in Poland the following example is worth noting:

A Haitian national who had been appointed consul of the Haitian Republic in Warsaw in 1934, held since 1935 the office of the Liberian consul too.⁵ Acting in this capacity permanently,⁶ he had been obliged to acquire an *exequatur* from the Polish authorities (irrespective of that which he obtained as consul of his home State) so as to be able to exercise his functions in that second capacity.

In international practice the protection of the interests of a third State and of its nationals has most frequently⁷ a provisional character (that is, of a State either not possessing direct consular relations with the receiving State, or its consular officer being no longer able to continue with his duties).⁸

A consul temporarily exercising on behalf of a third State his functions becomes by no means an official of that State and his basic official dependence on the sending State remains unchanged. For the

⁵ See a memorandum of the Polish Ministry of Foreign Affairs of Aug. 27, 1938 — Archiwum Ministerstwa Spraw Zagranicznych, [Archives of the Polish Ministry of Foreign Affairs, later quoted as APMFA], PD v. 39, Vol. 4.

⁶ It seems that the term "sending State" may justly be applied to a "non-home" State of a consul only in case of his permanent, but not temporary exercise of consular functions on behalf of that third State.

⁷ For example, in 1949 the United States were still exercising consular protection of 31 States, mainly Latin American ones (cf. Publication 3517, Department of State, "Protection of Foreign Interests in the United States," 1 April, 1949). Politically, this speaks for itself. But, for example, after diplomatic relations between France and Great Britain had been broken off (the sinking of the French Navy by the English Navy at Mers El-Kobir near Oran), no substitute was appointed to exercise on behalf of Great Britain consular functions on the unoccupied territory of France. In this situation, the Polish diplomatic and consular staff, which was to be evacuated from France, could not obtain either British visas or transit visas without obtaining the former ones. Cf. S. ZABIELLO, *Na posterunku we Francji* [*Standing Sentry in France*], Warszawa 1961, p. 137.

⁸ For example, the protection of the interests of both Great Britain and France and of their nationals on the territory of the Third Reich was undertaken in September 1939 by the United States. (Cf. *Ministère des Affaires Étrangères. Le Livre jaune français. Documents diplomatiques 1938 - 1939* [...], Paris 1939, No. 366/7.)

activities of a consul temporarily exercising protection of the interests of a third State and of its nationals are based on delegation, limited both in time and scope, which has been granted to him by that third State.⁹ Thus, for instance, when on 18 November, 1918 the representatives of the German occupation authorities (which until 18 November, 1918 had exercised the civil administration of the Congress Kingdom of Poland) had left Warsaw, the Polish Government was notified that, pending the establishment of normal diplomatic relations between Poland and Germany, the Swiss Consulate had taken over the protection of German nationals in Poland.¹⁰ However, two days later the German Envoy, H. Kessler, had arrived in Warsaw and on 21 November, 1918 the Polish Ministry of Foreign Affairs made the announcement that diplomatic relations with the German Government had been established. The Polish Government granted the German Envoy an *agrément*, on 23 November 1918.¹¹ Thus the protection of the interests of Germany and of its nationals by the Swiss Consulate had lasted scarcely a week. Nevertheless, shortly afterwards the protection was again needed, for on 15 December, 1918 the Polish Government notified the German Government that it considered the diplomatic relations to be suspended (this occurred mainly in connection with the political situation in the region formerly under Prussian occupation), and Envoy Kessler left Warsaw.¹²

⁹ A specific situation was created when the Polish Second Republic Consulate in Winnipeg took over the archives of the former Austro-Hungarian Consulate. As a result, the Polish Consulate, apart from extending protection over the Poles from the territories formerly under the Austrian occupation, had also, *inter alia*, to co-operate with the organs of the successor States of the former Austro-Hungarian Monarchy, since the documents concerning either the interests of these States or those of their nationals were to be found in these archives. For not only the interested States, but also their nationals could not, for lack of their own missions, have a direct access to the archives. Therefore, wishing to refrain from exercising consular functions for other States and to put an end to a situation imposed immediately after the First World War, the Polish Consulate in Winnipeg distributed the documents among the interested States and their territorially closest missions. (Cf. the report of the Polish Consulate in Winnipeg for the last quarter of 1921, dated 20 January, 1922, p. 3 ff, APMFA AW/1920, v. 50, Vol. 13.)

¹⁰ *Chronologia stosunków międzynarodowych Polski* [Chronology of Poland's International Relations, later quoted as *Chronology*] publ. by Polish Institute of International Affairs (PIIA), 1918-1921, sect. 228. Having regained independence, the Government of the Polish Republic accepted only one of the six representatives of German occupation authorities namely Prince Oetting as a semi-official representative of the Auswärtiges Amt (in the rank of a diplomatic secretary), limiting his stay to 20 November, 1918 and stipulating that no formal *agrément* would be granted to him. See, L. GROSFELD, *Listopad 1918 r. w Warszawie* [November 1918 in Warsaw], "Kwartalnik Historyczny," 1966, No. 3, p. 665.

¹¹ *Chronology*, 1918-1921, sect. 235 and 241.

¹² *Chronology*, 1918-1921, sect. 280 and 285.

In exercising the above-mentioned kind of protection, a consul is responsible to the third State commissioning him to act on its behalf, whereas his home State, that is, the sending State is rather not responsible for his functions exercised within the scope of authorization received from the commissioning third State.

Usually, a permission to undertake such a temporary protection is granted by the State of consul's residence (although an exequatur is not required). The Polish practice seems to confirm this principle.

During the inter-war period, namely on 1 May, 1922, the Belgian consular posts in Poland were charged with the conduct of consular functions for the Grand Duchy of Luxembourg.¹³ This was preceded by the Polish Government's approval and subsequently given to the public knowledge.¹⁴ Similarly, on 27 March, 1922, the Polish Government agreed that the protection of Albanian nationals staying on the Polish Territory be undertaken by the Italian Legation in Warsaw.¹⁵ Such cases have also repeatedly occurred in the Polish People's Republic, in particular immediately after the Second World War. And thus the Polish Ministry of Foreign Affairs, in a letter of 26 November, 1945, informed the Polish Ministry of Public Administration that "from all the foreign diplomatic representations in Warsaw, only the French Embassy represents the interests of a third State, namely those of Switzerland."¹⁶

In the following year "the Government of Great Britain agreed, at the request of the Government of Iraq, to undertake the protection of Iraq's interests in Poland."¹⁷

Also the Yugoslavian Embassy in Warsaw, in a note No. Br. 156 of 26 March, 1947 asked, at the request of the Albanian Government permission for the Yugoslavian missions in Poland to protect Albanian interests.¹⁸ However, shortly afterwards, in a note No. 54/48 of January,

¹³ *Chronology*, 1922 - 1924 sect. 2288.

¹⁴ "Monitor Polski" ["Polish Monitor," further abbr. PM] 14 August, 1922, No. 183.

¹⁵ *Chronology*, 1922 - 1924 sect. 2154.

¹⁶ APMFA PD 1945, v. 1, Vol. 3. In fact the French Embassy took up its functions several years earlier. See the Communiqué of the visit of the Swiss Repatriation Mission in Warsaw requiring the interested parties to apply to the French Consulate, published in the newspaper "Rzeczpospolita" of October 4, 1945.

¹⁷ This was imparted by the Director of the Ministry of Foreign Affairs, J. Olzowski, to the British Ambassador, V. Cavendish Bentinck, in a note No. 324/245/46 of 25 September, 1946, APMFA PD, 1946, v. 3, Vol. 4b.

¹⁸ This note was forwarded by the Yugoslavian Charge d'Affaires in Warsaw, Nikol Prifti, to the Minister of Foreign Affairs, Z. Modzelewski. The fragment containing the request of the Albanian Government reads as follows: "*Afin d'éviter les inconvénients qu'amène l'absence des représentants diplomatiques et consulaires albanais en Pologne, en attendant l'échange de missions diplomatiques entre les*

1949, the Yugoslavian Embassy informed the Polish Ministry of Foreign Affairs that "it does not protect the interests and rights of the Albanian Republic and of her nationals in the Polish People's Republic any more." This had been caused by the fact, as was further explained in the note, that already on 28 September, 1948 the Yugoslavian Ministry of Foreign Affairs had notified the Albanian diplomatic representation in Belgrade that "as result of irresponsible policy of invectives and slander against Yugoslavia which the Albanian Government has started on 29 June, 1948, the Yugoslavian Government is compelled to deem itself relieved from the obligation to continue in the future with protecting the interests and rights of the Albanian Republic and of its nationals in the countries where it has done so hitherto."¹⁹

Before the Dutch Consul in Gdańsk Mr Cikot left Poland, the Legation of Holland in Warsaw had informed the Polish Ministry of Foreign Affairs that it had intended to transfer the direction of the Dutch Consulate in Gdańsk to the British Consul—to which, however, the Polish Ministry of Foreign Affairs did not consent. Nevertheless, prior to his departure, Consul Cikot informed in writing the Praesidium of the People's Voivodship Council that he transferred the conduct of his consular functions to the British Consul in Gdańsk. And since the Polish Ministry of Foreign Affairs had failed to inform the People's Voivodship Council that it had not expressed its approval, the Consul of Great Britain in Gdańsk, following the departure of the Dutch Consul had exercised *via facti* within the Dutch Consulate's district the protection of Dutch nationals till the Director of the Diplomatic Protocol of the Polish Ministry of Foreign Affairs settled the matter, during his visit to Gdańsk in May

deux pays, le Gouvernement de la République Populaire d'Albanie s'est mis d'accord avec le Gouvernement de la République Fédérative Populaire de Yougoslavie que ce dernier prenne en charge la défense des intérêts et des droits des ressortissants albanais en Pologne. Le Gouvernement Albanais espère que le Gouvernement Polonais acceptera avec bienveillance la communication qu'elle a l'honneur de lui faire et qu'il fera ce qui est nécessaire". The Council of Ministers of the PPR had complied with this request and the Polish Ministry of Foreign Affairs informed about it the Yugoslavian Embassy in a verbal note, No. 206/47 of 29 April, 1947, APMFA PD, 1947, v. 4, Vol. 6/1 About Polish-Albanian relations up to that time, see an article by Professor H. Batowski published in the newspaper "Rzeczpospolita" of March 5, 1946.

¹⁹ APMFA PD, 1949, v. 10, Vol. 1 (Yugoslavia). This fact, among others, speeded up the exchange of diplomatic representatives between Warsaw and Tirana. Such an exchange was proposed by the Albanian Legation in Moscow in its note No. I of 13 January, 1949, with an attached "Pro Memoria" requesting an *agrément* for Mikol Prifti as the Albanian Envoy in Poland, resident in Moscow APMFA PD, 1949, v. 10, Vol. 10 (Albania).

1953, with the Chairman of the Praesidium of the People's Voivodships Council.²⁰

Also accepted is the custom that in the event of the severance of consular relations between two States (both in time of peace and war), a third State may be, with the consent of the receiving State, entrusted with the protection of the interests and nationals (and sometimes also of the consular premises) of the State with which consular relations have been broken off.²¹

And thus, in accordance with the instructions of the Dutch Government, the protection of German nationals in Poland was undertaken on 1 September, 1939, that is, from the moment of the Nazi aggression, by the Legation of Holland in Warsaw (as representing the then neutral State). This was done in connection with the preparations of the eight German missions personnel to leave Poland.²² On the same day, the Dutch Envoy notified the Polish Ministry of Foreign Affairs, and also the German Charge d'Affaires in Poland, about his new duties.²³

II. Exercise of Protection by Other States of the Interests of the Polish State and of its Nationals in Third States

Many times over the span of the last half century, at the request of the Polish Government (and sometimes in virtue of special agreements),

²⁰ Report of the Director of the Diplomatic Protocol of the Ministry of Foreign Affairs, E. Bartol, from his tour of inspection to Gdańsk, of 20 May, 1953, p. 3 (APMFA PD, 1953, v. 27, Vol. "Ogólne").

²¹ J. MAKOWSKI, *Zerwanie stosunków dyplomatycznych i jego skutki prawne* [Rupture of Diplomatic Relations and Its Legal Consequences], "Sprawy Międzynarodowe," 1959, p. 55 and M. GAŚTOROWSKI, *Dyplomaci i konsulowie* [Diplomats and Consuls], Warszawa 1966, p. 101. A relevant situation is dealt with by Art. 27 of the Vienna Convention on Consular Relations. Sometimes in such circumstances the representatives of a third State that has taken over the protection, exercise certain functions with the participation of the former consul of the State deprived of that possibility. This occurred, for example, in relation to the Soviet Consul in Berlin when after the Nazi aggression upon the USSR the protection of Soviet interests in the Third Reich had been undertaken by the Swedish Government, and those of the Third Reich in the Soviet Union by the Bulgarian Government. See V. Bierzegov, *W misji dyplomatycznej u Hitlera* [In a Diplomatic Mission to Hitler], (translation into Polish from Russian), Warszawa 1967, pp. 142 - 143 and 146.

²² See more E. J. PAŁYGA, *Stosunki konsularne Drugiej Rzeczypospolitej* [Consular Relations of the Polish Second Republic], Warszawa 1970, pp. 141 - 142, 231 and 267 - 269.

²³ Cf. an interview with Envoy van Rosenthal entitled: *Rząd holenderski objął opiekę nad obywatelami niemieckimi* [Dutch Government Assumes Protection of German Nationals], publ. in the newspaper "Kurier Warszawski" of 2 September, 1939,

the governments of other States have entrusted their missions with the protection of Polish interests and nationals in areas outside the jurisdiction of Polish diplomatic and consular posts.

In the early inter-war period Poland made twice use of good offices of Denmark,²⁴ namely, in the area of the Russian SFSR and of Germany.

In the first case, in view of the initial rejection by the Government of the Polish Second Republic of the Soviet Government's proposal to establish normal diplomatic relations and to exchange diplomatic representatives²⁵ between the two countries, the Danish Envoy in Petrograd²⁶

²⁴ Cf. a reply of the Danish Government concerning the assuming of the protection of Polish nationals in Russia (cable of 28 November, 1918 accompanying a letter of the Polish Legation in Berlin to the Polish Ministry of Foreign Affairs of 14 December, 1918 — APMFA Polish Diplomatic Representation in Berlin, v. 1, Vol. 5).

²⁵ Irrespective of the differences between the two social systems, the Soviet Government tried from the first days of the Polish Second Republic to establish diplomatic relations with Poland. Under the right-wing pressure (see, i.a., a letter of the Union for the Polish State Construction, of 7 November, 1918 to the Regency Council warning against the recognition of J. Marchlewski as diplomatic representative of the Soviet Government in Poland — N. Gąsiorowska (ed.), *Materiały archiwalne do historii stosunków polsko-radzieckich* [Archival Materials for the History of Polish-Soviet Relations], Warszawa 1957, p. 397) the Polish Ministry of Foreign Affairs published on 11 November, 1918 a communiqué subordinating the Government's decision on this issue to adequate protection of Polish interest in Russia. Essentially, this attitude was caused by the anxiety about the fate of the former Regency Council Representation abolished on 24 November, 1918 by the Committee of Polish Refugees in Russia (*Chronology*, 1918 - 1921, sect. 209, 244 and 251). The People's Commissariat of Foreign Affairs of the Russian SFSR agreed in a note of 18 December, 1918 to recognize as representatives of the Polish Republic those members of the Representation which would be indicated by the Polish Government, and on 14 December, 1918 the Soviet authorities ordered the return of the premises and archives of the former Regency Council Representation in Moscow (*Chronology*, 1918 - 1921, sect. 276 and 278). But the successive request of the Soviet Government, of 15 December, 1918, to the Polish Government to fix a date of arrival of the Soviet diplomatic representation in Warsaw (*Chronology*, 1918 - 1921, sect. 279) was rejected by the Polish Ministry of Foreign Affairs in a note of 30 December, 1918. See H. JABŁOŃSKI, *Wojna polsko-rosyjska 1917 - 1920* [The Polish-Russian War 1917 - 1920], "Przegląd Socjalistyczny", 1948, No. 7/8, p. 24 ff. The situation was additionally complicated by the murder of the members of the Russian Red Cross Mission in the beginning of 1919, before their departure from Poland.

²⁶ The Polish Ministry of Foreign Affairs directly informed the Soviet Government that the Danish diplomatic representation in the Russian SFSR had undertaken the protection of Polish nationals in Russia (note of 24 November, 1918 to the People's Commissariat of Foreign Affairs of the Russian SFSR protecting against the internment of the Polish Mission personnel in Russia (*Chronology*, 1918 - 1921, sect. 250). For his part, the Danish Envoy in Moscow informed the People's Commissariat of Foreign Affairs of the RSFSR about his additional function on 7 December, 1918. See: J. DĄBSKI, *Pokój Ryski* [Riga Peace Treaty], Warszawa 1931, p. 78. This was

undertook in November 1918 the protection of Polish interests in Russia. Acting in this capacity, he approached on 7 December, 1918 the People's Commissar for Foreign Affairs of the Russian SFSR with the request that the archives of the Polish Mission (previously acting as the Regency Council Representation) in Petrograd and Moscow be handed over, and that the members of the Mission be allowed to return to Poland.²⁷ The second case of this kind occurred shortly after the first one. When in January 1919 Poland had broken off diplomatic relations with Germany, the Polish Consul General in Berlin was compelled to act *de facto* under the protection of the Danish Embassy in the German capital, since the Danish Government had officially undertaken "the protection of Polish nationals in Germany."²⁸

Later, during the inter-war period, the protection of Polish interests and nationals was, as a rule, entrusted to France, a country with which Poland maintained particularly friendly relations at the time.

Thus, in accordance with the agreement signed in December 1919 between the Polish Legation in Paris and the French Ministry of Foreign Affairs, the French consular posts were entrusted with the protection of Polish nationals in China, pending the establishment of Polish-Chinese diplomatic relations.²⁹ Hence the Polish Consul who had arrived in Shanghai in February 1920, acted initially on the premises and under the auspices of the French Consulate in Shanghai,³⁰ as being the consular post of a State officially protecting the Polish interests and nationals in China.

Before the Second World War, Mexico and Cuba were among those

also confirmed by the People's Commissariat of Foreign Affairs of the RSFSR in a note of 12 December, 1918 to the Polish Minister of Foreign Affairs, L. WASILEWSKI (*Dokumenty Wniešnoi Politiki Sojuza Soveckih Socialističeskikh Respublik*, pub., by the USSR Ministry of Foreign Affairs, Moskva 1957, No. 849, pp. 607 - 609).

²⁷ *Chronology*, 1918 - 1921, sect. 271. Shortly before the protection had been exercised by Germany Note of 6 October 1918 of the German Secretary of State for Foreign Affairs, Solf, informing the Regency Council that German representations in Russia had been charged with the protection of Polish "nationals" (*Chronology*, 1918 - 1921, sect. 145).

²⁸ Communiqué of the Polish Ministry of Foreign Affairs, appeared in the newspaper "Gazeta Polska" on 3 January, 1919. The Consulate General was the first Polish representation abroad to be established after the First World War. The document appointing K. Rose to Consul General in Berlin, which also constituted his letter of commission, had been signed by the Premier I. Daszyński on 15 November, 1918 APMFA — Polish Representation in Berlin, v. 3, Vol. 3 about difficulties in cooperation with the Danish side, in this connection see: K. ROSE, *Wspomnienia berlińskie* [*Berlin Reminiscences*], Warszawa 1932, pp. 124 - 128.

²⁹ Poles enjoyed this protection still in 1927. See: "Wychodźca," No. 14 of 3 April, 1927.

³⁰ *Rozwój stosunków polsko-chińskich 1917 - 1936* [*The Development of Polish-Chinese Relations, 1917 - 1936*], "Polityka Narodów," 1937, No. 3 p. 146.

countries in which Polish emigrants were making a temporary stay prior to further emigration, particularly to the United States. Their situation was extremely difficult in view of the immigration quotas introduced by the United States, whereas the finding of employment in both those "transit" countries was not an easy task. As a result many Poles in Mexico and Cuba found themselves in a most unfavourable conditions and without any protection whatever on the part of the Polish Second Republic.

However, following an exchange of notes concerning this question,³¹ the protection of Polish nationals in Mexico, pending the establishment of a Polish consulate, was undertaken in 1928 by the French Consulate acting in Mexico City. Apart from that the Polish Ministry of Foreign Affairs requested the Polish Legation in Washington to inform the French Consulate in Mexico about the dealings with the French Government,³² and to instruct this Consulate as to the scope of its protection over Polish nationals in Mexico.

Stating its position on this subject, the Polish Ministry of Foreign Affairs advised that the authority of the French Consulate in Mexico be limited to the following functions:

- protecting the rights, property and interests of Polish nationals, providing counsel and assistance, as well as interposing with the Mexican authorities on behalf of Polish nationals,
- accepting applications from Polish nationals,
- delivering or transmitting private letters for Polish nationals, if necessary through official channels,
- transmitting documents concerning Polish nationals through official channels,
- collecting dues on behalf of Polish nationals and transferring money orders and securities through official channels,
- obtaining from the Mexican authorities civil status certificates,
- legalizing documents requiring superlegalization by the Polish Legation in Washington,
- conducting damage suits on behalf of Polish nationals,
- assisting in inheritance proceedings,
- collecting consular fees according to the French consular tariff.³³

³¹ A copy of a Polish verbal note of 3 May, 1926 to the French Embassy in Warsaw in reply to its *noté verbal* of 22 January, 1926 APMFA DK/1930, v. 41.

³² A letter of the Polish Ministry of Foreign Affairs of 23 July, 1926, APMFA DK/1930, v. 41.

³³ For exercising consular functions for Polish nationals, the French consular posts collected fees according to the French consular tariff. According to French regulations, 5 per cent of the total incomings derived from these functions went to the chief of the consulate's chancellery and the remainder of the fees — to the French State Treasury similarly as with fees collected from French nationals (Letter of

However, according to the Polish Ministry of Foreign Affairs instruction, the authority for the French Consulate with regard to the protection of Polish nationals did not comprise issuing passports and visas, as well as performing functions connected with the military service liability of Polish nationals.

Nevertheless, in this case the material scope of protection exercised by a foreign consular post with respect to Polish nationals was relatively wider than even the authority of many Polish permanent honorary consulates.

As for the protection of Polish nationals in Cuba, the French Consulate had been lending them assistance in their dealings with the Cuban authorities for several years, even before it was officially confirmed.³⁴ But in 1927, according to written instructions of the Polish Ministry of Foreign Affairs,³⁵ the Polish Embassy in Paris made semi-official inquiries whether a request concerning protection of Polish nationals in Cuba would be accepted by the French Government. Then the Polish Ministry of Foreign Affairs, instructing the Polish Embassy in Paris to request the Quai d'Orsay that the French Consulate in Havana undertake the protection of Polish nationals "in conformity with the principles generally accepted in France,"³⁶ emphasized that the protection should be organized "in a manner analogous to that being applied with regard to the protection of Polish nationals in Mexico."³⁷ The protection of Polish nationals in Cuba was established on 28 May, 1928,³⁸ after its details had been determined with the Polish General Consulate in New York.³⁹ The Polish Ministry of Foreign Affairs undertook to send (at least once a year) a consular officer from the General Consulate in New York to Cuba who was to control the state of the protection of Polish nationals and to settle certain

the Polish Embassy in Paris to the Polish Ministry of Foreign Affairs of 25 February, 1928 — APMFA DK (1930, v. 41).

³⁴ A letter of the Polish Legation in Washington to the Polish Ministry of Foreign Affairs of 21 January, 1928 (APMFA — *ibid.*)

³⁵ A letter of the Polish Ministry of Foreign Affairs to the Polish Embassy in Paris of 2 October, 1927 (APMFA — *ibid.*).

³⁶ A letter of the Polish Ministry of Foreign Affairs to the Polish Embassy in Paris of 28 March, 1928 (APMFA — *ibid.*).

³⁷ A letter of the Polish Ministry of Foreign Affairs to the Polish Embassy in Paris of 21 October, 1927 (APMFA — *ibid.*).

³⁸ A letter of the Polish Ministry of Foreign Affairs to the Polish Embassy in Paris of 25 June, 1926 (APMFA — *ibid.*).

³⁹ Official announcement for Polish offices abroad pub. in "Dziennik Urzędowy MSZ" ["Official Gazette of the PMFA"], 1928, No. 8, sect. 62. The Polish Ministry of Foreign Affairs had received the confirmation of actual assuming of the protection on June, 1928 (APMFA — *ibid.*) The Ministry published it in PM. No. 134 of 25 June 1928.

reserved matters on the spot.⁴⁰ The Polish Ministry of Work and Social Welfare, for its part, was sending through the French Legation in Cuba certain funds for the National Association of Poles in Cuba to distribute financial help among the most needy. This situation had persisted till 1934 when a Polish honorary consulate was opened in Havana.⁴¹

Polish Government took steps to ensure this type of protection shortly before the German aggression upon Poland. And so, on 30 August, 1939, the Italian Minister of Foreign Affairs was officially informed by the Dutch Legation in Rome about the Polish Government's request presented to the Dutch Government to place Polish nationals and their interests, in case of war, under the protection of Dutch Consulates on the Italian territory.⁴² As for the protection of the interests of the Polish Republic and of its nationals on the Third Reich territory, it was undertaken in September 1939 by Sweden.⁴³ Sweden was also, *inter alia*, to protect the premises and property of the Polish Government's mission in Germany, as well as their staff.⁴⁴

During the Second World War the protection of Polish civilian emigrants and interned soldiers in Rumania (where Polish diplomatic and consular representations had been closed on 5 November, 1940 as a result of the Third Reich pressure on Rumanian authorities) was entrusted at the end of 1940 to the Legation of Chile, which already infiltrated by the German intelligence service, was in no position to discharge its mission adequately.⁴⁵

⁴⁰ A letter of the Ministry of Foreign Affairs to the Polish Embassy in Paris of 28 March 1928 (APMFA — *ibid.*).

⁴¹ Report of the Polish Consulate General in New York (APMFA KG NJ, v. 212).

⁴² *Chronology*, 1939, sect. 1055.

⁴³ K. LIBERA, *Zasady... [Principles...]*, p. 159.

⁴⁴ And thus, on 1 September 1939, the officers of the Polish diplomatic and consular representations in Germany transmitted to Swedish diplomatic and consular representations in Germany, "in accordance with the agreement between Poland and Sweden", that part of their private property furniture, cars, works of art, etc., which they were not able to take away from Germany. In 1940, this property had been handed over to the Third Reich authorities and later sold by public auction. There had been 42 former officials of the Polish Ministry of Foreign Affairs involved in the affair, who after the war assessed their damages at £89000. The Swedish Ministry of Foreign Affairs recognized its "moral responsibility," showing at the same time no inclination whatsoever to pay damages and directing the interested parties to the German Government which at that time did not yet exist formally. See, *Polska służba zagraniczna po 1 września 1939 r.* [*Polish Foreign Service after September 1, 1939*], publ. by the Association of Polish Foreign Service Officials, London 1954, p. 165.

⁴⁵ W. BIEGAŃSKI, *Władze rumuńskie wobec internowanych i uchodźstwa polskiego w Rumunii — wrzesień 1939 — luty 1941* [*Rumanian Authorities Attitude to Polish Internees and Refugees in Rumania, September 1939 — February 1941*], "Najnowsze

In 1943, when Polish-Soviet relations became "interrupted," the Polish Government in Exile requested Great Britain to assume the protection of Polish interests and nationals in the USSR. Whereupon the Polish Ministry of Foreign Affairs in London informed in a circular code of 14 May, 1943 its diplomatic missions abroad that the "British Government had formally undertaken the representation of Polish interests in the USSR [...] stipulating that for the time being its decision should remain unpublished and expressing the hope that it would be possible to transmit this representation later to another State."⁴⁶

Already on 29 April, 1943, the Polish Embassy in Washington—complying with the instructions received from the Polish Government in Exile and in concert with the Foreign Office's standpoint in this matter⁴⁷—"informally" requested the State Department (announcing at the same time that a special note concerning this question was to be sent later) to entrust the United States Ambassador in Moscow with the protection of Polish interests and nationals in the USSR.⁴⁸ The Foreign Office for its part

Dzieje Polski — Materiały i Studia z Okresu Drugiej Wojny Światowej," Vol. 8, p. 69. The fact that the Polish Government in Exile entrusted the Chilean Legation in Bucharest with the protection of Polish interests in Rumania had been connected to a high degree with the employment by this Legation of a certain Mikociński alias Unger, apparently of Russian origin. Before the Second World War he had been Honorary Consul of Peru in Warsaw but later he had been employed by the Chilean Charge d'Affaires with whom he left Warsaw. Then he had worked in Bucharest and, finally, in the newly established Chilean Legation in Ankara where he was arrested at the end of December 1940. See, M. SOKOLNICKI, *Dziennik Ankarcki 1939 - 1943* [*Ankara Diary 1939 - 1943*], London 1965, pp. 172 - 173 and 181. It is also worth mentioning that the Polish underground organizations were helped between 1939 and 1940 by a number of diplomatic missions (particularly by those of Bulgaria in Berlin and in occupied Warsaw, as well as of the United States in Bucharest) in transmitting money orders and various consignments to and from the Occupied Poland. See, E. STACHURSKI, *Z dziejów polsko-bułgarskich tradycji przyjaźni i braterstwa broni* [*From the History of Polish-Bulgarian Friendship and Armed Brotherhood*], "Woj-skowy Przegląd Historyczny," 1969, No. 2 pp. 241 and 244 - 245.

⁴⁶ APMFA, P. Bern, Ciphers — 1943.

⁴⁷ Circular Cipher Bulletin of the Polish Ministry of Foreign Affairs in London of 30 March, 1943 sent i.a. to the Polish Legation in Bern, informing about the line of conduct adopted by the Polish Government after the rupture of Polish-Soviet relations (APMFA P. Bern, Ciphers IV, setc. 1, p. 147). See also W. T. KOWALSKI, *Walka dyplomatyczna o miejsce Polski w Europie 1939 - 1945* [*Diplomatic Struggle for Poland's Place in Europe*], Warszawa 1966, p. 237.

⁴⁸ Foreign Relations of the United States: Diplomatic Papers 1943 later quoted as FRUS, Vol. 3, *The British Commonwealth Eastern Europe. The Far East*, Washington 1963, pp. 402 - 403.

also made diplomatic approaches to the American Government which mainly amounted to explaining its disinclination to assume the protection despite the fact that it had been quite natural to the Polish Government in Exile to direct its request exactly to the British Government, its closest ally at the time.⁴⁹

However, owing to objections presented by the Secretary of State, Cordell Hull, the United States Government also declined (with President Roosevelt's approval) to assume the protection of Polish interests and nationals in the USSR. In assuming a negative attitude, both the United States and Great Britain probably preferred to remain uncommitted *vis-à-vis* their Soviet partner and to keep up appearances of impartiality in order to be able to mediate between the Polish Government in Exile and the Soviet Government in settling prospective disputes. For it seems that the Western Powers quite understandably assumed that it would be undesirable that this problem, after all not the most important one, should hamper the cooperation between the Three Great Powers.⁵⁰

Such being the situation, the Polish Government in Exile supported by Great Britain, had approached Canada, but also in this instance the reply was negative. The British Government also considered the possibility of approaching with the same request the Norwegian or Dutch Governments.⁵¹ Finally, the British Government had succeeded in convincing the Australian Government that it assume the representation of Polish interests in the USSR; this fact found later its expression in an official communiqué.⁵²

In practice, however, it soon turned out that the protection of Polish nationals within the framework of this settlement could have only a formal significance as the protection exercised by the Association of Polish Patriots had become increasingly comprehensive and effective.⁵³ For the

⁴⁹ FRUS, p. 410.

⁵⁰ FRUS, Vol. 3, pp. 407 - 408, and the *Memoirs of Cordell Hull*, London 1948, Vol. 1 - 2, p. 1269.

⁵¹ FRUS, Vol. 3, p. 414.

⁵² "Dziennik Polski," London, 25 May, 1943. This communiqué was simultaneously published in Moscow, London, and Canberra on 25 May, 1943. See; *Sprawa polska w czasie II Wojny Światowej na arenie międzynarodowej* [Polish Cause During the Second World War on International Arena (later quoted as *Polish Cause*)], "Zbiór Dokumentów," Warszawa 1965, p. 364.

⁵³ After the rupture of the relations between the Soviet Government and the Polish Government in Exile, the Association of Polish Patriots assumed the role of a leader and representative of the Polish community in the USSR, and of the organizer of its every-day life and of people's armed forces for the battle against the Germans. See; T. RAWSKI, Z. STĘPOR, J. ZAMOJSKI, *Walka wyzwolenicza narodu pol-*

Soviet Government took a positive attitude towards the creation of this Association and its protective functions with regard to the Polish population in the USSR.⁵⁴ In such circumstances the Association itself and its local organizations were able to exercise several functions of a Polish consular network on the Soviet Union territory.⁵⁵

Immediately after the Second World War, an old tradition accordingly in a number of countries the protection of the People's Poland interests and of its nationals was entrusted to France. At the close of 1945 the Polish Ministry of Foreign Affairs approached the French Embassy in Warsaw with the request that the French diplomatic and consular posts in Latin America undertook the protection of Polish interests in that area.

*skiego w latach 1939 - 1945 [The Liberation Struggle of the Polish Nation, 1939 - 1945], Warszawa 1966, p. 403. The founders of the Association of Polish Patriots stressed that the organization of this new political centre in the USSR was to be a counter-balance to the political forces grouped around the former Polish Embassy in the USSR subordinated to the Polish Government in Exile. See: I. JAŁOSZYŃSKI, *Niektóre problemy dotyczące powstania i struktury organizacyjnej Związku Patriotów Polskich [Some Problems of the Establishment and Organizational Structure of the Association of Polish Patriots]*, "Najnowsze Dzieje Polski 1918 - 1939," Vol. 6, 1962, p. 153. The Polish Government in Exile had realized that it was threatened by the Association of Polish Patriots and wished neither to recognize its activities, nor relinquish its own protection of Polish nationals in the USSR. And so General Sikorski, after the conference (at Brummen near Beirut) of the heads of Polish Near East missions subordinated to this Government, requested in a letter to President Roosevelt, of 28 March, 1943, that the protection of the remaining Polish population in the USSR by Polish organizations connected with the Polish Government in Exile be restored, which constituted an "indirect blow against the Association of Polish Patriots." See: S. ZABIEŁŁO, *O rząd i granice. Walka dyplomatyczna o sprawę polską w II Wojnie światowej [For a Government and Frontiers. Diplomatic Struggle for the Polish Cause During the Second World War]*, Warszawa 1964, p. 131. This occurred precisely at the time when the activities of the Association in the territory of the USSR were getting more and more efficient.*

⁵⁴ *Ibid.*, p. 110.

⁵⁵ The Association of Polish Patriots acted through an extensive network of 99 district, about 100 regional, and 3,000 local organizations scattered throughout the vast spaces of the USSR. See: P. M. KALENICENKO, *Polska progresywna emigracja w SRSR w roku drugoi swjatovoi wojny*, Kiev 1957, Chapt. III, pp. 153 - 183. See also *Uchwała Zarządu Głównego ZPP o działalności w zakresie opieki nad ludnością polską w ZSRR [The Resolution of the APP Headquarters on Activities Connected with the Protection of the Polish Population in the USSR]*, passed on 13 April, 1944, and dealing in detail with the problem of satisfying the needs of the Polish colony in the USSR. Also the repatriation of Poles from the USSR took place mainly with the active participation of the APP which exercised in this far-flung action "functions of a Polish consular network on the territory of the USSR" (JAŁOSZYŃSKI, *op. cit.*, p. 163).

In Brazil ⁵⁶ and in Argentina ⁵⁷ the French missions had exercised this protection until the People's Poland Legations were established in these countries. In Uruguay ⁵⁸ and Chile France exercised her protection even in 1947.⁵⁹

The archives of the Ministry of Foreign Affairs, for example those of 1950, show that also in the following years the Polish Government entrusted to other States the protection of Polish interests and nationals in third States.⁶⁰

⁵⁶ Jan DROHOJOWSKI, *Wspomnienia dyplomatyczne* [*Diplomatic Reminiscences*], Warszawa 1959, p. 296. Moreover, in a verbal note No. 49/46 of 26 January, 1946 the Diplomatic Protocol of the Polish Ministry of Foreign Affairs informed the French Embassy in Warsaw that the President of the National People's Council, Bolesław Bierut, intended to appoint W. Wrzosek to be Polish Envoy in Rio de Janeiro and requested ("taking advantage of good relations existing between France and Brazil") French assistance in obtaining an *agrément* for him (APMFA PD, 1946, v. 2, Vol. 20). Mr. Wrzosek obtained the *agrément* on 25 April, 1946 Note of the Brazilian Embassy in Washington No. 921 of 25 April, 1946 to the Polish Chargé d'Affaires in Washington—APMFA PD, 1946, v. 2, Vol. 9.

⁵⁷ The first People's Poland Envoy in Buenos Aires, S. Szumowski, presented his letter of credence of 18 March, 1947—see a letter of the Ministry of Foreign Affairs, No. PD 148/47 of 20 March, 1947—AMPFA, 1946 PD v. 2, Vol. 6 to the Argentinian President, General Juan D. Peron, on July 30, 1947 "Rzeczpospolita" of 5 August, 1947. It is worth emphasizing that President Peron, having entered upon his office in 1947, assumed a negative attitude towards the proposal of General Anders (who belonged to a circle of Polish emigrant politicians in London which, despite the withdrawal in 1945 of recognition of the Polish Government in Exile by the States of anti-Hitlerite coalition, attempted to sustain the fiction of an "émigré government" aimed at sabotaging the activities of People's Poland Government of a collective settlement in Argentina of a part of demobilized in Italy and England Polish military formations which had fought during the Second World War on the side of Western Allies. On the other hand, the Argentinian authorities were permitting individual immigration of former Polish soldiers to Argentina, allowing at the same time the British Consulate in Buenos Aires to exercise a number of technical functions connected with this immigration. See: J. RADZYMIŃSKA, *Biały Orzeł nad Rio de la Plata* [*White Eagle Over Rio de la Plata*], Warszawa 1971, pp. 150 - 151.

⁵⁸ This is confirmed, *inter alia*, by the note No. 64 of 11 Feb. 1947 of the French Embassy in Warsaw transmitting to the Ministry of Foreign Affairs in Warsaw an invitation to the ceremony to be held in Montevideo on the occasion of entering upon office of the new President of Uruguay (APMFA PD, 1947, v. 4, Vol. 2).

⁵⁹ For that period the French Government charged the Polish Ministry of Foreign Affairs with costs incurred in connection with the exercise of this protection (letter No. 284 of 19 July, 1948 from the Latin American Division of the Polish Ministry of Foreign Affairs to the Diplomatic Protocol of the same Ministry concerning the state of relations between the People's Poland and Argentina, Uruguay, Chile, and Brazil, as well as a memorandum of the reply of the Director of the Diplomatic Protocol—APMFA PD, 1948, v. 7, Vol. 2 "Ogólne").

⁶⁰ A letter of the Director of the Legal Bureau of the Ministry of Foreign Affairs, Professor M. Lachs, of 20 July, 1950 (APMFA PD, 1950, v. 14, Vol. "Ogólne").

III. Polish Protection over the Interests of Other States and of Their Nationals on the Territories of Third States

The Polish Government has also sometimes exercised the protection of the interests of foreign States and of their nationals when abroad.

As for the inter-war period, it took place for the first time in 1922 at the request of the French Government in connection with the repatriation of French nationals from the USSR.⁶¹

Then, at the request of the Turkish Government in 1924, the Polish Government agreed to exercise the protection of Turkish nationals by Polish consular posts in Yugoslavia.⁶² The fact that Turkey had turned itself precisely to Poland for the protection of Turkish interest in Yugoslavia, was presented by the Polish official circles as confirming Poland's international prestige, and the more so as, thanks to the "*bons offices*" of Poland, Turkish-Yugoslavian diplomatic relations were afterwards established.⁶³ The Turkish Legation in Warsaw in a note of 27 February, 1925 transmitted to the Polish Ministry of Foreign Affairs the official gratitude of the Turkish Government for the Polish protection of Turkish nationals in Yugoslavia.⁶⁴

Even in 1930 Polish consular posts in the Soviet Union also exercised consular protection of the nationals of certain third states which had no diplomatic relations with the Soviet Union (including Bulgaria).⁶⁵

During the Second World War, Polish missions abroad, subordinate to the Polish Government in Exile, were obliged to "give every possible assistance and legal, consular, and social protection" to Czechoslovak nationals staying in or passing through the area of the territorial jurisdiction of these missions, unless a representative of Czechoslovak Government in Exile performed his functions in this area or requested Polish assistance on his behalf. The Polish Government in Exile assumed that in the future — undoubtedly in connection with the prospective establishment of a Polish-Czechoslovak confederation after the war — the whole question would be settled on an appropriate "public-legal basis."⁶⁶

⁶¹ Note of the Polish Ministry of Foreign Affairs of 13 February, 1922 forwarded to the People's Commissariat of Foreign Affairs of the Russian SFSR (*Chronology*, 1922 - 1923, sect. 2032).

⁶² PM No. 57, of 10 March, 1925.

⁶³ J. GRZYMAŁA-GRABOWIECKI, *Polska w stosunkach międzynarodowych* [Poland in International Relations], in: *Księga Pamiątkowa—Dziesięciolecie Polski Odrodzonej 1918 - 1928*, 1928, p. 244.

⁶⁴ PM No. 57 of 10 March, 1925.

⁶⁵ Materials for the 3rd Congress of Polish Consuls in the USSR, p. 13 (APMFA DK, 1930, v. 46).

⁶⁶ Circular letter by Minister of Foreign Affairs, A. Zaleski, concerning Polish-Czechoslovak co-operation, of 2 June, 1941 (*Polish Cause*, p. 199).

After the Second World War the People's Poland posts abroad exercised for several years consular protection most frequently of the interests of the Socialist countries in the period of temporary difficulties in their relations with the Capitalist countries, and in particular of the Bulgarian interests in the United States, Hungarian in Canada,⁶⁷ and the Soviet Union's in Brazil. In the latter country, Polish posts exercised the protection of Soviet nationals, facilitating i.a. their repatriation from Brazil.⁶⁸

IV. A Specific Case: Polish Protection of the Interests of the Free City of Gdańsk and of Its Nationals

It would be impossible in the context of the problems presented here not to mention a specific practice in the domain discussed above due to the existence during the inter-war period of such an international person as the Free City of Gdańsk. Specifically, we are interested in the protection exercised abroad of its interests and those of its nationals in virtue of the specific ties linking Poland with the Free City,⁶⁹ which in the understanding of the Treaty of Versailles was not a State organism.

Before the Free City of Gdańsk had been created,⁷⁰ the protection of its citizens when abroad was exercised by Great Britain, albeit not without some reservations held by the Polish authorities which considered this protection not fully adequate everywhere. Therefore, the Polish Ministry of Foreign Affairs, reckoning that Poland will obtain in not too

⁶⁷ M. GĄSIOROWSKI, *Dyplomaci i konsulowie* [Diplomats and Consuls], Warszawa 1966, p. 81. *Nota bene*, the Department of State demanded in a note of 28 December, 1951 that the Hungarian Consulate in New York and Cleveland be closed. This occurred in connection with the well-known case of four American airmen in Hungary. See: "Sprawy Międzynarodowe", 1951, Chronologia, p. 62.

⁶⁸ This issue had been a matter of talks between the Polish Envoy in Rio de Janeiro, J. Chabasiński, and the Brazilian Envoy in Warsaw, Moscoso, before he took over the office of the Chief of Diplomatic Protocol in Itamarati (Chabasiński's letter to the Ministry of Foreign Affairs in Warsaw of 22 November, 1957—APMFA PD, 1957, v. 37, Vol. "Brazil").

⁶⁹ For more see: E. J. PAŁYGA, *Prowadzenie przez Polskę spraw konsularnych Wolnego Miasta Gdańska—prawo i praktyka* [Conduct by Poland of the Consular Matters of the Free City of Gdańsk. Law and Practice], "Rocznik Gdański," Vol. 29/30, 1970 pp. 65 - 111. Summary pp. 111 - 113.

⁷⁰ In the Gdańsk area existed at the time a kind of co-empire of the Allied and Associated Powers, and France, Japan, Great Britain and Italy maintained direct relations with the Free City authorities. See: J. MAKOWSKI, *Zagadnienie państwowości Wolnego Miasta Gdańska* [The Statehood Problem of the Free City of Gdańsk], Warszawa 1934, p. 24.

distant future a right to conduct the foreign affairs of the Free City,⁷¹ entrusted its missions abroad with the duty to take special care of the City's inhabitants "by furnishing them with informations, council, instructions, aid and letters of recommendation, as well as by protecting them against injurious regulations of local authorities, and the like."⁷²

It is worth noting that at that time the control over the realization of the rights of the Polish population in Gdańsk, as well as the protection of Polish nationals and of their interest in the City area, before it became a Free City, had been exercised by a Polish agency, founded in the beginning of 1919. It is characteristic that, in view of the legal position of Gdańsk at the time, the Agency formed a part of an American foodstuff mission.⁷³ It was only after the coming into force of the Treaty of Versailles that the Polish Government had sent its official representative to the Free City who, in conformity with the Treaty stipulations acted there as a Polish Commissioner General.⁷⁴

As to the question of consular protection of the Free City interests and those of its citizens between 1921 and 1939, it is, as a matter of fact, outside the scope of the present article since the functions connected with such a protection came within the competence of the Polish Government, in accordance with Article 104, paragraph 6 of the Treaty of Versailles. For the fact that Poland conducted the foreign relations of the Free City resulted in depriving it not only of the right of legation, but also that of

⁷¹ Admittedly, this occurred after the conclusion of the Treaty of Versailles, but before the conclusion of the Paris Convention between Poland and Gdańsk, of 9 November, 1920, which expressed more precisely the provisions of Art. 104, para. 6 of the Treaty of Versailles on the protection by the Polish Government of the Gdańsk citizens when abroad. The Convention came into force together with the creation of the Free City of Gdańsk, which took place on 15 November, 1920 (Collection of Official Documents on Relation of the Free City of Gdańsk to the Polish Republic, Part I. 1918 - 1920, Gdańsk 1923, pp. 12 - 13).

⁷² Circular of the Polish Ministry of Foreign Affairs of June 7, 1920—confidential (AMPFA AW, v. 5, Vol. 9).

⁷³ S. KUTRZĘBA, *Polskie prawo polityczne według traktatów [Polish Political Law According to Treaties]*, Kraków 1923 - 1925, p. 54.

⁷⁴ Art. 2 of the Polish Council of Ministers instruction of 30 May, 1920. See: circular of the Polish Ministry of Foreign Affairs No. 185 of 31 May, 1920; S. KUTRZĘBA; *Gdańsk i Polska [Gdańsk and Poland]*, "Przegląd Współczesny," 1922, No. 1. p. 52. Nevertheless, as the debate in the Polish Senate had shown Record No. 2 of the Polish Senate sitting on 17 May, 1923, p. 28 even in 1923 the Polish nationals in Gdańsk were treated worse than foreigners. Only after the Permanent Court of International Justice had pronounced on 4 February, 1932 its advisory opinion related to this question [Publications de la Cour Permanente de Justice Internationale, A/B No. 44 of 4 February, 1932], the legal situation of Polish nationals in the Free City of Gdańsk became formally equalized (also with regard to legal protection) with that of the foreigners in Poland.

consular representation. In certain cases Poland officially notified other States of her prerogatives. Thus, for example, the Polish Legation in Berlin informed the German Government on 14 September, 1921 that the Polish Government had undertaken the conduct of diplomatic and consular relations of the Free City.⁷⁵ However, it should be noted here that German State organs had, repeatedly and in contravention to international law, tried to "substitute" Poland in her protective functions exercised with regard to the external interests of the Free City and those of its citizens. This led to many diplomatic protests lodged by the Polish Legation in Berlin with the *Auswärtiges Amt*. Thus, for example, the Polish Legation in Berlin was compelled to draw the German authorities' attention (in a verbal note of 4 March, 1929) to the fact that it was the Polish consulates that had been called upon to exercise protection over Gdańsk citizens when abroad.⁷⁶

By usurping the right to exercise protection of the interests of the Free City and of its citizens, the Third Reich authorities also encroached on Polish right of issuing passports to the Gdańsk citizens. This, too, led to frequent diplomatic interventions. Thus, for example, with regard to personal documents being issued by the Nazi authorities to Free City citizens the Polish Embassy was compelled to send a verbal note, of 31 January, 1937, to the German Ministry of Foreign Affairs with a categorical reminder, as in previous cases, that in accordance with the rules of international law also this function rested exclusively within the competence of Polish authorities.⁷⁷

⁷⁵ *Chronology*, 1918 - 1921, sect. 1769.

⁷⁶ *Chronology*, 1927 - 1929, sect. 736.

⁷⁷ *Chronology*, 1936 - 1937, sect. 36.

BOOK REVIEWS * COMPTES RENDUS

Remigiusz BIERZANEK, *Prawa człowieka w konfliktach zbrojnych* [*Human Rights in Armed Conflicts*], MON, Warszawa 1972, 208 pp.

The most recent major codification of legal problems connected with armed conflicts took place in 1949 when, at the diplomatic conference in Geneva, four conventions on the protection of war victims were passed (on the sick and wounded in land forces, on the sick, wounded and shipwrecked in armed forces at sea, on prisoners of war and on civilians). Several conventions from the sphere of the law of war passed during the years that followed dealt with relatively narrow and detailed, although important, questions.

In 1968 was commenced, within the framework of UN and the International Committee of the Red Cross (ICRC), work aimed at the reform of the law of armed conflicts towards its further humanization. At present the half-way mark has been reached. The conclusion of the next stage of codification, anticipated in 1974, is a convocation of diplomatic conferences for the adoption of new international legal instruments. They are intended to adapt humanitarian law to the requirements of new war technics, new kinds of armed conflicts, and to the postulates of public opinion.

The book by Professor Remigiusz Bierzanek constitutes an excellent introduction to problems of the protection of human rights in times of armed conflicts. With a great knowledge of the subject, the author presents in it the main trends in which law is to be developed, he confronts the projects for new legal instru-

ments with the conventions hitherto in force and makes a critical analysis of proposals tabled to supplement the Geneva Conventions of 1949 and The Hague regulations on law and customs of land war signed in 1907.

The author has paid particular attention to four subjects, justifiably considering them the most important in the process towards developing humanitarian law.

They cover the following problems: the increased protection of the victims of armed conflicts not of an international character (Chap. 3), the increased protection of the civilian population (Chap. 4), the increased protection of combatants who, on the basis of the conventions in force, are denied the status of legitimate combatants (Chap. 5) and the increased effectiveness of the humanitarian law in force (Chap. 6).

These subjects are not uniformly treated. Undoubtedly the best elaborated chapter is the one dealing with partisans and with the other so-called irregular combatants as, for example, the participants in the fight for national liberation. R. Bierzanek centers much attention on the legal status of partisans and the chapter we are discussing, one third of the book as to volume, constitutes the synthesis of his work in this field up-to-date.

The protection of the civilian population and the victims of armed conflicts not of an international character is dis-

cussed fairly comprehensively, whereas the measures aimed at ensuring that the law in force is more effective have been dealt with very briefly.

The problem of the increased protection of the sick, wounded and prisoners of war has been all but entirely avoided. The author assumes that the existing international instruments in this domain are adequate and require no fundamental alteration. This view would seem plausible.

A part of Bierzanek's considerations deals with the differences between the international armed conflicts and the conflicts not having that character and with the trend to extend the concept of international conflicts in a legal understanding and to confine the concept of conflicts of a non-international character.

It is noteworthy in this connection that many difficulties involved when drawing a border-line between these kinds of conflicts could well be avoided if, from the legal point of view, the armed conflicts are divided not into two, but into three groups: international armed conflicts, armed conflicts not of an international character and conflicts of internal character.

And to the latter, not having an armed character, the rules of international law of war are obviously not applicable. The first group is that of typical international armed conflicts and, as such, the whole of international law of war is applied. The middle group, to which several if not all rules of international law of war should be applied, has been in the most recent proposal of ICRC (1972) defined as follows: "A situation where in the territory of one of the High Contracting Parties hostilities of a collective nature are in action between organized armed forces under the command of a responsible authority."

The starting point of the author's considerations on the legal status of the civilian population and partisans is the conviction that the right to defend one's

country is an inherent right of the population in contemporary armed conflicts. And considerations of every type must reckon with this factor. The author decidedly casts aside the views, held above all in the German doctrine, according to which only the regular armed forces are authorized to participate in war activities and he postulates the greater legal protection of partisans.

The criticism he has made of the present legal state in the field of partisan protection is fully justifiable.

In the chapter on the civilian population a polemic note, evoked by a French lawyer and which the author of the book seems to share, is expressed in the view that one of the most effective means of protecting the population in times of armed conflict is to intern it in camps for interned civilians (p. 108-110). R. Bierzanek discusses this problem in the subsection entitled *Safety Zones*.

In my opinion, camps for civilian internees can neither on the basis of the law in force, nor on that of practice, be included among the measures directed at increasing the protection and safety of the civilian population.

One of the values of the book under review is its clear structure. The exception is discussing the problems of the so-called economic war in the sub-section dealing with types of weapon instead of discussing them in the next one, dealing with the methods of war. Since the application of the humanitarian law by the armed forces of UN is treated of in the same place, it is not unlikely that a misprint has crept in here.

The proposals for the reform of the law of war and particularly the projects announced by ICRC in the field covered by the book have been discussed in detail. However, at times the reader will sense a certain inadequacy due to the fact that the author only rarely clearly indicates his own preferences for various proposals and very frequently leaves an alternative solution without a commen-

tary. This remark would concern only particular problems because for the basic ones the author puts forward his postulates as to the trends and methods for the reform of the law of war.

As, for example, in connection with work currently being carried out by the ICRC and government experts on the elaboration of additional protocols to the Geneva Conventions of 1949 on the protection of war victims, R. Bierzanek expresses the view that these are only half measures that would rather delay than accelerate the reform of the law of war since they will create the illusion that the matter can be settled by way of additional protocols. The author considers that the acceptance of complementary protocols will not fill in all the gaps and that it is necessary to basically reform the law of war, although he fully realizes the difficulties this would involve.

To support his view, R. Bierzanek recalls that in the field of the method of combat, and thus one of the most important parts of the law of war, the legal regulations in force are practically hundred years old. The Hague regulation in force up to this very day was elaborated in 1907 and based on the Brussels Declaration of 1874. And thus it dates back to an epoch in which, for example, air force war did not exist.

In replying to the question: why, despite the enormous progress in war technics and the fundamental changes in methods of conducting war, The Hague

regulation from the first years of the century is continued without being substantially supplemented?, the author points out that The Hague codification was achieved with great difficulty as a compromise between what was considered a political and military necessity and the humanitarian postulates of public opinion. This compromise had been so extremely carefully deliberated that any infringement of it whatsoever would have threatened the whole structure of the law of war and yet, even so, its provisions were repeatedly violated in practice. The solutions accepted in The Hague regulation were recognized by its creators as temporary ones, but they have turned out to be unexpectedly lasting. Only recently, the situation has once again matured to renew the codification process of the law of armed conflicts.

Many resolutions of the International Red Cross Conferences include recommendations to disseminate knowledge on international humanitarian law in university, army, Red Cross, State administration and other circles. For that reason there have appeared abroad many a books in the realm of the law of armed conflicts. This popularizing role is successfully fulfilled by the Ministry of National Defence Publishers' (MON) publication of R. Bierzanek's work that supplements the fairly small, as yet, set of Polish elaborations in the field of humanitarian law.

Stawomir Dąbrowa

Wojciech MORAWIECKI, *Funkcje organizacji międzynarodowych* [*Functions of International Organizations*], Warszawa 1971, 460 pp.

The scientific output of W. Morawiecki in the field of international organizations catches the attention of the reader by its variety and versatility. Apart from many articles dealing almost with every important problem connected with international organizations, two basic and

universally quoted monographies, one under the title *Organizacje międzynarodowe* [*International Organizations*] and another—*Narody Zjednoczone—zamierzenia i rzeczywistość* [*United Nations—Intentions and Reality*], came from under his pen in the last years. The need for

these works and their wide recognition has been confirmed by the fact that both publications and quickly disappeared from the booksellers' shelves and had been re-edited in a short time. At present the reader has been presented with a new and extensive W. Morawiecki's work under an impressive title *Funkcje organizacji międzynarodowych* [*Functions of International Organizations*].

As the title of the work indicates, the author has approached the subject of research in a new way. He has shown international organizations through their basic functions, enlightening his model formulations and generalizations by many examples of the activity of universal as well as regional organizations. The author has divided all his penetrating considerations into four parts, each containing several chapters.

In Part I, entitled *General Problems of the Functioning of International Organizations* (pp. 25-120) the author formulated his general view on the nature of international organizations and discussed the method of research and systematization criteria he had adopted.

The introductory considerations begin with the observation that international organizations are becoming more and more the main instrument of co-operation between the States. Their growing importance attracts not only law theoreticians, but also professional politicians and, in an increasing degree, even the general public. International organizations have also ceased to be a domain of international law exclusively. They have become the subject of comprehensive research with various political, economic, and sociological aspects included. The author rightly and very convincingly argues that the science of international organizations is slowly assuming interdisciplinary character and turning increasingly into a section of political sciences which also have interdisciplinary character.

Morawiecki sees the essence of international organization above all in its activity, in fulfilling its functions. And by its functions he understands "processes of the activity of the organization aimed at realization of its tasks." Unlike the tasks of an organization, which constitute substantiated intentions, *sui generis* patterns, "the function" is "a process of gradual achieving of the pattern; inasmuch as the task defines what the organization is to achieve, the function refers to the way the organization acts to produce the desired environment transformation" (p. 100). It is worth stressing here that the author shows and remembers all the time — both at analyzing and working out a synthesis — that the functioning of international organizations has always the character of a political process. This process comes to light first and foremost through the decisions taken by particular organs. There is also a clearly formulated thesis that not exactly the formal authority of international organizations over the States, but rather the concrete ability to arrange agreements between the member States, determine the effectiveness of these organizations. It is from these observations and assumptions of a general character that the author derives the basic function of every international organization. It consists in a political process which:

- (a) discloses the scope of the uniformity of interests of the member States,
- (b) leads to a general agreement on common tasks within the scope of agreed interests,
- (c) leads to an agreement on means of achieving these common tasks (p. 102).

The basic function defined in this way should, in author's opinion, constitute the main current of activity of every international organization and permeate all types and kinds of its function. Thus general assumptions and

particular structural solutions of the organization should be adapted to this function.

The three subsequent parts of the work have been devoted to the presentation of various functions of the international organizations. The author, basing himself on the typification of the activity processes, that is, on methods and means used by an organization to carry out its tasks, distinguishes the following three kinds of functions: regulatory, control and operational ones. These three main types of the functions of international organizations at the same time reflect three types of their internal political processes (p. 103).

The regulative functions have been presented in detail in the second part of the book (pp. 121 - 204). Under this name the author means "the process of establishing norms and patterns" but on the understanding that these norms and patterns are not uniform in character; they may be moral, political or legal. It is in this sense that they are to influence the activities of their addressees. In successive chapters the author discusses:

1. problems concerning the creation of the norms of international law with the participation of international organizations,
2. negotiation of international agreements by international organizations,
3. establishing by these organizations of legal norms binding the member countries, and
4. establishing of internal law for their own use.

The definition of the regulative functions as well as the examples from practice have been clearly and convincingly presented.

Part III of the work (pp. 205 - 283) has been devoted to control functions of the international organizations. By these functions the author understands "all kinds of activity of any organization directed — through confrontation

of the facts of a case with binding or recommended patterns of action — at generating compliance with those patterns." In connection with this author aptly distinguishes three consecutive phases of the control process:

1. determining the facts of the case,
2. confrontation of the facts of the case with the requirements of the behaviour patterns,
3. determining of guilt and responsibility for infringing the patterns of behaviour.

The control functions determined in this way express themselves in the first place in demands for information and reply, and in special investigations, observations and inspections. Moreover, the author extends these functions to the settlement of conflicts, that is, to the international courts in the strict sense of the word.

Part IV (pp. 285 - 408), the last one, comprises the discussion of the operational functions. These functions are characterized by a specific method of action, different from the two previous ones. Carrying out regulative and control functions, the international organization tries to persuade particular countries to fulfil the tasks established by this organization through exerting certain political pressure on the countries concerned. While, carrying out operational functions, the international organization itself fulfils its tasks with the aid of its own personnel and using material means at its disposal. This kind of functions, treated by the author separately, has been exemplified in an interesting manner by the UN peace operations, international settlement and investment credits operations, and by technical assistance and scientific research operations. The object of these functions is perhaps extremely varied, but their common character arises no doubts.

The author has taken over many observations, and even a few extensive

arguments, from his previous publications. Nevertheless it is undoubtedly a completely new work, entirely different in its essence from the former ones. It seems that almost all Morawiecki's previous publications on international organizations had been only stages on his way to extensive research and development of a general theory of international organizations, which has been presented in his latest work. Thus the research and scientific output produced up to the present have been considerably widened and thoroughly transformed and, what is even more important, the rich and multifarious results obtained by the author have been systematized in an entirely new and original manner as a coherent whole. He has presented a general theory of international organizations of his own, which is a great achievement not only in the Polish science.

It is evident that not a few doubtful, controversial, or even incomprehensible points could be found in this valuable book. The very concept of function and its classification have not been always treated with equal precision and definiteness. For instance, the reader is first faced with the "basic function of the international organization" (pp. 100-102), then a classification of all basic functions into three types follows and finally we are again faced with a chapter under a general title *Consul-*

tative Character of the Function containing remarks about some other, consultative kind of function. Yet my doubts concern not exactly the heart of the matter but certain rather editorial, shortcomings.

In point of fact, it is difficult to blame the author for certain simplifications or overstatements of which he was well aware when writing the book. He himself explicitly admits that his differentiation of the main types of functions attributed to international organizations does not signify at all that these functions occur entirely separate and mutually independent or that they exhaust all possible kinds of functions of international organizations (p. 104).

The importance of the work lies in the fact that the author has very aptly seized certain general model rules of the functioning of the international organizations and that he has worked out and applied successfully a new method of analytical examination to various modes of their action. This is an analysis which leads to a correct general synthesis. Attention also should be drawn to the thesis consequently followed throughout the book that, as a matter of fact, it is the sovereign States that are always the subjects of international cooperation, and that all their activities have a political character.

Jan Kolasa

Stanisław Edward NAHLIK, *Narodziny nowożytnej dyplomacji* [*Naissance de la diplomatie moderne*], Ossolineum, Wrocław 1971, IX, 286 pp.

La monographie dont l'auteur est Stanisław Nahlik, est l'un des plus intéressants ouvrages, qui viennent de paraître ces dernières années en Pologne, dans le domaine de l'histoire du droit international. Le titre même dudit ouvrage peut frapper le lecteur: *La naissance de la diplomatie moderne*. Dans ces trois mots, d'une manière concise, on a formulé le

sujet de l'ouvrage. L'auteur a reculé bien loin dans le passé afin de connaître la genèse du droit diplomatique contemporain, non seulement pour satisfaire une curiosité cognitive elle-même. Tout consciemment il ne s'occupe pourtant ni de l'Antiquité ni de l'époque médiévale bien qu'il faille y chercher l'existence des germes des principes fondamentaux qui

régissaient les relations diplomatiques entre les souverains de ces époques reculées.

S. Nahlik commence donc ses considérations par l'époque de la Renaissance, c'est-à-dire par ce stade de développement des relations politiques où les souverains européens ont commencé à établir, auprès d'autres cours, au lieu des postes temporaires, des postes diplomatiques permanents. L'auteur a justement reconnu cette étape pour le tournant dans l'évolution de l'organisation du service diplomatique étranger, non seulement parce que c'était sans doute une toute nouvelle forme des relations maintenues entre les cours européennes, mais en raison des conséquences assez importantes qu'ont produites ces transformations.

La diffusion des missions diplomatiques permanentes sur le continent européen est devenu un fort stimulant à la création de nouvelles formes et de nouvelles règles de droit dont le but fut de faciliter toujours une communication entre les souverains, tout d'abord seulement de la partie occidentale de l'Europe. Lesdits principes se sont répandus ensuite sur tout le continent. Ils ne sont nés et ne sont développés que par la voie de la pratique. Enfin, grâce à la consolidation au cours de longues années, d'une certaine manière d'agir et aussi grâce à la conviction qu'il n'est pas permis de déroger à l'usage établi, les règles du droit coutumier se sont établies. La conscience de l'existence des principes de cette sorte a été renforcée par la doctrine.

On sait que la doctrine a joué un rôle important dans le cadre de l'époque qui comprend selon l'auteur « la naissance de la diplomatie moderne ». Il est donc tout clair que les opinions doctrinales du droit des gens ont été traitées par l'auteur comme la matière essentielle de la monographie entière. La doctrine a joué pourtant dans l'ouvrage de S. Nahlik un rôle double: comme l'information sur les opinions de l'écrivain donné sur cer-

tain problème et deuxièmement, comme une confirmation de l'existence d'une règle du droit coutumier. On sait qu'il existe très peu d'exemples dans l'évolution du droit international de l'ensemble si développé des règles coutumières dudit droit qu'elles avaient présenté vers la fin du XVIII^e siècle. Elles ont déjà englobé presque tous les problèmes relatifs surtout aux privilèges et immunités des agents diplomatiques ainsi qu'à beaucoup d'autres problèmes portant sur les missions diplomatiques permanentes (désignation d'un envoyé ou d'un ambassadeur, demande d'agrément, remise des lettres de créance, etc.). L'auteur a justement fait en puisant pour ses besoins dans une littérature extrêmement vaste. Ses recherches ont consisté dans l'étude des ouvrages des écrivains européens, et entre autres de ceux des écrivains polonais, publiés dès les XVI^e - XVIII^e siècles, c'est-à-dire des écrivains de la période classique du développement de la doctrine du droit des gens. De plus, il a augmenté le registre de ces auteurs qui s'occupaient dans les époques assez reculées des problèmes d'envoyés et de légations, en remettant leurs ouvrages à la doctrine contemporaine ou en leur donnant une valeur différente de celle qu'ils ont eue jusqu'à présent dans la doctrine.

Il convient de souligner que S. Nahlik a justement fait remarquer qu'il faut chercher les origines de la doctrine du droit des gens dans ces oeuvres et ouvrages, aujourd'hui dits monographiques, qui abordant les problèmes liés aux envoyés et légations déjà en XV^e et XVI^e siècles, ont considérablement devancé les grandes synthèses philosophiques du droit de la nature et du droit des gens formulées par les célèbres maîtres des XVII^e et XVIII^e siècles. Cette observation faite par S. Nahlik peut paraître facile et évidente, mais en effet c'est lui qui l'a faite.

En dehors de la littérature dont l'examen est si proche dans cette monographie

de l'examen de la pratique, l'auteur devait évidemment prendre connaissance de la pratique par l'intermédiaire « des cas célèbres », c'est-à-dire des précédents diplomatiques. Je dois attirer mon attention sur un tel trait de l'ouvrage en question, qui ne devait être mis en relief chez l'Auteur si éminent, mais c'est le trait si saisissant qu'il est digne de le souligner.

L'auteur domine le matériel énorme d'une façon excellente, la narration est exposée d'une manière si pittoresque et libre comme s'il écrivait un récit et non pas un important ouvrage scientifique. Il convient de remarquer également que l'idée directrice est formulée par l'auteur d'une manière très précise et concise. S. Nahlik s'est servi, entre autres, de l'habitude, aujourd'hui peut-être un peu démodée, de précéder chaque chapitre d'un *motto* convenable. Ce n'est pas seulement une décoration, mais une introduction toujours bien intéressante dans l'essence du problème abordé dans ce chapitre. Lorsque l'auteur s'occupe, par exemple, du problème de « l'origine du droit de légation », un *motto* emprunté à Pufendorf informe: *Ubi arbitramur, ipso iure naturae legatos esse inviolabiles*, pendant que l'autre répète après Textore l'opinion contraire: *Legatorum publica illa securitas et sanctimonia consensu gentium originem traxit*. Ainsi l'auteur suggère au lecteur d'une manière très ingénieuse deux opinions essentielles, mais entièrement différentes, exprimées par les auteurs de la période classique du développement du droit des gens, sur l'origine du droit en général, et du droit ayant trait aux relations diplomatiques en particulier. L'autre chapitre, où l'auteur s'occupe du rôle d'un envoyé « entre les souverains accréditaire et accréditant », est précédé d'un *motto* suivant: « Négociier sans cesse... » emprunté à Richelieu. En réalité, au XVII^e siècle, les négociations ont constitué une tâche essentielle, sinon unique, des en-

voyés accrédités auprès des cours étrangères. Ainsi les citations ne sont pas seulement un ornement du texte, mais elles constituent une partie intégrale de chaque chapitre.

Toutes ces valeurs de ladite monographie sur la naissance de la diplomatie moderne sont indoubtables, mais la question se pose de savoir si l'auteur a réellement enrichi la science du droit international. On sait que plusieurs idées et opinions portant sur cette période de développement du droit diplomatique ont été déjà formulées il y a longtemps. La doctrine du droit international a déjà reconnu depuis longtemps que l'établissement des missions diplomatiques permanentes fut le début de la nouvelle ère dans l'évolution des relations internationales. Pourtant S. Nahlik a introduit de nouveaux éléments à ses développements. Dans la doctrine du droit international pratiquée dans les pays de l'Europe occidentale on a reconnu depuis longtemps que les savants en examinant l'évolution d'une institution du droit international se sont presque exclusivement limités à la pratique ouest-européenne des relations internationales. Ils ne prenaient pas en considération entièrement ou presque entièrement la pratique diplomatique de l'Europe centrale ou orientale qui a également contribué au développement du droit diplomatique. S. Nahlik a considérablement augmenté le champ de recherches, en étudiant aussi bien la pratique des relations internationales que les oeuvres et ouvrages théoriques qui ont été publiés dans cette partie de l'Europe. Ainsi il a enrichi la théorie et la pratique de toute l'Europe d'une expérience et des réalisations scientifiques du continent entier. L'auteur a présenté donc l'histoire complète et réelle de la naissance de la diplomatie moderne.

Stanisław Hubert

Edward J. PAŁYGA, *Stosunki konsularne Drugiej Rzeczypospolitej* [*Consular Relations of the Second Republic*], PWN, Warszawa 1970, 271 pp.

Edward Pałyga's monograph is an elaboration from the domain of international public law. The author supports his considerations contained in it on the right to establish consular relations (the right of consulate) which is the basic concept of consular law, while consular relations themselves he analyses from the aspect of legal principles and rules by which the Second Republic was directed when performing this right. This study deals with the legal problems connected with the dispatch of consular representatives by Poland and the admission of consuls of foreign countries into its territory. It accounts for the active and passive sides of the performance of the right of consulate.

The basing of the monograph on the concept of the right of consulate has decided the structure of this elaboration as a whole. Particular chapters of the study describe the various aspects of the application of this right. At first, the author discusses the international law bases of consular relations joining general considerations of these bases and the concept of the right of consulate with a detailed presentation of the conventional bases for the exercise of this right by the Second Republic (Chap. 1). In the rest of the chapters E. Pałyga analyses general and special problems of the performance of the right of consulate.

In the group of general problems are also found questions like: the establishment of consular agency (Chap. 2), the circumstances of the termination of consular missions (Chap. 4) and the territorial aspects of the exercise of the right of consulate or, as it is termed, the determination of seats, consular districts and the growth of the consular network (Chap. 6). The historical conditions in which the Second Republic established and maintained consular relations have decided the selection of special questions.

The first place among these special

questions is given to the problem of realizing the right of consulate under conditions when State recognition is lacking. In the practice of the Second Republic this problem appeared with particular force in the initial period of its existence. The author has included this problem in one chapter together with questions such as the functioning of semi-official consular organs and the exercise of consular protection when direct consular relations are absent (Chap. 3).

The next problem E. Pałyga has justly chosen for a closer analysis is the matter of consular agencies at a time when there are changes in territorial sovereignty (Chap. 5). Within the limits of this problem, the author deals with the results of the loss of territorial sovereignty both on the part of the sending State and on the part of the receiving State. The principal subject under consideration is the history of the Polish consular agencies after Poland was occupied by Germany. The detailed research that the author has undertaken on this subject indicates "that the foreign service of the Second Republic (and in this both the honorary and the career) constituted during the Second World War (besides that of the armed forces) the most important element of the continuity of the Polish Statehood" (p. 156).

The last chapter of the monograph deals with the position of the Free Town of Gdańsk in Polish consular relations: E. Pałyga, a good authority on this problem, (compare his article entitled *Poland's Conduct of Consular Affairs of the Free Town of Gdańsk*), discusses the performance of the right of consulate under conditions of the conventional rule in force appointing Poland to conduct the foreign affairs of the Free Town of Gdańsk and to exercise protection over its citizens abroad (Art. 104, pt. 6, Treaty of Versailles).

It is necessary in the author's general

considerations to pay particular attention to the legal basis of consular relations as a whole and to the concept of the right of consulate. E. Pałyga justly accepts customary law as the basis of these relations recognising that the role of conventional law leads only to the specification of principles of the performance of the right of consulate in relations between States parties of a given international convention. The author proves his standpoint by the conclusions drawn from a presentation of the international bases of the maintenance of consular relations by the Second Republic. It appears that Poland, during this period of its existence, maintained consular relations with 61 countries, in that with 42 countries these relations were exclusively based on customary law and only in its relations with 19 countries there appeared contractual rules on the subject of the performance of the right of consulate.

The author conceives the right of consulate on an equal footing with the right of legation as one of the attributes of the sovereign State (pp. 46 - 47). It constitutes an expression of the State subjectivity and means the right to send its own consular representatives and receive foreign ones. E. Pałyga successfully answers the argument of the theoreticians denying the existence of such a right on the grounds of the lack of an obligation to receive consuls, or through their reference to the absence of appropriate provisions in the Vienna Convention on consular relations from 1963.

There appear certain ambiguities in the author's considerations as to the formulation of the content of the right of consulate. This is indicated by his remark, according to which "the substance of the right of consulate is determined in a given case by the practice of the Second Republic and the countries with which it maintained consular relations" (p. 51). This statement remains contrary to the author's other consider-

ations which indicate that the right of consulate, as an essential element of sovereignty, is based on customary law and in its essence is uniform for all States. Whereas the manner itself of the performance of the right of consulate by a given State may well vary, and generally does, since this is determined, as in the case of the Second Republic, by practice and the international conventions in force (see p. 23). And thus it is necessary to distinguish more consequently that the author has done the legal bases of the right of consulate and its substance from the international bases of the performance of this right, i.e. from the legal basis of consular relations maintained by the Second Republic.

Giving the first chapter the title *International Law Bases of Consular Relations* and using the word "bases", E. Pałyga clearly suggests that the legal bases of the performance of the right of consulate are the objects of concern. In compliance with the title and the purpose of his treatise as a whole, the author in this chapter deals particularly with the legal bases of the Second Republic's consular relations. And hence his interesting considerations on the subject of the right of consulate are found only at the close of the chapter while the essential concept of this right, despite its importance as the foundation for the structure of the monograph as a whole, is treated somewhat as a secondary matter. To a greater extent the author presents and evaluates views on this subject, especially in the Polish doctrine, rather than endeavouring to define its essence. The omissions in this field are particularly evident in connection with his observations on the matter of obligation to maintain consular relations (see pp. 48 - 52). Repeatedly referring to this question, especially in his evaluations of other authors' views, he does not conclude with the statement that the concept of the right of consulate, as a subjective right, is essentially unable to carry an obligation to maintain con-

sular relations. The legal foundation for such an obligation must be sought in other international law structures or principles (as, for example, in the principle of peaceful co-existence).

Analysing the general and special problems of the performance of the right of consulate by the Second Republic, the author competently separates the legal considerations and the presentation of the course of the consular relation. On one hand, a wealth of material from the domain of international relations serves to illustrate problems as to consular law emerging during the exercise of the right of consulate and, on the other, it enables the appreciation of if, and to what measure, the Second Republic's practice complied with principles of the international consular law. The author indicates such a compliance by, among other ways, the comparison of Polish practice (and this also includes the provisions of conventions concluded by the Second Republic) with those rules of consular law that were codified in the Vienna Convention on consular relations of 1963.

In principle, E. Pałyga's study comprises a full analysis of the Polish consular law doctrine and the provisions of the international conventions concluded by the Second Republic concerning the maintenance of consular relations. But the main value of the treatise does not lie in this. It can be found in the manner of presenting rich material illustrating the development and course of the Second Republic's consular relations. Consequent to strenuous searchings, the author has reached to interesting archival materials as well as to various types of information, and on their basis he has given a very good picture of the Second Republic's consular relations. In this picture the author has cast some light on a number of particularly important aspects of these relations. It is necessary here to pay attention to such problems like: (a) the establishment of consular

relations during the Second Republic's initial period of existence, (b) the problem of the maintenance by that Republic of semi-official consular relations, (c) the complicated legal and political problems of maintaining consular relations with Germany or, at last, (d) the problem of maintaining consular relations after the Polish territory was captured by Germany. The author's research fills a hitherto empty or ambiguous gap in the knowledge of the Second Republic's foreign relations. In the treatise and at its conclusion the author has inserted a number of tables illustrating the state and development of the Second Republic's consular network. They allow us to orientate ourselves how many consular agencies there were, what their character and standing were as well as they give us a chance to ascertain the main trends of the development of the Polish consular network in the period treated of.

From E. Pałyga's considerations concerning the number of consular offices and the developmental trends of the consular network, it follows that the Second Republic, in comparison with other States, possessed an inadequate reach of its consular agency network from the point of view of trade and protection over citizens of Polish descent abroad. Analysing the Second Republic's experience and comparing the current state of the consular network of the Polish People's Republic with its needs in the field of foreign relations, at least two conclusions may be reached. Firstly, the ampler inclusion of the consular service into the economic exchange continues to be closely associated with the development of the honorary consulate agencies. And thus, it is necessary in the practice of the Polish People's Republic to reactivate the honorary consuls according to that measure in which the consular service is to receive wider than hitherto economic tasks, particularly of export. Secondly, the career consular agencies

must keep pace with the increased interest in the protection over citizens of Polish descent abroad and the growth of personal movement with Poland. Hence, the steadily increasing needs in the sphere of such a protection as well as

the development of the international movement of persons must, to a greater extent than hitherto, lead to the extension of the consular network of the Polish People's Republic.

A. Catus

Stanisław PAWLAK, *Okinawa*, Ministry of National Defence—MON, Warszawa 1971, 258 pp. + map.

Scientific books, especially those meant to serve popularization are of a particular value when written by an author acquainted with the subject by reason of his professional work. Such is the case of the book under review. Dr. Pawlak held, for many years, important diplomatic posts, first in Japan, then in the United States, that is, in both countries involved in the "Okinawa problem." The author happily has avoided any journalistic superficialities. On the basis of the former version of the work he obtained his doctor's degree. Writing now for a broader public, he has left comparatively few footnotes and a selected bibliography. The latter reflects the author's concern chiefly to use first-hand source material.

The book deals with a problem not too familiar to most Poles. A comprehensive historical chapter (pp. 75-114) is thus particularly important. The author presents in it the changing fortunes of the Ryukyu Archipelago (Okinawa is the largest of the islands) — first an independent kingdom, then a fief owing allegiance to China, an object of Sino-Japanese rivalry, finally (from 1875) a constituent part (prefecture) of the Japanese Empire. In one of the following chapters (pp. 115-174), Pawlak deals with the history of Okinawa after the Second World War when, after the defeat of Japan, the United States took over the Ryukyu Archipelago, initially as an occupation zone, then as a territory with a special status, now partially ruled by bilateral treaties between the United States and Japan. In any case, whatever

particular name may be given to the legal status of the Ryukyu Archipelago, whether in its present or in its previous stage of development (i.e. immediately after the Second World War), there is no doubt about its military and political content. It is simply a powerful United States' military base on the Pacific Ocean facing the eastern coast of China. It may be simply called an entire system of such bases; for the American military objects on Okinawa alone were in 1966 as many as 117. The cost of constructing them amounted to 300,000,000 dollars and they are manned by about 55,000 soldiers.

While both chapters already mentioned give a picture of the dynamic development in question, the very next chapter (pp. 175-221) constitutes a retardation. It gives a statical sketch of the question, presents the American system of administration, discusses the structure of its organs, the laws applied, the division of functions between American and local factors and, finally, the very specific legal situation of the inhabitants of the island (or, rather, of the Archipelago as a whole), particularly in connection with the exceptionally complicated problem of their diplomatic protection.

In the next and last chapter (pp. 222-253), the author returns to his interrupted narration so as to present the basic perspectives for the turn that may be expected in the nearest future when the Ryukyu Islands are to be given back to Japan. This was promised by President Nixon during his talks with Sato, the Japanese Prime Minister, in November 1969. Mr. Nixon promised to give them

back, in fact, already in 1972. The United States is not guided of course by any sort of philanthropy or special sympathy for Japan. Even if its actions coincide with the aspiration of Japan or of the inhabitants of the Ryukyu Archipelago themselves, it is not doing it free of charge. It is going, as much as possible, to maintain the command of its military bases both on the Ryukyu Islands and on other territories under Japanese sovereignty, and only to shift on Japan a series of economic and administrative burdens which it has hitherto borne directly administering the Ryukyu Islands. It is a part of its general plans, the same as the "Vietnamization" of the Indo-China conflicts as proclaimed by President Nixon to preserve supreme control over the whole of the Pacific region while, at the same time, to impose on others the burden of a considerable proportion of the duties and costs involved. And who can do better in this respect than Japan, the economically most powerful partner and one who has revealed the greatest ability in the difficult art of government? Is not this, at the same time, the country where, in a very characteristic way, feudalism and capitalism are strangely amalgamated? But it is another matter whether, to what degree and for how long is Japan likely to agree to the role, assigned to her by Washington, of being a faithful attendant to the United States. Historical experience and the mood of the many circles, not only in Japan but also in the Ryukyu Islands, may well contradict the over-optimistic prospects for the United States.

These concluding accents of the last chapter link it in a special way with the first two chapters of Pawlak's book (pp. 11 - 74), as well as with its concise introduction (pp. 5 - 10), giving it this interesting frame. These first parts of the book do not deal as yet with the problem of Okinawa, but with American-Japanese relations in general. The first chapter

presents an outline of the origin of the alliance between these States, while the second discusses the treaties "on security" that the United States and Japan—after the negotiation with Japan of a separatist peace treaty in San Francisco—concluded in 1951 and 1960. Penetrating the book's structure still further, we may state that the very *Introduction*, consistently and clearly presenting the economic and political significance of Japan (the third, after the United States and the Soviet Union, economic power in the world that has managed to outdistance France, Great Britain and the Federal Republic of Germany) allows us to understand why Japan was chosen for such an important role in the perspective plans of the United States. In turn, and only against this background, the problem of Okinawa takes shape, not as something that has any sort of value in itself, but only as an element in the complicated mechanism of American-Japanese relations as a whole.

It is apt that the author of the book has approached the problem of Okinawa from this point of view. However, precisely in this connection and in view of the fact the fact that this book, issued in a comparatively large edition (15,000 copies) is intended for a wider public, not necessarily for the reader understanding the comprehensive political perspectives, a somewhat different title should have been given or, at least, a subtitle added to that of *Okinawa* informing the reader that the author considers the problem of Okinawa against the background of the relations of one super-power and a country not greatly, at least from the economic aspect, in its van.

Pawlak's book has many values. Rich sources of research material which, however, the author does not impose on the reader; a basic knowledge of all the aspects of the problem; an all-round approach; a lively and vivid narration, that may interest not only the better prepared reader but also a wider public.

There is little that the reviewer can question in this book. Perhaps certain details, firstly as to essentials and secondly as to language.

The historical chapter indicates that the whole of the history of the Ryukyu Archipelago was either based on its independence or, rather, on its union with China whereas its dependence on Japan is of a relatively recent date since that was formally sanctioned only by the end of the eighteen-seventies and full integration was not achieved until the inter-war period. And thus, how are we to interpret from this historical sequence presented in detail by Pawlak in Chapter 3, although presumably mainly based on American literature, the fact that among the population of the Ryukyu Islands there has not appeared, or so it would seem from the next chapters, to any great extent a separatist trend demanding that the Archipelago be given full sovereignty and not a union with Japan

once again? Is the Ryukyu population, in supporting the union with Japan, exclusively directed by economic reasons, simply seeing a greater chance to enrich itself in an integral union with such an economic power as Japan has become? Or has that short period of its union with Japan (1879 - 1945) sufficed to extinguish in the Archipelago's population an ambition to possess its own statehood? But it seems that to these and perhaps the most striking questions Pawlak's book gives no answer. It simply accepts, without reservation, the thesis that the problem in question is to return the Ryukyu Island to Japan.

Pawlak's book can be read with great satisfaction. Certainly it ranks among the best monographs in the field of international relations that have appeared on the booksellers' shelves in the last years.

Stanisław E. Nahlik

Kazimierz RÓWNY, *Protektorat międzynarodowy w Afryce i Azji a ciągłość traktatów* [*Le protectorat international en Afrique et en Asie et la continuité des traités*], PWN, Warszawa 1971, 215 pp. Rozprawy Uniwersytetu Warszawskiego.

La thèse de doctorat de Kazimierz Równy constitue une contribution à l'étude des problèmes du « Tiers monde ». Dans le titre même de l'ouvrage, l'auteur a clairement défini l'étendue de l'étude. Le titre indique que les considérations de l'auteur se concentrent sur deux problèmes: le protectorat et l'influence de l'établissement et de la cessation du protectorat sur les obligations contractuelles de l'État sous protectorat. En conséquence, l'ouvrage a été divisé en deux parties. La première est consacrée à l'étude de l'institution du protectorat et à la définition de la situation juridique de l'État sous protectorat, c'est-à-dire à des questions juridiques internationales dans leur aspect historique théorique. Par contre, la seconde partie est destinée aux problèmes actuels.

L'auteur y expose l'attitude des États ex-protectorats envers les accords internationaux en vigueur avant l'accession à l'indépendance.

Dans la première partie de son ouvrage, l'auteur désire établir sur la base d'une analyse scrupuleuse des traités de protectorat, si ces pays ont perdu ou ont conservé leur qualité de sujets de droit international. C'est à cela que sont dédiées les considérations sur la limitation de la souveraineté de ces pays aussi bien dans le domaine des relations intérieures, qu'extérieures.

Les recherches effectuées par l'auteur sur les limitations des compétences des pays sous protectorat dans le domaine des rapports internes et les essais d'établir le degré d'ingérence dans ces relations de la part des pays exploitant la

protection, méritent une attention particulière. En effet, cet aspect de la dépendance des États protégés des États protecteurs est, en général, passé sous silence. L'analyse des traités de protection et de la pratique, permet à K. Równy de constater une grande variété dans le degré dans lequel les affaires intérieures des protectorats étaient contrôlées par les pays protecteurs (pp. 57 - 58). Dans certains cas, ce contrôle était très poussé (par exemple Tahiti, Maroc), dans d'autres, il ne concernait que certains domaines des rapports internes.

En procédant à une analyse détaillée de l'institution de protectorat, l'auteur consacre une grande partie des considérations à définir les compétences dont jouissait l'État protégé dans le domaine des relations internationales, car leur étendue permet de répondre à la question de savoir si les protectorats ont conservé la qualité de sujets du droit international. C'est pour cela que l'auteur soumet à un examen détaillé les *ius contrahendi* attribués aux protectorats, ainsi que les prérogatives qu'avaient les organes des pays sous protectorat pour exprimer leur volonté dans les relations internationales. Il examine aussi l'étendue dans laquelle les États protégés jouissaient du droit actif et passif de légation et de consulat.

En ce qui concerne ce second aspect de la situation juridique internationale des protectorats, une analyse extrêmement poussée des traités de protection permet à l'auteur d'émettre la thèse, que les pays protégés étaient privés du droit actif de légation et de consulat (p. 69). Ces prérogatives étaient transmises aux pays protecteurs, soit sous forme d'une délégation générale contenue dans un accord, soit sous forme de dispositions particulières des traités de protectorat. Dans cette mesure, les opinions de la doctrine et celles de l'auteur coïncident entièrement. Par contre, en ce qui concerne le droit passif de légation et de

consulat, les opinions de l'auteur sont dans une certaine mesure controversées par celles des représentants de la doctrine française (E. Rouard de Card et P. Fauchille) ainsi que celles des théoriciens soviétiques (J. P. Bliščenko et V. N. Durdenevski). La polémique de K. Równy avec les opinions de ces auteurs est pleinement convaincante et lui donne le droit de formuler, en toute bonne foi, l'opinion qu'en principe les protectorats, étaient également privés du droit passif de consulat et de légation. Cette limitation découlait soit de stipulations contractuelles expresses, qui déniaient aux protectorats le droit de recevoir les représentants diplomatiques et consulaires étrangers, soit de dispositions concernant une limitation générale de la souveraineté des pays protégés dans le domaine des relations extérieures, soit enfin des dispositions des traités qui, à vrai dire, ne prévoyaient pas expressément que le protectorat était privé de ces droits, mais en faisaient dépendre la réalisation de l'accord du protecteur.

Ensuite, l'auteur passe à l'étude des *ius contrahendi* dont jouissaient les protectorats. Les sources ont permis à l'auteur de constater que les traités de protectorat ne prévoyaient que deux possibilités (pp. 90 - 91): la privation complète du protectorat des *ius contrahendi* ou la sujétion de sa réalisation de l'accord du protecteur.

Les considérations de K. Równy sur la situation juridique internationale du protectorat, complétées par une analyse critique des opinions sur le caractère juridique de l'institution de protectorat, l'ont conduit à formuler sa propre définition du protectorat. Il définit le protectorat comme un « rapport de soumission d'un État faible par un État plus puissant, basé sur un accord international inégal, imposé souvent par force à l'État faible, dans lequel l'État plus puissant prend la direction et le contrôle et seulement partiellement la direction des af-

fares étrangères de l'État protégé et souvent, s'attribue aussi certaines compétences internes de l'État protégé. Le contenu du protectorat et les conséquences légales qui en découlent dépendent dans chaque cas du traité de protectorat » (p. 122).

Cette définition a été formulée par l'auteur comme une conséquence des considérations qui l'ont conduit également à constater que les pays sous protectorat, malgré une souveraineté limitée, « n'ont pas cessé d'exister en tant que sujets distincts du droit international ». Cette thèse n'est pas seulement étayée par les textes des traités instituant le protectorat, mais aussi par la pratique politique, car les protectorats ont conservé dans une mesure plus ou moins grande des droits aussi bien dans le domaine de la politique intérieure que dans celle des relations internationales. Le bien fondé de cette opinion est aussi confirmé par la jurisprudence des tribunaux internationaux, par les déclarations officielles des hommes politiques, ainsi que par la doctrine du droit international.

La seconde partie de l'ouvrage est consacrée à l'étude de l'influence de l'instauration du protectorat sur les accords conclus par le protégé antérieurement, de l'influence de l'annexion du protectorat par l'État protecteur sur ces obligations découlant des traités, ainsi que de l'influence de l'accession à l'indépendance sur les accords internationaux qui avaient un caractère obligatoire pour l'État durant le protectorat.

L'analyse des sources mène K. Równy à conclure que l'instauration du protectorat n'avait pas d'influence sur les accords conclus antérieurement par le pays protégé (p. 132). D'ailleurs, dans ce domaine, il y a unanimité dans la doctrine du droit international. La conclusion suivante concerne le sort des accords en cas d'annexion du protectorat par l'État protecteur. Dans cette mesure, l'au-

teur formule la thèse, qu'en cas d'annexion, les accords en vigueur jusqu'à ce moment perdent leur valeur juridique (p. 154).

Une place importante est réservée aux considérations sur l'influence qu'a l'accession du protectorat à l'indépendance sur les accords en vigueur durant la durée du protectorat.

L'auteur montre que les pays protégés confirmaient, après l'accession à l'indépendance, la continuité de la validité des accords conclus précédemment de façon légale, pour une durée illimitée ou limitée. Cette thèse est confirmée par les clauses sur la dévaluation dans les accords avec d'anciens protectorats (Maroc, Laos, Vietnam du Sud) ou bien dans les déclarations unilatérales de ces pays (Ouganda, Botswana, Lesotho), ou alors dans la pratique politique dont il découle, qu'ils se prononcent également en général en faveur de la continuité des accords conclus avant qu'ils n'accèdent à l'indépendance (Cambodge, Tonga, Tunisie). Selon l'auteur, la justesse de la thèse qu'il émet n'est pas infirmée par l'attitude du Maroc et de Tonga qui ont accepté de reconnaître la validité des traités en vigueur durant le protectorat sous réserve de confirmation qu'au moment de leur conclusion, les pouvoirs de conclure ces accords au nom du protégé n'avaient pas été transgressés (p. 205). La valeur de l'ouvrage ne réside pas seulement dans l'honnêteté et les aptitudes de chercheur de l'auteur mais aussi dans le fait que l'ouvrage est d'actualité. De ce point de vue, les plus importantes sont les considérations sur l'influence de l'accession à l'indépendance par les protectorats en Asie et en Afrique sur les accords internationaux en vigueur. Ce sont en effet des problèmes qu'on peut rencontrer dans la pratique politique courante.

Grzegorz Gromadzki

Mieczysław SOŚNIAK, Bronisław WALASZEK, Eustachy WIERZBOWSKI, *Międzynarodowe prawo rodzinne* [International Family Law], Ossolineum, Wrocław 1969, 346 pp., Institute of Legal Sciences of the Polish Academy of Sciences, "System Polskiego Prawa Prywatnego Międzynarodowego" Series, vol. 1.

The book under review is the first work in the system of Polish international private law. This big undertaking has been tackled for some years now by a team composed of over a dozen scholars and practitioners. The family law has appeared as the first volume. This does not mean that Polish international private law is based on a system beginning with family law. The volume was the first to be published simply because it was the first to be completed. The rapidity of the preparation of international family law was due probably to two causes. The first of them was certainly the great energy of the authors, and the second—the very subject matter of family law which is homogenous and compact. These are virtues that play a no mean role when it comes to collective authorship.

The composition of the work under review is consistent with the systematization accepted by the legislation on international private law of 12 November, 1965. It begins with the contract of marriage. This involves first of all questions of substantive requirements and formalities of marriage (Chap. one). Next come the non-patrimonial (Chap. two) and matrimonial property relations (Chap. three). The marriage law ends with questions concerning the annulment of a marriage and divorce (Chap. four).

The marriage law is followed by the chapter on the conflict of laws arising from the relationship between parents and children (Chap. five). The final two chapters deal with adoption (Chap. five) and guardianship (Chap. six).

As regards the contracting of marriage, the strongest emphasis is laid on the substantive requirements of a valid marriage. Worth noting is the fact that

the authors divide impediments into unilateral and bilateral. Unilateral impediments concern one of the betrothed only. The second impediments are a source of considerable difficulties, since account has to be taken of the legal situation of both betrothed. Attention has been also drawn to the effects of the law in force at the place of contracting (*lex loci celebrationis*) on the evaluation of the intrinsic requirements of validity. Much attention has been devoted to public order and the law evasion—institutions which played a great and multivocal role in cases connected with the contracting of "international" marriages.

As regards the formalities of marriage, the authors present requirements as to the form of marriage contracted by Polish citizens abroad, and by foreigners in Poland, as well as the form of a marriage contracted by citizens of other countries outside the country of their citizenship.

According to Polish law, non-patrimonial and property relations between the spouses are subject to the law of their common nationality. This produces an important problem of characterization in cases of doubt which of the legal relations between the spouses belong to their non-patrimonial relations and which to their property relations. The authors consider that evaluation should be made according to *lex causae*, that is the common national law of the spouses, and if their citizenships are different, according to the legislation on international private law, that is the law of the State in whose territory the spouses have their domicile. Polish law is applied *ultimo loco*, that is in cases in which the spouses have neither a com-

mon national law, nor their domicile in the same State.

As regards property relations, separate evaluation is made of régime by operation of law and by agreement. The authors have also made the appraisal of an existing property agreement and the legal possibility of the conclusion of such an agreement.

Annulment of marriage and divorce are in principle separate legal problems. In spite of this they are contained in the same chapter. As regards the annulment of marriage, the authors are of the opinion that the law proper for the annulment of a marriage should be also decisive for the effects on property and non-patrimonial relations of that annulment, as well as for the effect on the annulment and its consequences of such elements as good faith. Separate remarks are devoted to children from an annulled marriage. Although the authors did not express their opinion in so many words, it may be assumed from the context, they think that children born from a bigamous marriage should be treated as legitimate.

As regards divorce, there appear separate questions of the ascertaining the connecting factors for the causes of a divorce and the ones for the effects of a divorce.

One common question remains in connection with the annulment of a marriage and a divorce. This is the question of the recognition of foreign judgments in this respect. Highly important for social reasons, the question has received much attention.

The chapter on legal relationships arising from kinship and relations between parents and children treats on problems of the rights of legitimate and illegitimate children, as well as problems connected with the inquiry into paternity and maternity.

Very much attention is drawn in the book to adoption. Both connecting fac-

tor and object have been analysed in detail. Next the authors deal with the substantive requirements of the adoptee and the adopted. In conclusion the authors describe the formalities of adoption, its effects and its dissolution.

The problem of guardianship closing the book received a more modest treatment than the rest of it.

It may be seen from this brief survey of the contents of the book that it presents all questions of international family law. It is, no doubt, highly commendable that the authors have filled a gap painfully felt by theory and practice. But their merit is not limited to this. The work is very comprehensive, and is not a whit inferior in this respect to works on law contained in the largest systems of international private law. An identical opinion may be expressed, I think, as regards the contents of the book which contains a wealth of comparative material presenting comparisons with substantial law, first of all with the conflict of laws on family and guardianship. The chief quality of the work, however, is the exegesis of Polish international private law in the field of family and guardianship relations. The results of an interpretative analysis of Polish conflict rules are fully satisfactory. The book gives theoretical and practical solutions of a large number of questions. One may feel certain that in unforeseeable future cases, it will be possible to find in this book a starting point leading to the solution of doubtful problems. The interpretation of the norms of Polish international private law is very penetrating. The authors succeeded in finding deeply hidden connections between individual legal phenomena. Besides an accurate analysis of the various institutions of international private law, the book contains also the analysis of situations where it is necessary to apply the general principles of international private law, such as: classification, *renvoi*, law evasion, changes of statute, prelim-

inary question or public order. An all-round exegesis of sources is combined with an analysis of the problems of jurisdiction, which are of prime importance for international private law. The investigation of sources is based on the law on international private law of 12 November 1965, as well as international agreements, chiefly bilateral agreements on legal relations concluded by Poland with Bulgaria, Czechoslovakia, France, German Democratic Republic, Hungary, Rumania, the Soviet Union and Yugoslavia.

Thanks to the above-mentioned qualities, the results obtained are of a very high scientific standard which, like the work itself, is in no way inferior to works universally known in legal literature and generally respected. The numerous questions making up the contents of the book under review include some which give rise to certain critical remarks:

1. On pp. 12-13 the authors assert that the question of impediments to marriage, which may be eliminated by way of dispensation, constitutes a problem of jurisdiction. They quote two conceptions; according to one of them, impediments of this kind may be eliminated by the authorities of the *loci celebrationis*. According to the other one, the problem should be settled by authorities proper for the evaluation of the impediments. Looking at this problem from the point of view of Polish law, this means the authorities of the State whose citizenship is held by the person involved. It is said in conclusion that "in Polish territory the question of the jurisdiction should be presupposed in this case in favour of the competence of Polish law (at least with regard to marriages contracted by Polish citizens in a foreign country)."

Personally, I doubt, first of all, whether the question constitutes a problem of jurisdiction. In this case competence belongs not to a court but to the

registrar or some other similar organ. As soon as a registrar has considered himself as competent for the performance of a marriage ceremony, there is no question of jurisdiction, but solely of a problem of substantive law. Law proper for the evaluation of impediments is indicated for the ceremony-performing organ by the conflict rules of the State to which that organ belongs. According to Article 14 of the law of 12 November, 1965, that law is the national law of each of the contracting parties. In my opinion, therefore, the possibility of dispensation should be looked for in that law.

If Article 14 indicates a foreign law, it should be applied, according to the fundamental principles, in the form in which it is in force in that foreign State. Thus the example referring to Article 10 paragraph 1 of the family and guardianship code is correct in my opinion only insofar as it concerns Polish law applied on the basis of a direct indication by Article 14 or in another more indirect manner (e.g. on the basis of a *renvoi* or auxiliary competence of Polish law). The dispensation referred to in Article 10 paragraph 1 of the family and guardianship code concerns the consent of a guardianship court to the contracting of marriage by persons who have not attained the age stipulated by law, that is 21 years for men and 18 years for women.

Neither do I share the view that Polish law should be applied in cases of dispensation when it comes to the marriage of Polish citizens contracted in a foreign country. This should depend, after all, on the conflict of laws of the State in whose territory the marriage is contracted. The recognition of such a marriage as valid in Poland constitutes quite another question.

2. I did not find in the book any cases of the classification of compensation suits arising from a broken-off betroth-

al. The point is whether such claims arise from the non-execution of a contract, or whether they are the effect of a tort, or whether they may be based on unjustified enrichment. The above shortcoming may be felt when it comes to the problem of marital property relations. The authors omit the question of law proper for claims arising from a marriage contract when no marriage has taken place.

3. As regards the problem of the liability of spouses for obligations towards third persons, I should like to add the question of the protection of persons acting with full faith and credit who have performed a legal operation in Poland (which is to have a legal effect here) with a married woman—foreigner whose national law does not permit her such an operation. Is Article 10 of the law of 12 November, 1965 applicable in such cases? According to this article, operations performed by persons incapable of them in accordance with their national law, but fulfilling the requirements of Polish law for the evaluation of capacity, such operations are legally effective if this is required by the protection of persons acting in full faith and credit. If the answer is yes, then the question arises whether the exemption contained in this provision referring to operations in the field of family law and successions applies only to bilaterally family operations, or whether it is enough for the operation to have a family character on one side only. In my opinion, the exemption from the application of the provisions of Article 10 pertains only to operations of family character for both parties.

4. In order to solve the problem arising from the fact that according to some legal systems the same causes effect the annulment of a marriage, while according to other systems they may only serve as grounds for the dissolution of a marriage by divorce, in their book the authors distinguish an un-

changing statute of annulment and a changing statute of divorce. The characteristic feature of the former is that the spouses wish to free themselves from the bonds of marriage on the basis of a cause existing at the moment when the marriage was contracted. The second statute concerns a situation in which the spouses plead grounds which appeared after the marriage had been contracted.

I share the view in question only as to the principle, and not as to justification. For when one starts from procedure premises, it will appear that the situation is clear and no distinction into a changing and unchanging statute is necessary. Courts try as a rule cases at the demand of parties, and the demand of parties must be accurately defined (Article 321 paragraph 1 and Article 187 paragraph 1 point 1 of the code of civil procedure). This in this case is necessary for the parties to declare themselves: annulment or divorce. This is why the distinction seems unnecessary to me.

5. As regards the pronouncement by Polish courts of separation from bed and board, I am in favour of an absolute pronouncement of separation wherever this is known by the law proper for a given case. The author of the book expresses himself with greater caution in this respect: "[...] for humanitarian reasons we should rather be inclined [...] to grant separation to citizens of foreign States." I have expressed my opinion on this subject more than once. I think that not humanitarian reasons but the principle of proper application of foreign law and the need of harmony of jurisdiction in cases of an international character require from our courts the pronouncement of separation, although this institution is unknown to Polish law. As regards the fundamental principles of the Polish legal system I do not see any that would be in favour of excluding the applica-

tion of a foreign provision on separation on the basis of the public order clause.

6. As regards alimony claims between parents and children I expressed a view different from the view of Wala-

szek and Sośniak in reviewing their manual. I see, therefore, no need of repeating myself.

Witalis Ludwiczak

Julian Sutor, *Państwa neutralne i niezaangażowane* [Neutral and Non-Aligned States], Warszawa 1972, 227 pp., Biblioteka Wiedzy Współczesnej "Omega", vol. 214.

In the world of today, politically and military polarized, a non-alignment, in the widest sense of the term, constitutes an important qualitative and quantitative element in the plane of international relations. At present, at least half the existing countries are neutral and non-aligned. For these more than 70 countries, lack of attachment to one or other of the political-military blocks, has assumed various forms, resulting from differing ideological and political circumstances, and involving various legal and political consequences. At the same time, these countries have developed genuine attitudes, which cannot be disregarded when indicating possible ways in which relations between countries may develop. These attitudes are of interest not only to politicians but also to commentators on the international scene and all who are concerned with international relations.

Hitherto in Polish academic and popularizing literature there has been a lack of a more extensive elaboration on the subject of neutrality and non-alignment in international relations. Valuable studies of a fragmentary character¹ have not filled the gap, while journalistic commentaries have often only added to doubts as to the meaning of conceptions and consequences of proceedings connected with non-alignment. Therefore, it is with gratitude to the author and the publishers that we re-

cord the appearance of Julian Sutor's book on neutral and non-aligned countries. This book was intended as a work of a popular character based on wide historical, factual and legal materials. At the same time it is not without significance that the author — as he himself writes — has laid on himself "a modest task" to the end that his book "may contribute to a better understanding of those important occurrences in present-day international life, of which undoubtedly neutrality and political non-involvement are topical." At the same time, he remains a member of the Polish diplomatic service and therefore approaches problems and poses questions from practical rather than theoretical points of view. In this situation and in view of theoretical complications of the problematics, this was surely the only pertinent approach.

One of the factors which complicates the question from the theoretical point of view is that of terminology and comprehension. Julian Sutor also begins his considerations by elucidating this aspect and suggesting the acceptance of three fundamental forms in which neutrality appears to-day, so that by means of them he can explain and clarify more than twenty terms used in connection with neutrality and non-alignment. These forms include "war-time neutrality" (otherwise "temporary neutrality" or "neutrality in time of war"), "permanent neutrality" (otherwise "continuing" or "fixed"), and "political non-alignment" (otherwise "neutralism" or "the policy of not belonging to blocks").

"War-time neutrality," as the oldest

¹ Cf. for instance B. MROZEK, *Trzeci Świat i neutralizm* [The Third World and Neutralism], Warszawa 1960 and *Szkice o neutralizmie azjatyckim* [On Asian Neutralism], Warszawa 1968.

and most frequently occurring form of neutrality, takes place during a particular armed conflict and concerns the countries which fall under a clearly defined category. "That country is neutral which does not take part in a war, whereas neutrality involves neutral countries in defined laws and commitments, just as it involves countries engaged in hostilities in laws and commitments, regardless of the ideology and the relevant regime [...] and showing sympathy to one of the protagonists or even giving aid other than military aid are not contrary to the principles of neutrality" (p. 17). The critical point of this institution, especially during the Second World War, together with the general character of present-day armed conflicts caused certain countries to become interested in other forms of neutrality, guaranteeing their own security outside the security system of the United Nations.

The fundamental form of neutrality, also extending into peace time, is "permanent neutrality." It is based on the assumption that a country "which has voluntarily taken on itself the commitments of non-participation in any kind of war or wars, with the exception of armed defence of its own territory, and also agreed not to undertake any international commitments which might engage a permanently neutral country in war," undertakes all this commitment *sine die*, and its will in this respect "must be accepted and, if not guaranteed, at least recognised (irrespective of the form which the recognition takes), by other countries, above all the great powers" (p. 25). In treaties establishing the status of permanent neutrality, "the countries which are parties to the treaty, usually guarantee the independence and integrity of the given country's territory [...] and the giving of guarantees individually or collectively implies a responsibility on the part of the guarantor countries to de-

fend a neutral country in the even of possible aggression."

The author rightly emphasises, using the example of Iceland, that a unilateral declaration by an interested country does not provide sufficient basis for achieving a status of permanent neutrality. To achieve this status, a multilateral international treaty is necessary, negotiated by the interested countries or, in exceptional cases, recognised at least *per facta concludentia*.

The third form is determined by "a non-alignment policy" otherwise known as "neutrality," which was initiated in the fifties in the countries of the "third world." This depended on "abstention from participation in either imperialist or socialist blocks," on non-identification with either of these two blocks on an obviously equidistant basis—that is, equal withdrawal from both blocks or equal relations with both these systems" (p. 38). The laying down in 1954 in Bandung of the five principles of peaceful co-existence, and the conferences of non-aligned countries in Belgrade (1961), Cairo (1964) and Lusaka (1970) defined even further the idea of non-alignment as a political concept and not a legal institution, a concept "expressing non-entry into military blocks, active support for peaceful co-existence and international cooperation regardless of the constitutional, economic and social differences occurring between the individual countries, and struggle against imperialism and neo-colonialism" (p. 43).

The author rightly draws attention to the fact that the difference between the policy of a permanently neutral country and a non-aligned country lies in the fact that the policies of the former "find support in an international treaty clearly specifying definite rights as well as the responsibilities of that country," whereas the policies of non-alignment "emerge from and are based on the unilateral will of that coun-

try," which may "unilaterally change the course of its foreign policy" and in the case of war "may invoke its policy of non-alignment as its own law, although no legal international responsibility can arise from this attitude" (p. 44).

The defining character of general settlements finds detailed foundations in the reasoning leading to their formulation, as also in Chapter 2, in which the author discusses the basic laws and responsibilities of neutral countries together with the principles of non-alignment policy. Such a linkage may give rise to certain doubts, since it gives the impression of placing on one plane the laws and responsibilities of permanently neutral countries or neutral countries in particular armed conflicts (war on land, at sea or in the air), and the real consequences of non-involvement on another. These consequences do not have an entirely real or political character. Since the legal status of non-aligned countries is based on the "basic principles of international law assuring to all countries the right of sovereignty and independence, of non-intervention in their internal affairs, of equal treatment, of peace, etc." (p. 84), non-alignment may be understood as a consequence of acceptance and realization of fundamental principles of international law. From this, it is but a step to supposing that "non-alignment" exhibits no such kind of consistency.

Chapter 2 includes a valuable and useful analysis of international conventions concerning neutrality in war-time, as well as the principles of the policy of non-alignment. Particularly as regards the latter, the author not only presents the evolution to the most recent-date (including the conference in Lusaka), but he also draws the reader's attention to several possibilities and critical observations concerning the principles and consequences of non-alignment policy.

The following five chapters can be classified as a "test of neutrality" in various geopolitical and historical circumstances. Analysed in them is the form of neutrality in Switzerland, Austria, Sweden, Finland and the countries of Indo-China. This interesting and informative analysis not only shows the past but formulates—and this is particularly valuable—the consequences and prospects of events. The author's observations give rise to the greater interest in that they are concerned with the prospects of general European co-operation as well as the attitudes which European countries are obliged to assume from the legal point of view in relation to the process of integration of Western Europe within the framework of the European Common Market. The author shows that in the current foreign policy of countries not having neutral status there begin to emerge elements and tendencies characteristic of non-aligned countries. This may, however, indicate the increasing attractiveness of non-alignment as a practical relationship with opposing blocks and groups now existing.

In the last chapter (neutral countries and the system of collective security) the legal-theorist gives way to the practical diplomat, who notes that the use of force or the threat of it is prohibited in the Chapter of the United Nations, (Art. 2, para. 4) and that aid to the Organization is enjoined in actions it may undertake to maintain international peace and security (Art. 2, para. 5). However, the author looks at these norms in the light of experience of international society and the ineffectiveness of the United Nations system of maintaining peace. In view of the principles of the UN Charter, neutrality (whether war-time or permanent) is not possible for members of the United Nations. In the light of the UN Charter and the resolution accepted by the General Assembly on 24 October, 1970 (Res. 2625/

XXV) proclaiming the principles of international law concerning friendly relations and cooperation between countries in accordance with the United Nations Charter, neutrality is not possible for countries which are not members of the organization. In the case of disturbance of the peace or an act of aggression, a positive responsibility rests on them to contribute towards the restoration of undisturbed peace and international security.

Neutrality, however, is not an institution or conception able to take into consideration occurrences taking place only in the plane of the norm. On the contrary. The facts, a definite arrangement of relations between countries, are the factors which determine the neutrality (especially the war-time neutrality) of a given country. Consequently one may, not without theoretical reservations, agree with the author that since the UN Charter does not eliminate military conflicts from the present-day international life, it leaves room for neutrality which is not contrary to the spirit of the UN Charter since "the main aim of neutrality should be to en-

sure peace and security of nations" (p. 208). Can this exclude those countries which are permanently neutral and are members of the United Nations from partaking in actions specified in Chapter VII of the United Nations Charter? It is difficult to give to this question an explicit answer, taking into account the conclusions to be drawn from interpretations of the norms of the UN Charter, as well as its incoherent interpretation in practice?

Julian Sutor's book will be received with great interest not only as a work of a popular character. The questions it poses and the problems it outlines may beneficially influence interest in research work on the problems connected with legal and political questions of neutrality and non-alignment. We may express the hope that among those writing on this subject will be found also the author of the book under review who reveals both scholarly competence and a rare skill in linking theoretical considerations with practical needs.

Gwidon Rysiak

Janusz SYMONIDES, *Terytorium państwowe w świetle zasady efektywności* [*Le territoire d'État à la lumière du principe d'effectivité*], Toruń 1971, 260 pp. Towarzystwo Naukowe w Toruniu.

L'ouvrage de J. Symonides publié en 1971 aborde des questions très importantes et compliquées du droit international. L'auteur y définit tour à tour la notion de l'effectivité et celle du territoire d'État en droit international et il passe ensuite à une analyse plus concrète du rôle du facteur d'effectivité dans les questions telles que le changement du territoire d'État, les frontières d'État et la frontière polono-allemande.

La construction de l'ouvrage paraît répondre à la méthode déductive de

conclure, d'autant plus que la constatation de l'existence du principe d'effectivité dans le droit international a revêtu presque le caractère du principe théorique préliminaire. A un tel principe, qui n'est pas pourtant formulé dans aucun acte du droit international positif, l'auteur ne pouvait pas arriver autrement que sur la base d'une généralisation des solutions concrètes existant dans ce droit, donc plutôt par voie inductive. En effet, le nouvel ouvrage de J. Symonides constitue le développement et l'approfondissement du sujet essentiel traité dans sa dissertation

d'aggrégation publiée en 1967¹ où, en dehors de la problématique liée au territoire d'État, a été aussi examinée l'influence du facteur d'effectivité sur la personnalité juridique internationale de l'État et du gouvernement, sur la compétence personnelle de l'État, de même que sur la nationalité des navires de mer, des aéronefs et des vaisseaux cosmiques.

Puisque dans l'ouvrage sur le territoire d'État les conceptions théoriques ont été traitées d'une manière concise, elles peuvent paraître au lecteur un peu apodyctiques sans connaissance de l'ouvrage précédent de l'auteur, d'autant plus que l'ouvrage en question ne contient aucun résumé qui formulerait des conclusions générales.

Ainsi Symonides prétend d'une façon un peu inattendue que dans le droit international existe le principe d'effectivité. Il le définit comme « le principe conformément auquel l'existence réelle (effective) ou la non-existence de certaines situations de fait prévues par le droit international produit *ipso facto* les effets juridiques ou bien constitue une condition indispensable de leur naissance » (p. 25).

Des données plus concrètes, contenues dans les chapitres suivants des deux ouvrages, il paraît pourtant résulter que le droit international trop souvent ne fait pas dépendre l'effectivité juridique de ses normes de l'existence ou de la non-existence des situations réelles. Ainsi p.ex., l'exercice du pouvoir effectif sur la mer territoriale et dans l'espace aérien n'a pas d'influence sur l'étendue du territoire maritime et aérien de l'État, l'occupation par l'agresseur n'entraîne pas la perte par l'État de sa souveraineté sur le territoire occupé par lui, etc. Les situations de fait déterminées ont l'influence sur l'effectivité juridique des règles du droit

international seulement dans les cas indiqués par ce droit. Ceci est reconnu par Symonides dans sa définition du principe d'effectivité et il le constate expressément dans les conclusions de sa dissertation de 1967, en écrivant que « le principe d'effectivité est opérant dans les situations expressément prévues et dans les limites établies par le droit international » (p. 168 de la dissertation). Si pourtant en est ainsi, cela ne servirait-il pas de preuve de l'absence du principe général d'effectivité dans le droit international? Si un tel principe général existait, les règles particulières du droit international formuleraient plutôt des exceptions à ce principe et ils ne le confirmeraient pas dans les cas concrets. Il paraît que de la reconnaissance du principe d'effectivité pour le principe général du droit international résulterait aussi certaines conséquences négatives. Elles sont prises en considération partiellement par l'auteur lui-même, qui voit, p.ex., le danger de mettre le signe d'égalité entre les faits et la norme ce qui aboutirait même à la reconnaissance que *ex iniuria ius oritur* (pp. 22 - 25).

Dans cet état de choses les considérations théoriques de l'auteur contribuent — plutôt par le fait de mettre au jour plusieurs questions essentielles et doutes que par la réponse à ces questions — à une meilleure orientation dans les problèmes importants du droit international.

A cela contribue aussi la présentation de ces problèmes sur le large plan de l'évolution et de l'état actuel de la doctrine du droit international. Il faut souligner surtout l'esprit de système et l'habileté avec lesquels l'auteur se sert du riche matériel de source c'est-à-dire de tout cela qu'on appelle habituellement la « doctrine » du droit international.

Il est permis même de ressentir une impression qu'il attache une trop grande importance au rôle de ladite « doctrine » dans la formation du droit international ou comme preuve d'exi-

¹ J. SYMONIDES, *Zasada efektywności w prawie międzynarodowym* [Principe d'effectivité en droit international], Toruń 1967, 298 pp.

stence de ses normes. J. Symonides compare, classe et apprécie d'une manière critique les opinions exprimées par nombreux représentants, anciens et contemporains, plus ou moins connus, de la science du droit international de divers pays. A ce point de vue, l'ouvrage de Symonides apparaît comme un important résultat du grand travail de recherche et du « laboratoire scientifique » parfaitement organisé.

Cela enrichit également les chapitres consacrés aux problèmes particuliers relatifs au territoire en droit international.

Dans le chapitre intitulé « Territoire d'État dans la théorie du droit international », l'auteur présente et soumet à une analyse critique les théories suivantes: 1) « objective », qui reconnaît le territoire pour la propriété d'État; 2) « subjective », qui traite le territoire comme une partie intégrale d'« organisme » d'État; 3) « spatiale », qui reconnaît le territoire pour la sphère du pouvoir d'État; 4) théorie de la compétence qui reconnaît le territoire pour la sphère où l'ordre juridique de l'État est obligatoire; 5) théories géopolitiques postulant pour l'État l'« espace vital » nécessaire. Tout compte fait l'auteur donne sa propre définition qui se compose de plusieurs éléments: « territoire d'État constitue aussi bien l'objet du pouvoir d'État (ce qui s'exprime surtout dans le fait que l'État en dispose) que l'espace dans les limites duquel l'État l'exerce d'une façon exclusive et pleine à l'égard des personnes, choses et événements. Le territoire d'État est aussi une base pour exercer certaines compétences d'État (personnelles) au-delà de ses frontières » (p. 56). De plus, l'auteur constate, à juste titre, que la notion du territoire ne peut être définie sans définir au préalable l'essence du pouvoir que l'État exerce à l'égard du territoire et consacre ensuite beaucoup d'attention à l'explication du contenu de la souveraineté ter-

ritoriale sous un « aspect positif » et un « aspect négatif » (pp. 56-84).

Le chapitre suivant a été consacré aux différentes voies du changement de territoire selon la classification admise par les manuels traditionnels du droit international. On y discute tour à tour cinq voies de l'acquisition de territoire telles que: occupation effective, cession, usucapion, débilitation et accroissement. En plus des voies de la perte de territoire qui correspondent à celles de son acquisition, mentionnées au-dessus, Symonides distingue la sécession et la création d'un État nouveau. En analysant d'une manière critique l'attitude de la « doctrine » du droit international ainsi qu'en évoquant la jurisprudence des tribunaux internationaux l'auteur arrive à ses propres définitions de ces voies de changement de territoire ainsi qu'il établit la position du droit international à l'égard de ces voies. Il s'efforce aussi de démontrer quelle importance pour l'efficacité juridique des modifications territoriales respectives possède leur effectivité conçue, entre autres, comme l'exercice du pouvoir d'État « à son nom d'une manière durable et pas troublée [...] créant une conviction dans la communauté internationale que la situation existante est conforme au droit international » (p. 148), accompagné de la « conviction que le changement de la situation existante, étant donné la menace pour la stabilité des relations internationales, serait incompatible avec l'intérêt de la communauté internationale » (p. 149). Il est permis de remarquer que ces critères d'effectivité ne sont pas susceptibles d'être déterminés d'une façon non équivoque. En tout cas l'auteur souligne d'une manière catégorique et conséquente que dans le droit international contemporain ne peuvent être effectives telles mutations territoriales qui seraient effectuées en violation de ce droit et, en particulier, à la suite de l'emploi illégitime de la force.

Dans le chapitre IV, ont été présentées les questions portant sur les frontières d'État. A cette occasion l'auteur tire une série de justes conclusions. Entre autres il constate que dans le cas de possession de titres juridiques équivalents à un territoire donné par deux États, c'est le titre accompagné de l'exercice effectif de la compétence d'État qui l'emporte (p. 186). Par contre, peu facile à comprendre est l'opinion que « les limites de la souveraineté d'État exercée sous la terre sont déterminées par l'effectivité (possibilité d'exploitation) sous réserve de l'égalité et de l'exclusivité des droits de l'État qui exerce la souveraineté sur la partie respective de la surface de la terre » (p. 189).

Intéressants à signaler sont également les développements relatifs à la frontière maritime. Il paraît pourtant que l'auteur ne résiste pas ici, comme dans d'autres endroits de l'ouvrage (p. ex. lorsqu'il examine les limites de la souveraineté de l'État dans l'espace aérien), à une tendance à exagérer l'importance du facteur d'effectivité dans le droit international. Il pourrait résulter de ses déductions (pp. 189 - 196, pp. 215 - 216) que l'étendue du territoire d'État maritime et aérien dépendrait de la capacité de l'État d'exercer d'une façon effective la souveraineté territoriale. Ainsi les États plus faibles, ne disposant pas des moyens suffisants d'exécution de

ses droits souverains, pourraient être exposés à la mise en doute des frontières de leur territoire maritime et aérien fixées par eux dans les limites admises par le droit international.

Dans le chapitre V, dignes d'attention sont les développements de l'auteur où il souligne que, étant donné la conformité avec le droit international du droit de la Pologne aux territoires occidentaux et septentrionaux, l'affermissement accessoire de sa souveraineté sur ces territoires constitue l'exercice effectif de la souveraineté territoriale (p. 227).

L'ouvrage de J. Symonides sur le territoire d'État à la lumière du principe d'effectivité constitue un essai audacieux de soumettre le droit international aux rigueurs d'une théorie systématique. Ce n'est pas une tâche facile à réaliser dans les conditions du droit international contemporain. Elle peut même être irréalisable. Les efforts de J. Symonides, effectués dans ce sens, apportent pourtant les précieux résultats scientifiques sous forme d'une meilleure compréhension du caractère du droit international et de ses fonctions dans les relations internationales contemporaines. Enfin en cela consiste aussi le rôle de la science du droit international et c'est pourquoi l'ouvrage de J. Symonides mérite une haute appréciation.

Wojciech Morawiecki

Andrzej TOWPIK, *Bezpieczeństwo międzynarodowe a rozbrojenie* [*International Security and Disarmament*], Warszawa 1970, 256 pp. Polski Instytut Spraw Międzynarodowych, Biblioteka Spraw Międzynarodowych, vol. 38.

Two basic questions constitute the starting point for the considerations presented in the work under discussion: 1) "What is the place of and the legal advantage of disarmament proposals in the complex of legal principles composing the security system envisaged in the United Nations Charter," and 2) "Whether within the limits of this system it

is possible to effect complete and universal disarmament and will this system maintain its value under disarmament conditions" (p. 23). The author poses these questions assuming that "interstate war as a social institution [...] loses its present rationale [...] and [...] as an institution which is not only forbidden by international law but also ceases to be a

practical form of continuing politics, should ultimately be eliminated from international life, as has happened with other social institutions which at a particular stage in human development lost their practical justification." N.B. this assumption is based on the implication, accepted by present day Marxism that the absence of inevitability of war is a basic law of social development.

The author's statement that war is an irrational institution is linked with the notion that disarmament does not mean liquidation of all armed forces but only of those designed for service externally (active external use, forces maintained as a deterrent). The result of disarmament in the above context, therefore, would be to leave untouched armed forces and organizations regarded as necessary for maintaining internal order and safeguarding the security of citizens. Even if such a formula, constituting one of the agreed principles of disarmament negotiations, can be criticised on the ground of unsatisfactory precision, it does form a basic constructional element, in which international security is the result of a lack of menace in the plane of international relations. This is achieved by disarmament on the level of securing internal order but not allowing the use of armed forces in a country's external relations.

The author states the place of disarmament in the United Nations security system, interpreting not only the United Nations Charter but also the resolutions of the United Nations General Assembly on the question of general or universal and complete disarmament. In this approach, disarmament (which at the time when the United Nations Charter was elaborated was not regarded as a *sine qua non* for the creation of an international security system or as one of its fundamental elements) subsequently became the principle element in a new conception of the security system, a conception in which the relationship between

international security and disarmament found expression particularly in the resolutions of the United Nations General Assembly. Such resolutions are treated by the author as instruments by means of which members of the United Nations interpret the UN Charter in accordance with their needs and independent of the intention of the authors of the Charter (p. 35), or as instruments which fulfill the general stipulations of the UN Charter.

In discussing the resolutions of the United Nations General Assembly concerning disarmament the author concludes that they do not place a country under any legal responsibility as regards disarmament but merely constitute the initial element in the creation of general principles in the plane of international law "for they delineate only a certain standard and at the same time draft a development programme for international law in the sphere of disarmament, in order to achieve which members of the United Nations should aim at entering into appropriate treaties or international agreements" (p. 5). The author eschews emphasising the character of this "necessity" (moral, political, theological, since it is not legal) in favour of the international legal consequences of the free will of States. Only in multilateral treaties signed simultaneously in London, Moscow and Washington, in which the parties concerned emphasised their "determined will to achieve" understanding in the matter of universal and complete disarmament, does the author detect "a sort of *pactum de contrahendo*"—obligations leading to negotiations with a view to including appropriate international understanding in the matter of universal and complete disarmament and also obligations as to abstention from any kind of unilateral action which might impair the sense of negotiations in progress.

This contribution, although logical, cannot fail to arouse certain doubts. The author has excluded from his considera-

tions the resolutions of the General Assembly in which there is mention of partial disarmament or a reduction of arms, and of course these resolutions are linked with the law-making processes concluded by agreements signed in the three capitals. Furthermore, several countries—members of the United Nations—who participated in passing the General Assembly resolution did not become parties to these agreements. Can one then speak of a link (having the characteristics of a necessary link) between the General Assembly's resolutions and agreements signed in the three capitals? It would rather seem that the material source for both were agreements among the three great powers accomplished outside the United Nations and merely affirmed by the General Assembly.

In the foundations of the book appears an assumption, previously formulated in the League of Nations Covenant and accepted in the UN Charter—assumption of the connection between security and disarmament. The connection between disarmament and the maintenance of international peace and security reveals itself particularly clearly in the considerations concerning the model of international security which consists of disarmament, conducted under control and related to appropriate means of maintaining international peace and security. *Vis-à-vis* ideas of an international security system (the balance of power, collective security and world government) the author places the problem of disarmament. He disregards the first conception in its present day form—the conception of “the balance of terror.” On the basis of the two remaining conceptions, he formulates his own original conception of safe disarmament.

A safe realization of the disarmament process requires, according to Andrzej Towpik, the existence of a particular system of security, or compliance in the

manner of conducting disarmament activities with such principles as realization of the disarmament programme by stages, the equal importance of individual advances in disarmament, the particular order of approach of different countries to the disarmament treaty as well as to international control over disarmament, with the tacit assumption that all countries are embraced by the disarmament process. The author gives particularly extensive consideration to control of the disarmament process, taking his personal stand on the projects proposed by the great powers for establishing an International Disarmament Organization linked with the United Nations.

In the security system enabling an approach to a safe disarmament, the author indicates two basic principles. Firstly, the peaceful settlement of international disputes—based fundamentally on the mechanism established in the United Nations Charter. Changes in such mechanism during the process of disarmament are not excluded by the author, but he expresses his *a priori* opposition to changes. In interesting arguments concerning the role of the International Court of Justice, the author has not avoided certain errors in accepting the traditional division of international disputes into legal and political, while at the same time confusing the normative plane with the political consequences of a given controversy. Admittedly, a compromise may have greater value for peace, than the verdict of an international court, in view of the political implications and consequences, but no conclusion can be drawn from this to specify whether a dispute is political or legal, even if we were to agree that such a division is justifiable under the United Nations Charter. The aim—namely, the peaceful settlement of the dispute—dictates in a given situation the best possible choice for settling the controversy, but whether the given dispute can be specified as a legal or political one is of no significant

ance in relation to the choice of acceptable means of settlement of such dispute.

The second basic element of the security system, as also of a „secure” progress of the disarmament process is a sanction, as a negative reaction by international society to the violation of international law. While agreeing with the author that only collective sanctions have any real meaning (that is, in principle the means provided in Chapter 7 of the UN Charter) one may express doubt as to their effectiveness in the process of safe disarmament. Under present conditions, it would be difficult to agree that disarmament could be secured by individual sanctions based on the principle of reciprocity. In this reviewer's view, to envisage the possibility of individual sanctions being employed during universal disarmament, undermines not only the universality of this process but also its aim. A more useful sanction here would seem to be the reaction of public opinion or at least the author's reserve concept of responsibility before the international court as a means to enforcement of the provisions of a disarmament treaty.

In the last chapter of his book, Andrzej Towpik very successfully undertook to criticize the idea of „peaceful changes in the world disarmed,” an idea which sees in the abolition of armed forces the disappearance of a powerful factor neces-

sary for the development of society or which postulates an increase in the role and meaning of international and super-State organs. This is not conservatism on the author's part, but a realistic emphasis on the fact that „peaceful changes under conditions of disarmament will be able, at least in their essential part, to take advantage of methods and relations already existing in the system of international law” (p. 222) while any attempt to express future changes by establishing new norms in advance appears to be dangerous and superfluous.

Andrzej Towpik's work in addition to possessing great theoretical values, is characterized by the fact that it takes into account all the important documents and proposals introduced by countries as regards universal and complete disarmament. The idea of safe disarmament is firmly grounded in political realities, as well as material norms. And even if one can find fault with this idea from a theoretical point of view, its practical value may become meaningful in the future.

Andrzej Towpik is a research worker in the Polish Institute of International Affairs. On the basis of the work here reviewed he was awarded his doctorate in international Law at the Jagiellonian University (Cracow).

Gwidon Rysiak

Bronisław WALASZEK, Mieczysław SOŚNIAK, *Zarys prawa międzynarodowego prywatnego* [*An Outline of Private International Law*], State Scientific Publishers—PWN, Warszawa 1968, 285 pp.

The book under review is a university textbook for law students. The textbook is based on the principle that international private law involves solely the conflicts law. In this respect the textbook covers the whole of the field. According to the accepted definition of international private law, there is in principle no analysis of the unified law regulating international civil law relations. The authors strictly observe this

principle, and unified law is discussed incidentally only, namely when it constitutes a starting basis for an analysis of conflict of laws.

The textbook is divided into a general part and a circumstantial part. The former contains discussion of all problems generally considered to belong to the general doctrine of international private law, *viz.* the scope of international private law, history, sources, in-

terpretation, transitive problems, iunctims, classification, prejudicial questions preliminary and final, renvoi, ununitary law, change of statute, law evasion, public order, and principle pertaining to the conception and application of the competent law.

In accordance with the principle accepted in the Polish international civil and private law, the detailed part of the textbook is arranged on the system of pandects. It begins with the discussion of the conflicts concerning the law of physical and legal persons and the form of legal operation. It goes on to cover problems of property law, obligations, family law and successions. The section on obligations deals separately with questions of obligations arising from legal operations, general terms of delivery of the Council of Mutual Economic Assistance, obligations which do not arise from legal operations, and transport law. Enclosed to the detailed part is an annex on the law of aliens.

The authors present all constructions in a highly exhaustive manner. There is also a breath of topicality in this textbook which contains everything important that has appeared recently in the doctrine of international private law. This is why there is a wealth of material in the general part. The circumstantial part, on the other hand, contains a penetrating analysis and exegesis of Polish norms of international private law. In this respect the authors have introduced numerous new conceptions and treatments, markedly contributing to an enrichment of the Polish doctrine of international private law. Practitioners will be also probably grateful to the authors, as they will find ways to the solution of doubts which always arise in the quest for seeking the competent law.

Some critical and polemic remarks also suggest themselves in the reading of the textbook. Here they are:

1. A very important role is played in a textbook by the method of the trans-

mission of the various theories, arguments and scientific views. There are two, generally used methods in this respect. The first of them consists in the successive description of the existing views and the argumentation used by their representatives. The unravelling of similarities and differences is left to the reader. By the second method, the author of a textbook presents a compact synthesis of a theory or a view. In my opinion the latter method is more suitable for a textbook for students. A student who for the first time in his life meets various views, theories and scientific arguments in a textbook is quickly lost in the thicket of names and controversies. The aim of university teaching is to present students with a clear, synthetic picture of the corner stones of science. The authors of the present textbook use both these methods. I think it would be better to uniformize the textbook in this respect.

2. It seems to me that for the same reasons I gave under (1.), it is useless in a textbook to carry out an exegesis of the law in force with the help of comparisons with the formulations of an earlier law which is already abrogated. Similarly, the highly correct in principle method of interpretation is unintelligible for students. For if they were to understand and assimilate this interpretation, they would have thoroughly to study and learn the abrogated law. I think also that it is superfluous to introduce deliberations on the history of the origin of certain provisions, particularly their modulation on the way from the codification commission through its praesidium to the parliament.

3. Proportions between the various problems dealt with in the textbook are not always right. Particularly striking in this respect is the excessively expanded family and guardianship law which takes up nearly one half of the detailed part. Adoption itself takes up almost as much space as the whole law of obligations,

which is the second section after the family and guardianship law to receive the most space.

4. Treating international private law in the strict sense of the term, that is confining themselves to conflicts law, the authors omit problems of international civil procedure. They are not consistent in this respect, however. Among some problems of the circumstantial part, mainly on issues belonging to family and guardianship law, they deal first of all with the problems of jurisdiction. In the case of adoption and the question of the rights of the condition of the child and the relationship between children and parents, they touch also upon such circumstantial questions as the filing of a suit abroad, question of proof or the recognition of foreign claims.

5. For the first time in Polish literature the textbook deals also with the final question (*Nachfrage*). The authors quote G. Kegel. I must confess that nowhere have I met this problem outside Kegel's textbook, and that Kegel's arguments on this head are not understandable for me. It is all the more difficult to understand what has been said after Kegel in the textbook under review. Kegel's argumentation sins by its lack of clarity. This is one of the few places in the otherwise excellent work, which has failed completely in my opinion. I am not convinced at all that final question constitutes a separate and independent problem of international private law. I would rather place it in the change of statute.

I would not like anybody to regard what I have said at this moment as a mature "scientific view." The problem is a complex one and requires a profound study. If, therefore, the problem is vague and doubtful, it would have been better not to mention it in a textbook at all.

6. According to Article 20 of the law of 11 November, 1965, claims to alimony between relatives and connections are subject to the national law of person entitled to alimony. The authors are of

the opinion that this provision does not apply to alimony claims between parents and children. The textbook does not contain any justification of this view. It is contained on the other hand, in a work written by M. Sośniak, B. Walaszek and E. Wierzbowski, *Międzynarodowe prawo rodzinne* [*International Family Law*] pp. 279-282. It was explained there that the first drafts of the law on international private law were limited in their proposals to legal relations between parents and children, leaving legal relations between more distant relatives to the analogous application of principles provided for elsewhere. The provision of Article 20 was introduced by the Praesidium of the Codification Commission while its final wording was the work of the Administration of Justice Committee of the Parliament (*Seym*). Basing themselves on the above facts, the authors point out that "the introduction of the present Article 20 indicates solely a change of views within the Codification Commission as regards the regulation of the question of alimony claim between relatives. Secondly—alimony claims are one of the most essential components of the legal relations between parents and children. The exclusion of these claims from those legal relations and their inclusion within the norm of Article 20 would be in fact a legislative doubling of the same problem."

I hold a different view on this question. The grammatical and logical formulation of Article 20 is so obvious that it cannot be undermined. Any attempt to impart to this provision a content other than linguistic with the help of a historical interpretation is an abortive one, as it tries to say something different than has been expressed by the legislator in words which do not give rise to any doubts. Were one to accept the view expressed by the authors, one would have to impeach the legislator for legislative indolence. For if

he had the intention ascribed to him by the authors, the formulation would have been simple. The contents of Article 20 would have to be included in Article 19 and to say: "Claims to alimony between more distant relatives are subject to the national law of the person entitled to alimony."

Regardless of the grammatical and logical interpretation, the contents of Article 20 are fully consistent with justice. Let us take a situation in which the person entitled to alimony is a child. Its national law will be then applied on the basis of Article 20. The situation will be, therefore, identical were Article 20 non-existent and were the right of

the child based on Article 19 paragraph 1. However, Article 20 assumes full significance only when it is the parent that is entitled to alimony from a child. How right is this solution! A parent claims alimony from a child as a rule when he himself suffers from poverty, and when the child is grown up, can afford to help the parent but does not want to do it of his own free will. Why should a child benefit in such a situation from the privilege of the appliance of its own national law to the disadvantage of the needy parent?

Witalis Ludwiczak

Karol WOLFKE, *Rozwój i kodyfikacja prawa międzynarodowego. Wybrane zagadnienia z praktyki ONZ* [*Le développement et la codification du droit international. Problèmes choisis de la pratique de l'ONU*], Ossolineum, Wrocław 1972, 182 pp. Prace Wrocławskiego Towarzystwa Naukowego.

L'ouvrage en question a pour objet l'activité de l'ONU sur le plan du développement et de la codification du droit international ainsi que de son influence sur la doctrine du droit international. L'auteur constate dès le début que l'intérêt actuel prêté à ce domaine de l'activité de l'ONU se concentrait, en majeure partie, sur les résultats obtenus dans les domaines particuliers du droit international comme p.ex. le droit maritime, le droit des relations diplomatiques et consulaires, le droit des traités. Par contre, il existe beaucoup moins d'ouvrages monographiques qui présentent l'activité de codification, l'analyse des expériences acquises et l'appréciation des résultats. Ceux qui viennent de paraître portent plutôt sur certains aspects, en majeure partie sur ceux de la procédure et de la technique du développement et de la codification n'abordant point les questions ayant l'importance essentielle pour les bases du droit international. Par conséquent, la doctrine du droit international a pour tâche d'analyser d'une manière critique les

réalisations de l'ONU dans le domaine de l'évolution et de la codification du droit international ainsi que les matériaux et les expériences recueillis à cette occasion.

Par suite de cette conception, l'auteur se propose, dans sa monographie, tout d'abord de préciser le rapport entre deux fonctions—du développement et de la codification du droit international, et, ensuite, d'examiner le rôle que, dans la pratique de développer et de codifier le droit international, jouent les facteurs fondamentaux dits « matières » (pratique des États, précédents, doctrine). En se rendant compte que cette tâche ambitieuse dépasse les possibilités d'un chercheur, l'auteur s'est borné, dans sa monographie, à présenter un essai d'examiner cette question à la lumière des exemples choisis afin d'illustrer l'utilité des recherches de cette sorte et d'indiquer la méthode qu'on y pourrait appliquer.

Une analyse perspicace de la question du rapport entre l'évolution et la codification du droit international à la lu-

mière de la pratique concernant le droit maritime, le droit des relations diplomatiques et consulaires et le droit des traités, mène l'auteur à la conclusion que les deux fonctions sont indissolublement liées entre elles, pas tellement pour les raisons de principe, mais plutôt purement pratiques. En examinant la question sur le plan logique — la délimitation de deux notions ne présente aucune difficulté, par contre il n'est pas facile de donner la réponse à la question de savoir si l'on peut développer le droit international sans codifier en même temps les normes déjà en vigueur et si l'on peut codifier les normes sans faire naître en même temps les normes nouvelles. Le développement progressif, c'est-à-dire la création de nouvelles normes, est possible indépendamment de la codification bien qu'il soit précédé de la pratique en cours étant l'expression de la nécessité du règlement juridique. Il est possible aussi, à titre exceptionnel, la codification, c'est-à-dire la formulation plus étroite des normes coutumières existantes qui ont été déjà auparavant formulées dans les accords particuliers, dans la jurisprudence ou la doctrine. Il n'est pas permis tout de même de reconnaître pour la codification, aux termes de l'art. 15 du Statut de la Commission du Droit International, la transformation d'une norme coutumière en norme conventionnelle.

En examinant le rôle de la pratique et du précédent, l'auteur remarque que dans l'activité actuelle de l'ONU, en ce qui concerne le moyen de profiter de la pratique, on préfère la pratique la plus récente, que la Commission du Droit International attache plus d'attention à prendre en considération les tendances les plus récentes se manifestant dans la pratique plutôt qu'à établir la pratique traditionnelle et fortement consolidée. En ce qui concerne le fait d'évoquer les accords internationaux, aussi bien multilatéraux que bilatéraux, il a occupé beaucoup de place et a été

toujours pris en considération dans l'activité de l'ONU, bien qu'on en ait fait le différent usage à différentes occasions. La Commission du Droit International attachait une grande importance à la jurisprudence de la Cour Permanente de la Justice Internationale et de la Cour Internationale de la Justice: même alors où on n'accordait pas à la jurisprudence le rôle décisif, et même quand on s'y opposait, en tout cas on faisait une analyse de la position prise par la Cour d'une manière perspicace jusqu'à la citation de larges extraits empruntés aux arrêts. Les cours d'arbitrage et nationales ont joué un rôle considérablement moindre. Le grand rôle incombe à la documentation des différentes conférences internationales (p. ex. de la conférence de codification de 1930) ainsi qu' à la documentation préparée par le Secrétariat de l'ONU. En ce qui concerne l'exploitation, par les conférences diplomatiques de codification, tenues sous les auspices de l'ONU, des projets et matériaux préparés par la Commission du Droit International, la participation de la Commission du Droit International, la participation de la Commission, notamment à la codification, est relativement grande et accuse une tendance toujours croissante. Il est particulièrement caractéristique le pourcentage minimal des projets d'articles de la Commission qui n'ont pas été pris en considération et aussi le fait que les diverses proportions dans les conventions particulières entre le développement du droit international et sa codification n'ont eu aucune influence visible.

L'analyse du rôle des États et de leur législation mène à la conclusion que la participation des États nouveaux au développement et à la codification du droit international ne cesse pas de croître.

Les opinions et commentaires exprimés par les gouvernements exercent une influence à plusieurs reprises sur la correction des projets des articles,

mais pourtant il n'y a pas lieu de croire que l'autorité de ces observations serait décisive pour la Commission du Droit International. L'influence de la législation nationale sur le développement et la codification a été visible le plus sur les exemples négatifs, c'est-à-dire là où les divergences entre les dispositions intérieures rendaient impossible l'établissement ou la création d'une règle générale du droit international.

Le rôle important a joué également la doctrine qui ne s'est pas limitée à prêter son aide dans la codification des normes déjà en vigueur: la doctrine a pris une part active à la création du droit international ce qui trouve l'expression dans l'influence exercée par les publications du domaine de droit international aussi bien celles formulant les nouvelles tendances et conceptions que d'autres contenant les observations critiques. C'est pourquoi l'auteur est d'avis qu' en dépit des opinions souvent expri-

mées, le rôle de la doctrine ne diminue pas dans le droit international, et au contraire, il est permis de parler de sa renaissance *sui generis*.

En appréciant l'ouvrage du professeur Wolfke il faut constater en conclusion qu'il constitue, du point de vue méthodique, un essai très intéressant de voir d'une manière nouvelle le processus de la création et du développement du droit international dans le système de l'ONU. Il faut partager l'avis de l'auteur lorsqu'il affirme en conclusion que les recherches de cette sorte devaient être menées à une plus grande échelle parce qu'elles sont très utiles et même indispensables et parce qu'elles permettent de vérifier plusieurs opinions convenues sur les problèmes clé relatifs à la théorie et à la pratique du droit international.

Remigiusz Bierzanek

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