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VI

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Les traités sur les frontières en Europe centrale (1970—1973)

par KRZYSZTOF SKUBISZEWSKI

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Le présent article passe en revue les clauses territoriales qui figurent dans les traités conclus dans les années 1970-1973 et qui se rapportent à certaines frontières en Europe centrale. Par ordre des dates, ce sont des accords suivants :

1) Le traité signé à Moscou le 12 août 1970 entre l'Union des Républiques Socialistes Soviétiques (l'U.R.S.S.) et la République Fédérale d'Allemagne (la R.F.A.) [1]. Ce traité porte sur la renonciation à la force et sur la coopération entre les parties.

2) Le traité sur les fondements de la normalisation des relations entre la Pologne et la R.F.A., signé à Varsovie le 7 décembre 1970 [2].

3) L'accord quadripartite signé le 3 septembre 1971 « au palais précédemment occupé par le Conseil de Contrôle allié dans le secteur américain de Berlin » [3]. Les parties en sont les quatre puissances, anciens occupants de l'Allemagne: la France, l'U.R.S.S. le Royaume-Uni de Grande-Bretagne et l'Irlande du Nord et les États-Unis d'Amérique (les U.S.A.). Ce traité règle les différents aspects de la question berlinoise.

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[1] Traduction française : R.G.D.I.P., Vol. 74, 1970, p. 1159. Entré en vigueur le 3 juin 1972.

[2] Traduction française : *ibid.*, p. 1163. Entré en vigueur le 3 juin 1972.

[3] Texte français : « Bulletin » de l'Office de Presse et d'Information du Gouvernement de la R.F.A., Vol. 18, 1971, p. 243. Entré en vigueur le 3 juin 1972.

4) Le traité sur les bases de relations entre la R.F.A. et la République Démocratique Allemande (la R.D.A.), signé à Berlin le 21 décembre 1972 [4]. On l'appelle le traité fondamental, le *Grundvertrag*, à la différence d'autres accords entre les mêmes parties, touchant aux matières plus détaillées.

5) Le traité sur les relations mutuelles entre la R.F.A. et la Tchécoslovaquie, signé à Prague le 11 décembre 1973 [5].

En particulier, l'article décrit le statut juridique actuel de la frontière qui traverse le territoire de l'ancienne Prusse orientale, de la frontière Odra—Nysa, des secteurs occidentaux de Berlin, de la frontière entre la R.F.A. et la R.D.A. et de la frontière germano-tchécoslovaque dans la région des Sudètes.

I. La frontière à travers l'ancienne Prusse orientale

L'historien peut démontrer que déjà au début de la Première Guerre mondiale on a parlé de l'amputation de la Prusse orientale en tant que territoire du Reich [6], mais cette idée n'est devenue réalisable qu'au cours des hostilités de la dernière conflagration. En effet, les alliés ont envisagé un changement de souveraineté dans cette région-là pendant leurs premiers pourparlers sur les futures frontières de l'Allemagne. A l'époque, l'Union soviétique soulignait son intérêt pour un débouché situé à l'ouest de ses confins européens, et pour un port qui pourrait fonctionner pendant tout l'hiver.

Pendant la conférence de trois puissances à Téhéran (1943) le Premier ministre soviétique, J. V. Staline, fit allusion à l'argument maritime en demandant que l'U.R.S.S. reçoive, après la guerre, la ville de Koenigsberg avec la région adjacente [7]. Le Royaume-Uni et les U.S.A. ont reconnu le bien-fondé des revendications soviétiques et y ont donné, en 1945, leur approbation formelle. On lit dans le chapitre VI du rapport sur la con-

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[4] Traduction française: R.G.D.I.P., Vol. 77, 1973, p. 475. Entré en vigueur le 21 juin 1973. Cette traduction est annexée à l'article de D. COLARD, *Le traité fondamental entre la R.F.A. et la R.D.A. du 21 décembre 1972*, *ibid.*, p. 444.

[5] Publié après son paraphe au mois de juin 1973, « Frankfurter Allgemeine Zeitung », n° 143 du 23 juin 1973, p. 6.

[6] Cf. la conversation entre S. Y. Witte, alors ancien président du Conseil de l'Empire russe, et l'ambassadeur de France, M. Paléologue, en 1914. M. PALÉOLOGUE, *La Russie des tsars pendant la grande guerre*, Vol. 1, Paris 1921, p. 120.

[7] Sir Llewellyn WOODWARD, *British Foreign Policy in the Second World War*, t. 2, London 1971, p. 651. PH. BRETTON, *Le traité germano-polonais du 7 décembre 1970*, A.F.D.I., Vol. 17, 1971, p. 171, à la p. 185, lie cette réclamation au sort du triangle de Białystok.

férence tripartite de Berlin (la conférence de Potsdam) que « la conférence a accepté le principe de la proposition soviétique concernant le transfert à l'U.R.S.S. de la ville de Koenigsberg et de la région adjacente [. . .], sous réserve d'un examen de la frontière actuelle par les experts » [8]. Le rapport constate que « le président des États-Unis et le Premier ministre britannique ont déclaré qu'ils appuieraient la proposition de la conférence au moment du traité de paix ». La France s'associa à la décision d'accorder l'administration de Koenigsberg à l'U.R.S.S.[9]. La promesse des puissances occidentales participant à la conférence de Potsdam de soutenir l'acquisition de ce territoire par l'U.R.S.S., tranchait l'affaire même avant la conclusion de la paix. Car c'étaient les quatre puissances qui, en assumant l'autorité suprême en Allemagne, se sont données, en conformité avec le droit international, le pouvoir de déterminer « ultérieurement les frontières de l'Allemagne, en tout ou en partie » [10].

Tandis que les U.S.A. essayaient, au cours des conférences diplomatiques des années quarante, de faire réviser, au détriment de la Pologne, la ligne Odra-Nysa [11], ni le gouvernement américain ni les autres puissances occidentales n'ont essayé de rouvrir la question de Koenigsberg. Le décret du Présidium du Conseil suprême soviétique du 7 avril 1946 a incorporé la région de Koenigsberg dans le territoire de l'U.R.S.S., à savoir dans celui de la République Fédérale Russe. Le 2 juillet 1946, le nom de Koenigsberg a été officiellement changé en celui de Kaliningrad. La région a le statut administratif d'une *oblast'*.

Il restait encore à régulariser le régime de frontière. Malgré les préparatifs diplomatiques qui suivaient la cessation des hostilités en Europe, on n'a pas réussi à convoquer une conférence pour signer la paix avec l'Allemagne. Entre-temps, la division de celle-ci éloignait encore davantage les chances pour un traité de paix. Les deux États qui, depuis 1945, sont voisins dans l'ancienne Prusse orientale, la Pologne et l'U.R.S.S., ont d'abord attendu le règlement de paix. Celui-ci ne se réalisant pas, les

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[8] *Recueil de textes à l'usage des conférences de la paix* (cité ci-après *Recueil*), Paris 1946, p. 33.

[9] *Foreign Relations of the United States. Diplomatic Papers. The Conference of Berlin (The Potsdam Conference) 1945* (cité ci-après *Conference of Berlin*), t. 2, Washington 1960, document n° 1407, p. 1552.

[10] Déclaration de Berlin concernant la défaite de l'Allemagne du 5 juin 1945, *Recueil*, p. 93. R. Y. JENNINGS, *Government in Commission*, B.Y.B.I.L., Vol. 23, 1946, p. 112.

[11] Voir les déclarations du secrétaire d'État G. C. Marshall faites devant le Conseil des ministres des Affaires étrangères à Moscou en 1947, *Documents on American Foreign Relations*, vol. 9, Princeton University Press, p. 45 et *Documents on International Affairs 1947 - 1948*, Oxford University Press, p. 462.

deux gouvernements ont signé, le 5 mars 1957, le traité portant sur la délimitation et la démarcation de leur frontière commune « dans la partie adjacente à la Mer Baltique » [12].

Quant à l'attitude des deux États allemands, la R.D.A. ayant, dès son début, accepté les accords de Potsdam, elle n'a jamais mis en doute l'appartenance de Kaliningrad à l'U.R.S.S. D'autre part, la R.F.A. a maintenu, au moins jusqu'à la fin de 1969, la fiction de l'existence de l'Allemagne dans ses frontières de 1937; cette notion englobait l'ancienne Prusse orientale comme partie intégrante du territoire allemand. Le gouvernement fédéral à Bonn soulignait également que la fixation définitive des frontières de l'Allemagne devrait attendre un règlement de paix pour l'ensemble du pays.

Le traité U.R.S.S. — R.F.A. de 1970 apporte une modification à la position ouest-allemande et une clarification définitive à propos de la frontière dans l'ancienne Prusse orientale. Dans l'article 3, les parties « s'engagent à respecter sans restriction l'intégrité territoriale de tous les États en Europe dans leurs frontières actuelles ». Cette formule est suffisamment large pour qu'elle comprenne également la frontière en question. La déclaration faite par les parties dans la même stipulation, constatant qu'elles « n'ont pas de revendications territoriales envers qui que ce soit et n'en soulèveront pas non plus à l'avenir », exclut toute prétention de la R.F.A. de traiter la région de Kaliningrad comme appartenant au territoire allemand. Nous lisons aussi, toujours dans l'article 3, que l'U.R.S.S. et la R.F.A. «considèrent aujourd'hui et considéreront à l'avenir comme inviolables les frontières de tous les États en Europe, telles qu'elles sont tracées à la date de signature du présent traité ». Cette dernière phrase concerne aussi le tracé de la frontière tel qu'il a été effectué en vertu du traité polono-soviétique de 1957 [13].

En conséquence, les obligations de l'article 3 du traité de Moscou empêchent la R.F.A. de mettre en question la validité, en droit international, de l'acquisition par l'U.R.S.S. de la partie nord de l'ancienne Prusse Orientale. La R.F.A. y a consenti à la nature définitive et valable en droit de la frontière qui, dans cette région, sépare le territoire soviétique de celui de la Pologne.

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[12] R.T.N.U., t. 274, p. 133.

[13] Quant à l'applicabilité de l'art. 3 à la région de Kaliningrad, voir les observations de E. Menzel dans *Ostverträge, Berlin-Status, Münchener Abkommen, Beziehungen zwischen der BRD und der DDR*, Hamburg - Kiel 1971, p. 40 et W. Wengler, *Die Vereinbarkeit der Zustimmungsgesetze zu den Ostverträgen mit dem Grundgesetz* (une expertise hors commerce), 1972, p. 3.

II. La frontière Odra-Nysa

Nous ne reviendrons pas ici sur la longue histoire de la révision des frontières de la Pologne après 1939. Rappelons que les pourparlers menés entre les trois puissances au sujet du nouveau arrangement territorial polono-allemand ont abouti à l'accord de Potsdam sur la frontière occidentale de la Pologne [14]. Celui-ci, en attendant le règlement de paix, a remis à l'administration de la Pologne « les anciens territoires allemands » situés à l'est de la ligne Oder-Neisse, y compris la région de l'ex-Ville libre de Dantzig et « la partie de la Prusse orientale qui n'est pas placée sous l'administration soviétique ». La forme et la substance de la gestion polonaise n'ont pas été définies par l'accord de Potsdam. Pourtant un autre texte adopté simultanément par la conférence des Trois, et puis mis en effet par le Conseil de Contrôle à Berlin, ne laisse pas de doute sur le sort du territoire en question. Il s'agit de l'accord au sujet du transfert des Allemands [15] ; leur expulsion, exécutée entre 1945 et 1950 et entraînant le départ de plus de 3 millions nationaux allemands, n'a pas été opérée à titre provisoire, mais pour créer une situation permanente qui permettrait le peuplement de ce territoire uniquement par les Polonais, libérant ainsi la Pologne d'éléments allogènes.

Le règlement de paix avec l'Allemagne envisagé à Potsdam ne survenant pas, la Pologne a néanmoins réussi à consolider son titre territorial par des actes de reconnaissance, explicites ou implicites, notamment par ceux de l'U.R.S.S.[16], de la France [17] et du Royaume-Uni [18], ainsi qu'en vertu des accords conclus avec les deux États allemands.

Commençons par l'attitude de la R.D.A. Le 6 juillet 1950, à Zgorzelec, la Pologne et la R.D.A. ont signé un accord relatif « à la délimitation de la frontière d'État établie et existante entre la Pologne et l'Allemagne » [19]. Remarquons que déjà le titre de l'accord se réfère à la frontière en tant que phénomène de droit (« établie ») et de fait (« existante »). Dans le préambule de l'accord les chefs des deux États reconnaissent l'inviolabilité de cette frontière et aussi son caractère pacifique et amical (« une frontière inviolable de paix et d'amitié, qui ne sépare pas les deux peuples mais au

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[14] *Recueil*, p. 45. La France a donné son approbation à cet accord, voir *Conference of Berlin*, pp. 1551 et 1562.

[15] *Recueil*, p. 33, chap. 13.

[16] Voir les déclarations soviétiques du 17 septembre 1946 et du 9 avril 1947, V. Molotov, *Questions de politique extérieure. Discours et déclarations : avril 1945 - juin 1948*, Moscou 1948, pp. 244 et 429.

[17] Voir, en particulier, les déclarations du Général Charles de Gaulle, « Le Monde » du 27 mars 1959, p. 3, col. 1 - 2 et *ibid.*, 12 septembre 1967, p. 2, col. 4.

[18] « The Times » du 21 novembre 1970, p. 1, col. 7.

[19] R.T.N.U., t. 319, p. 93.

contraire les unit »). L'article premier dispose que les parties contractantes « confirment d'un commun accord que la frontière établie et existante [ici suit la description du tracé] est la frontière d'État entre la Pologne et l'Allemagne ». Aucune disposition ne mentionne le rôle possible et futur du traité de paix. L'accord se limite à préparer la délimitation et la démarcation de la frontière, les deux opérations étant bientôt effectuées [20]. Il constitue l'expression très nette et sans équivoque du consentement est-allemand à la frontière Odra-Nysa.

Il fallut attendre encore vingt ans avant que l'autre État allemand se décide de suivre le même chemin. La normalisation des rapports entre Varsovie et Bonn se réalisait lentement et difficilement. Le gouvernement de la R.F.A. a refusé, dès le moment de sa création, de reconnaître la frontière Odra-Nysa, il a protesté contre la reconnaissance accordée par la R.D.A. et pendant de longues années il a regardé le territoire acquis par la Pologne comme constituant toujours « une partie de l'Allemagne » [21]. Cette position rigide n'a commencé à changer qu'au temps de la « grande coalition » unissant les démocrates chrétiens de M. Kurt-Georg Kiesinger avec les socialistes de M. Willy Brandt (1966). En 1969, la Pologne a déclaré qu'elle était prête à conclure un accord avec la R.F.A. si celle-ci reconnaissait « la frontière existante occidentale de Pologne en tant que définitive » [22]. Le nouveau gouvernement de Bonn, à savoir celui de M. Brandt (formé avec la participation du parti libéral de M. Walter Scheel), ayant repris l'offre polonais, les deux pays, après de longs entretiens préliminaires et après des négociations épineuses, ont finalement abouti à une solution commune et ont signé leur traité à Varsovie le 7 décembre 1970.

Cependant, des complications surgissaient. La ratification des traités de Moscou et de Varsovie par la R.F.A. a mené à une crise intérieure dont l'intensité et l'envergure ont dépassé tout ce que la vie politique de Bonn a connu dès 1949. L'opposition démocrate-chrétienne a tenté de faire jouer

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[20] L'acte portant sur la démarcation de la frontière entre la Pologne et l'Allemagne, signé à Francfort-sur-l'Oder le 27 janvier 1951, *ibid.*, p. 100.

[21] « Das Gebiet bleibt ein Teil Deutschlands », déclaration du Bundestag du 13 juin 1950. Voir aussi la déclaration du chancelier fédéral devant le Bundestag le 20 septembre 1949. Les deux textes, qui se trouvent dans les Verhandlungen des Deutschen Bundestages, 1. Wahlperiode, sont reproduits dans Presse- und Informationsamt der Bundesregierung, « Bulletin », 1970, p. 1835.

[22] Discours de W. Gomułka, alors premier secrétaire du Comité central du Parti Ouvrier Polonais Unifié (PZPR), prononcé le 17 mai 1969, « Trybuna Ludu » (Varsovie), éd. C, n° 137 du 19 mai 1969, p. 4, col. 4 et 5 : « Il n'y a pas d'obstacles de nature juridique pour que la R.F.A. puisse reconnaître la frontière existante occidentale de Pologne en tant que définitive. Nous sommes prêts, à chaque instant, à conclure avec la R.F.A. un tel accord interétatique, de même qu'il y a dix-neuf ans nous avons conclu un accord à ce sujet avec la R.D.A. ».

le « vote de défiance constructif » et elle est presque parvenue à écarter M. Brandt du pouvoir. Celui-ci a finalement gagné la partie mais au prix d'un compromis qui s'exprima dans le vote par le Bundestag, le 17 mai 1972, d'une « résolution commune » qui prétend interpréter les deux traités [23]. Nous reviendrons encore à ce texte, mais il faut tout d'abord jeter un coup d'oeil sur les clauses concernant la ligne Odra-Nysa.

Dans le traité avec la Pologne, la R.F.A. constate que la ligne frontière, dont le tracé a été fixé au chapitre IX des décisions de la conférence de Potsdam, est une ligne « existante » et qu'elle « constitue la frontière d'État [24] occidentale » de la Pologne (art. I al. 1er). Le traité avec l'U.R.S.S., lui aussi, mentionne « la ligne Oder-Neisse qui forme la frontière occidentale » de la Pologne (art. 3). Ainsi, les traités confirment un certain statu quo territorial, mais leur signification ne se limite pas au seul domaine des faits. La frontière d'État étant une notion et un concept juridique, les deux gouvernements, en employant le terme « frontière », admettent que dans les territoires situés à l'est de la ligne indiquée la Pologne exerce la souveraineté. L'article I du traité de Varsovie mentionne la frontière d'État, il s'agit donc de la limite de la Pologne et de son territoire, et non pas de celle d'un territoire non polonais, donc étranger, qui se trouverait sous une sorte d'administration temporaire polonaise [25].

Les traités de 1970, en se référant à la frontière « actuelle » et « existante », prennent en considération le tracé de la frontière tel qu'il ressort de la délimitation et de la démarcation opérées entre la Pologne et la R.D.A.[26]. Ainsi le moindre doute est exclu sur l'appartenance à la Pologne d'une parcelle de territoire, quelle qu'elle soit, soumise au pouvoir effectif

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[23] « Die Welt », n° 114 du 18 mai 1972, p. 8, col. 2. La résolution a été adoptée par 491 voix (ou 513 si l'on compte les députés berlinois) et 5 abstentions. D'autre part, les lois autorisant la ratification des traités n'ont obtenu que les 248 voix des députés de la majorité gouvernementale, c.-à-d. exactement la moitié du Bundestag (496). La grande majorité des autres 248 députés se sont abstenus, sauf 10 qui ont voté contre le traité avec l'U.R.S.S. et 17 qui ont voté contre le traité avec la Pologne. Voir « Le Monde » du 19 mai 1972, p. 1, col. 2 ; « Die Welt » du 18 mai 1972, pp. 1 et 8 ; « The Times » du 18 mai 1972, p. 7, col. 1.

[24] Dans le texte allemand : *Staatsgrenze.*

[25] H. STAINBERGER, *Völkerrechtliche Aspekte des deutsch-sowjetischen Vertragswerks vom. 12. August 1970,* Z.f.a.ö.R.u.V., Vol. 31, 1971, p. 63, à la p. 111, limite la notion de frontière, dans le traité de Moscou, aux « lignes géographiques » protégées par la renonciation à la force. D'autre part, cf. les observations de W. WENGLER, *Der Moskauer Vertrag und das Völkerrecht,* « Juristenzeitung », Vol. 25, 1970, p. 632, à la p. 634 et PH. BRETTON, *Le traité germano-soviétique du 12 août 1970,* A.F.D.I., Vol. 16, 1970, p. 125, à la p. 136.

[26] L'accord de Zgorzelec et l'acte de Francfort-sur-l'Oder, voir notes 19 et 20.

polonais en 1970 et relevant de la souveraineté du Reich le 31 décembre 1937 [27].

Il y a encore d'autres stipulations dont le but et l'effet sont de stabiliser la frontière en question. Selon le traité de Moscou, la R.F.A. considère la frontière comme inviolable « aujourd'hui et [...] à l'avenir » (art. 3). Dans le traité de Varsovie, elle réaffirme l'inviolabilité de la frontière « maintenant et à l'avenir » ; le même texte stipule également un respect « sans restriction » de l'intégrité territoriale (art. I al. 2). La R.F.A. déclare aussi qu'elle n'a pas, généralement, « de revendications territoriales envers qui que ce soit et n'en [soulèvera] pas non plus à l'avenir » (traité de Moscou, art. 3) et, en particulier, que de telles revendications n'existent et n'existeront pas envers la Pologne (traité avec celle-ci, art. I al. 3). Ajoutons que le respect des frontières et de l'intégrité territoriale est stipulé dans le traité Pologne — R.F.A. en tant que tel et non pas en fonction d'une autre obligation, par exemple de la renonciation à la menace ou à l'emploi de la force. Il est vrai que les deux traités, en parlant de l'inviolabilité des frontières, ne se servent pas du terme « intangibilité » [28]. Mais aucune formule ou disposition de ceux-ci n'ouvre la voie à une révision du statu quo territorial polono-allemand par des procédures pacifiques (*peaceful change*). La renonciation ouest-allemande aux revendications territoriales signifie logiquement l'abandon de toute idée ou activité tendant à changer ce statu quo. Un tel abandon constitue, sans doute, l'une des bases sur lesquelles les deux États normalisent et développent, notamment depuis 1972, leurs relations mutuelles.

C'est justement le but de normalisation, déjà exprimé dans le titre du traité germano-polonais, ainsi que l'intention des parties de liquider le passé [29] et d'« assurer un avenir pacifique » qui font tourner notre attention vers la « résolution commune » du Bundestag. Car dans celle-ci, le parlement fédéral déclare que les traités « constituent d'importants éléments du *modus vivendi* que la République fédérale d'Allemagne cherche à établir avec ses voisins de l'est » (al. 1er). En même temps, la résolution réaffirme « la validité continue et sans restriction » de certains accords qui datent de la période antérieure à la *Ostpolitik*. Or, le terme *modus vivendi* implique un état temporaire de choses, une solution qui, il est vrai, règle le problème donné, mais de façon provisoire, en attendant l'avènement du

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[27] Cf. K. Ipsen, *Diskrepanz zwischen der Grenzklausel des Warschauer Vertrages und dem faktischen Grenzverlauf ?*, dans : *Ostverträge*..., p. 75.

[28] E. H. Albert, *Bonn's Moscow Treaty and Its Implications*, « International Affairs », Vol. 47, 1971, p. 316, à la p. 323 ; D. Colard, *Considérations sur les « traités de normalisation » signés par la R.F.A. avec l'U.R.S.S. et la Pologne*, R.G.D.I.P., Vol. 75, 1971, p. 333 aux pp. 340 et 352.

[29] Ph. Bretton, *Le traité germano-polonais*..., p. 175.

moment où l'arrangement permanent serait réalisable. Pourtant, le traité Pologne — R.F.A. nous dit dans son préambule que les deux parties sont « désireuses d'établir des fondements durables en vue d'une coexistence pacifique et du développement de normales et bonnes relations entre elles ». Et l'article III alinéa 1er souligne que « le présent Traité constitue le solide fondement » de leurs relations mutuelles. Ces phrases expriment donc une intention qui va clairement, et loin, au-delà d'un simple *modus vivendi.*

Mais la constatation la plus étonnante se trouve à l'alinéa 2 de la résolution. Le Bundestag y affirme que les traités « ne fournissent pas de base juridique quelconque aux frontières aujourd'hui existantes ». Cette surprenante assertion est en contradiction évidente avec l'article I du traité de Varsovie. Par l'entremise de celui-ci, l'Allemagne fédérale change sa position juridique soutenue depuis 1949 sur la frontière Odra-Nysa. Elle rejette maintenant la fiction du territoire allemand prétendument existant dans ses limites de 1937. Bien que le traité ne se serve pas du terme « reconnaissance », le consentement de la R.F.A. à la frontière s'exprime dans des formules qui reviennent à une reconnaissance. Ce sont : la constatation que la ligne Odra-Nysa est la frontière d'État occidentale de la Pologne; la réaffirmation de l'inviolabilité de cette frontière maintenant et à l'avenir; la déclaration qu'il n'existe pas, entre les deux pays, de revendications territoriales et qu'elles ne seront pas soulevées à l'avenir. Concluons alors qu'il n'est pas vrai qu'un traité d'un contenu pareil ne fournit pas de base juridique à la frontière en question. Certes, la frontière n'a pas été juridiquement créée par le consentement de Bonn et le traité de normalisation ne remplace pas un traité de paix [30]. Néanmoins, avec les accords de Potsdam et de Zgorzelec, avec les actes de reconnaissance, notamment par les puissances, il fait partie d'un ensemble des textes qui déterminent le statut juridique de la frontière Odra-Nysa.

En tout cas, l'interprétation contenue dans la résolution ne possède aucune valeur obligatoire ou n'importe quelle autre pour la Pologne. Celle-ci n'a pas été associée aux tractations dans lesquelles la résolution a été mise au point. Son texte ne fut pas officiellement communiqué au gouvernement polonais (le cas échéant, son acceptation serait sans doute refusée) et les porte-paroles de Varsovie ont insisté sur le fait que seul le traité tel quel constituait une base acceptable pour les relations avec la R.F.A.[31]. La résolution n'est pas opposable au gouvernement polonais.

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[30] Cf. H. Meyrowitz, *Le traité de Varsovie du 7 décembre 1970*, R.G.D.I.P., Vol. 75, 1971, p. 944, à la p. 997.

[31] Voir « Polish Facts and Figures » (Ambassade de Pologne, Londres), n° 899, p. 5 et n° 900, p. 2, col. 2.

Citons à ce propos l'opinion du Tribunal arbitral de réclamation entre le Royaume-Uni et les U.S.A., énoncée dans l'affaire du navire *The David J. Adams* :

« Le principe fondamental de l'égalité juridique des États s'oppose à ce qu'on place un État sous la juridiction d'un autre. Il s'oppose à la soumission d'un État à l'interprétation d'un traité avancée par un autre État. Il n'existe aucune raison pour laquelle un État, plus qu'un autre, serait en mesure d'imposer une telle interprétation unilatérale d'un contrat essentiellement bilatéral. Une interprétation pareille ne devient pas obligatoire pour l'autre partie du seul fait qu'elle émane d'une autorité législative, judiciaire ou autre de l'une des parties » [32].

En d'autres termes, la « résolution commune » du Bundestag n'est pas le contexte dans lequel le traité de Varsovie pourrait ou devrait être interprété. Mais aussi sa valeur en tant qu'instrument d'interprétation émanant d'une seule partie contractante reste très douteuse. Car la résolution contient des affirmations dont le but est d'affaiblir ou même de changer le sens ordinaire et naturel des dispositions du traité. Et celles-ci, comme nous l'avons démontré, reviennent à une stabilisation non équivoque de la frontière Odra-Nysa.

III. Le caractère distinctif des secteurs occidentaux de Berlin

Selon les accords interalliés sur les zones d'occupation et sur les organisations de contrôle en Allemagne [33], la région du « Grand Berlin » a été occupée par des forces de chacune des quatre puissances. Une autorité interalliée de gouvernement (la Komendantura), composée de commandants des quatre secteurs (en lesquels Berlin fut divisé), a été établie pour administrer conjointement cette région. Le commandant du secteur soviétique a cessé de participer aux travaux de la Komendatura à partir du 1er juillet 1948. Vers la fin de cette année fonctionnaient deux administrations municipales séparées, l'une dans le secteur soviétique, l'autre dans les secteurs occidentaux.

Les accords interalliés sur l'occupation de l'Allemagne ainsi que les arrangements mettant fin au blocus de Berlin (1948-1949) [34] ou relatifs à la liberté des communications entre Berlin et le reste de l'Allemagne [35] n'ont pas réglé, avec une clarté absolue, toutes les questions relevant du statut de la ville. Par conséquent, à part les grandes difficultés pratiques et

[32] *Recueil de sentences arbitrales*, vol. 6, p. 85, à la p. 89 (traduction de l'auteur).

[33] R.T.N.U., Vol. 227, p. 279.

[34] Communiqué des quatre puissances, New York, le 4 mai 1949, *ibid.*, Vol. 138, p. 124.

[35] Accords du 20 juin 1949, *Documents on Germany (1944—1959)* (publication officielle américaine), Washington 1959, p. 66.

politiques, il y avait toujours des points juridiques équivoques et confus relatifs à la situation de Berlin. Le rôle de l'accord quadripartite de 1971 consiste dans la clarification de certaines questions essentielles. Ainsi, l'accord met au point la circulation civile entre la R.F.A. et les secteurs occidentaux. Il étend la liberté de mouvement des habitants de ces secteurs (visites dans la R.D.A., y compris sa capitale). Il contient des dispositions sur la représentation de Berlin (Ouest) à l'extérieur. Finalement, il apporte des précisions sur les liens qui existent entre les secteurs occidentaux et la R.F.A. Toutes ces réglementations ne se font que sur le plan des rapports pratiques : les quatre puissances ont conclu leur accord « sans préjudice de leurs positions juridiques » (préambule) et « abstraction faite des divergences de vue juridiques » (partie I, al. 4). Soulignons que ces divergences commencent déjà avec la question préalable, à savoir le champ d'application de l'accord quadripartite. Selon l'interprétation occidentale, l'accord vise toute la région du « Grand Berlin » [36]. Du côté soviétique, et en particulier de celui de la R.D.A.[37], on insiste que l'accord se rapporte seulement à Berlin-Ouest.

Quoi qu'il en soit [38], les quatre puissances agissent en « tenant compte de la situation existante », c'est-à-dire l'accord stabilise et sanctionne le statut territorial de Berlin tel qu'il s'est formé en fonction de la division de l'Allemagne. Il est vrai qu'aucune clause de l'accord ne mentionne pas expressément Berlin en tant que capitale de la R.D.A. (Berlin-Hauptstadt

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[36] Voir la déclaration de M. KENNETH RUSH qui a négocié et signé l'accord au nom des U.S.A., « Europa Archiv », Vol. 27, 1972, p. 54.

[37] Voir, par exemple, la résolution du Comité central du SED, *ibid.*, p. 948 ; le communiqué commun de l'U.R.S.S. et de la R.D.A., « Neues Deutschland », n° 303 du 2 novembre 1972 ; l'interview de M. E. Honecker, « Dokumente zur Politik der Deutschen Demokratischen Republik », 1972, n° 5, pp. 9—10.

[38] La partie I contient des « Dispositions générales », ce qui contraste avec la partie II (« Dispositions relatives aux secteurs occidentaux de Berlin »). La partie I paraît s'appliquer à l'ensemble de Berlin, pendant que le terme « secteurs occidentaux » pourrait impliquer l'existence d'un secteur « oriental ». Les termes tels que la « région correspondante » (préambule ; partie I, paragraphe 1er) ou la région tout court semblent couvrir toute la ville divisée, mais l'on peut également interpréter ces mots comme concernant uniquement les secteurs occidentaux. Aucune disposition ne parle de la responsabilité des quatre puissances pour Berlin dans son ensemble ; ce concept de la responsabilité quadripartite est soutenu par les gouvernements occidentaux. Le traité ne mentionne pas non plus, au moins expressément, l'existence du secteur « oriental », quoique certaines phrases ne laissent pas de doute qu'elles se rapportent à cette partie de Berlin qui constitue, actuellement, la capitale de la R.D.A. (les « régions limitrophes » de Berlin-Ouest, partie II C et Annexe III ; l'« extérieur », Annexe III, paragraphe 4). Pour la discussion de toutes les questions relevant de l'accord quadripartite, voir J. R. GASCARD, *Die Berlin-Regelung*, « Deutschland Archiv », Vol. 5, 1972, p. 1158 et K. DOEHRING, G. RESS, *Staats- und völkerrechtliche Aspekte der Berlin-Regelung*, Frankfurt a. M. 1972.

der D.D.R.). Les puissances occidentales n'ont pas reconnu *de jure* l'incorporation du secteur soviétique de Berlin dans la R.D.A. Mais il est possible d'apercevoir, notamment dans l'insistance de l'accord sur « la situation qui s'est constituée dans la région » (partie I, al. 4), les éléments d'une reconnaissance *de facto*. Cette « situation » se caractérise par la soumission d'une partie de l'ancien « Grand Berlin » à la souveraineté territoriale de la R.D.A.

L'accord confirme le statut particulier des secteurs occidentaux. Ils forment une entité séparée par rapport aux deux États allemands, bien que dans chacun de ces cas la relation est tout à fait différente.

Quant à l'Allemagne fédérale, l'accord stipule que les liens entre ces secteurs et la R.F.A. seront maintenus et développés, en soulignant toutefois que les secteurs occidentaux « continuent de ne pas être un élément constitutif de la République fédérale d'Allemagne et de n'être pas gouvernés par elle » (partie II, al. B). Les trois puissances occidentales soutiennent toujours leur point de vue que les « dispositions de la loi fondamentale de la R.F.A. et de la constitution en vigueur dans les secteurs occidentaux de Berlin, qui sont en contradiction avec ce qui précède, ont été suspendues et continuent d'être privées d'effet » (Annexe II, al. 1er) [39].

Quant à la R.D.A., son territoire, y compris « Berlin — capitale de la R.D.A. », constitue une région distincte et extérieure par rapport aux secteurs occidentaux. Berlin-Ouest est une enclave en territoire de la R.D.A.; il ne fait pas partie de ce territoire.

L'intégrité territoriale des secteurs occidentaux est garantie par les dispositions prohibant la menace ou l'emploi de la force ainsi que par les stipulations qui interdisent des modifications unilatérales « dans la région » (partie I, alinéas 2 et 4). L'accord a contribué à la solution de certains problèmes de délimitation, en prévoyant l'échange de territoires (Steinstücken et autres parcelles).

IV. La frontière entre la R.F.A. et la R.D.A.

Jusqu'à 1970, la R.F.A. soutenait qu'elle était séparée de l'autre État allemand non pas par une frontière au sens de droit international mais par une ligne interzonale de démarcation. Et pourtant déjà avant 1970 il y avait, en droit fédéral, des règles qui semblaient prendre comme point de départ le fait qu'entre les deux États il existait une frontière internationale régulière.

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[39] Voir la lettre des trois gouverneurs militaires occidentaux du 12 mai 1949 et la lettre de la Komendantura occidentale du 29 août 1950 dans *Germany 1947—1949. The Story in Documents* (publication officielle américaine), Washington 1950, p. 279 et « Verordnungsblatt für Gross-Berlin », 1950, I, p. 440.

Sans entrer dans les détails de ces querelles dépassées, antérieures à la *Ostpolitik*, rappelons que le gouvernement de Bonn a adopté une nouvelle attitude en signant le traité de Moscou. Dans l'article 3 de celui-ci il a consenti à employer le terme « la frontière entre la R.F.A. et la R.D.A. » et il s'est engagé à la considérer comme inviolable « aujourd'hui et [. . .] à l'avenir ». De même, l'accord inter-allemand sur le transit du 17 décembre 1971 [40] part du principe qu'une frontière normale sépare les deux parties contractantes. Tel est aussi le cas du traité sur la circulation entre les deux États allemands, signé le 26 mai 1972 [41].

Le *Grundvertrag* a scellé la nouvelle position ouest-allemande. Dans le préambule du traité sur les bases de relations, les deux gouvernements constatent que « l'inviolabilité des frontières et le respect de l'intégrité territoriale et de la souveraineté de tous les États en Europe, dans leurs frontières actuelles, sont une condition fondamentale pour la paix ». L'article 2 invoque les objectifs et les principes qui sont fixés dans la Charte des Nations Unies et par lesquels les parties se laisseront guider [42] ; on y mentionne expressément le respect de l'intégrité territoriale. Mais c'est l'article 3 qui contient la disposition principale : la R.F.A. et la R.D.A. y « réaffirment l'inviolabilité, pour le présent et l'avenir, de la frontière existant entre elles et s'engagent à respecter sans restrictions leur intégrité territoriale ».

De même que les traités que la R.F.A. a conclus avec l'U.R.S.S. et la Pologne, le *Grundvertrag* emploie le mot « frontière » dans son acception courante de droit international. Les parties y parlent de la ligne qui sépare le territoire de la R.F.A. de celui qui reste soumis à la souveraineté de la R.D.A. L'allusion à la frontière en tant qu'existante (*bestehende*) démontre que le traité prend en considération son tracé actuel et que lui-même ne la crée pas. Le traité se réfère à une situation territoriale qui s'est formée avant sa signature.

Pourtant, en parlant de l'existence de la frontière, le traité ne réduit pas le consentement de la R.F.A. au plan des faits. En vertu des articles 2 et 3, la frontière inter-allemande jouit de la protection habituelle de droit international. En particulier, elle tombe sous le coup du respect de l'intégrité territoriale ainsi que sous le coup de l'interdiction de l'emploi de la force en vue de violer ou de modifier une frontière. Dans le protocole additionnel complétant les articles 3 et 7 du traité, les parties ont décidé de convoquer une commission bipartite dont la tâche serait de

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[40] « Europa Archiv », Vol. 27, 1972, p. D 68.

[41] *Ibid.*, p. D 320.

[42] Au moment de la signature du traité, les deux Républiques allemandes n'ont pas été encore admises à l'ONU. L'admission a eu lieu au début de la 28e session de l'Assemblée générale, en 1973.

vérifier la démarcation de la frontière et, le cas échéant, la compléter, y compris l'établissement de la documentation requise. Autres problèmes liés au tracé de la frontière, tels que l'administration des eaux, la provision de l'énergie et la prévention des dégats, relèvent également de la compétence de cet organisme. Ainsi, le traité vise à faire construire un régime juridique comparable à celui qui existe d'ordinaire entre les États dont les rapports sont ceux de bon voisinage [43].

Il s'ensuit donc que le consentement de la R.F.A. à sa frontière de l'est ne revient pas uniquement à la reconnaissance d'un fait ; ce consentement englobe aussi les effets juridiques qui découlent de la situation existante. Quant à son régime juridique et quant à la protection contre une attaque ou contre d'autres violations, la frontière R.F.A.—R.D.A. ne diffère pas, à la lumière du *Grundvertrag*, d'autres frontières internationales. La thèse de Bonn que les deux États allemands ne sont pas pour autant des pays étrangers l'un pour l'autre [44] n'a pas, en fin de compte, trouvé son expression dans les stipulations sur la frontière. Il est vrai que le traité n'emploi pas le terme « frontière d'État » (*Staatsgrenze*) [45]; pourtant, dans le contexte des dispositions que nous venons de signaler, l'absence de ce terme est plutôt sans importance.

Retenons que le devoir de respecter la frontière séparant les deux Républiques ne s'oppose pas aux aspirations pacifiques à une unification éventuelle du peuple allemand. Le postulat de la réunification en tant que « but politique de la République fédérale d'Allemagne » a été réitéré pendant les négociations avec l'U.R.S.S. et la R.D.A. Il a été formulé dans les lettres officielles que Bonn a adressées à ses partenaires [46] et ceux-ci ont pris bonne note de ces messages. Néanmoins, la perspective de la réunification reste très éloignée et peu pratique. La division de l'Allemagne est un fait accompli et les traités inter-allemands de 1971—1972 donnent un cadre juridique à la division. La frontière actuelle entre la R.F.A. et la R.D.A. possède tous les traits d'une frontière internationale.

5. La frontière germano-tchécoslovaque dans la région des Sudètes

L'aspect le plus important de cette frontière ne présentait aucune difficulté après la guerre : tous les gouvernements intéressés ont été d'accord sur la restitution définitive et permanente de la frontière entre l'Alle-

[43] Le traité sur la circulation (voir note 41) parle dans son préambule du développement de tels rapports. Certaines dispositions de ce traité, ainsi que celles de l'accord sur le transit (note 40), contiennent des éléments du régime de frontière.

[44] Déclaration du chancelier fédéral M. W. Brandt du 28 octobre 1969, « Frankfurter Allgemeine Zeitung », n° 251 du 29 octobre 1969, p. 6, col. 1 et 2.

[45] Cf. l'art. I du traité Pologne — R.F.A.

[46] « Bulletin » (note 21), 1970, p. 1094 et 1972, p. 2012.

magne et l'Autriche, d'une part, et la Tchécoslovaquie, d'autre part, telle qu'elle fut tracée en vertu des traités de paix de 1919. On était donc unanime à reconnaître que la révision de la frontière, opérée en 1938 et dont l'élément principal était l'accord des puissances signé à Munich, avait perdu toute sa valeur et toute sa signification pour le règlement de l'appartenance des Sudètes [47]. Il est vrai qu'en 1945 le gouvernement tchécoslovaque a soulevé certaines réclamations territoriales dans cette région au-delà de l'ancienne frontière allemande, à savoir dans la Basse-Silésie [48], mais il l'a fait sans succès et l'affaire est close depuis longtemps.

Néanmoins, sans mettre en question le retour, entre l'Allemagne et la Tchécoslovaquie, au statu quo de 1919, les gouvernements intéressés professaient des opinions divergentes sur le sort des arrangements territoriaux de 1938. Tandis que les uns, dont la Tchécoslovaquie, invoquaient leur nullité dès l'origine (*ex tunc, ab initio*), les autres, dont la R.F.A., soutenaient la thèse de la nullité dès maintenant (*ex nunc*), ou plutôt de l'extinction, en soulignant que, pendant un certain temps, l'accord de Munich et les traités connexes avaient été parfaitement valables et en vigueur.

Le langage politique et diplomatique se servait, trop souvent, du terme simple « l'accord de Munich », mais en réalité il y avait toute une série de traités, d'arrangements, d'échanges de notes et de mesures exécutoires [49] qui conduisaient, en 1938, au détachement des Sudètes de la Tchécoslovaquie. En effet, quand on parle de la nullité de l'accord de Munich, cette formule aurait dû être étendue pour englober l'ensemble des textes de 1938 portant sur les Sudètes.

L'accord de Munich *sensu stricto*, c'est-à-dire l'accord signé par l'Allemagne, la France, l'Italie et le Royaume-Uni le 29 septembre 1938 [50], tenait compte, comme indique son préambule, « de l'arrangement déjà réalisé en principe pour la cession à l'Allemagne des territoires des Allemands des Sudètes » (*sudetendeutsches Gebiet*) et formulait « des dispositions et conditions [. . .] réglementant ladite cession et les mesures qu'elle comporte ». Un traité conclu par les puissances ne pouvait, à lui seul, disposer valablement du territoire tchécoslovaque, car Prague ne faisait pas partie de celui-ci. Les puissances—signataires de cet accord ne possédaient, en droit international, aucune compétence de prendre des décisions sur la perte d'une région (les Sudètes) par un État (la Tchécoslo-

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[47] O. KIMMINICH, *Zusammenfassende Thesen zum Zustandekommen und zur Beendigung des Münchener Abkommens*, dans: *Ostverträge* . . ., p. 177.

[48] Voir la correspondance diplomatique publiée dans *Foreign Relations of the United States. Diplomatic Papers*, vol. 4, 1945, pp. 513 et 521 ; vol. 2, 1946, p. 176.

[49] F. WITTMANN (dans: *Ostverträge* . . ., pp. 200—201) en a compté environ 55.

[50] G. F. DE MARTENS, *Nouveau recueil général de traités*, 3e série, vol. 36, p. 24.

vaquie) et l'acquisition de celle-ci par un autre État (le Reich allemand). Pourtant, l'aspect juridique reste beaucoup plus compliqué. Dans sa correspondance diplomatique avec la France et le Royaume-Uni précédant l'accord des puissances, le gouvernement tchécoslovaque a consenti à une révision de sa frontière en faveur de l'Allemagne ; ajoutons toutefois que les conséquences territoriales de l'accord de Munich allaient plus loin que ne le prévoyait ce « plan anglo-français ». En tout cas, par son communiqué officiel du 30 septembre 1938, le gouvernement tchécoslovaque a accepté l'accord de Munich, mais il a assorti cette acceptation d'une protestation contre des décisions prises d'une manière unilatérale et sans sa participation. Néanmoins, malgré son dissentiment, le gouvernement de Prague a participé aux travaux de la commission créée par l'accord de Munich, y compris la démarcation de la nouvelle frontière, et il a conclu des accords avec l'Allemagne [51], dont le but était la mise au point de l'accord du 29 septembre 1938. Tout cela s'est passé sous la menace constante de l'écrasante puissance militaire du Troisième Reich. On sait très bien que Hitler lui-même a bientôt violé l'arrangement de 1938, en occupant la Bohême et la Moravie et en mettant fin à l'existence de l'État tchécoslovaque (mars 1939). Encore avant cette annexion, les quatre puissances de Munich n'ont pas tenu leur promesse de garantir, sur le plan international, les nouvelles frontières de la Tchécoslovaquie.

Revenons maintenant aux attitudes disparates des gouvernements intéressés au sujet du sort juridique de l'accord de Munich.

Dans la lettre du 5 août 1942 adressée à son homologue tchécoslovaque, le ministre britannique des Affaires étrangères invoquait le fait que l'Allemagne avait « délibérément détruit les arrangements concernant la Tchécoslovaquie, aboutis en 1938 », et il déclarait que le « Gouvernement de Sa Majesté [se considérait] libéré de tout engagement à cet égard » [52]. La formule britannique montrait donc clairement que, selon Londres, l'accord de Munich était, à l'époque, valable, mais que maintenant il a perdu sa force obligatoire pour le Royaume-Uni. D'autre part, la France s'est prononcée pour la nullité de l'accord. Dans la lettre du 29 septembre 1942, adressée au président du Conseil tchécoslovaque, le général Charles de Gaulle a communiqué que le Comité national français considérait « ces accords comme nuls et non avenus, ainsi que tous les actes accomplis en application ou en conséquence desdits accords » [53].

Depuis 1940, le gouvernement tchécoslovaque indépendant, reconstitué à Londres, soulignait qu'il ne reconnaissait ni l'accord de Munich ni ses

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[51] Par exemple, l'accord germano-tchécoslovaque sur la nationalité et l'option, signé le 20 novembre 1938 (« Reichsgesetzblatt », 1938, II, p. 893).

[52] M. M. Whiteman, *Digest of International Law*, vol. 3, p. 158.

[53] Ch. de Gaulle, *Mémoires de guerre*, vol. 2 : *L'unité*, Paris 1956, p. 371.

effets. Après la guerre, Prague maintenait cette attitude en précisant que l'accord était dépourvu de validité dès le moment de sa signature, c'est-à-dire qu'il était toujours non valable, *ex tunc* et *ab initio*.

Il nous reste à répondre quelle était l'attitude des États allemands. La R.D.A., sans beaucoup d'hésitations, a épousé la thèse tchécoslovaque. Déjà dans la déclaration du 23 juin 1950 [54] les deux gouvernements ont souligné qu'ils « n'ont aucunes revendications territoriales ou de frontière ». L'article 7 du traité de l'amitié, de la coopération et de l'assistance mutuelle du 17 mars 1967 entre la R.D.A. et la Tchécoslovaquie [55] constate que l'accord de Munich « était nul dès le début » (*von Anfang an*).

D'autre part, la R.F.A., tout en adoptant la position que l'accord a perdu sa force obligatoire, insistait qu'il y avait une période où il restait en vigueur et produisait des effets valables. A part cela, il existait entre la R.F.A. et la Tchécoslovaquie une concordance de vues sur le sort de l'accord. En défendant le concept du territoire allemand dans les frontières de 1937, la R.F.A. ne s'associait pas aux anciennes réclamations nazies portant sur les Sudètes et, en réalité, elle les rejettait sans équivoque. Bonn n'a jamais soulevé de prétentions d'ordre territorial envers Prague, et le rétablissement, à la fin de la guerre, de la frontière d'avant-Munich ne suscitait ni difficultés ni protestations.

Faut-il en conclure que l'issue de la querelle sur la nullité *ex tunc* ou *ex nunc* ne présentait qu'un intérêt académique ? Non, certes. Si l'Allemagne avait incorporé les Sudètes sans aucune base conventionnelle, la présence des autorités et des troupes allemandes dans le territoire ne constituerait qu'une occupation illégale *de facto*, pendant que leurs actes officiels (législatifs, administratifs, etc.) seraient, dans la plupart, illicites et sans effets juridiques. Si, d'autre part, l'accord de Munich avait seulement pris fin à partir d'une certaine date, il aurait, avant cette date, produit des effets, et il serait impossible de les annuler ou de les liquider rétroactivement, même dans le cas où les deux parties le voulaient.

Le problème, d'ailleurs, de la normalisation entre la R.F.A. et la Tchécoslovaquie était trop complexe pour pouvoir trouver sa résolution dans le simple choix entre les formules *ex tunc* ou *ex nunc* [56]. Même si tous les intéressés ont été d'accord que l'ensemble de l'arrangement territorial et autre, passé en 1938 et concernant la Tchécoslovaquie, était nul et non avenu, il faudrait distinguer entre la non-reconnaissance de l'incorporation des Sudètes et l'inévitable effectivité de certains actes y réalisés, dans le cadre de l'ordre juridique introduit par le Troisième Reich. La pratique internationale connaît très bien le dualisme, et le parallélisme, entre la

[54] « Europa Archiv », Vol. 5, 1950, p. 5216.

[55] « Gesetzblatt der D.D.R. », 1967, I, p. 53.

[56] Cf. les observations de E. MENZEL dans *Ostverträge* ..., p. 193.

non-reconnaissance d'une situation dont on conteste la légitimité, et l'admission de la validité de certains actes qui résultent de cette situation (nationalité, statut civil des personnes, transactions de droit privé, etc.) [57].

Il semble que le traité de 1973 adopte une sage solution de compromis.

Dans le préambule, les parties reconnaissent que l'accord de Munich du 29 septembre 1938 « avait été imposé à la République tchécoslovaque par le régime national-socialiste sous la menace de la force ». Cette déclaration semble tenir compte des raisons psychologiques [58] qui ont joué un rôle dans l'insistance de Prague que l'accord a été entaché de nullité originaire. Mais ce qui est caractéristique, c'est le fait que le traité passe sous silence la querelle portant sur l'invalidité *ex tunc* ou *ex nunc*. Il est vrai que les parties considèrent l'accord de Munich comme nul (*nichtig*, art. I al. 1er), mais elles s'abstiennent de préciser la nature et le moment de ladite nullité. En outre, elles précisent qu'elles constatent la nullité « eu égard à leurs relations mutuelles selon ce traité » (c.-à-d. le traité de 1973, *im Hinblick auf ihre gegenseitigen Beziehungen nach Massgabe dieses Vertrages*). C'est une nette limitation de la nullité de l'accord de Munich à la sphère des relations actuelles et futures.

Quant aux relations du passé, le traité, sans se prononcer sur le principe de la nullité *ex nunc* ou *ex tunc*, « ne porte pas atteinte aux effets juridiques qui résultent, pour les personnes physiques ou morales, du droit appliqué dans la période du 30 septembre 1938 jusqu'au 9 mai 1945 » (art. II al. 1er). Ainsi, la déclaration sur la nullité de l'accord du Munich n'influence pas, en tant que telle, la validité des actes d'ordre interne qui ont eu lieu dans le territoire des Sudètes (et, en général, en Bohême et en Moravie) sous le régime allemand. Le traité, bien sûr, ne touche pas non plus à la législation ou aux actes administratifs tchécoslovaques ou ouest-allemands qui, après la guerre, ont annulé ou modifié, dans le domaine du droit interne, plusieurs effets de la domination du Troisième Reich. Mais ici il s'agit uniquement des conséquences qu'on pourrait tirer, dans ce domaine-là, du seul traité de 1973. Le traité stipule qu'il n'y a qu'une seule exception à la règle de non-atteinte, par lui-même, aux effets juridiques, à savoir les mesures que les deux parties considèrent comme incompatibles avec les principes fondamentaux de la justice (art. II al. 1er, 2e phrase), par exemple la législation raciste. Le traité ne change rien en ce qui concerne la nationalité des personnes (vivantes ou mortes)

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[57] Le principe de la non-reconnaissance a ses limites, voir : H. LAUTERPACHT, *Recognition in International Law*, Cambridge 1948 ; J. CHARPENTIER, *La reconnaissance internationale et l'évolution du droit des gens*, Paris 1956 ; E. R. ZIVIER, *Die Nichtanerkennung im modernen Völkerrecht. Probleme staatlicher Willensäusserung*, 2e éd., Berlin 1969. Voir aussi MENZEL dans : *Ostverträge* ..., p. 195.

[58] Cf. l'opinion de E. MENZEL, *ibid.*, p. 192.

telle qu'elle résulte des ordres juridiques des deux pays (art. II al. 2). « Avec ses déclarations sur l'accord de Munich, ce traité ne constitue aucune base juridique pour des revendications matérielles de la part de la République Tchécoslovaque Socialiste et de ses personnes physiques et morales » (art. II al. 3) [59].

En affirmant la nullité de l'accord de Munich, la R.F.A. réitère sa reconnaissance de la frontière germano-tchécoslovaque dans son tracé de 1919. Les deux États se sont maintenant décidé d'établir des relations de bon voisinage (préambule, al. 5). Il confirment l'inviolabilité de leur frontière commune maintenant et à l'avenir, ils s'engagent mutuellement à respecter sans restriction leur intégrité territoriale et ils déclarent qu'ils n'ont aucune revendication territoriale l'un envers l'autre et qu'ils n'en soulèveront pas non plus à l'avenir. Il est difficile d'imaginer des dispositions encore plus complètes et plus définitives dont le but serait de stabiliser la frontière entre la R.F.A. et la Tchécoslovaquie. Ce but a été pleinement atteint par le traité de 1973.

Conclusions

Les clauses territoriales des traités signés au cours des années 1970 - 1973, que nous venons de passer brièvement en revue, ont leur origine dans l'absence d'un traité de paix avec l'Allemagne. Le vide juridique ainsi créé a été progressivement comblé par toute une série de traités. Il y a longtemps que l'Allemagne fédérale a régularisé ses rapports avec les trois puissances occidentales et avec ses voisins de l'ouest. Elle l'a fait maintenant avec les pays de l'est européen.

Il est, bien sûr, juridiquement toujours possible, bien que ce soit peu probable, au moins dans l'avenir prévisible, que les anciens belligérants concluent un traité de paix. Mais ses sujets habituels, comme la terminaison de l'état de guerre et le rétablissement de la paix, les frontières, les réparations, le règlement des problèmes touchant la propriété, les droits et les intérêts privés, etc. — tout cela, ou presque, a déjà abouti à une solu-

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[59] L'échange de lettres entre les ministres W. Scheel et B. Chnoupek a étendu la force obligatoire de l'article II à Berlin Ouest. Une autre lettre, celle du ministre tchécoslovaque, assure le gouvernement fédéral allemand qu'il n'y aura pas de poursuites judiciaires contre les personnes qui ont commis, selon le droit tchécoslovaque, des crimes, sauf où le droit prévoit la peine de mort et l'acte criminel constitue un crime de guerre ou un crime contre l'humanité selon le statut du Tribunal militaire international à Nuremberg.

tion conventionnelle, bilatérale ou multilatérale [60]. Le traité de paix avec l'Allemagne, s'il en est signé un dans l'avenir, ne peut que confirmer les choses telles qu'elles ont été tranchées par des engagements valablement contractés. Quand on souligne que le futur traité de paix peut s'occuper des frontières allemandes et que les quatre puissances gardent certaines de leurs compétences à l'égard de l'ensemble de l'Allemagne, on est loin d'impliquer l'idée d'une modification des frontières extérieures d'Allemagne. Les traités de normalisation des années soixante-dix ont mis définitivement fin aux contentieux territoriaux, s'il en avait encore, dans les confins orientaux de l'ancien Reich allemand.

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[60] Rappelons que l'état de guerre avec l'Allemagne a été terminé par les gouvernements alliés à base de leurs déclarations unilatérales à cet effet. Voir *Die Beendigung des Kriegszustands mit Deutschland nach dem zweiten Weltkrieg*, rédigé par H. Mosler et K. Doehring, Köln — Berlin 1963.

The Paris Agreement on Ending the War and Restoring Peace in Vietnam

by ROMAN JASICA

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I

It was with great relief and satisfaction that the world took note of the signing in Paris on 27 January, 1973, by the Democratic Republic of Vietnam, the Republic of South Vietnam, the United States of America, and the Republic of Vietnam, of the Agreement on Ending the War and Restoring Peace in Vietnam.

The Paris Agreement put an end to a war which, for more than 30 years, was bringing untold sorrow to the people of Vietnam and poisoning the atmosphere of international relations, thus making it impossible to solve many international problems. It was first of all a war of the Vietnamese people, but, at the same time, it was a part of the national liberation struggle waged in many different corners of the world, and, for these reasons, the Paris Agreement has become the subject of interest of the whole world public opinion. Therefore, it seems necessary to examine its content in order to realize that it really was a great victory of the Vietnamese people, of all nations struggling for their independence, and of all forces of peace and progress, as well as to conceive the dimensions of that victory and the significance of the Paris Agreement for the future of Vietnam and of the national liberation movement all over the world.

II

The written history of Vietnam reaches as far back as to the 3rd century B.C., when the Vietnamese State, after several centuries of ex-

istence, was invaded by China. After more than one thousand years of the rule of the Chinese, who gave Vietnam the name "Annam," meaning "pacified South," Vietnam regained its independence in 939, and existed as an independent State till the end of the 19th century. In 1862 France annected three provinces of Nam-bo (southern part of Vietnam)[1] and in 1874 the remaining provinces of Nam-bo,[2] and formed from them her colony called Cochinchina. In the treaty signed in Hue on 6 June, 1884, France imposed upon the emperor of Vietnam her protectorate over the two remaining parts of Vietnam—Bac-bo and Trung-bo (northern and central parts of Vietnam).[3]

During the Second World War France passed Vietnam, together with the whole of French Indochina, to Japan, thus violating the treaty of 1884 under which she was obliged to defend the protectorate against aggression, and losing thereby all rights given to her by that treaty.

The Vietnamese people, under the leadership of Vietnamese communists, who on 8 September, 1941, created the League of Independence of Vietnam (Viet-nam doc lap dong minh—in short Viet-minh), started their struggle for independence against the Japanese invaders and French colonialists.

The climax of this struggle was the August Revolution of 1945 and the proclamation in Hanoi on 2 September, 1945, of the Democratic Republic of Vietnam[4] which embraced the whole of the country—from the Chinese border in the North to the Ca-mau peninsula in the South.

But it was only for three weeks that the Vietnamese could enjoy their independence within the whole country: in the southern part of Vietnam, up to the 16th parallel, the French rule had been restored with the help of the British forces which, on the basis of the decision taken at the Potsdam Conference, entered Vietnam from the South in order to take the capitulation of the Japanese. They liberated the interned French troops, rearmed the surrendered Japanese, and overthrew the authorities of the Democratic Republic of Vietnam. At the same time the Chinese forces which entered Vietnam from the North for the same purpose of taking

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[1] Treaty of Friendship and Peace between France and Spain on one part, and the Kingdom of Annam on the other part, signed in Saigon on 5 June, 1862. C. SAMWER, *Nouveau Recueil Général de Traités. Continuation du Grand Recueil de C. Fr. de Martens*, vol. 27, part II, Gottingue 1869, pp. 169—173.

[2] Treaty of Alliance and Peace between France and Annam, signed in Saigon on 15 March, 1874. *Ibid.*, vol. 2, p. 206.

[3] Treaty of Protectorate between France and Annam, signed in Hue on 6 June, 1884. *L'affaire du Tonkin. Histoire diplomatique de l'établissement de notre protectorat sur l'Annam et de notre conflit avec la Chine 1882—1885. Par un diplomat*, Paris 1888, pp. 418—421.

[4] HO CHI MINH, *Selected Works*, vol. 3, Hanoi 1962, pp. 17—21.

the capitulation of the Japanese, did their best in order to disturb the development of the young Vietnamese statehood and to draw it from its road of social progress.

In this situation and deprived of any external help, the Democratic Republic of Vietnam had, in order to get time for its consolidation, to make some concessions towards France, although it rightly suspected her of the will of regaining the whole of Vietnam and of Indochina. In the Preliminary Convention signed in Hanoi on 6 March, 1946 by the Democratic Republic of Vietnam and France, the first agreed to join the French Union to be created in the future, and to accept on its territory for the period of five years 15,000 of French soldiers who would take over the functions determined in Potsdam and performed up to that time by the Chinese. France, on her part, recognized the Democratic Republic of Vietnam "as a free State, having its own government, its parliament, its army and its finances" and agreed to a referendum on the reunification of the three parts of Vietnam.[5] In view of the fact that after the restoration of the French rule in the southern part of Vietnam in September 1945 the population immediately resumed fighting the French, it was clear that would the referendum be held, it certainly would vote for the Democratic Republic of Vietnam and not for the French. The Preliminary Convention of 1946 can be regarded as the renunciation by France of the protectorate over Bac-bo and Trung-bo and as the recognition of the provisional character of her presence in Nam-bo.

Despite the negotiations between the Democratic Republic of Vietnam and France conducted in Dalat and Fontainebleau in the execution of the Preliminary Convention which lead to the signing by the two parties on 14 September, 1946, of a common declaration,[6] the French brought in Nam-bo into being a puppet creature under the name of the "Autonomous Republic of Cochinchina" aimed at preventing the referendum in that part of Vietnam, and then provoked in Haiphong and Hanoi incidents which led on 19 December, 1946, to the outbreak of war between the Democratic Republic of Vietnam and France.[7]

This war ended with military defeat of France at Dien-bien-phu and the signing on 20 July, 1954, in Geneva, of the Agreement on the Cessation

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[5] "La documentation française, Notes documentaires et études," No. 548, (Série France d'Outre-Mer XIX), 15 Feb., 1947, p. 4.

[6] *Ibid.*, p. 8.

[7] On the history of Vietnam see also: VAN TAN, *Lich su Viet-nam so gian [A Short History of Vietnam]*, Ha-noi 1963 ; C. B. MAYBON, *Histoire moderne du pays d'Annam (1592—1820)*, Paris 1920 ; J. CHESNEAUX, *Contribution à l'histoire de la nation vietnamienne*, Paris 1955 ; THANH LUONG, *A Short History of Vietnam*, Hanoi 1955 ; J. BUTTINGER, *The Smaller Dragon—A Political History of Vietnam*, New York 1958.

of Hostilities in Vietnam[8] as well as the adoption on 21 July, 1954, of the Final Declaration of the Geneva Conference on Indochina.[9]

The Geneva documents contained provisions on all main problems of Vietnam and provided for their solution in accordance with the right of the Vietnamese people to self-determination. They put an end to the rule of France in Vietnam and, combined with the Agreements on the Cessation of Hostilities in Laos and Cambodia, in the whole of Indochina. The realization of the Geneva documents had to lead to the unification of the whole Vietnamese people within the borders of one single independent State. This aim had to be reached by way of general elections in Vietnam to be held within two years. As to the result of these elections there was a general conviction that the only force able to win them would be the Democratic Republic of Vietnam, the Vietnamese communists, and their leader, the President of the Democratic Republic of Vietnam, Ho Chi Minh. From many statements in this respect[10] it is sufficient to quote only the opinion of the then President of the United States, Dwight D. Eisenhower, who wrote in his memoirs as follows:

"I am convinced that the French could not win the war because the internal political situation in Vietnam, weak and confused, badly weakened their military position. I have never talked or corresponded with a person knowledgeable in Indochinese affairs who did not agree that had elections been held as of the time of the fighting (1946—1954—*R. J.*), possibly 80 per cent of the population would have voted for the Communist Ho Chi Minh as their leader."[11]

The United States had no intention to allow the decisions taken at Geneva to be realized which, althoung they only "took note of" (and this with the exception of the last point of the Final Declaration), were, however, binding them to the same extent as the other participants of the Conference (the Democratic Republic of Vietnam, France, the Soviet Union, the People's Republic of China, the United Kingdom, Laos, Cambodia, and the State of Vietnam). Already before the beginning of the Geneva Conference, the then Secretary of State of the United States, John F. Dulles, in his speach delivered on 20 March, 1954, to the Over-

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[8] *Geneva Conference. Indo-China. Documents*, pp. 1—14.

[9] *Ibid.*, pp. 39—40.

[10] See E. HAMMER, *Indochina*, in: *The State of Asia. A Contemporary Survey*, ed. by Lawrence K. Rosinger and associates, New York 1951, p. 267; J. ALSOP in "Time," 1955, vol. 65, 3 Jan., 1955; L. CHERNE, quoted by M. E. GETTLEMAN, *Viet Nam. History, Documents, and Opinions on a Major World Crisis*, ed., with an introduction by..., New York 1966, p. 115.

[11] D. D. EISENHOWER, *The White House Years. Mandate for Change 1953—1956*, Garden City, N. Y. 1963, p. 372.

seas Press Club in New York, had formulated as follows the aims of the American policy towards Vietnam :

" Under the conditions of today, the imposition on Southeast Asia of the political system of Communist Russia and its Chinese Communist ally, by whatever means, must be a grave threat to the whole free community. The United States feels that that possibility should not be passively accepted but should be met by united action. This might involve serious risks. But these risks are far less than those that will face us a few years from now if we dare not be resolute today."[12]

In other words, the United States were not willing to recognize the right of the Vietnamese people to self-determination, because it wanted to make use of this right to build socialism, and not to join the " free community," not to submit to the policy of the United States. The United States decided therefore to " construct a dam to Communism " on the 17th parallel in the form of a strong South Vietnamese State. The task of the realization of this plan was entrusted to a Vietnamese nationalist Ngo Dinh Diem, whom the United States forced in June 1954, to the post of the prime minister of the State of Vietnam. In October 1955, he overthrew the Emperor Bao Dai, proclaimed the creation of the Republic of Vietnam in the place of the former State of Vietnam, and named himself the President of that Republic, to be able to realize without any obstacles the policy of the United States.

Violating the provisions of the Geneva documents, the United States and the Ngo Dinh Diem regime did not permit the elections to be held in 1956 and the unity of Vietnam to be restored. They seriously expanded the military potential of the Republic of Vietnam, provided its armed forces with many military advisers and equipment, constructed in South Vietnam huge military bases, helped to expand the police apparatus, and initiated and supported a policy of bloody mass repressions, first against former resistance fighters and later against all opposition. This policy resulted in a civil war in South Vietnam. After the creation in December 1960, of the National Front of Liberation of South Vietnam, when the Ngo Dinh Diem regime had faced a complete defeat, in December 1961, the United States openly and actively joined in this war.

In November 1963, the United States came to the conclusion that the territorist Ngo Dinh Diem regime was not able to fulfill their plans and caused a *coup d'état* which ended with the killing of Ngo Dinh Diem and of his brother Ngo Dinh Nhu. However, all South Vietnamese regimes that followed one after another on the political scene of South Vietnam, including the present one headed by Nguyen Van Thieu, could not find

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[12] " Department of State Bulletin," vol. 30, 1954, pp. 539—540.

the way out of the situation, because they all were pro-American, conducted a policy of division of Vietnam and, acting against the will of the population, had not only to continue, but even to escalate the policy of terror and of war.

The pretext of the open intervention of the United States in the civil war in South Vietnam was the alleged infiltration from the Democratic Republic of Vietnam of men and war material. However, despite unlimited possibilities in producing evidence of that " infiltration," the United States and the Saigon authorities were not able to prove that the war in South Vietnam was an " aggression from the North," and not a struggle of the whole population of South Vietnam against a régime selling out their country to the United States.[13] In reality, the help given by the Democratic Republic of Vietnam to the struggling population of South Vietnam was not the cause, but the result of the intervention of the United States, and it began to come to South Vietnam only later, when the war and the participation in it of hundreds of thousands of American soldiers started to threaten the very physical existence of the South Vietnamese population. Besides, as far as the help in men was concerned, they were mostly South Vietnamese who had been regrouped to the North in 1954 in accordance with the Geneva Agreement.

By introducing in 1968 into South Vietnam of 548,000 of American soldiers and also soldiers from South Korea, Australia and New Zealand, by beginning in February 1965, of the systematic bombing of the territory of the Democratic Republic of Vietnam, and by expanding the war to Laos and Cambodia, the United States converted the civil war in South Vietnam into a war of the United States with the whole Vietnamese nation and with all nations of Indochina.

When the United States realized that despite their crushing military superiority they would not be able to win the war, they limited on 1 April, 1968, the bombing of the territory of the Democratic Republic of Vietnam, and started on 13 May, 1968, in Paris, the preliminary talks with the Democratic Republic of Vietnam. After the complete cessation of the bombing on 1 November, 1968, a four-party conference on Vietnam began in Paris on 20 January, 1969, with the participation of the Democratic Republic of Vietnam, of the National Front of Liberation of South Vietnam (from 8 June 1969, of the Republic of South Vietnam), of the

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[13] *A Threat to Peace. North Viet-Nam's Effort to Conquer South Vietnam*, Washington 1961, Department of State, Parts I and II ; *Communist Viet-Minh Aggressive Policy and Communist Subversive Warfare in South Viet-Nam*, Saigon 1962, Government of the Republic of Vietnam ; *Aggression from the North. The Record of North Viet-Nam's Campaign to Conquer South Viet-Nam*, Washington 1965, Department of State.

United States of America, and of the Republic of Vietnam. The result of these negotiations was the signing in Paris on 27 January 1973, of the Agreement on Ending the War and Restoring Peace in Vietnam.

III

The Agreement on Ending the War and Restoring Peace in Vietnam concluded in Paris on 27 January, 1973,[14] is composed of five documents: of the Agreement itself and of four Protocols accompanying it, concerning:

1. the cease-fire in South Vietnam and the Joint Military Commissions;
2. the International Commission of Control and Supervision;
3. the return of captured military personnel and foreign civilians and captured and detained Vietnamese civilian personnel; and
4. the removal, permanent deactivation, or destruction of mines in the territorial waters, ports, harbours, and waterways of the Democratic Republic of Vietnam.

In reality, however, nine documents have been signed in Paris, because it was only the fourth of the above mentioned Protocols that has been signed in one version only, the Agreement itself and the first three Protocols having been signed in two versions, namely:

1. In a version the parties to which are "the Government of the Democratic Republic of Vietnam, with the concurrence of the Provisional Revolutionary Government of the Republic of South Vietnam" and "the Government of the United States of America, with the concurrence of the Government of the Republic of Vietnam," and which bears only two signatures: of the Minister for Foreign Affairs Nguyen Duy Trinh "for the Government of the Democratic Republic of Vietnam," and of the Secretary of State William P. Rogers "for the Government of the United States of America," which version can be called as one signed by two parties; and
2. In a version the parties to which are "the parties participating in the Paris Conference on Vietnam," and which bears four signatures: of the Minister for Foreign Affairs Nguyen Duy Trinh "for the Government of the Democratic Republic of Vietnam," of the Minister for Foreign Affairs Madame Nguyen Thi Binh "for the Provisional Revolutionary Government of the Republic of South Vietnam," of the Secretary of State William

[14] *Restoring Peace in Viet-Nam. Basic Documents on Ending the War and Restoring Peace in Viet-Nam, with a Commentary by Dr. H. A. Kissinger*, Saigon 1973, United States Information Service.

P. Rogers "for the Government of the United States of America," and of the Minister for Foreign Affairs Tran Van Lam "for the Government of the Republic of Vietnam," which version can be called as signed by four parties.

The two versions of the Agreement and of each of the three Protocols mentioned above differ only in the first part of the preamble where the parties to the Agreement (or Protocol) are listed, and by the text of the last Article of the Agreement (or Protocol) where the difference is, however, more substantial: in the version signed by four parties the last Article states that the Agreement (or Protocol)

"shall enter into force upon signature by plenipotentiary representatives of the parties participating in the Paris Conference on Vietnam,"

while in the version signed by two parties that the Agreement (or Protocol)

"shall enter into force upon signature by the Minister for Foreign Affairs of the Government of the Democratic Republic of Vietnam and by the Secretary of State of the Government of the United States of America, and upon signature of a document in the same terms by the Minister for Foreign Affairs of the Government of the Democratic Republic of Vietnam, the Minister for Foreign Affairs of the Provisional Revolutionary Government of the Republic of South Vietnam, the Secretary of State of the Government of the United States of America and the Minister for Foreign Affairs of the Government of the Republic of Vietnam."

Behind this rather complicated façade which is a compromise between two opposite views, a deep political meaning is hidden. The Democratic Republic of Vietnam and the Republic of South Vietnam insisted upon signing the Agreement and the three Protocols only in one version in which the parties to these documents would be the Government of the Democratic Republic of Vietnam with the concurrence of the Provisional Revolutionary Government of the Republic of South Vietnam and the Government of the United States of America with the concurrence of the Government of the Republic of Vietnam, and which would be signed by the Ministers for Foreign Affairs of all the four Governments. In this way, the documents would differentiate between the Democratic Republic of Vietnam and the United States on the one hand, as sovereign States and full subjects of international law, and the Republic of South Vietnam and the Republic of Vietnam on the other hand, as belligerent parties in a civil war and, consequently, limited subjects of that law. At the same time, this solution would mark the division of the four parties into two opposing groups: one composed of the Democratic Republic of Vietnam and the Republic of South Vietnam, and the other of the United States and the Republic of Vietnam. By putting on them the signatures of all the

four plenipotentiaries, these documents would be binding upon the two full, as well as the two limited subjects of international law.

The Republic of Vietnam refused to sign such a document because it regarded itself as the same full subject of international law like the Democratic Republic of Vietnam and the United States, while the Republic of South Vietnam was, in its opinion, only a rebel and was not, as such, a subject of international law. To sign a document mentioning by name the Provisional Revolutionary Government of the Republic of South Vietnam would mean, in the opinion of the Government of the Republic of Vietnam, to recognize it in the capacity corresponding to its name, which the Government of the Republic of Vietnam categorically refused. As a result, the documents in this version have been signed only by the Democratic Republic of Vietnam and the United States. In this way, the documents took into account the principle advocated by the Democratic Republic of Vietnam and the Republic of South Vietnam, but they were not binding upon the Republic of Vietnam and the Republic of South Vietnam.

It was therefore necessary to seek a formula enabling the signing of the Agreement and of the three Protocols by the remaining two parties. This formula was a new version of the first part of the preamble and of the last Article. It was not necessary to change the whole texts of the Agreement and Protocols, because in these texts the Provisional Revolutionary Government of the Republic of South Vietnam and the Government of the Republic of Vietnam are described as " the two South Vietnamese parties " or are included into a broader term of "the parties participating in the Paris Conference on Vietnam " or " all the parties concerned " or " the parties " or " the four parties." Even the signatures have been put on two separate pages: those of the representatives of the Democratic Republic of Vietnam and of the Republic of South Vietnam on one page, and of the United States and of the Republic of Vietnam on another.

As far as the fourth Protocol is concerned, two versions have not been necessary because their parties have been only the Governments of the Democratic Republic of Vietnam and of the United States, and it has been signed only by the Minister for Foreign Affairs of the Government of the Democratic Republic of Vietnam and by the Secretary of State of the Government of the United States.

The problem of the parties to the Paris Agreement is the continuation of the problem of the parties to the Paris Conference on Vietnam. Two different views in this respect appeared already in the preliminary talks conducted in Paris by the representatives of the Democratic Republic of Vietnam and of the United States. The Democratic Republic of Vietnam, and also the National Front of Liberation of South Vietnam represented

the view that the conference to be held should be one of four parties,[15] stressing at the same time that the agreement to the participation in that conference of the Saigon régime was not the recognition of that régime by them. In the course of the talks they repeatedly requested this régime to be removed and replaced by another one, not blamed by the responsibility for the war in South Vietnam and with which an agreement solving the problems of Vietnam could be signed. A turn in the talks took place on 8 October, 1972, when the Democratic Republic of Vietnam and the Republic of South Vietnam agreed to sign an agreement with the Saigon régime. It was then that they proposed to conclude an agreement in which the four parties to the Paris Conference would appear in two separate groups mentioned above, whereby the signatures of all the four parties put on this agreement would make it a four-party document. The agreement in this form has been signed, however, only by two parties; seemingly, because of the number of signatures, it is a bipartite agreement, in fact, however, thanks to the connection existing between the two versions, it is a four-party agreement.

The United States and the Saigon régime sought to give the Paris Conference a bipartite character[16] to stress that they did not recognize the National Front of Liberation of South Vietnam (and later the Republic of South Vietnam) as a representative of the whole, or even of a part of, the population of South Vietnam. This blind opposition against the recognition of the unreversible reality finally lead to a situation that the Saigon régime reached, indeed, that its representative signed only a document, in which the Provisional Revolutionary Government of the Republic of South Vietnam has not been mentioned by its name in a one single place, and the reader of this document learns only after reading the signature who are " the parties participating in the Paris Conference on Vietnam " and that one of them is precisely the Provisional Revolutionary Government of the Republic of South Vietnam; and the Minister for Foreign Affairs of the Saigon régime put, indeed, his signature on a separate page and even had not to look in the moment of the signing at the signature of the Minister for Foreign Affairs of the Provisional Revolutionary Government of the Republic of South Vietnam, but the price for

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[15] Statement of the Ministry for Foreign Affairs of the Democratic Republic of Vietnam of November 1968—" Zbiór dokumentów," 1968, No. 11, pp. 2000—2006; Statement of the Comission for Foreign Affairs of the National Front of Liberation of South Vietnam of 28 November 1968—" Zbiór dokumentów," 1968, No. 11, pp. 2014—2016.

[16] Statement of the Department of State of 13 November 1968—" Zbiór dokumentów," 1968, No. 11, pp. 1996—1999; Statement of the Government of the Republic of Vietnam of 26 November 1968—" Zbiór dokumentów," 1968, No. 11, pp. 2012—2013.

it appeared to be the recognition of the quadripartite character of the Paris Conference and of the Paris Agreement as well.

In sum, there are not two Paris Agreements but there is only one single Paris Agreement. This has been confirmed by the Act of the International Conference on Vietnam signed in Paris on 2 March, 1973[17] which speaks about the Paris Agreement in singular and not in plural form. The last one has been used only once, in the preamble of the Act, but in that case it was the Agreement and its four Protocols that the Act had in mind.

On the occasion of the signing of the said Act the problem of the parties to the Paris Agreement arose once again. Speaking of them the Act uses the expressions " the four parties to the Agreement " or " the four parties signatories to the Agreement," or " the two South Vietnamese parties." However, as far as the parties to the Act itself are concerned, it enumerates all the 12 participants to the International Conference on Vietnam, among them also the Government of the Democratic Republic of Vietnam, the Provisional Revolutionary Government of the Republic of South Vietnam, the Government of the United States, and the Government of the Republic of Vietnam in whose name the Act was signed by the Ministers for Foreign Affairs of the participating Governments, called in the text of the Act " the parties to the Act." Although the final Article 9 of the Act contains a clause that the signing of the Act does not constitute recognition of any party in any case in which it has not previously been accorded, the parties to the Act which are at the same time the parties to the Paris Agreement may, in relations among themselves, refer to this clause only as far as it does not contravene with previously, and namely in the Paris Agreement, expressed recognition of their character and of their role in the Vietnamese conflict, and, first of all, with the recognition of the exercising by the two South Vietnamese parties of their actual power over definite areas of South Vietnam. That is why the clause embodied in the Act could not be used in the Paris Agreement, and the complicated solution described above had to be used there.

From the point of view of their title to participate in the Paris Agreement the four parties to it can be divided into three categories :

1. The United States participated in the Paris Agreement because of their military engagement in the Vietnamese conflict. The Agreement clearly emphasises their character of intervener by obliging them to withdraw within 60 days from South Vietnam their troops, armaments and war material (Art. 5), to dismantle within 60 days their military bases in South Vietnam (Art. 6), and to discontinue their military involvement or intervention in the internal affairs of South Vietnam (Art. 4) ;

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[17] Document distributed at the Paris Conference.

2. The Democratic Republic of Vietnam participated in the Paris Agreement for the one and only reason that as a State comprising a part of the territory of divided Vietnam and a part of the Vietnamese people it had the right to participate in the elaboration of the foundation of the final settlement of the problem of Vietnam and in the final settlement itself. As to the way in which this problem has to be settled, the Paris Agreement states beforehand that it shall be the reunification of Vietnam (Art. 15). As to the military engagement of the Democratic Republic of Vietnam in the Vietnamese conflict, the Paris Agreement treats it in an entirely different way than the military engagement of the United States : not mentioning directly the presence of the military forces of the Democratic Republic of Vietnam in South Vietnam, not recognizing them—like the forces of the United States—as foreign military forces, but as a part of Vietnamese forces in South Vietnam, and leaving the solution of the problem of all Vietnamese forces in South Vietnam to the two South Vietnamese parties (Art. 13), the Paris Agreement has recognized tacitly the right of the Democratic Republic of Vietnam to participate in the Vietnamese conflict. Therefore, the military engagement of the Democratic Republic of Vietnam in the conflict does not constitute for it a title to participate in the Paris Agreement, but, on the contrary, the Agreement gives it *ex post* the title to that military engagement ;

3. To the third category belonged the two South Vietnamese parties : the Provisional Revolutionary Government of the Republic of South Vietnam and the Government of the Republic of Vietnam. Their title to participate in the Paris Agreement resulted from the fact that in the Vietnamese conflict which, in its essence, was a civil war they were two forces exercising power over specific parts of South Vietnam and had the support of specific parts of the population of South Vietnam. The Paris Agreement offers them perfectly the same treatment : it puts upon them exactly the same obligations and grants them exactly the same rigths. There is no single provision in the Agreement which would place one of these two parties in any way over the other one. Describing them by names characteristic of States : " the Republic of South Vietnam " and " the Republic of Vietnam," calling their representations Governments and their representatives Ministers for Foreign Affairs, the Paris Agreement recognized not only their military, but also their political character. The consequence of this ideally equal treatment of the two South Vietnamese parties is of an extremely great significance : the Paris Agreement rejected the argument of the Saigon régime that only it, as the Government of the Republic of Vietnam, exercizes the sovereign State power over the whole territory of South Vietnam and in this capacity can, according to its own

will, and at its own discretion, grant the other party of " rebels," calling themselves the Provisional Revolutionary Government of the Republic of South Vietnam, certain rights or privileges. The Paris Agreement degraded the Government of the Republic of Vietnam to the role of one military and political force which, together with the other military and political force—the Provisional Revolutionary Government of the Republic of South Vietnam—had equal rights and equal possibilities of influencing the political future of South Vietnam. The only limitation in this respect, but also equal for the two South Vietnamese parties, is their duty to include into the process of the settlement of political problems of South Vietnam in the framework of the National Council of National Reconciliation and Concord, the third political force existing in South Vietnam (Art. 12).

On the one hand it is a serious concession on the part of the Democratic Republic of Vietnam and of the Republic of South Vietnam which agreed to the participation in the settlement of the problem of Vietnam of the discredited régime of Nguyen Van Thieu, on the other hand, however, it is an important achievement reaching with its consequences far beyond the problem of Vietnam into the sphere of national liberation struggle: in the history of this struggle it is the first example that an organ pretending to be the legal sovereign Government of a State and recognized in that capacity by several States, and even participating in several international organizations, has been deprived of the attributes of its sovereign State power and put on the same footing as an organ representing national liberation movement, a movement of the population for liberation from the neocolonial rule of a foreign power.

Similar process goes on parallel in the General Assembly of the United Nations which in a number of resolutions recognized the legality of the struggle of colonial peoples and of peoples under foreign domination for their right to self-determination and independence and called upon all States and specialized agencies of the United Nations system to give moral and material support to all nations struggling for freedom and independence in colonial territories and under foreign domination,[18] and reaffirmed that national liberation movements are authentic representatives of real aspirations of the population of colonial territories, and recommended that all Governments, specialized agencies and other organizations of the United Nations system invite the representatives of these movements while discussing the problems concerning these territories.[19]

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[18] Res. 2908 (XXVII) of 2 Nov., 1972, and 2955 (XXVII) of 12 Dec., 1972.

[19] Res. 2918 (XXVII) of 14 Nov., 1972, 2980 (XXVII) of 14 Dec., 1972, and 3103 (XXVII) of 18 Dec., 1972.

IV

The central problem of the Paris Agreement is the problem of the reunification of Vietnam which has to be realized through the exercizing by the population of South Vietnam of its right to self-determination.

Vietnam has always been an entity united by common history, culture, and language. Since the liberation from the Chinese bondage the Vietnamese people has lived in the boundaries of one State and this unity could not be destroyed even by the struggle of two feudal families of Nguyen and Trinh which flared up at the beginning of the seventeenth century. The division of Vietnam into Tonkin, Annam, and Cochinchina, was the work of French colonialists. The Declaration of Independence of Vietnam of 2 September, 1945, already quoted above, drew the attention to that fact, as well as to the struggle of the whole Vietnamese people for the creation of one Vietnamese State—of the Democratic Republic of Vietnam. France had to recognize formally that unity of Vietnam in the Preliminary Convention of 6 March, 1946, also quoted above, although, in fact, she did not intend to allow this unity to be realized.

The unity of Vietnam has been recognized finally by the Final Declaration of the Geneva Conference on Indochina of 21 July, 1954 and by the Geneva Agreement on the cessation of hostilities in Vietnam of 20 July, 1954. Point seven of the Final Declaration stated clearly that the political problems of Vietnam should be settled

> "on the basis of respect for the principles of independence, unity and territorial integrity"

of Vietnam. According to point 11 of the Final Declaration the French Government, for the settlement of all the problems connected with the re-establishment and consolidation of peace in Vietnam will procede

> "from the principle of respect for idependence and sovereignty, unity and territorial integrity"

of Vietnam. According to point 12 of the Final Declaration each member of the Geneva Conference undertook to respect these principles regarding Vietnam and to refrain from any interference in its internal affairs. Consequently, point six of the Final Declaration and Articles 1 to 4, 6, 8, 16, 17, and 20 of the Geneva Agreement stated categorically that the military demarcation line at the 17th parallel for the purpose of the regrouping of armed forces of the two parties was

> "provisional and should not in any way be interpreted as constituting a political or territorial boundary."

Point seven of the Final Declaration stated that in July 1946 general elections would be held in Vietnam and that from 20 July, 1955, competent

representative authorities of both zones would start consultations to this effect. From this point and from Article 14(a) of the Geneva Agreement followed clearly that the result of these elections would be the reunification of Vietnam.

For more than 18 years the United States with the help of subsequent puppet régimes and with active or passive support of its allies tried not to allow the principles recognized in Geneva to be realized. In the war which it started for this purpose about two million of Vietnamese were killed,[20] six million people in South Vietnam had to leave their homes in connection with pacifications, and the whole social structure of the whole population of South Vietnam underwent complete disintegration.[21] And after these tragic 18 years these principles have been repeated word by word, and with even greater emphasis, in the Paris Agreement. To the same extent as the impossibility for the United States to win the war at the battlefield was a military defeat of this superpower, the Paris Agreement was its defeat on the political platform, and, at the same time, a great victory of the Vietnamese people—although payed with equally great sacrifices.

The unity of Vietnam became the central point of the Paris Agreement: the right to unity was recognized in the preamble of the Agreement—together with the right to independence, sovereignty, and territorial integrity—as one of the four fundamental national rights of the Vietnamese people. On the basis of respect of this right and of the South Vietnamese people's right to self-determination, the parties to the Paris Agreement decided to end the war and to restore peace in Vietnam. In Article 1 of the Agreement, forming a separate Chapter I entitled "The Vietnamese People's Fundamental National Rights," the United States and all other countries undertook to respect

"the independence, sovereignty, unity, and territorial integrity of Vietnam as recognized by the 1954 Geneva Agreements on Vietnam."

The Paris Agreement contains detailed provisions on the reunification of Vietnam, and very closely binds this problem with the problem of the right of the South Vietnamese people to self-determination. In this question there is, therefore, a certain similarity between the solutions foreseen

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[20] According to "International Herald Tribune," 25 Jan., 1973, in South Vietnam only, 180,676 soldiers of the Saigon army and 921,350 soldiers of the National Front of Liberation of South Vietnam were killed in the years 1961—1972, and 415,000 civilians in the years 1965—1972.

[21] See the report of the Chairman of the Subcommittee on Refugees in the United States Senate, Edward Kennedy, quoted in "International Herald Tribune" of 25 Jan., 1973.

in Geneva in 1954 and in Paris in 1973, but there are also serious differencies between these two solutions. The similarity comes to that both in Geneva and in Paris it was decided that first general elections would be held and after them the process of reunification of Vietnam would start. Both in Geneva and in Paris it was assumed that the reunification of Vietnam was certain and beyond any argument. It was clearly shown by a repetitition in Article 15(a) of the Paris Agreement of the formulation of the Final Declaration of the Geneva Conference that

"pending reunification the military demarcation line between the two zones at the 17th parallel is only provisional and not a political or territorial boundary, as provided for in paragraph 6 of the Final Declaration of the 1954 Geneva Conference."

The differences between Geneva and Paris solutions concern the process of reunification of Vietnam. First of all, it was decided in Geneva that within two years, in July 1956, general elections would be held in the whole of Vietnam, whereas Articles 9(b) and 12 of the Paris Agreement provide for general elections and settlement of internal political problems in South Vietnam only. This means the recognition of the Socialist Government of the Democratic Republic of Vietnam as the genuine representative of the will of the people of North Vietnam, of the Socialist system in the North, as accepted by that people and not requiring verification by general elections, as it should have been done in 1956.

Then, it was decided in Geneva that the reunification of Vietnam would take place automatically in the result of general elections, and a concrete time-limit was set up—July 1956, and the whole process of the preparation of elections and of reunification of Vietnam was limited to a concise statement that on 20 July, 1955, the consultations on this subject would start between North and South Vietnam. The Paris Agreement rejected this automatism : general elections and the creation of a new Government in South Vietnam would close the first period of solving internal problems of South Vietnam and open the second period of reunification of Vietnam. Neither does the Paris Agreement foresee any time-limits for the holding of general elections nor for the reunification as well. Finally, the Paris Agreement contains detailed course of action for both these periods.

As far as the first period of solving internal problems of South Vietnam is concerned, the Paris Agreement accentuates very strongly the right of the people of South Vietnam to self-determination. These problems are dealt with in Chapter IV, entitled "The Exercise of the South Vietnamese People's Right to Self-Determination," containing Articles 9 to 14. Article 9 recognizes the right of the South Vietnamese people to self-determination as "sacred and inalienable." This Article provides that all countries shall respect this right, that

"the South Vietnamese people shall decide themselves the political future of South Vietnam through genuinely free and democratic general elections under international supervision,"

that

"foreign countries shall not impose any political tendency or personality on the South Vietnamese people,"

and that the Governments of the Democratic Republic of Vietnam and of the United States shall respect the foregoing principles for the exercise of the South Vietnamese people's right to self-determination.

In the period preceding general elections the two South Vietnamese parties are obliged, according to Article 10 of the Paris Agreement,

"to respect the cease-fire and maintain peace in South Vietnam, settle all matters of contention through negotiations, and avoid all armed conflict."

According to Article 11 the two South Vietnamese parties have immediately after the cease-fire to achieve national reconciliation and concord, end hatred and enmity, prohibit all acts of reprisal and discrimination against individuals or organizations that have collaborated with one side or the other, and ensure the democratic liberties of the people : personal freedom, freedoms of speech, of the press, of meeting, of organization, of political activities, of belief, of movement, of residence and of work, right to property and right to free enterprise. According to Article 12

"immediately after the cease-fire, the two South Vietnamese parties shall hold consultations in a spirit of national reconciliation and concord, mutual respect, and mutual non-elimination."

The purpose of these consultations shall be the creation of a National Council of National Reconciliation and Concord, composed of three equal elements. Article 12 does not explain what these three equal elements are, there is no doubt, however, that what is meant are the representatives of that part of the population of South Vietnam which has always condemned the pro-American policy of the Nguyen Van Thieu régime, but has not been inclined to give full support to the programme of the National Front of Liberation of South Vietnam, i.e. those who the Front for a long time had had wanted to see as its only partner in the Paris talks and in the solving of the problem of Vietnam, before it agreed to talk and to sign the Paris Agreement with the present Saigon authorities. The National Council of National Reconciliation and Concord has an auxiliary character : its task shall be to promote the implementation of the Paris Agreement by the two South Vietnamese parties and to organize general elections, but the institutions for which the elections are to be held will be agreed upon by the two South Vietnamese parties only. The Council, how-

ever, will have the right to request the International Commission of Control and Supervision to investigate alleged violations of Article 9(b) of the Agreement dealing with general elections, as provided for in Article 2 of the Protocol concerning the International Commission of Control and Supervision.

In the period preceding general elections the two South Vietnamese parties have been obliged in Article 13 of the Paris Agreement to settle the question of Vietnamese armed forces in South Vietnam. Article 13 does not contain any concrete advice as to what is meant under "the question of Vietnamese armed forces in South Vietnam." It only explains that

"among the questions to be discussed by the two South Vietnamese parties are steps to reduce their military effectives and to demobilize the troops being reduced."

It can be admitted that on the basis of these provisions those soldiers of the Republic of South Vietnam who came from the North and who are natives of the South, could stay in South Vietnam and go back to their homes there after demobilization, and that only those soldiers of the Republic of South Vietnam would be evacuated to the North who came from there and are native there.

Although the problem of the return of captured military personnel and of Vietnamese civilian personnel captured and detained in South Vietnam have been treated separately in Article 8, they also pertain to the questions to be settled in the period preceding general elections in South Vietnam. According to Article 8(a) captured military personnel had to be returned within 60 days, but in respect to Vietnamese civilian personnel captured and detained in South Vietnam Article 8(c) only provides that

"the two South Vietnamese parties will do their utmost to resolve this question within ninety days after the cease-fire comes into effect."

Neither Article 8, nor the Protocol concerning the return of captured military personnel and foreign civilians and captured and detained Vietnamese civilian personnel grant the captured military personnel the status of prisoners of war in the meaning of the Geneva Red Cross Convention of 1949 on the treatment of prisoners of war. According to Article 8 of the Protocal mentioned above all captured military personnel of the parties and also all Vietnamese civilian personnel captured and detained in South Vietnam

"shall be treated humanely at all times, and in accordance with international practice."

It seems, however, that it will be difficult to call to account the Saigon régime and the United States for all acts of bestial treatment of captured soldiers of the National Front of Liberation of South Vietnam and of the

Vietnamese civilian personnel captured by them in South Vietnam, committed before the entry into force of the Paris Agreement.

As far as " the Vietnamese civilian personnel " is concerned, it follows from the reference by the Paris Agreement to Article 21 of the 1954 Geneva Agreement concerning " civilian internees," that the term " civilian personnel " does not include only the personnel in the sense of a body of emplyoees or of staff of an institution or organization, but all civilians who in whatever way contributed to political or military struggle between the parties and for that reason, or suspected of such activities, have been arrested and detained by any of the South Vietnamese parties.

As it has been mentioned above, the Paris Agreement does not provide any time-limit for holding general elections in South Vietnam. The only and, besides, very vague indication in this respect is the statement contained in Article 12(a) of the Paris Agreement that the two South Vietnamese parties " shall do their utmost " to sign within ninety days after the cease-fire comes into effect an agreement on the internal matters of South Vietnam. This time-limit has already passed and it is more than sure that the Saigon régime will do its utmost to delay further the signing of that agreement. The Paris Agreement does not say how much time will be necessary to prepare general elections after the agreement on internal matters of South Vietnam will at last be signed. Compared with the Geneva Agreement this is certainly a serious concession to the benefit of the Saigon régime. However, the Provisional Revolutionary Government of the Republic of South Vietnam has obtained exactly the same possibility to influence the political situation in South Vietnam as the Saigon régime, whereas, according to the 1954 Geneva Agreement, it was only the Government of the Southern zone which could conduct political activities, and all what the opposition in the South was granted was the protection against persecution because of past activities.

The possibility cannot be excluded that the Saigon régime will try to use the strong emphasizing in the Paris Agreement of the right of the South Vietnamese people to self-determination to protract the process of settling of internal problems of South Vietnam, the more so, the weaker will be its chances to win the political struggle for that settlement. It seems, however, that in this respect a sufficient guarantee against the sabotage of the Paris Agreement by the Saigon régime is the fact that, in contradistinction to the 1954 Geneva Agreement, the Paris Agreement does not foresee the regrouping of armed forces of opposing parties but their remaining at positions occupied in the moment of the entry into force of the cease-fire. This undoubtedly will not allow to maintain indefinitely the existing state in which the areas under occupation of the South Vietnamese parties are intermingled.

The position the Saigon régime has taken hitherto confirms this apprehension : it has not permitted the National Council of National Reconciliation and Concord to be set up, it has not freed the detained Vietnamese civilian personnel, it has impeded the activities of the Joint Military Commissions and of the International Commission of Control and Supervision.[22] This position made it necessary to sign on 13 June, 1973, in Gif-sur-Yvette by the four parties to the Paris Agreement of a document requesting the two South Vietnamese parties, among other things, to set up the National Council for National Reconciliation and Concord within 45 days, to liberate within the same period the detained Vietnamese civilian personnel, to grant the members of the Joint Military Commission full privileges and immunities, to grant the members of the International Commission of Control and Supervision full liberty of movement, to grant the people of South Vietnam democratic liberties, and to observe strictly military clauses of the Paris Agreement.[23]

In the result of general elections in South Vietnam a new Government will be created, the two South Vietnamese parties will cease to exist, and the process of reunification of Vietnam will start

> " step by step through peaceful means on the basis of discussions and agreements between North and South Vietnam, without coercion or annexation by either party, and without foreign interference " (Art. 15).

The Paris Agreement does not give a clear answer as to the legal character of South Vietnam and of its Government in the period between the creation of that Government and the reunification of Vietnam. On the one hand from Article 15(b) of the Paris Agreement it should be concluded that pending reunification South Vietnam will not fully have the character of a State, as pending that moment the military demarcation line at the 17th parallel will not have the character of a State boundary. On the other hand, Article 14 of the Paris Agreement grants the Government, created after general elections in South Vietnam, some attributes of a Government of a sovereign State : the right

> " to establish relations with all countries irrespective of their political and social systems on the basis of mutual respect for independence and sovereignty,"

the right to

> " accept economic and technical aid from any country,"

and even the right to accept military aid; from Article 7 of the Paris Agreement it can be concluded that such military aid may include

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[22] Statement of the Ministry for Foreign Affairs of the Democratic Republic of Vietnam of 27 June, 1973 ; " South Viet Nam in Struggle," 1973, No. 197.

[23] " Trybuna Ludu," 14 June, 1973.

"the introduction of troops, military advisers and military personnel including technical military personnel, armaments, munitions, and war material."

In this respect the Paris Agreement contains a flagrant contradiction, because Article 15(d) states clearly that

"pending reunification North and South Vietnam shall not join any military alliance or military bloc and shall not allow foreign powers to maintain military bases, troops, military advisers, and military personnel on their respective territories, as stipulated in the 1954 Geneva Agreements on Vietnam."

It seems that the Paris Agreement has adopted a conception similar to that the German Democratic Republic and the Federal Republic of Germany adopted in the Treaty on the principles of relations between them signed in Berlin on 20 December, 1972 :[24] two States, every one of which arranges its relations with third States on the basis of international law, and the relations between themselves on another basis which, although these two States recognize the principles of international law, is not fully the basis of that law. In respect to the two German States this basis has been outlined in the Berlin Treaty, in respect to the two Vietnamese States—in the Paris Agreement. There is, however, a substantial difference between these two conceptions resulting from the fact that in the case of Germany there is no agreement in the national problem, and consequently the Berlin Treaty constitutes a durable foundation on which a durable constrution of relations between the German Democratic Republic and the Federal Republic of Germany will be shaped, whereas in the case of the two future Vietnamese States the problem of reunification has been put unequivocally and categorically, and consequently the Paris Agreement as the basis of relations between the Democratic Republic of Vietnam and South Vietnam has clearly a temporary character.

One may not, however, exclude the possibility that after the first period of settling internal problems of South Vietnam having been completed and the Government of South Vietnam formed, even after the victory of the forces supporting the present Provisional Revolutionary Government—what seems to be beyond any doubt—there will be political forces in South Vietnam which will try to replace the process of reunification by a process of shaping relations between the two Vietnamese States in view of the allegedly arisen difference of opinions in the national question of reunification, misusing to this purpose the lack in the Paris Agreement of a time-limit for reunification of Vietnam, and referring erroneously to the example of the relations between the two German States. These tendencies will be the more stronger, the greater will be the achieve-

[24] "Neues Deutschland," 9 Nov., 1972.

ments in the first period of those elements which now support the Saigon régime.

The Paris Agreement created two machineries :

1. The machinery of the parties to ensure their joint action in implementing specified military provisions of the Paris Agreement, in the form of the Four-Party Joint Military Commission composed of representatives of armed forces of all the four parties to the Agreement, and of the Two-Party Joint Military Commission composed of representatives of armed forces of the two South Vietnamese parties (Arts 16 and 17 of the Paris Agreement and the Protocol concerning the cease-fire in South Vietnam and the Joint Military Commissions) ; and

2. The international machinery to control and supervise the implementation by the parties of specified military and political provisions of the Agreement in the form of the International Commission of Control and Supervision composed of representatives of Canada, Hungary, Indonesia and Poland (Art. 18 of the Agreement and Protocol concerning the International Commission of Control and Supervision). After the withdrawal of Canada it has been replaced in August 1973, by Iran.

The Four-Party Joint Military Commission has been created for the period from the entry into force of the cease-fire to the withdrawal from South Vietnam of armed forces of the United States and of its allies (60 days), the Two-Party Joint Military Commission—for the period from the entry into force of the cease-fire to the formation in the result of general elections of a new Government of South Vietnam, and the International Commission of Control and Supervision—for the period from the entry into force of the cease-fire to the moment when the new Government of South Vietnam formed after general elections requests it to end its activities.

During the first 60 days, i.e. until 28 March, 1973, the two Joint Military Commissions acted parallel :

the Four-Party Joint Military Commission had to deal with problems regarding the enforcement of the cease-fire throughout South Vietnam on 27 January, 1973, 24 hours GMT (Art. 2(1)), the cease-fire by United States forces and those of their allies (Art. 3(a)), the cease-fire between all parties in South Vietnam (Art. 3(c)), the withdrawal from South Vietnam of United States troops and those of their allies (Art. 5), the dismantlement of military bases of the United States and those of their allies in South Vietnam (Art. 6), the return of captured military personnel and of foreign civilians of the parties (Art. 8(a)), and the mutual assistance of the parties in getting information about those military personnel and foreign civilians of the parties missing in action (Art. 8(b)) ;

the Two-Party Joint Military Comission had in the same time of

60 days to deal with problems regarding the cease-fire between the two South Vietnamese parties (Art. 3(b)), the prohibition of the introduction of troops and armaments into South Vietnam by the two South Vietnamese parties (Art. 7), the return of Vietnamese civilian personnel captured and detained in South Vietnam (Art. 8(c)), and the reduction of military effectives of the two South Vietnamese parties and the demobilization of the troops being reduced (Art. 13) ; after the liquidation of the Four-Party Joint Military Comission to the above mentioned tasks of the Two-Party Joint Military Commission came only the problem of the enforcement of the cease-fire throughout South Vietnam (Art. 2(1)) and the cease-fire between all parties (Art. 3(c)), in reality between three of them, in view of the withdrawal of the United States troops.

The structure of the Joint Military Commissions embraces Central Joint Military Commission located in Saigon, seven Regional Joint Military Commissions (Four- and Two-Party) located in the centres of seven regions into which South Vietnam has been divided 26 joint military teams (Four- and Two-Party) subordinated to Regional Commissions and located in 26 specified places in South Vietnam, Four-Party joint military teams for the region of Saigon-Gia-dinh placed under the responsibility of the Central Joint Military Commission, Four-Party joint military teams to observe the return of the captured military personnel and foreign civilians, Four-Party joint military teams to get information about military personnel and foreign civilians missing in action and to take care of their graves, Two-Party joint military teams at the points of entry into South Vietnam to observe the replacement of armaments, munitions and war material, Two-Party joint military teams to carry out tasks concerning captured and detained Vietnamese civilian personnel, and other Four- and Two-Party sub-commissions, joint staffs and joint military teams the Joint Military Commissions may establish.

The structure of the International Commission of Control and Supervision is strictly adjusted to that of the Joint Military Commissions : the International Commission has correspondingly its headquarters in Saigon, seven regional teams, twenty-six local teams, teams in the points of entry of war material, to control and supervise the return of captured military personnel and of the Vietnamese civilian personnel, etc. The Agreement provides for the possibility of forming by the International Commission of additional teams and increasing the machinery of control and supervision for the time of general elections in South Vietnam.

According to Article 18 of the Paris Agreement and the Protocol concerning the International Commission of Control and Supervision, the task of the International Commission is to control and supervise the implementation by the parties of the provisions of the Agreement enu-

merated distinctly in that Article: they are the same provisions as listed above in connection with the tasks of the Joint Military Commissions, with the exception of Article 8(b) concerning military personnel and foreign civilians missing in action and their graves but plus Article 9(b) concerning the free and democratic elections in South Vietnam, where the International Commission will cooperate also with the National Council for National Reconciliation and Concord.

Article 1 of the Protocol concerning the International Commission explains that the control and supervision include

(1) following the implementation of the provisions of the Agreement through communication with the parties and on-the-spot observation;

(2) investigating violations of the provisions of the Agreement, and

(3) when necessary, cooperating with the Joint Military Commissions in deterring and detecting violations of the provisions of the Agreement.

As far as the communication with the parties is concerned, the International Commission has undoubtedly complete freedom of action. In the sphere of on-the-spot observation it has complete freedom of initiative, but is allowed only such freedom of movement as is reasonably required.

As far as investigations of violations are concerned, the International Commission, according to Article 2 of the Protocol mentioned above, may start them on the request of the Four-Party Joint Military Commission, of any of the parties, of the National Council of National Reconciliation and Concord (with respect to Article 9(b) of the Agreement concerning general elections), or on its own initiative. It follows from Article 10(d) of the Protocol concerning the International Commission that the teams of the International Commission while carrying out investigations may move even without the company of liaison officers of the parties, as, according to that Article, they shall have the opportunity to accompany the Commission's team, provided the investigation is not thereby delayed.

The result of the International Commission's activity may be a statement that the Agreement has been violated. If the International Commission recognizes that such a violation is "serious," it shall report this to the four parties to the Agreement. It shall also report to the four parties to the Agreement if it finds that there is a threat to peace. It should be admitted, in the light of Article 18(b) and (c) of the Agreement that those will be special reports to the parties immediately after the serious violation of the Agreement or a threat to peace have been found. As far as violations less than "serious" are concerned, the International Commission, it seems, will inform the parties (all four or only the two South Vietnamese parties) in general reports containing the results of its control

and supervision of the implementation of the Agreement provided for in Article 18(b) and (c).

Not clear are the provisions concerning the deterring and detecting violations. The "deterring" goes far beyond that what is understood under control and supervision. From Article 10(b) (2) of the Protocol concerning the cease-fire in South Vietnam and the Joint Military Commissions it results that deterring violations comes within the responsibility of the Four-Party Joint Military Commission (the Two-Party Joint Military Commission has been omitted here probably by mistake), and therefore the Protocol concerning the International Commission only provides that the International Commission shall cooperate in this regard with Joint Military Commissions. Meanwhile, the "detecting" of violations is nothing more than a possible result of observations or investigations, comes therefore within the scope of what is normally understood under control and supervision, and cannot be interpreted in a restrictive way, like "deterring" violations.

Pending the withdrawal from South Vietnam of the United States forces, the International Commission acted along two separate lines: it controlled and supervised the implementation of the Agreement by the four parties and reported them of these activities, and simultaneously it controlled and supervised the implementation of the Agreement by the two South Vietnamese parties and reported them separately of this part of its activities. After the withdrawal of the United States forces, the International Commission has controlled and supervised only the implementation of the Agreement by the two South Vietnamese parties and has reported only them of its activities, with the only exception of serious violations and of threats to peace, where it has to report, as before, to all parties to the Agreement.

The International Commission operates in accordance with the principle of consultations and unanimity. If there is no unanimity, all its members shall present their different views, which, however, are not considered as reports of the International Commission.

The International Commission, and its personnel, while carrying out their tasks, enjoy diplomatic privileges and immunities.

V

The territorial sphere of action of the Paris Agreement is limited to South Vietnam. There are only a few exceptions from this rule: Article 2 of the Agreement and the Protocol concerning the removal, permanent deactivation, or destruction of mines in the territorial waters, ports,

harbours, and water-ways of the Democratic Republic of Vietnam oblige the United States to stop all its military activities against the territory of the Democratic Republic of Vietnam by ground, air and naval forces, to end the mining of territorial waters of the Democratic Republic of Vietnam, and to remove, deactivate or destroy all mines put there hitherto ; Articles 11(d) and 12 of the Protocol concerning the return of captured military personnel and foreign civilians and captured and detained Vietnamese civilian personnel, and Article 5(a) of the Protocol concerning the International Commission of Control and Supervision provide for the sending by the Four-Party Joint Military Commission of Four-Party Joint Military Teams and the sending by the International Commission of its control and supervision teams to each place in Vietnam, i.e. also in the Democratic Republic of Vietnam, where the captured military personnel of the parties would be returned and to the last detention place from which it would be taken to the places of return.

Whereas no doubts arise in the cases mentioned above, the remaining exceptions require some explanations : Article 15 of the Agreement stipulates that pending reunification, North and South Vietnam shall respect the demilitarized zone on either side of the provisional military demarcation line, and shall not join any military alliance or military bloc, and shall not allow foreign powers to maintain military bases, troops, military advisers, and military personnel on their respective territories, as stipulated in the 1954 Geneva Agreement on Vietnam. Pending the formation in South Vietnam of a new Government which will ask the International Commission to end its activities, the implementation of these provisions of the Paris Agreement will be controlled and supervised only in South Vietnam and not in the Democratic Republic of Vietnam. According to Article 4(d) of the Protocol concerning the International Commission of Control and Supervision the area covered by the International Commission's team located at Gio-linh is limited to the area south of the provisional military demarcation line.

VI

Article 19 of the Paris Agreement provides for the convening within 30 days of the signing of the Agreement of an International Conference of the four parties to the Agreement, of the four countries of the International Commission and of the People's Republic of China, the United Kingdom, France and the Union of Soviet Socialist Republics, and of the Secretary General of the United Nations

" to acknowledge the signed Agreements ; to guarantee the ending of the war, the maintenance of peace in Vietnam, the respect of the Vietnamese people's fundamental

rights, and the South Vietnamese people's right to self-determination; and to contribute to and guarantee peace in Indochina."

From Article 18(b), (c) and (h) of the Agreement it has followed that the Conference would finally decide as to the recipient of the reports of the International Commission.

The Conference opened on 28 February, 1973 in Paris, and after three days of deliberations, in which its participants did not enter into the merits of the Agreement and of its Protocols, they signed on 2 March, 1973, an Act in which they solemnly acknowledged, expressed their approval and support of the Paris Agreement and of the four Protocols to it. They recognized that the Agreement responds to the aspirations and fundamental national rights of the Vietnamese people, i.e. the independence, sovereignty, unity, and territorial integrity, to the right of the South Vietnamese people to self-determination, and to the earnest desire for peace shared by all countries in the world. The parties to the Act recognized all these rights, undertook to respect strictly these rights and the Agreement, and appealed to all countries to respect them. They also decided that the International Commission would send its reports and views to either the four parties to the Agreement or to the two South Vietnamese parties, and only they would send them to the other participants of the International Conference on Vietnam.

In the event of a violation of the Paris Agreement or of the Protocols threatening peace, independence, sovereignty, unity, or territorial integrity of Vietnam, or the right of the South Vietnamese people to self-determination, the parties to the Paris Agreement shall consult individually or jointly with the other signatories of the Act with a view to determining necessary remedial measures. The Act provides also that a new International Conference on Vietnam could be convened upon a joint request by the Democratic Republic of Vietnam and the United States acting on behalf of the signatories of the Paris Agreement, or upon a request by six or more signatories of the Act.

To contribute to peace in Indochina and to guarantee it, the signatories of the Act acknowledged the commitment of the parties to the Paris Agreement to respect independence, sovereignty, territorial integrity, and neutrality of Cambodia and Laos, agreed themselves to respect them, and called other countries to do the same.

VII

The last problem requiring explanation is the fate of the 1954 Geneva Agreement on the cessation of hostilities in Vietnam and of the Final

Declaration of the 1954 Geneva Conference on Indochina in its part concerning Vietnam.

On the one hand an entirely new situation arose in Vietnam, in which a number of the provisions of the Geneva documents has lost their value ; consequently entirely new provisions have been incorporated in the Paris Agreement ; the institutions of the Geneva Conference and of its Co-Chairmen has been abandoned and a new institution created—the Paris Conference on Vietnam ; and finally the decision to liquidate the International Commission for Supervision and Control created by the Geneva Agreement has been taken.

On the other hand, the Paris Agreement refers in many places to the provisions of the Geneva Agreement and of the Final Declaration of the Geneva Conference, and there is up till now no declaration by any of the signatories of the Geneva Agreement or of the participants of the Geneva Conference on the expiry of these documents.

Do, therefore, the Geneva documents remain in force—if not in their entirety, then at least in those parts which can still be applied in the new situation and which are referred to by the Paris Agreement ? To answer this question one should depart from the situation created in Vietnam in the result of the war waged by the United States which violated the Geneva documents from their first to their last provisions and which forced the Democratic Republic of Vietnam to desist from the implementation of several provisions of these documents. The situation which has arisen in the result of this war is so diametrically different from that existing at the moment of the signing of the Geneva Agreement and of the adoption of the Final Declaration of the Geneva Conference that it is only its declaration of the right of the people of Vietnam to independence, sovereignty, unity, and territorial integrity and of the provisional character of the military demarcation line that have not become out-of-date. All other provisions of the Geneva documents are useless in the present situation. It is also significant to point out that the right of the people of Vietnam to independence, sovereignty, unity, and territorial integrity existed independently of the Geneva documents and that they only confirmed its existence.

In this situation one should state that the Geneva documents have lost their force with the moment of the signing of the Paris Agreement. The fact that the parties to the Paris Agreement refer to fundamental principles and to concrete provisions of the Geneva documents does not demonstrate their intention to keep in force the Geneva documents or even only the provisions referred to. It only proves that these provisions

were just all the time the Geneva documents were in force and that the United States reaffirmed that fact and by that admitted to have violated them.

There is, besides, one more reason for which the Geneva Agreement has to be recognized as expired, and namely this that in the result of the war and of the Paris Agreement the Republic of Vietnam is not able today to bear the responsibility for the implementation of that Agreement as the successor of the French Union.

VIII

It has been for 19 years that the United States fought politically and militarily to abolish the Geneva documents and the principles contained in them. Their defeat consists not only in that it was not able to abolish these principles and that it had to reaffirm them in the Paris Agreement, but also that despite its crushing military superiority they found itself at the end of the war, owing to the heroic stand of the Vietnamese people, in a situation more inferior to that existing before the war and created by the Geneva documents.

The victory of the Vietnamese people in their war with the United States consists not only in that the adversary has been defeated, because in politics the defeat of one side does not necessarily mean equal victory of the other side, and that they was able to create for themselves a more advantageous situation. Their victory consists first of all in that the Paris Agreement—despite concessions the Democratic Republic of Vietnam and the Republic of South Vietnam had to make in it—contains formulations which will not allow to deceive the Vietnamese people for the third time, as they were deceived by France in 1946 and by the United States and its allies in 1954. The consent to cooperate with the Saigon régime in the settlement of the problems of South Vietnam and in the preparation of general elections there, undoubtedly the furthest going concession on the part of the Democratic Republic of Vietnam and of the Republic of South Vietnam, may complicate and prolong the process of reunification of Vietnam, but cannot stop it. The patriotic part of the South Vietnamese people obtained in the Paris Agreement the most important guarantee in the form of the recognition of their solely and real representative—the Provisional Revolutionary Government of the Republic of South Vietnam—as a competent and equal participant in the process of reunification, in its capacity of a political power administering one part of the territory of South Vietnam and of a military power able to maintain legally its military potential to the very end of that process.

The satisfaction from the achieved victory should not, however, dim the fact that the Paris Agreement, while ending the period of armed struggle, opens a new period of political struggle for the implementation of its provisions. The experience gained hitherto proves that this struggle will be a difficult one. In this connection the Paris Agreement, as the legal basis of this struggle, requires particular attention, because only a detailed knowledge of its provisions can allow to judge properly the process of its implementation.

The Role of International Treaties in the Process of Socialist Economic Integration

by ANDRZEJ WASILKOWSKI

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1. General Remarks

An international treaty constitutes the basic legal form employed in the process of socialist economic integration.[1] This is due to various circumstances pertinent to the character of relations between the States which take part in the process of socialist economic integration, as well as to the function of the socialist State in economic life. Without pretending to a comprehensive presentation of the problem, it would be perhaps useful to draw attention to the following circumstances :

A. Parties to international socialist division of labour are States which are guided in their mutual relations i.a. by the principle of sovereign equality. Under these circumstances the development of economic cooperation between the members of the Council for Mutual Economic Assistance is subject in each case to a consensus of the States concerned. This means that the basic method of carrying out integration aims consists in coordinating the intentions of the parties through accord of their will. As a consequence, also in this instance, an international treaty preserves its fundamental importance as the classic expression of concentrated will

[1] Cf. F. Usenko, *Formy regulirovanija socialističeskogo rozdelenia truda,* Moskva 1965, pp. 122 ff ; P. Bożyk, J. Sołdaczuk, *Międzynarodowe umowy gospodarcze krajów RWPG, [International Economic Agreements of the CMEA Countries],* in : *Integracja ekonomiczna krajów socjalistycznych [Economic Integration of the Socialist Countries],* Warszawa 1970, pp. 141—142.

of the parties. So the resolutions of CMEA and other organizations being set up in the process of integration do not aim at substituting the treaty relations *sensu stricto,* but serve most frequently as premises for concluding appropriate treaties by the member-States. Moreover, it is worthy of stressing that the resolutions of these organizations, taken according to the principle of unanimity of all parties, or at least of all parties interested in a matter, do not essentially differ from deeds of a contractual character (although from the strictly formal point of view they constitute unilateral acts—as every resolution of an organization does).

B. In their mutual relations, the CMEA States act not only as sovereign political subjects, but also as owners of basic means of production. This widens considerably the traditional scope of economic matters subject to legal regulation by international law. Thus the treaties concluded by the CMEA States do not limit themselves to establishing general principles and conditions of cooperation (which conforms to the classic function of states as sovereigns), but they penetrate deeply into the very essence of economic life, that is, into international specialization of production, investment policy, or exchange of goods and services (which corresponds to the function of socialist States as owners of basic means of production). In consequence these treaties form not only a framework for integration, a framework filmed afterwards by subjects (other than States) conducting economic activities, but they also directly shape material premises of integration, concrete international economic relations. Thus here a treaty, as a form peculiarly characteristics of economic relations between various owners, promotes—the expansion of international law into new domains of economic life—owing to the specific character of function of the socialist State.

C. The countries of the socialist community conduct a socialist planning policy. Accordingly, also their mutual relations have a planned character. The role of States as subjects of economic planning finds its expression in public law—both in the internal and international sphere. As a result, international treaties play a crucial part in the entire process of cooperation and integration by creating planned foundations for the bulk of mutual economic relations within the socialist community.

2. Criteria of Classification of Treaties

International treaties concluded by the countries of the socialist community regulate a steadily increasing number of domains of economic life and types of relations. This undoubtedly encourages the attempts to systematize the subject matter on the basis of precise classificatory criteria.

Such attempts are also stimulated by the fact that treaties have a very different, often incomparable significance in international life. Furthermore, the importance of international treaties—with regard to legal order in the States being parties to these treaties—varies greatly.

These differences find sometimes their expression in the names of treaties, though not as a rule.[2] In practice the States of the Socialist community use in their mutual economic relations such names of treaties as statute, convention, agreement, protocol. But, as is well known, the naming of a treaty has no influence upon its legal validity. As one of the authors observed, international law is in this respect markedly handicaped in comparison with municipal law.[3] The latter has at its disposal a number of differing acts of a precise legal meaning which, in general, conform to their different social uses. And international law knows only one universal device—a treaty.[4]

This modesty of means stems, however, from the very character of international law, subjects of which are its only creators. The admissibility of the treaty differentiation is limited by the fact that all treaties are equally binding.[5] And all the classifications that cannot be based on formal criteria (especially on the criterion of the kind of binding power) fulfil rather an ordering role. Besides, these classifications may be arranged variously, subject to the inventiveness of individual authors.

International treaties are fairly widely classified according to the kind of relations (political, economic, and others) they regulate. Although such a classification has mainly an informative character, it may be useful.

However, from the theoretical point of view, attempts to classify international treaties with regard to the kind of obligations they produce, as well as to their formal features, are of a greater importance. To be more precise, these attempts are based on functional (that is, material) and formal criteria.

The above-mentioned classificatory conceptions may also be employed with regard to international treaties concluded in the process of socialist economic integration.

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[2] Cf. M. LACHS, *Umowy wielostronne* [*Multilateral Treaties*], Warszawa 1958, pp. 25—28.

[3] See S. NAHLIK, *Umowy międzynarodowe w Polsce Ludowej* [*International Treaties in People's Poland*], in : *20 lat polityki zagranicznej Polski Ludowej*, [*Twenty Years of People's Poland Foreign Policy*], Warszawa 1964, p. 246.

[4] To the consequences of this fact an already classical McNair's work is devoted. See A. D. MCNAIR, *The Functions and Differing Legal Character of Treaties*, " British Yearbook of International Law," vol. 11, 1930.

[5] Cf., i.a., C. ROUSSEAU, *Principes généraux du droit international public*, Paris 1944, pp. 134—141; P. REUTER, *Droit international public*, Paris 1963, p. 58; M. LACHS, *op. cit.*, p. 260.

3. Regulation-of-the-Object Criterion

Numerous doubts are expressed in legal literature as to the usefulness of the classification of international treaties according to the regulation-of-the-object criterion, that is to their content, or—in reality—to the kind of social relations to which they may refer.[6] And in fact, theoretically, such a classification has no particular importance. Furthermore, it is and cannot be precise for lack of adequate formal criteria. The more detailed criterion of division is accepted, the less precise is the outcome. But this kind of classification should not be entirely disregarded. It has undoubtedly a considerable practical value when applied to a particular field of international relations, to a certain clearly discernible type of these relations. For in such a case it shows the direction in which legal regulation in a given domain is developing. Thus it may sometimes form a basis for theoretical conclusions too. Therefore the usefulness of the discussed classification is a function of the research aims. Being of little interest as an attempt to seize international treaties as a whole, it may prove valuable as an attempt of a subject-matter arrangement of the law-making activities of certain States aiming at the realization of their planned intentions.[7] It seems that encouraging conditions of this kind arise when international treaties are concluded by States engaged in the process of economic integration.

The above does not prejudge at all upon the choice of detailed criteria of a subject-matter classification. Possibilities abound, of course, they are inexhaustible. It seems that it would be most useful to look at the object of treaties concluded in the process of socialist economic integration from the point of view of specific directions of juridical regulation. In considering this question, three basic spheres (kinds) of relations connnected with the process of socialist economic integration could be discerned. These are :

— relations in the field organization of international cooperation,
— relations in the field of economic and planning policy,
— relations in the field of production and exchange.

Each of these spheres constitutes the object of legal regulation in the process of integration, each of them is regulated by international treaties.

In the first sphere international treaties shape purposes, principles, and organizational forms of socialist economic integration. In the second—they coordinate the general economic policy and national economic plans of the

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[6] See, i.a., W. Šuršalov, *Osnovnyje voprosy teorii meždunarodnogo prava*, Moskva 1959, pp. 128—129 ; F. Usenko, *op. cit.*, pp. 170—179.

[7] See M. Lachs, *op. cit.*, 261.

CMEA States, as well as coordinate or unify the use of particular devices of the economic policy of these States (including legal regulations). In the third—they establish the kind and size of material relations between the national economies of the socialist community.

But not all international treaties concluded in the process of socialist economic integration can be unequivocally classified according to the above-mentioned criteria. As already said the division based on the regulation-of-the-object criterion is not precise. Generally, however, each treaty can be properly classified according to its prevailing substance resulting from the purpose of its conclusion. Thus, for instance, to the first group (relations in the field of organization of international cooperation) one can include without greater doubts treaties which form constitutional instruments of international organizations, even though they might contain—apart from setting up purposes, principles, and forms of cooperation—occasional stipulations with regard to relations in the field of economic policy. In the second group (relations in the field of economic and planning policy) it is possible to place, for instance, agreements resulting from mutual consultations on the main directions of economic policy, and the so-called protocols of the central planning organs signed at the conclusion of talks on the coordination of national economic plans. The third group (relations in the field of production and exchange) could embrace—without greater doubts too—agreements on production specialization as well as long-term commercial agreements and annual protocols.

Undoubtedly, the proposed classification of treaties may be criticized for its rather facultative character. Should less syntetic criteria be chosen, different classifications could be established (for instance, a classification comprising specific fields of cooperation). But then only few treaties would fit into such a framework. And, furthermore, such classifications would be deprived of their continuation, that is, of a clear-cut link with a treaty systematization based on functional and formal criteria. On the other hand—as we shall see later—the classification that has been proposed here has such a link, and this facilitates the search of a common denominator for different kinds of classification of international treaties concluded in the process of socialist economic integration. Exactly this speaks in favour of its usefulness.

Moreover, a classification with respect to specific fields of cooperation (for instance, scientific and technical cooperation, currency and financial cooperation, etc.) could have only a purely informative character. Nevertheless, some questions connected with international treaties regulating specific fields of cooperation will be included further in the respective chapters. At present only an enumeration is given which, without pretending to be a division *sensu stricto,* embodies some characteristic types of

international economic treaties developed in a long-standing practice of the socialist States. These are :

— agreements establishing international economic organizations,
— commercial treaties of the traditional type,
— agreements following consultations on economic policy,
— agreements following consultations on the coordination of national economic plans,
— agreements on scientific and technical cooperation,
— agreements on specialization and cooperation in production,
— five-year commercial agreements and annual protocols,
— agreements on common enterprises,
— investment agreements (most frequently in the field of raw materials and fuels),
— agreements on technical services,
— agreements on international payments and settlements,
— loan agreements,
— agreements on the unification of internal law,
— agreements on the unification of technical standards and on the methodology of organizational activities.

4. Criterion of Function

The most frequent attempt to systematize international treaties according to their function consists in the differentiation (introduced by Bergbohm) of law-making treaties from contractual treaties.[8] This conception has survived with various modifications to the present day.[9] But at the same time it is strongly criticized.[10]

It seems inquestionable that individual treaties actually play a differing part as sources of international law.[11] In particular, the degree of generality and abstractedness of the norms they introduce tends to vary. Presently, especially in international economic relations, treaties are fairly

[8] See C. Bergbohm, *Staatsverträge und Gesetze als Quellen des Völkerrechts,* Dorpat 1877, pp. 79—81, and also H. Triepel, *Völkerrecht und Landsrecht,* Leipzig 1899, pp. 49—62.

[9] See, for instance, A. Verdross, *Völkerrecht,* Wien 1960, p. 87.

[10] See, for instance, *Meždunarodnoe pravo* — ed. by F. Korovin, 1951, p. 16; H. Kelsen, *Principles of International Law,* New York 1952, p. 319 ; M. Lachs, *op. cit.,* pp. 259—261.

[11] Thus, for instance, M. Lachs (*op. cit.,* p. 261) discusses the following classification : (a) treaties conforming or formulating existing principles of law, (b) treaties creating new principles or rules, (c) treaties applying existing principles or rules *ad casum.*

frequently concluded which limit themselves to the regulation of particular legal relation.[12] However, these differences are disregarded by the doctrine of the sources of international law. It states that all treaties are a source of rights and obligations of the parties concerned, only these rights and obligations are defined differently.[13] In this sense there are no grounds for reserving the law-making function only for treaties establishing general and abstract rules (*traités-lois*). Not all authors, however, employing the above-mentioned classification, draw from it such far-reaching conclusions (that is, deprive of law-making function those treaties that are classified as contractual treaties (*traités-contrats*)). Some of them state very clearly that both kinds of treaties are mutually in no hierarchical relation whatever and have equal power.[14] Formulated in this manner, the whole problem is reduced to a purely doctrinal framework and becomes—despite a rather freely adopted criterion of classification—considerably less controversial.

It seems that the criterion of function understood in this way has only a limited usefulness in view of the fact that many treaties have a mixed character. For in practice the same treaties create fairly often general rules as well as contractual rules. Thus, for instance, five-year trade agreements of the CMEA States, which apparently should agree perfectly well with the notion of a contractual treaty (if this conception is accepted), contain also provisions that do not correspond to this notion. Among them are such as provisions establishing material jurisdiction in disputes between foreign trade enterprises (CMEA General Conditions of Delivery) or provisions determining the procedure of interstate consultations should difficulties in negotiating foreign trade contracts arise.

Thus it seems that the criterion of function would be better used for a differentiation of certain types of international obligations (types of contractual stipulations) than for a differentiation of the types of treaties considered as a whole. Also the classification into general and individual norms may be here helpful. Such a classification would not throw doubt upon the law-making character of treaties and, at the same time, upon the equality of their binding power.

Also in the process of socialist economic integration, treaties may be tentatively classified into treaties whose function consists mainly in

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[12] The practice of the socialist States makes in this instance use of loan agreements, investment agreements, agreements on surplus commodity deliveries, etc.

[13] H. KELSEN (*op. cit.*, pp. 319—320) suggests a classification into treaties creating general norms and treaties creating individual norms; both have a law-making character.

[14] See, for example, C. de VISSCHER, *Coutume et traité en droit international public,* "Revue de droit international public," 1955, No. 3, p. 360.

establishing certain general rules of conduct obligatory for an unspecified time,[15] and treaties whose function consists mainly in securing the achievement of measurable material effects in a specified time.[16] But this is not a precise classification. The line of division conforming to the discussed criterion runs not as much between treaties as between their particular stipulations. Against this background rather certain typical categories of *international obligations* could be discerned.

It seems that an analysis of the treaties concluded in the process of socialist economic integration may lead to the differentiation between two specific categories of obligations. The first would embrace obligations defining the directions of economic policy of the member-States and establishing rules of conduct and institutions to carry out this policy.

The Comprehensive Programme aiming at the further deepening and improving of cooperation and at the expansion of socialist economic integration of the CMEA countries, passed by the 25th CMEA Session in July 1971 in Bucharest, envisages obligations to be undertaken in the matter of mutual consultations about the main directions of economic policy, long-term forecasting and planning of economic development, terms of cooperation of the economic units or establishing new common units, etc. A number of provisions belonging to the category under discussion are included in the statutes of international organizations established in the process of socialist economic integration.

As the above-mentioned category of obligations belongs to the traditional domain of international law, it does not call for particular attention. It is through such obligations that States, in conformance with their function as sovereigns, establish the general framework and conditions for the development of mutual economic relations.

However, treaties concluded in the process of socialist economic integration also contain a different category of obligations which express the function of the CMEA States as owners of the means of production and organizers of a planned economic development. Generally speaking, these obligations refer to the turnover of material goods. To distinguish them from the obligations concerning economic policy, they may be defined as material obligations.

By material obligations resulting from an international economic treaty such a kind of obligation is to be understood that reveals beyond any doubt the intention of the contracting parties to achieve by a definite course of action economic effects in a given time, establishing at the same

[15] For instance, constitutional instruments of international organizations or agreements on the unification of municipal law.

[16] For instance, long-term trade agreements and annual protocols, agreements on specialization and cooperation in production, loan agreements, and so on.

time an obligatory bound as much concrete as to form a sufficient justification for submitting mutual claims.

In the practice of socialist economic integration such obligations stem most frequently from contractual stipulations which impose upon the contracting parties the duty to exchange particular goods in a given amount and in a time conforming to the planning period, as well as from provisions which require from the contracting parties that they develop a specific production with the aim of satisfying future mutual needs through the exchange of this production on the international socialist market.

Material obligations, as defined above, may arise by the following international treaties, typical of the process of socialist economic integration: (a) five-year trade agreements (and annual protocols), (b) agreements on specialization and cooperation in production, (c) investment agreements, (d) agreements on raw materials, (e) agreements on the so-called surplus commodity deliveries. Obligations of this kind may also be formulated in agreements on scientific and technical cooperation if they refer, for example, to research cooperation or usual working out of particular scientific and technical problems.

The most characteristic example of undertaking material obligations are the five-year trade agreements entered into by States as a result of the coordination of national economic development plans. These agreements establish lists of commodities which are to be supplied by the contracting parties in the period of validity of each agreement. The lists contain detailed specificatios and are binding on the parties.

It seems that the functional difference between contractual stipulations has a clear connection with the above-mentioned classification (point 3) according to the object. For the category of material obligations appears only in relations concerning production and exchange. The remaining two spheres of relations (shown in point 3) find their reflection in obligations of a more traditional type.

The new kind of obligation, called here a material obligation, which has been established by international treaties concluded in the process of socialist economic integration, produces a number of problems of a great practical and theoretical importance as, for instance, the problem of connecting international treaties with contractual deliveries, or the problem of the material responsibility of a State arising from international economic treaties.

5. Formal Criteria

The systematization of international treaties according to formal criteria is based in most cases on the classification into bilateral and multi-

lateral treaties. It is probably the only classification which—being clear and precise—does not raise much doubt. Some authors, however, connect it with the above-mentioned classification (according to the criterion of function) into law-making treaties and contractual treaties (*traités-lois* and *traités-contrats*), which is unacceptable even within this division. For also bilateral treaties can establish rules of a general and abstract character.

In the practice of socialist economic integration, multilateral treaties mostly refer to the following fields of mutual realtions:

— setting up of international cooperation (establishment of the principles and institutional structures of cooperation),

— coordination of the economic policy of the Socialist community States and establishment of a common policy in specific fields,

— adjustment of internal law in the socialist community States to the needs of the integration process,

— establishing various technical as well as legal and organizational standards facilitating cooperation.

Such is the frame in which bilateral treaties establish concrete economic ties. They formulate mutual obligations first and foremost in the following fields:

— coordination of the five-year economic plans,

— specialization and cooperation of production,

— commodity deliveries and maintenance services,

— common investments and other enterprises.

The growing importance of multilateral relations in the process of socialist economic integration does not belittle the weight of bilateral relations and, consequently, of bilateral treaties. Thus, to evaluate the legal aspects of this process, an analysis of multilateral relations, as well as of corresponding treaties and organizational forms, is not sufficient. Multilateral and bilateral components get often interwined as stages of formulation and substantiation of mutual obligations. Important—and in the indicated above fields domineering—role of bilateral treaties is one of the characteristic legal regulation features of the process of socialist economic integration.

A certain relation may be here traced with the regulation-of-the-object criterion and the criterion of function. Treaties concerning the organization of cooperation and the economic policy of States are mostly of a multilateral character. And where property obligations come into play (in the meaning presented above) the domineering role belongs to bilateral treaties. However, as the process of integration gains momentum, the trend to widen the scope of issues regulated multilaterally becomes more and more manifest. Thus in practice several multilateral treaties on production

specialization stipulated property obligations too. The Comprehensive Programme of 1971 opened the way to a new form of multilateral cooperation embodied in the common planning of specific branches or kinds of production.

Likewise, with regard to bilateral treaties, the relation with the regulation-of-the-object criterion and the criterion of function is not automatic. These treaties also regulate sometimes certain problems concerning the organization of cooperation (for instance, agreements establishing bilateral committees or commissions on economic, scientific, and technical cooperation), or the scope of economic policy (for instance, commercial agreements of the traditional type or agreements on the terms of transmission of the research results and scientific-technical projects).

Multilateral treaties concluded in the process of socialist economic integration contain no reservation clauses. Seemingly, it results from a number of circumstances of which the following are worth of stressing:

(a) The treaties are concluded within a definite group of subjects and subordinated to already established general aims and principles of multilateral relations. As to the projects of treaties drafted within the framework of international organizations, the consensus of all the States concerned is obligatory already at the stage of passing of a project.

(b) As a rule, treaties concluded in the process of integration are based on common research, study, and expertise. Their function rests not so much in reconciling different or—still less—opposing interests, as in formulating the common will of the parties.

(c) There are other legal constructions which apply to such situations in the process of socialist economic integration when—due to the differentiation of the socialist community and other factors—reservation clauses might be required. To these constructions belongs, first and foremost, the very principle of mutual consent to specific integration endeavours which finds its practical expression in notifications of interest or disinterest in a given matter by the member-countries. Similar function is also fulfilled by the practice of differentiated specification or modification of certain common rules of conduct in bilateral relations—on the basis of appropriate bilateral treaties. Here bilateral protocols, supplementary to the CMEA General Conditions of Delivery, may serve as a characteristic example.

It is also worth stressing that a number of treaties formally bilateral, reflect—on its merits—intentions agreed to in a multilateral way. This appertains in the first place to those bilateral treaties that represent the stages of realization of a recognized (accepted) recommendation of CMEA or a specialized international organization. The States which have recognized a CMEA recommendation are no more entirely free in shaping their bilateral relations in the field covered by the directives contained in such

a recommendation. Here a characteristic example is provided by bilateral treaties concluded by the States which, basing themselves on the recommendation of the 10th CMEA Session, collaborated in constructing the " Friendship Pipeline."

The necessity of an appropriate correlation of multilateral and bilateral relations also gives rise to a trend towards a certain standarization of bilateral treaties in some fields. The notion of standarization refers to the legal form of treaties, and not to their actual economic content. The existence of standards simplifies the negotiation process considerably, concentrating it at the same time on strictly economic matters. It seems, however, that in this instance a certain unification of rules of conduct in a given field of mutual relations. Unification is most often mentioned in connection with the trend towards uniforming the internal law regulations. But in the process of socialist economic integration similar needs also arise in the international legal sphere. As yet, no sufficient attention has been paid to this fact. Specifically, it concerns circumstances in which bilateral treaties are to form parts of a general system operating within the socialist community. Here the most characteristic example is provided by the protocols on the effects of the coordination of national economic plans, as well as by long-term commercial treaties which formalize the effects of the coordination of plans in the field of mutual deliveries and maintenance services. The standarization (leaving the term " unification " for other uses) of these protocols and treaties provides a more lucid picture of the effects of the coordination of plans within the socialist community as a whole, and shows to what degree the multilateral provisions and postulates of the CMEA organs have been carried out by the member-States.

Keeping up with this example, it is also worthy of drawing attention to the fact that a certain standard of five-year trade agreements had been being shaped for a long time by way of custom. Finally, it was the CMEA Comprehensive Programme of 1971 that, generalizing the preceding practice, established a number of rules of conduct in this sphere which are at present binding upon all the members of the socialist community. Thus the discussed bilateral treaties have a twofold connection with the multilateral relations within the socialist community : on their merits, because they should take into account economic directives formulated by the CMEA recommendations, and with respect to form, because they should conform to legal standards established multilaterally.

In the practice of socialist economic integration certain significance is also attributed to the classification of international treaties according to the criterion of time. In particular, we may discern between treaties concluded for an unlimited time and for a limited time, and among the latter—between long-term and short-term treaties. Multilateral treaties are—as

a rule—concluded for an unlimited time (with the possible exception of multilateral agreements on production specialization or on common planning). In concluding bilateral treaties, all above-mentioned variants are used. The time criterion has a specific significance in agreements on commodity deliveries and maintenance services, because they create property obligations. Thus, for example, the date of expiration of a five-year trade agreement is closely connected with the problem of responsibility for obligations assumed by the States concerned.

6. Decentralization of the Treaty-Making Power

The contractual practice expressing the development requirements of socialist economic integration shows a remarkable disposition for enlarging the number of State organs entitled to conclude international treaties. This in turn bears upon the procedure of concluding treaties, that is, upon how the will of states is formally manifested.

Treaties not requiring ratification dominate decisively in the practice of socialist economic integration (which agrees with the universal trend anyway). Basically, this practice embraces all bilateral treaties, with the exclusion of commercial treaties of the traditional type, and treaties on legal transactions whose functions, however, are neither strictly connected with, or characteristic of, the process of integration.

The decentralization trend results first and foremost from political solutions which endow the government and main organs of the State administration with extended constitutional rights in the field of national economy management, that is, in the field where the State is carrying out its ownership functions. It is in this field where—for obvious reasons—also the processes of mutual economic, scientific, and technical cooperation are brought together.

Among multilateral treaties, it is first and foremost the more important constitutional instruments of international organizations that require ratification (the CMEA Statute, agreements on multilateral settlements in transfer roubles and on establishing the International Bank of Economic Cooperation and the International Investment Bank). But a number of other constitutional instruments required only government acceptance (agreement on establishing the Common Railway Truck Fleet, agreement on establishing the Organization of Industrial Cooperation on Rolling Bearings, and agreement on establishing the Organization of Metallurgical Cooperation " Intermetal "). However, the agreement on establishing the Central Dispatching Board of the Joint Power Grids came into force at the day of signing.

To multilateral treaties requiring ratification traditionally belong treaties aiming at the unification of internal law regulations in specific domains. Within the CMEA framework, however, a system has been developed that consists in setting in motion legislatures in the member-States in accordance with such CMEA recommendations as have been recognized (accepted) by these States. In the beginning of the 1970's, and in conformity with the intention of improving the legal system of integration (which was also formally expressed by the Comprehensive Programme of 1971), a trend became apparent to use in the above-mentioned instances the form of a convention. Hence the Convention of May 1972 on settling by arbitrage civil disputes issuing from economic, scientific, and technological cooperation marks the departure from the previous practice. The Convention required ratification.

The practice of the socialist community States universally recognizes the classification of international treaties (according to the form of the expression of will) into interstate, intergovernmental, and interdepartmental agreements. Such a division corresponds to the long-established systematization in the doctrine. In Poland this systematization is at present formally based on positive law (Resolution of the Council of State and the Conucil of Ministers of 28 December, 1968 on concluding and denouncing international treaties).

Interstate treaties are (in the narrow meaning of the term) agreements which require ratification. Generally, they are of a political character (for instance, treaties of friendship, cooperation, and mutual assistance). However, to this category should also belong treaties regulating objects reserved for municipal law or containing provisions differing from the legislation in force. This is of paramount importance especially in connection with the trend towards the unification of law in the process of socialist economic integration. Moreover, according to the already quoted resolution of the Council of State and the Council of Ministers, intergovernmental agreements of "fundamental importance" shall also be submitted to ratification. Depending on practical interpretation of this notion, the scope of agreements concerning the realization of the Comprehensive Programme of 1971 that are to be submitted to ratification may be narrower or wider. Yet it seems that in Poland the stress is laid rather on increasing the role of the Seym in controlling Polish foreign relations (also including those connected with the process of socialist economic integration) than on a purely formal widening of constitutional prerogatives of the Council of State with regard to ratification proceedings.

Intergovernmental agreements are concluded much more frequently. To this category belong, for example, quite a few constitutional instruments of international organizations and all long-term trade agreements.

In most cases trade agreements come into force on the date of signature, though, for instance, Article 15 of the Polish—Rumanian Trade Agreement for 1971–1975 stipulated that its coming into force required acceptance by an exchange of notes.

The process of socialist economic integration distinguishes itself *inter alia* by the expansion of interdepartmental agreements. Their content differs considerably. They may be related to the field of production and exchange, scientific and technological cooperation, transport and communication, and also, for instance, to adjusting technical standards, legal and organizational solutions, or methods, of action in the specific domains of mutual relations. The Comprehensive Programme of 1971 (Chapter III) clearly envisages the expansion of the agreements of this kind, recommending at the same time a widening of direct contacts between corresponding State organs of the socialist community States.

In some cases interdepartmental agreements require acceptance. In Poland acceptance is necessary " if it is required by a previous decision of the Council of Ministers or the Prime Minister," (paragraph 7 of the aforecited Resolution of 28 December, 1968). Thus the acceptance of interdepartmental agreements could appertain not only to the government, but also to the Prime Minister. However, doubts may be raised whether an agreement signed by the Prime Minister, but not accepted by the government, is an interdepartmental agreement at all.

The specific features of agreements concluded by ministers and heads of other central State authorities come to light when these agreements do not require acceptance nor any special full powers received from the government (usually both these factors condition each other). In accordance with the wording of the resolution of the Council of State and the Council of Ministers of 28 December, 1968 (para. 4), interdepartmental agreements are agreements whose objects pertain to the domain of individual ministers, and their ratification or acceptance is not required.

In view of the expansion of such agreements in the process of integration, the whole issue requires some attention. Three aspects of this issue seem to be the most important :

A. authorization to conclude interdepartmental agreements and its limits,

B. relation of an interdepartmental agreement to the sources of municipal law,

C. relation of an interdepartmental agreement to agreements concluded on a higher level of State representation.

A. Interdepartmental agreements are undoubtedly international treaties ; they engage States. This issue, however, assumes specific traits in connection with the fact that the process of socialist economic integration

distinguishes itself by the decentralization of the power to conclude agreements which we have classified as international. It seems that we have, and will have, to do more frequently not only with interdepartmental agreements, but also with those concluded by various State agencies (there is a lack in this instance of a proper syntetic denomination).[17] Inasmuch as, for instance, agreements concluded by chiefs of patent offices or water economics departments may be considered to be interdepartmental, agreements concluded by the so-called central economic boards and other organs not being central State organs belong probably to another category.

The Agreement on International Multilateral Specialization and Cooperation of Production of the Motor-Car Industry of 23, September 1971 may serve as an example of multilateral agreement belonging to the discussed category. Parties to this agreement consist of institutions of a central-board type (for example, the Bulgarian Economic State Association "Awtoprom," General Management of the Czechoslovak Motor-Car Factory, etc), which act together with appropriate foreign trade companies (in Poland, however, "Polmo" exercises both these functions). But the Agreement contains several provisions relating actually to the bulk of relations of the contracting parties in the domain under discussion. The Preamble of the Agreement invokes *inter alia* the respective recommendations of CMEA, and Article X, p. 7 of the Agreement designates the CMEA Secretariat as its depositary—in accordance with the usual international practice.

The legal position of the discussed here category of organs, and especially their ability to oblige States in their external relations, may in some instances arise doubts.[18] So an exchange of informations as to which organs are authorized to conclude international agreements seems quite purposeful. Such an exchange of informations could be effectuated, for example, by the CMEA Secretariat.

According to Article 46 of the Vienna Convention on the Law of Treaties of 1969, no State can invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties, and that, consequently, this consent is rendered invalid. An exception to this rule is a manifest violation (objectively evident to any State acting in accordance with usual

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[17] See N. MIRONOV, *Nekotoryje voprosy juridičeskoj prirody mežvedomstvennych meždunarodnyh soglašenij. Tezisy doklada*, in: *Meždunarodnoe naučnoe soveščanie na temu "Mežgosudarstvennye svjazi po linii ministerstv i vedomstv v uslovijah osuščestvlenija socialističeskoj ekonomičeskoj integracii,"* Moskva 1971. The author argues the usefulness of establishing a fourth category of international treaties, that is, interinstitutional agreements as distinct from interdepartmental agreements.

[18] Cf. MCNAIR, *The Law of Treaties*, Oxford 1961, p. 21.

practice and in good faith) of the internal law of fundamental importance. As for agreements concluded by central boards, and in view that the legal position of these institutions in individual countries has neither been fully clarified nor unified, the possibility that an extreme situation (as defined in Article 46 of the above-mentioned Vienna Convention) should arise cannot be excluded.

It seems, however, that a danger of another kind is more likely to materialize than the above-mentioned, namely, the danger of discrepancy as to whether a concrete agreement concluded by central boards should be regarded as an international treaty or rather as a civil law contract. And furthermore, such a discrepancy may not only be of an interpretative character, but it may also reflect the actual difference between legal positions of the parties, resulting from different planning and management systems and, consequently, different legal conceptions in the CMEA countries. It must be also said that in the CMEA countries, with their economic systems based on the State monopoly of foreign trade, the authority of individual economic units to enter into civil law contracts with foreign contracting parties may sometimes arise doubts as to the principle or object of a contract.

B. It should be assumed that the treaty-making power of the discussed organs has a purely functional character. That is to say that they can enter into international treaties only in matters that are within their competence according to municipal law and, basically, only with equivalent organs of other States.

As for the legal order of individual States, the above-mentioned requirements may be considered logical. Non-compliance with them may—from the point of view of international law—result in the invalidity of a treaty only in the extreme cases stipulated in Article 46 of the Vienna Convention on the Law of Treaties. For it should be assumed that the violation of municipal law as to the competence to conclude treaties are treated by international law jointly, that is, irrespectively of whether the infringement is related to the principle alone (an unauthorized organ takes part in international transactions) or to the scope of competence (an organ authorized to take part in international transactions exceedes its competence as defined in municipal law). It may be supposed that it would be easier to ascertain whether the violation was "manifest"—as defined in Article 46, paragraph 2 of the Vienna Convention—in the former case.

The problem discussed here becomes more important when international agreements concluded between departments or other State organs establish general rules of conduct supplementing or modificating in this way the corresponding provisions of municipal law. In such cases any international agreement concluded by departments or other organs outside

the scope of their strictly functional competence might lead to an evasion or infringement of the hierarchy of the sources of municipal law. This would arise if, for example, an international agreement concluded by departments (or central boards) were to establish rules of conduct different than those envisaged by the imperative norms of municipal law laid down by an act of higher grade (that is, by an act which could not be laid down within the competence of a given department or central board). From the viewpoint of international law such an agreement will be binding upon a State (on condition that it does not produce a manifest violation of the fundamental norms of its municipal law as to the capacity to conclude agreements), but at the same time its municipal law will not be properly adapted to international obligations created by this agreement. Remarks presented in Chapter V (para. 3), and related to the ways of introducing a unified legal regulation in the CMEA countries, demonstrate that the danger mentioned above is far from being only a theoretical one.

Thus it would be necessary to assume that international agreements negotiated by departments and central boards should be concluded exclusively within the scope of competence *in rem* of these organs, in accordance with municipal law, and without exceeding their law-making authority. It seems, however, that these organs may in concluding agreements establish (choose) specific lines of conduct in matters regulated by the dispositive norms of municipal law, without restrictions which may result from the hierarchy of the sources of municipal law.[19]

C. The expansion of the treaty-making practice also poses on the agenda the question of establishing a hierarchy of international treaties within the legal structure of socialist economic integration. This is a complicated problem in view of the generally accepted assumption that all international treaties are equally binding. However, this assumption does not—as it seems—exclude the possibility of establishing such a hierarchy with regard to treaties being concluded between subjects of equal status.[20] This would mean that treaties concluded by departments and other State organs must not exceed the framework set by interstate and intergovernmental agreements which establish broader rules of conduct in the process of socialist economic integration. Otherwise the expansion of agreements concluded at a lower level of State representation may lead to undertaking differing or even—in extreme cases—contradictory international obligations by the same subjects (States) and with regard to the same subject-matter.

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[19] Cf. N. Mironov, *op. cit.*

[20] Cf. *ibid.*

Les Pactes des Droits de l'Homme et les droits des citoyens en République Populaire de Pologne

par ANNA MICHALSKA

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1. En 1966, l'Assemblée Générale de l'ONU a voté le Pacte International des Droits Civiques et Politiques (dénommé ci-après le pacte politique) et le Pacte International des Droits Économiques, Sociaux et Culturels (dénommé ci-après le pacte économique) [1]. Les dispositions des deux pactes ont été déjà discutées dans notre littérature et cela de différents points de vue [2].

La doctrine du droit international n'a pas élaboré sa propre conception des droits de l'homme, de même ils ne sont définis non plus par aucun

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[1] Traduction polonaise, voir « Zbiór Dokumentów », 1968, n° 3, pp. 153 - 193.

[2] Cf., entre autres, S. DĄBROWA : *Międzynarodowe Pakty Praw Człowieka* [*Les Pactes internationaux des Droits de l'Homme*], « Państwo i Prawo », 1967, n° 4/5, pp. 575 - 589 ; LE MÊME AUTEUR : *Międzynarodowe środki ochrony praw człowieka w świetle Paktów Praw Człowieka* [*Les moyens internationaux de la protection des Droits de l'homme à la lumière des Pactes des Droits de l'Homme*], « Państwo i Prawo », 1967, n° 10, pp. 504 - 519 ; J. BAFIA : *Kodyfikacja prawa karnego PRL a międzynarodowy Pakt Praw Obywatelskich i Politycznych* [*La codification du droit pénal de la R.P.P. et le Pacte international des Droits Civiques et Politiques*], « Państwo i Prawo », 1969, n° 7, pp. 41 - 52 ; M. MATEY : *Pakt Narodów Zjednoczonych w sprawie społecznych i ekonomicznych praw człowieka a prawo pracy w PRL* [*Le Pacte des Nations Unies relatif aux droits économiques et sociaux de l'homme et le droit du travail en R.P.P.*], « Państwo i Prawo », 1970, n° 10, pp. 498 - 508 ; Z. RESICH : *Pakty Praw Człowieka* [*Les Pactes des Droits de l'Homme*], « Nowe Prawo », 1967, n° 3, pp. 327 - 335 ; S. ZAWADZKI : *Le Pacte international des droits économiques, sociaux et culturels et les constitutions des pays européens*, « La Pologne et les Affaires Occidentales », Vol. III, 1967, n° 2, pp. 217 - 228. Beaucoup de place a été consacré aux pactes dans d'autres publications relatives aux droits de l'homme ainsi que dans la littérature concernant le droit international.

acte du droit international [3]. Dans le cadre de l'ONU ou sous ses auspices ont été votées plusieurs déclarations et on a signé de multiples traités relatifs aux différents droits. La Déclaration Universelle des Droits de l'Homme, votée sous forme de la résolution de l'Assemblée Générale en 1948, a été le premier essai de formulation du catalogue international universel des droits fondamentaux de l'homme. Elle a été conçue comme « l'idéal commun à atteindre par tous les peuples et toutes les nations » [4], pourtant, elle n'a pas imposé aux États les devoirs juridiques. Les Pactes avec la Déclaration sont appréciés en tant que « loi internationale des Droits de l'Homme » [5].

L'adoption des pactes constitue un pas important vers la création de garanties efficaces de la protection des droits fondamentaux de l'homme. La protection desdits droits est devenue en effet aussi le devoir juridique, et non pas seulement le devoir moral et politique des États. Les discussions sur le contenu des pactes se déroulaient depuis plusieurs années, et dans les travaux sur l'élaboration de ceux-ci ont activement participé les représentants des États socialistes.

Il convient de souligner que les pactes sont au haut degré un acquis du constitutionnalisme socialiste et de la pensée politique socialiste. Les États socialistes, malgré les différents obstacles, ont abouti à inclure aux pactes les droits économiques, sociaux et culturels. Ces droits ont été reconnus pour les droits fondamentaux en pleine égalité avec les droits politiques et libertés traditionnels. Cela signifie qu'on a définitivement éliminé la doctrine qui avait traité le développement des droits socio-économiques comme une menace pour les droits politiques et l'assurance de l'égalité sociale — comme une limitation de la liberté.

La teneur des pactes témoigne de la reconnaissance générale d'une thèse marxiste que l'assurance des droits socio-économiques est une condition de la réalisation d'autres droits en question.

Dans le domaine des droits politiques, grâce à l'évolution qui s'est opérée au cours de la dernière décennie dans la doctrine et dans la pratique des États socialistes, ont été introduites aux pactes plusieurs dispositions novatrices et progressistes.

Les pactes ne peuvent pas être analysés exclusivement comme un document international. Leurs dispositions ont exercé une grande influence sur la législation des pays capitalistes et des États du tiers monde. Ainsi,

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[3] A. Klafkowski : *Prawo międzynarodowe publiczne* [*Le droit international public*], Warszawa 1966, p. 192.

[4] Traduction polonaise : « Zbiór Dokumentów », 1958, n°s 10 - 12, pp. 1 - 11.

[5] U Thant : *International Law and the United Nations*, New York 1968, UN(OPJ) 329, p. 3 ; cf. aussi K. Vasak : *Le droit international des droits de l'Homme*, « Revue des Droits de l'Homme », Vol. 1, 1972, pp. 44 - 46.

le rapport étroit entre les pactes et la pensée politique socialiste prend de l'importance particulière.

Les pactes entreront en vigueur après leur ratification par au moins 35 États. Jusqu'au 1er janvier 1974, les deux pactes ont été ratifiés par 24 États. Le nombre des ratifications est, pour une grande part, l'indice du degré de réalisation d'une convention, mais ce n'est qu'un critère formel. Il arrive que l'État ne ratifie pas une convention bien qu'il ait le niveau de protection des droits pas pire et parfois même plus haut que celui qui est prévu par la convention, étant donné la réglementation différente, dans sa législation intérieure, de certaines questions de nature technique ou de procédure. Ainsi, par exemple, les États scandinaves n'ont pas ratifié l'une des conventions adoptée par l'Organisation Internationale du Travail relative à la durée du travail (bien que les dispositions de leur droit interne garantissent les droits y stipulés), justement pour les raisons de certaines différences en matière de procédure.

Les obligations résultant du droit international, imposées à l'État par les pactes, ne peuvent être exécutées que par la voie de l'activité des organes de cet État dans la sphère des relations intérieures, à savoir par l'établissement des règles de droit, l'application convenable du droit, l'activité économique et organisationnelle. En devenant une partie à la convention internationale relative aux droits de l'homme, l'État assume l'obligation d'exécution de cette convention de bonne foi, conformément à la règle *pacta sunt servanda* [6]. Les dispositions de la convention de Vienne de 1969 sur le droit des traités stipulent que la partie au traité international ne peut pas invoquer les dispositions de son droit interne en vue de justifier la non-exécution du traité [7].

En considérant la ratification éventuelle des pactes par la Pologne, il faut poser la question de savoir si et dans quelle mesure les droits des citoyens garantis par les dispositions du droit interne sont conformes aux droits proclamés par les pactes. La réponse à cette question n'est pas facile. En vue d'obtenir une image plus complète, il faudrait analyser non seulement les dispositions de la Constitution, mais aussi l'ensemble de la législation ordinaire, de même que les actes juridiques publiés par les organes de l'administration d'État. Il est évident qu'une telle tâche dépasse

[6] *United Nations, International Conference on Human Rights 1968. Study prepared by the Secretary General: Methods used by the United Nations in the Field of Human Rights*, Doc. A/CONF. 32/6, p. 120 ; cf. aussi l'intervention du délégué de la Pologne lors de la 18ème session de l'Assemblée Générale, Doc. A/C. 3/SR. 1274, p. 334.

[7] Art. 27. Le texte de la convention : A/CONF. 39/27. Voir les observations sur le projet et la teneur de la convention faites par S. Nahlik : *W przededniu kodyfikacji prawa traktatów* [*A la veille de la codification du « droit des traités »*], « Sprawy Międzynarodowe », 1968, n° 4.

le cadre de cet article. Il existe également la seconde difficulté qui a pour conséquence l'impossibilité de donner une réponse complète et non équivoque à la question au-dessus posée. Les pactes ont été conçus comme le catalogue universel des droits qui doivent être assurés par tous les États sans égard à leurs systèmes politiques, socio-économiques, l'idéologie, la religion, etc. Étant donné la particularisation considérable du monde contemporain, en admettant même que les États agissent de bonne foi, il est difficile de s'attendre à ce que les pactes soient réalisés d'une manière similaire. Le différent niveau de développement des pays particuliers produit que plusieurs États ne sont pas tout simplement capables de garantir certains droits, notamment les droits socio-économiques. Dans les États particuliers, selon l'idéologie et les buts que se propose la classe étant au pouvoir, différents droits sont élevés au rang des droits fondamentaux et différentes sont également les priorités en matière de leur protection. Très souvent, la conformité du droit interne avec les dispositions des pactes n'aura que le caractère verbal, étant donné une interprétation et une application différentes des dispositions respectives. Il est vrai que, dans les pactes, il y a des dispositions de caractère universel, qui peuvent être applicables d'une manière universelle (l'interdiction de priver de liberté du fait de non-exécution des obligations contractuelles, le principe de présomption de l'innocence d'un accusé), le nombre n'en est pas pourtant assez grand. L'interprétation de la plupart des droits et libertés est conditionnée par de nombreuses circonstances que les auteurs des pactes n'ont pas été en mesure de prendre en considération. Ainsi, par exemple, la liberté de conscience et de religion sera réalisée d'une manière différente là où la constitution proclame une religion en tant que religion officielle et autrement là où on a adopté la séparation de l'Église et de l'État. Les clauses générales et les dispositions qui indiquent le mode de réalisation de certains droits ne peuvent que dans un degré restreint garantir une interprétation homogène des pactes, interprétation qui sera toujours fonction des facteurs intérieurs [8]. L'influence sur l'interprétation exerce aussi le mode de rédaction de différentes dispositions, et cela aussi bien dans les langues officielles de l'ONU que dans les traductions de celles-ci. La preuve éloquente en sont des difficultés qui se sont manifestées dans les discussions linguistiques lors de l'élaboration du texte de la Déclaration Universelle des Droits de l'Homme [9].

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[8] Cf. M. Sørensen : *Obligations of a State Party to a Treaty as Regards its Municipal Law*, dans : *Human Rights*, Manchester 1968, pp. 11 - 31.

[9] Cf. A. Verdoodt : *Influence des structures ethniques et linguistiques des pays membres des Nations Unies sur la rédaction de la Déclaration Universelle des Droits de l'Homme, Problèmes de protection internationale des Droits de l'Homme*, Paris 1969, pp. 404 - 416.

2. L'étendue des devoirs imposés par les deux pactes est différente. L'État ratifiant le pacte politique « s'oblige à respecter et à assurer à tous les individus [. . .] les droits reconnus par le présent pacte » (art. 2 al. 1er). Les obligations imposées par le pacte économique consistent en cela que l'État entreprend individuellement ou dans le cadre de coopération internationale, des mesures en vue d'obtenir d'une manière progressive la pleine réalisation des droits reconnus par ce pacte (art. 2 al. 1er). Des dispositions précitées résulte que la ratification du pacte politique oblige les États à l'assurance immédiate des droits y formulés, pendant qu'en ratifiant le pacte économique, l'État ne s'oblige qu'à la conduite d'une politique convenable. Ce ne sont que certaines des dispositions du pacte économique qui peuvent être réalisées avec un effet immédiat : jouissance sans discrimination des droits proclamés (art. 2 al. 2), assurance de l'égalité des droits des femmes et des hommes (art. 3). Ainsi, pour qu'on puisse faire des reproches à l'État qu'il ne respecte pas le pacte économique, il ne suffit pas de démontrer que certains droits ne sont pas assurés. Il faut encore prouver que cet État dispose des possibilités réelles de les assurer.

Au cours d'élaboration des pactes, l'un des points litigieux essentiels était l'étendue des droits garantis. On a discuté sur la question de savoir si le traité devrait contenir seulement les droits politiques et libertés traditionnels ou bien également les droits économiques, sociaux et culturels. Finalement, l'Assemblée Générale a inclu aux pactes les deux groupes de droits en question [10]. Le fait qu'on a voté deux pactes séparés, ce qui donne la possibilité de ratification seulement de l'un d'eux, prouve pourtant que les deux catégories des droits en question ne sont pas traitées d'une manière identique.

L'argument qui a décidé de la séparation de deux pactes était une affirmation que les droits économiques, sociaux et culturels doivent être réalisés progressivement, pendant que les droits politiques et les libertés — sans aucun délai. On avance donc une thèse que le pacte économique a le caractère de *Förderungskonvention,* de *promotional convention* ou bien de « programme-type » de la convention. Par ces termes en entend les traités qui ne comprennent que les principes généraux du comportement futur de l'État et ne sont pas la source des obligations qui pourraient être exécutées ou contrôlées par voie d'application de la procédure du droit international. Les dispositions de cette sorte doivent être développées par le droit interne et seulement en ce cas elles deviennent les règles de droit de pleine valeur (*full-value*) [11]. Le pacte économique n'oblige les États qu'à

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[10] Résolution 421E/V.

[11] Cf. à ce sujet E. Schwelb : *Prace kodyfikacyjne Narodów Zjednoczonych w dziedzinie praw człowieka* [*Les travaux de codification des Nations Unies en matière*

prêter certains soins (*certain policies*) [12] qui permettront à l'avenir de réaliser en plein les droits y formulés. Au sein de la Commission des Droits de l'Homme, on a même exprimé une opinion que les dispositions du pacte économique ne comportent pas les droits de l'homme, mais elles formulent seulement les buts sociaux à atteindre [13].

On a argumenté contre ces thèses en littérature polonaise. On a souligné en effet que le caractère progressif des droits économiques ne libère pas les États du devoir de leur réalisation immédiate. Il a seulement pour conséquence que l'étendue des obligations dépend des possibilités économiques actuelles [14]. Cela ne signifie nullement que les dispositions du pacte économique n'imposent pas aux États le devoir de nature juridique [15].

Sans nier le caractère juridique des dispositions du pacte économique, j'estime pourtant que c'est un acte-programme. Les droits socio-économiques ont le caractère dynamique et ne peuvent pas être garantis par voie de promulgation d'un acte normatif ou bien par voie d'une action unique de caractère économique et organisationnel. La réalisation de ces droits est un processus continu et son étendue et le niveau d'intensité changent selon les conditions et circonstances. Dans l'exercice du contrôle du respect des normes de cette sorte entre en jeu l'élément d'évaluation, et cela aussi bien des possibilités réelles que du degré de leur réalisation. Il manque donc de standard précis du contrôle et c'est pourquoi il serait difficile d'établir à l'avance en quoi consiste la « pleine » réalisation de ces droits, d'autant plus que les besoins socio-économiques ne sont pas non plus statiques et accusent une tendance toujours croissante. Il faut avoir à l'esprit ces circonstances si l'on discute le degré et l'étendue de réalisation du pacte économique dans le droit interne.

3. Plusieurs dispositions des pactes ne sont pas une nouveauté en droit international, mais elles constituent une récapitulation *sui generis* des conventions antérieurement signées, relatives aux différents droits de l'homme, ratifiées en règle générale par la Pologne. Pourtant on a plus d'une fois des doutes sur la question de savoir si toutes les dispositions de

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de droits de l'homme], dans : *Studia i dokumenty PIHZ* [*Études et documents de la Chambre Polonaise du Commerce Extérieur*], Warszawa 1961, p. 33 ; LE MÊME AUTEUR : *Some Aspects of the Measure of Implementation of the International Covenant on Economic, Social and Cultural Rights,* « Revue des Droits de l'homme », Vol. 3, 1968, pp. 375 - 376.

[12] M. MOSKOWITZ : *Human Rights and World Order,* New York 1968, pp. 186 et suiv.

[13] Doc. A/C. 3/SR. 197, §§ 42 - 47.

[14] Z. RESICH : *op. cit.,* p. 329.

[15] S. ZAWADZKI : *op. cit.,* pp. 223 - 225.

notre droit interne sont conformes aux droits au-dessus mentionnés [16]. Au forum de l'ONU et des organisations spécialisées, en particulier de l'Organisation Internationale du Travail et de l'UNESCO, on prépare actuellement d'autres conventions qui se proposent de développer et de préciser les droits formulés dans les pactes. Beaucoup d'entre elles seront certainement ratifiées par la Pologne. Les représentants de la Pologne ont activement participé aussi bien à l'élaboration des pactes qu'à celle d'autres conventions [17] ; la conception socialiste des droits de l'homme a exercé une grande influence sur la teneur définitive des pactes. C'est une raison de plus pour laquelle ladite conception devrait trouver son expression dans les normes du droit interne.

En discutant le problème de ratification éventuelle des pactes, il faut préalablement donner la réponse, entre autres, aux questions suivantes : 1° quelles nouvelles obligations, en comparaison avec celles qui résultent de la Charte de l'ONU et d'autres traités, assumerait la Pologne? ; 2° quelles nouvelles obligations de droit interne assumerait l'État à l'égard des personnes qui relèvent de sa juridiction, et surtout à l'égard des citoyens ? ; 3° ces nouvelles obligations contribueront-elles à la réalisation des buts de la politique de l'État et seront-elles conformes aux conceptions essentielles de celle-ci ?

Les pactes obligent les États à réaliser les droits y formulés entre autres par voie législative. Aucune des dispositions ne mentionne pourtant le devoir de garantir ces droits dans la constitution. Le catalogue des droits reconnus pour fondamentaux et, par conséquent, formulés dans la constitution, est différent dans les États particuliers. Il est difficile de s'attendre à ce que les États, en ratifiant les pactes, les traitent comme un standard pour leurs constitutions respectives. De plus, la question se pose de savoir s'il faut tendre à la réalisation des pactes justement par une prise la plus large possible en considération, dans les textes constitutionnels, des dispositions de ces pactes ou bien, par exemple, choisir la voie de la législation ordinaire, peut-être la meilleure. Il serait en effet utopique d'attendre l'unification universelle des dispositions constitutionnelles. Néanmoins une réflexion sur les dispositions respectives de notre loi fondamentale à la lumière des dispositions des pactes paraît tout à fait utile.

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[16] Cf., entre autres, K. Kolasiński : *Realizacja Paktów Praw Człowieka w polskim systemie zabezpieczenia społecznego, Materiały z sesji « Praw Człowieka »* [*La réalisation des Pactes des Droits de l'Homme dans le système polonais de la sécurité sociale, Matériaux de la session des « Droits de l'Homme »*], Toruń 1968, pp. 52 - 63 ; M. Matey : *op. cit.*, p. 507.

[17] Z. Resich : *Polska w obronie praw człowieka na forum ONZ* [*La Pologne en défense des droits de l'Homme au forum de l'ONU*], « Sprawy Międzynarodowe », 1969, n° 7/8, pp. 40 - 48.

En comparant les dispositions de la Constitution de la République Populaire de Pologne et celles des pactes, il convient de noter que : 1° les pactes proclament certains droits qui ont le caractère expressément international et il est difficile de s'attendre à ce qu'ils se trouvent dans le catalogue constitutionnel. Parmi eux il faut compter, entre autres, le droit des peuples à l'autodétermination et celui à la libre jouissance de leurs ressources et richesses naturelles (art. 1er des deux pactes est rédigé de la même façon) ; 2° dans la Constitution il y a certains droits qui ne figurent pas dans les pactes, par exemple le droit d'asile [18] ; 3° les pactes renferment les dispositions qui ne figurent pas dans la constitution d'aucun État socialiste, par exemple l'interdiction d'esclavage et de la traite d'esclaves (art. 8 pts 1 - 3 du pacte politique). La source de ces droits demeure dans les vues éthiques et idéologiques des sociétés particulières, mais sous forme de règles de droit ils ont été formulés pour la première fois en droit international. L'interdiction d'esclavage est évidente dans notre système culturel et civilisateur et de plus, elle résulte indirectement de l'ensemble des dispositions juridiques relatives à la liberté et à l'inviolabilité personnelles. La conception socialiste de la dignité humaine exclue l'esclavage. La formulation de l'interdiction de celui-ci dans la Constitution aurait été donc artificielle.

Les pactes comprennent plusieurs dispositions dont les équivalents n'existent pas dans la Constitution pour les raisons différentes de celles dont il a été question plus haut. La partie considérable de ces droits figure dans la législation ordinaire. L'exemple en sont les attributions dont jouit un accusé au cours de la procédure pénale, attributions auxquelles on a consacré beaucoup de place dans le pacte politique et dont seulement une partie limitée est garantie par notre Constitution. Par contre, elles sont assurées par les dispositions de la procédure pénale et cela d'une manière plus complète que ne le fait le pacte. Ainsi les attributions qui, dans le système du droit interne, ne sont que le fragment du droit subjectif, ont été élevées par le pacte au rang des droits fondamentaux de l'homme. En rapport avec cela, certaines dispositions des pactes ont le caractère casuistique.

On commence parfois à douter si la direction de l'évolution de la protection internationale des droits de l'homme, citée à base d'exemple au-dessus mentionné, est juste. Sont compréhensibles les intentions des auteurs des pactes qui ne voulaient pas formuler un acte de plus ayant le caractère de déclaration sublime, mais en même temps trop générale. D'autre part pourtant, étant donné une grande diversité des systèmes juridiques, la rati-

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[18] En 1967, l'Assemblée Générale a voté la Déclaration sur l'asile territorial (résolution 2312/XII).

fication universelle des pactes, si elle ne doit pas être seulement un acte purement formel, sera sans doute difficile à réaliser.

Indépendamment des doutes au-dessus soulevés, l'auteur du présent article se propose de prendre en considération surtout les droits qui soit ne figurent pas dans la Constitution, soit ils sont formulés d'une manière différente. Plusieurs dispositions des pactes et constitutions se couvrent en ce qui concerne leur teneur (il ne s'agit pas ici évidemment de conformité de la teneur littérale), et celles-ci seront bien sûr passées sous silence.

4. Les actes internationaux relatifs aux droits de l'homme n'ont pas à leur base de conception philosophique et idéologique unique. Cela ne signifie pas qu'ils n'aient pas été précédés de discussions. Ça veut dire que l'accord a été signé quant au contenu et non pas quant aux conceptions philosophiques [19]. Les vues de compromis en ce qui concerne le contenu des pactes sont basées sur les principes philosophiques entièrement différents et formés sur la base de différents systèmes économiques et politiques [20]. Cela est visible aussi bien dans le contenu des clauses générales que dans celui de plusieurs dispositions détaillées.

Les dispositions des pactes évoquent souvent les conceptions contemporaines du droit naturel. Il y est question entre autres de la « dignité inhérente à l'être humain », du « droit naturel à la vie », des « droits égaux et inaliénables » [21]. Mais en même temps, les pactes formulent un large catalogue des droits socio-économiques, en imposant aux États *expressis verbis* le devoir de les garantir. Cela est la preuve éloquente de la rupture avec les conceptions libérales de la liberté et de l'égalité.

La Constitution de la République Populaire de Pologne admet pour principe l'unité des droits et obligations, pendant que les pactes ne mentionnent pas en principe les obligations des citoyens à l'égard de l'État et de la société. Le principe de l'unité des droits et obligations est l'ex-

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[19] I. Szabó : *The Theoretical Foundation of Human Rights, dans : Nobel Symposium 7, International Protection of Human Rights,* Stockholm 1968, pp. 35 - 45.

[20] M. Borucka-Arctowa : *Współczesna koncepcja praw człowieka* [*La conception contemporaine des droits de l'homme*], dans : *Księga pamiątkowa ku czci Konstantego Grzybowskiego* [*Livre commémoratif en l'honneur de Konstanty Grzybowski*], Kraków, pp. 58 et suiv.

[21] Au sujet de la conception contemporaine des droits naturels, relative aux droits de l'homme voir S. Zawadzki : *Państwo dobrobytu. Doktryna i praktyka* [*L'État-providence. Doctrine et pratique*], Warszawa 1964, pp. 226 et suiv. ; K. Opałek : *Problem ograniczeń podstawowych praw i wolności obywatelskich przez ustawy zwykłe* [*Le problème de limitation des droits et libertés civiques fondamentaux par des lois ordinaires*], dans : *Księga pamiątkowa...* [*Livre commémoratif...*], pp. 134 - 136 ; F. Castberg : *Natural Law and Human Rights,* « Revue des Droits de l'Homme », Vol. 1, 1968, pp. 14 - 40.

pression de la corrélation des intérêts d'un individu et de la société. Dans les pactes, bien qu'ils proclament certains soi-disant droits collectifs [22], dominent en majeure partie les éléments de la conception individualiste.

Le pacte économique admet les limitations des droits particuliers « exclusivement en vue de promouvoir le bien-être général dans la société démocratique » (art. 4). La clause de la société démocratique, qui est la directive d'interprétation pour d'autres dispositions des pactes, doit avoir le caractère universel et supraconstitutionnel. Le pacte politique stipule que la limitation des droits ne peut avoir lieu qu'« en cas où le danger public exceptionnel menace l'existence de la nation et dont il a été communiqué dans un acte officiel » (art. 4 pt 1er). En même temps, on y énumère d'une manière taxative les droits qui, sans égard aux circonstances, ne peuvent pas être soumis aux restrictions. La Constitution ne comporte pas de clause générale de cette sorte précisant les conditions de limitation des droits fondamentaux. Cependant dans les circonstances indiquées dans les pactes se produirait sans doute la limitation de certains droits par voie législative. Il semble qu'une telle possibilité générale devrait être prévue par la Constitution.

Les droits formulés dans la Constitution ont le caractère de classe. Les dispositions relatives aux droits fondamentaux et aux libertés civiques sont interprétées à la lumière des dispositions qui précisent le régime socio-économique et politique de l'État. De plus, la Constitution indique expressément le caractère de classe des droits politiques dans les dispositions qui précisent les limites d'en bénéficier.

Les pactes seront interprétés dans tout État conformément aux conceptions idéologiques et politiques de la classe étant au pouvoir. Dans le régime socialiste, ces droits ont pour but de servir la réalisation du principe de la souveraineté du peuple travailleur. Du principe en question résulte que certains groupes humains vivant de l'exploitation du travail d'autrui peuvent être privés de certains droits, notamment politiques [23]. Il est clair que l'État veille à ce que les droits civiques ne soient pas utilisés pour le renversement du régime politique existant ou bien dans les buts contraires aux intérêts de la classe dirigeante. Dans la pratique, la question peut être poser de savoir quelle manière de la jouissance

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[22] Au sujet des soi-disant « droits collectifs » cf. R. Pelloux : *Réflexions sur les libertés collectives*, « Revue des Droits de l'Homme », Vol. 1, 1969, pp. 368 - 372.

[23] C. F. Siemieński : *Podstawowe prawa, wolności i obowiązki obywateli w europejskich państwach socjalistycznych* [*Les droits, libertés et devoirs fondamentaux des citoyens dans les États socialistes européens*]. Rapport donné lors de la conférence tenue à l'Université de Poznań, intitulé *Droits, libertés et devoirs fondamentaux des citoyens de la R.P.P. sur une toile de fond du monde contemporain* (cité ci-après conférence de l'Université de Poznań), Poznań 1972, ronéotype, pp. 10 - 12.

des droits et libertés est conforme aux intérêts du peuple travailleur et à qui appartient l'appréciation. Le postulat s'impose ainsi que les dispositions de la Constitution définissent la notion des intérêts du peuple travailleur ou bien précisent la voie et les conditions dans lesquelles, eu égard à ces intérêts, peut se faire la limitation de certains droits. On propose également que toute décision d'un organe administratif prise à ce sujet puisse être l'objet d'un recours porté en justice par toute personne intéressée [24]. Une telle solution garantirait à la personne « dont les droits ou libertés [...] ont été violés, l'obtention d'une satisfaction efficace » (art. 2 al. 3 du pacte politique).

L'étendue de la jouissance des droits et libertés est déterminée non seulement par leur caractère de classe, mais aussi par le contenu du principe de l'égalité des droits. Ce principe n'est pas, à mon avis, un droit distinct, mais il caractérise d'une manière générale tous les droits et libertés des citoyens. La Constitution (art. 66 et 69) proclame l'égalité des droits sans distinction de sexe, de nationalité, de race ou de religion. Ce n'est que dans le cas des droits électoraux que la Constitution ajoute aux qualités déjà mentionnées plus haut la formation, la durée du domicile, l'origine sociale, la profession et la situation matérielle. Des considérations présentées ci-dessus résultent deux conclusions : 1° ne sont pas admissibles les actes juridiques qui introduisent la discrimination ou les privilèges pour les citoyens eu égard à leur sexe, nationalité, race ou religion, 2° est admissible la différenciation des citoyens en ce qui concerne les droits qui leur ont été conférés eu égard à d'autres qualités [25]. Les pactes imposent aux États le devoir de garantir les droits y formulés sans faire de distinction de race, de couleur, de sexe, de langue, de religion, d'opinions politiques et autres, d'origine nationale et sociale, de fortune, de naissance ou de n'importe quelle autre situation (art. 2). Le principe constitutionnel de l'égalité des droits est donc plus restreint que celui qui est postulé par les pactes.

La réglementation constitutionnelle de l'égalité des droits peut prendre une double forme. D'une part, on postule le catalogue le plus large possible, presque énumératif de toutes les qualités à l'égard desquelles doit être maintenu le principe d'égalité. Il paraît tout de même qu'une telle énumération est impossible et n'englobera jamais toutes les sortes d'iné-

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[24] K. Biskupski : *Zagadnienie praw obywatelskich w państwach typu socjalistycznego* [*La question des droits civiques dans les États de type socialiste*], « Zeszyty Naukowe SGSZ », 1957, n° 3, pp. 57 et suiv.

[25] F. Siemieński : *Równość obywateli wobec prawa* [*L'égalité des citoyens devant la loi*], dans : *Podstawowe prawa i obowiązki obywateli PRL* [*Les droits et devoirs fondamentaux des citoyens de la R.P.P.*], ouvrage collectif sous la rédaction de A. Łopatka, Warszawa 1968, pp. 36 - 41.

galités possibles discriminant juridiquement les citoyens qui se trouvent objectivement dans la situation identique. Ainsi la seconde solution s'impose qui admet que le principe de l'égalité des droits caractérise, en règle générale, l'ensemble des droits et libertés et se ramène à l'égalité devant la loi ainsi qu'au principe d'après lequel « les choses égales doivent être traitées également, et les choses inégales — d'une manière équivalente ». Ce n'est que dans le cadre de ce second aspect qu'on peut établir d'une manière normative quelles inégalités ne doivent pas avoir d'importance juridique. La réglementation de cette question est laissée, en règle générale, au législateur ordinaire. Cette solution paraît être plus pratique, bien que les Constitutions de la Bulgarie (art. 35) et de la République Démocratique Allemande (art. 20) récemment votées aient élargi le principe de l'égalité des droits.

Le principe de l'égalité des droits est mis à la première place dans le texte des deux pactes, ce qui, indépendamment de la teneur de l'art. 2 cité plus haut, signifie qu'il se rapporte à tous les droits. Dans notre Constitution, ledit principe est placé entre les droits socio-économiques et les droits politiques et libertés individuelles. Cela ne paraît pas être juste. La structure intérieure de la Constitution, et en particulier sa systématique, est déterminée non seulement par des exigences techniques et rédactionnelles, mais elle joue un rôle essentiel dans son interprétation [26]. C'est pour cette raison aussi que le principe de l'égalité des droits doit figurer au début du chapitre consacré aux droits et libertés civiques.

Il y a beaucoup de droits qui ne sont pas seulement les droits du citoyen, mais aussi les droits de l'homme, par exemple l'inviolabilité personnelle, l'inviolabilité du domicile. Cela est expressément accentué par le pacte politique qui oblige les États à assurer les droits « à tous les individus qui se trouvent sur leur territoire et qui relèvent de leur juridiction » (art. 2 pt 1). Cependant les formulations de la Constitution suggèrent que ce ne sont que les citoyens qui sont autorisés à jouir des droits et libertés. La pratique dans ce domaine va beaucoup plus loin que la rédaction littérale des dispositions de la Constitution. Il paraît donc que les dispositions de la loi fondamentale doivent sanctionner cette pratique.

5. Il y a de considérables différences entre le catalogue constitutionnel

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[26] Cf. A. Burda : *Prawa obywatelskie w konstytucjonalizmie socjalistycznym, Studia z zakresu konstytucjonalizmu socjalistycznego* [*Les droits civiques dans le constitutionnalisme socialiste, Études en matière de constitutionnalisme socialiste*], Wrocław 1969, pp. 183 et suiv.; M. Sobolewski : *Systematyka zasad konstytucji* [*La systématique des principes de la constitution*], « Państwo i Prawo », 1952, n° 11, pp. 615 et suiv.; W. Zakrzewski : *Konstytucja państwa a konstytucja społeczeństwa,* [*La constitution de l'État et la constitution de la société*], « Państwo i Prawo », 1969, n° 11, p. 781.

des droits et libertés et les dispositions du pacte politique. Certaines d'entre elles résultent du fait que de nombreux droits formulés dans le pacte ne sont réglés que par la législation ordinaire.

Le grand groupe de dispositions du pacte a pour but de garantir « le droit à la vie, à la liberté et à la sécurité individuelle » ainsi que les droits des personnes privées de liberté. Les devoirs imposés dans ce domaine à l'État sont précisés d'une manière assez détaillée. Les dispositions légales, et en premier lieu celles du code de procédure pénale, sont non seulement conformes aux dispositions du pacte, mais, dans de nombreux cas, elles développent les idées dont il s'est inspiré [27].

Néanmoins certains doutes peuvent naître en ce qui concerne la réponse à la question de savoir si le fait de laisser presque entièrement à la disposition de la législation ordinaire le problème de la réglementation de la sphère si importane des rapports sociaux, est juste. La Constitution, dans la disposition relative à l'inviolabilité personnelle (art. 74), ne mentionne qu'une seule forme de sa limitation : la privation du citoyen de la liberté. La conclusion pourrait donc s'imposer que la Constitution identifie la notion de l'inviolabilité personnelle avec la protection du citoyen contre la privation de celui-ci de la liberté, ou bien qu'en dehors de la privation de la liberté n'existent pas d'autres formes de porter atteinte à l'inviolabilité personnelle. Les deux interprétations sont évidemment fausses [28].

La notion de « la liberté et de la sécurité individuelle », dont se sert le pacte, est plus large, c'est-à-dire elle comporte plus d'attributions que le droit constitutionnel à l'inviolabilité personnelle. De plus, la Constitution, dans l'art. 74 pt 1, ne précise pas les attributions du législateur ordinaire en matière de publication des normes juridiques prévoyant de différentes formes de limitation de la liberté individuelle, par exemple par les organes extrajudiciaires. Cependant le pacte dispose expressément que la personne arrêtée doit être traduite « devant le tribunal ou devant la personne autorisée à exercer le pouvoir judiciaire » (art. 9 al. 3). Il est aussi peu clair dans quel sens la Constitution se sert, dans la disposition citée plus haut, des expressions « arrestation » et « détention ».

Un certain développement du droit à la liberté individuelle constituent les dispositions du pacte (art. 12) qui proclament « la liberté de circulation et celle d'élire domicile ». Je juge comme non fondée une opinion que de l'art. 74 pt 1 de la Constitution résulte la liberté de circulation, le droit d'élire domicile permanent de même que la liberté morale et la

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[27] J. Bafia : *op. cit.*, pp. 41 - 52.

[28] Cf. M. Lityński, A. Murzynowski : *Niektóre prawa osobiste obywateli w świetle art. 74 Konstytucji PRL oraz ważniejszych ustaw szczegółowych* [*Certains droits individuels des citoyens à la lumière de l'art. 74 de la Constitution de la R.P.P. et des lois détaillées plus importantes*], « Nowe Prawo », 1957, n° 10, p. 53.

liberté de disposer des biens personnels et patrimoniaux [29]. En admettant l'interprétation de l'art. 74 ci-dessus exposée, il faut déclarer comme contraires à la Constitution tous les actes réglementaires qui limitent la liberté d'élire domicile permanent (p. ex., les actes réglementaires relatifs aux villes fermées, à l'interdiction d'inscrire sur le livre des locataires), la libre disposition des biens immeubles, etc. Il est de toute évidence que les libertés de cette sorte ne peuvent pas, pour des raisons sociales ou économiques, être garanties d'une manière complète et absolument universelle. Par suite à ce qu'il a été dit plus haut, certains postulats s'imposent pourtant, à savoir : 1° l'élargissement du catalogue constitutionnel des libertés individuelles, par exemple en ce qui concerne la liberté de circulation sur tout le territoire de l'État, laquelle résulte enfin explicitement de l'ensemble des dispositions de la législation ordinaire et est totalement garantie dans la pratique ; 2° la précision dans la Constitution des compétences des organes respectifs, du mode et des conditions dans lesquelles peut se produire la limitation de ces droits et libertés. Il serait utile, paraît-il, de prendre pour modèle les solutions admises par les Constitutions de la Tchécoslovaquie (art. 31), de la Yougoslavie (art. 51) et de la République Démocratique Allemande (art. 32), dont les dispositions respectives garantissent directement la liberté d'option de domicile et précisent en même temps les circonstances dans lesquelles peut se faire la limitation de celle-ci.

L'inviolabilité du domicile et de la correspondance est protégée dans le pacte (art. 17) par l'institution de l'interdiction d'ingérence arbitraire ou illégale « dans la vie privée, familiale, domestique ou dans la correspondance », de même que par l'ordre d'assurer la protection légale convenable contre les actes de cette sorte. La disposition de la Constitution a pour but, en premier lieu, la protection de l'inviolabilité du domicile et du secret de la correspondance au cours de la procédure pénale. Ces libertés sont protégées dans la Constitution d'une manière indirecte, car elle renvoie en la matière à la législation ordinaire. Il n'existe pas de loi qui aurait précisé d'une manière générale les conditions dans lesquelles peut se faire l'infraction à l'inviolabilité du domicile.

La disposition du pacte citée plus haut interdit également de porter atteinte à l'honneur et à la réputation du citoyen, en obligeant en même temps les États à assurer la protection légale appropriée en cette matière. En Pologne, ce sont les lois et, en premier lieu, les dispositions du code de procédure pénale qui décident des genres et de l'étendue des limitations possibles des libertés dont il est question dans l'art. 74 de la Constitution.

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[29] T. Nowak : *Nietykalność osobista* [*L'inviolabilité personnelle*], dans : *Podstawowe prawa i obowiązki...* [*Les droits et devoirs fondamentaux...*], p. 164.

La justesse d'une telle solution peut susciter certains doutes. La Constitution ne comprend pas en effet d'instructions concernant les restrictions possibles — en dehors des clauses générales telles que l'intérêt du peuple travailleur — en laissant en la matière une pleine liberté d'action au législateur ordinaire. En même temps, la norme de l'art. 74 § 2 admet explicitement la limitation du droit à l'inviolabilité personnelle [30]. Il paraît que la Constitution doit au moins d'une manière générale préciser la voie et les conditions dans lesquelles peut se faire la limitation desdites libertés.

Relativement peu de place occupent dans le pacte les droits directement politiques [31] ; les dispositions de la Constitution relatives aux droits électoraux sont développées d'une manière considérablement plus large. L'étendue des droits politiques, qui résulte de la conception admise en matière de système constitutionnel de l'État, ne peut pas être réglée d'une manière supranationale par un acte du droit international et c'est pourquoi la modération dont ont fait preuve les auteurs du pacte est, dans ce cas, tout à fait compréhensible. En outre, le pacte politique a en premier lieu pour but de protéger les libertés fondamentales et s'occupe au degré beaucoup moindre du statut politique du citoyen.

6. La réalité des droits et libertés proclamés dans la constitution dépend du degré d'assurance de ceux-ci par les garanties matérielles et juridiques convenables. Les unes et les autres sont indispensables, car les garanties matérielles n'agissent pas automatiquement.

Le pacte ne précise pas en principe les garanties matérielles qui, dans la Constitution, occupent une place fondamentale. Certains droits et libertés, par exemple la liberté de parole, de la presse, de réunion, de meetings, de défilés, de manifestation (art. 71), le droit d'association (art. 72) ne sont assurés dans la Constitution que par les garanties matérielles. Il manque par contre dans la Constitution de garanties légales qui protégeraient les droits civiques contre l'infraction à ceux-ci par les organes d'État. Des dispositions du pacte politique résulte expressément le devoir de l'État : a) d'assurer que tout individu dont les droits ont été violés obtienne une satisfaction efficace, même si la violation du droit a été faite par les personnes agissant en qualité officielle, b) d'assurer que le droit de réclamer une telle satisfaction soit précisé par les autorités législatives,

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[30] K. Opałek : *op. cit.*, p. 143.

[31] Je cite ce terme après D. Wojtkowiak (*Konstytucyjne wolności obywatela PRL* [*Les libertés constitutionnelles du citoyen de la R.P.P.*], « Roczniki Prawnicze, Ekonomiczne i Socjologiczne », 1970, n° 3, p. 15) en vue de définir ces droits « qui donnent au citoyen les compétences pour entreprendre les actions qui produisent les effets juridiques déterminés et qui sont liés directement à l'activité politique de l'État ».

administratives ou judiciaires compétentes, c) de développer une possibilité de satisfaction par voie judiciaire.

L'une des garanties des droits et libertés est la façon de formuler les dispositions respectives de la Constitution. De la nature même des dispositions de la Constitution il résulte qu'elles doivent se caractériser par le degré assez haut de généralité. Si l'on compare les façons de formuler les dispositions dans le pacte et dans la Constitution de la République Populaire de Pologne, il paraîtra indispensable de donner à ces dernières un caractère plus juridique [32]. Le caractère déclaratoire excessif de celles-ci signifie en effet qu'une large liberté a été laissée aux organes législatifs et parfois aux organes exécutifs. Dans une telle situation, il est même très souvent difficile d'apprécier la conformité des lois ou actes administratifs avec la Constitution.

Les dispositions particulières du pacte politique, indépendamment de la clause citée plus haut qui précise d'une manière générale les conditions dans lesquelles peut se faire la limitation des droits, déterminent ces circonstances également à l'égard des droits particuliers. Ainsi, par exemple la liberté des cultes ou d'opinions ne peut être soumise qu'à de telles restrictions prévues par la loi qui sont nécessaires pour la protection de la sécurité publique, de l'ordre, de la santé et de la morale publique ou bien des droits et libertés fondamentaux d'autres personnes (art. 18). De la même manière est formulée la disposition relative au droit de réunion et d'association (articles 21 et 22).

Il manque de dispositions de cette sorte dans notre Constitution. Il paraît donc souhaitable d'y insérer les dispositions précisant les conditions dans lesquelles peut se produire la limitation des droits particuliers ainsi que de désigner des organes compétents de même que de la voie applicable en la matière. Lesdites dispositions doivent être formulées d'une manière non équivoque, qui obligerait le législateur à régler strictement le mode de jouissance par un citoyen des droits et libertés qui lui ont été conférés. Les délais convenables doivent être observés en ce qui concerne l'adoption des lois éventuelles ayant le caractère exécutif.

Il manque dans la Constitution de dispositions qui garantiraient au citoyen la possibilité de revendiquer ses droits ou bien qui assureraient la réalisation de la satisfaction en cas d'infraction à ceux-ci. L'institution de plaintes et de réclamations (art. 73) joue le rôle de peu d'importance. Le devoir de rendre les actes réglementaires de cette sorte découle expressément des dispositions du pacte politique. Il serait difficile de pour-

[32] Cf. A. Burda : *Rozwój podstawowych praw, wolności i obowiązków obywatelskich w Polskiej Rzeczypospolitej Ludowej* [*Le développement des droits, libertés et devoirs civiques fondamentaux en République Populaire de Pologne*], conférence de l'Université de Poznań, p. 5.

suivre ici les considérations sur les garanties institutionnelles optimales des droits et libertés. Il paraît pourtant que l'introduction de la juridiction administrative postulée d'une manière de plus en plus universelle, pourrait être ici une des garanties essentielles. C'est justement cette sorte de protection judiciaire qui, en tant que la plus souhaitable, est prévue par le pacte.

Le droit d'association, la liberté de conscience et de religion, la liberté de parole, de la presse, d'association sont traités dans la littérature comme les droits politiques. Dans certaines circonstances, ils peuvent sans doute être exploités pour des buts politiques. Pourtant ce sont, en premier lieu, les droits et les libertés individuels, sans lesquels l'homme vivant dans la société organisée ne peut pas se passer [33]. Pour ces raisons, ils doivent être garantis de la même façon que les autres droits et libertés individuels.

7. Les dispositions du pacte économique sont en majeure partie formulées d'une manière conforme au but. En imposant aux États le devoir de réaliser le but défini, elles précisent également, souvent d'une manière détaillée, les moyens et les méthodes de la réalisation de celui-ci. La Constitution impose également au législateur ordinaire les devoirs positifs à cet égard, notamment en ce qui concerne les droits ayant le caractère dynamique. La règle constitutionnelle d'élargissement des droits et libertés par voie de la législation ordinaire se rapporte aussi aux autres droits et libertés ; sa réalisation est facile à remarquer au cours des années.

Du point de vue de la formulation des dispositions, il est intéressant de voir la différence qui existe entre le pacte politique et le pacte économique. Le pacte politique, dans la plupart des dispositions, proclame les droits de « chacun », par contre, le pacte économique impose les devoirs aux États. Ces différences n'ont pas peut-être d'importance pratique essentielle, car les droits politiques peuvent, eux aussi, être efficacement assurés exclusivement par l'État ; elles ont pourtant une importance idéologique et politique. C'est pour la première fois à l'échelle tellement large qu'on a reconnu l'existence d'un rapport indissoluble entre ces deux catégories des droits, de même qu'on a reconnu que c'est justement l'État qui a le devoir de garantir les droits socio-économiques. Les différences qui existent dans la façon de formuler les dispositions des deux pactes étaient d'ailleurs un des arguments qui ont servi à contester le caractère juridique des obligations résultant du pacte économique.

La précision détaillée dans le pacte économique des méthodes d'assurance des droits particuliers cause qu'il est souvent difficile d'établir le catalogue des droits reconnus dans ce pacte pour les droits fondamentaux.

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[33] F. Siemieński : *Podstawowe prawa, wolności i obowiązki...* [*Les droits, libertés et devoirs fondamentaux...*], p. 17.

Ainsi, par exemple, il existe certains doutes quant à la question de savoir si le droit de grève (art. 8 al. 1er lettre d) est un droit autonome ou bien s'il est une des garanties juridiques de fonder des syndicats (art. 8 al. 1er lettre a). De la systématique desdites dispositions résulte plutôt cette seconde interprétation.

En rapport avec cela la question se pose de savoir si l'État, en ratifiant le pacte économique, assume l'obligation de réaliser les principes essentiels de celui-ci en admettant que les méthodes indiquées de sa réalisation sont traitées par les auteurs du pacte comme optimales mais non pas uniques ; ou bien l'État est obligé de réaliser le pacte exclusivement par les moyens qui y ont été formulés. La première interprétation peut paraître contraire aux principes du pacte, parce qu'elle laisse en effet trop de liberté à l'État. En adoptant la seconde position, il faut pourtant prendre en consiédaration le fait que plusieurs dispositions ne seront pas réalisées par les États qui ont ratifié le pacte.

Le droit au travail et au repos se trouve, de même que dans la Constitution, à la tête des dispositions du pacte. Il existe pourtant certaines différences entre ces dispositions. Le pacte parle du droit au libre choix du travail, pendant que des articles 58 et 14 de la Constitution résulte le devoir de travail et celui de respecter la discipline de travail. Il est vrai que, dans la littérature, on accepte l'opinion que le devoir constitutionnel de travail ne signifie pas l'obligation au travail, mais que c'est le principe de la politique de l'État visant à limiter d'autres sources de subsistance [34]. Cela n'exclue pas pourtant la possibilité d'introduire l'obligation du travail en tant que l'un des instruments de la réalisation de cette politique. La loi instituant une telle obligation ne serait pas contraire à la Constitution, par contre, elle serait non conforme aussi bien au pacte politique (art. 8), qui mentionne d'une manière énumérative les formes licites du travail obligatoire, qu'à la convention de l'Organisation Internationale du Travail sur la suppression du travail obligatoire, convention qui a été ratifiée par la Pologne. Il paraît que les dispositions de la Constitution, pour qu'elles soient conformes au pacte, doivent tenir compte de l'élément du choix volontaire du travail, du choix correspondant aux qualifications professionnelles.

La Constitution comprend exclusivement les garanties matérielles du droit au travail. Les moyens de réalisation de ce droit, précisés dans le pacte, imposent aux États, entre autres, le devoir de créer les garanties institutionnelles.

L'étendue du droit au travail est largement discutée dans notre litté-

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[34] W. Piotrowski : *Prawo do pracy* [*Droit au travail*], dans : *Podstawowe prawa i obowiązki...* [*Les droits et devoirs fondamentaux...*], p. 108.

rature et il n'y manque pas de controverses à ce sujet. On postule, d'une part, le renforcement du droit de chacun au travail [35], et de l'autre, la protection de la stabilité du rapport de travail [36]. Indépendamment de cela lequel de ces éléments jouit de la priorité, les garanties institutionnelles sont nécessaires en vue d'assurer le droit au travail d'une manière réelle. Le règlement des problèmes essentiels portant sur les rapports de travail doit avoir lieu par la voie d'édiction des lois et non pas par les actes des organes administratifs. La Constitution doit imposer aux organes d'État le devoir de créer des conditions indispensables pour que les garanties matérielles puissent remplir leurs fonctions. Cette voie est partiellement suivie par la Constitution de la République Démocratique Allemande qui dispose que le droit au travail est garanti par les institutions déterminées du droit du travail (art. 24). Les garanties institutionnelles, formulées justement dans la Constitution, sont indispensables également pour l'assurance d'une garantie réelle du droit au repos (art. 59). La pratique prouve en effet que le devoir constitutionnel d'introduction de la journée de travail de huit heures n'a pas été toujours respecté [37].

Certaines dispositions du pacte ne trouvent pas d'équivalents dans les dispositions de la Constitution, par exemple le droit de tout individu « au niveau de vie convenable » et à « l'amélioration constante des conditions de subsistance » (art. 11 al. 1er). En analysant l'ensemble des dispositions de la Constitution, notamment à la lumière de l'article 3, ainsi que les dispositions de la législation ordinaire, on peut remarquer que l'assurance des conditions indiquées dans la disposition du pacte au-dessus mentionnée est un des buts de la politique de l'État.

De lege ferenda un postulat peut s'imposer, celui d'élargir le catalogue constitutionnel des droits socio-économiques et d'y inclure le droit au logement (il est dans la Constitution de la R.D.A. — art. 37) qui répond à l'un des besoins biologiques les plus élémentaires de l'homme. La satisfaction des besoins en matière de logements a été reconnue pour l'une des tâches essentielles de l'État dans le programme de la politique socio-économique élaboré au cours du VIe Congrès du Parti Ouvrier Polonais Unifié. La question d'inclusion éventuelle du droit au logement ou bien d'autres droits socio-économiques dans les dispositions constitutionnelles est pourtant discutable. Elle dépend en effet du caractère qu'on veut attribuer aux dispositions de la Constitution. Si celle-ci a pour but de formuler les droits d'une manière réaliste, et non pas idéale, l'octroi constitutionnel

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[35] M. Matey : *op. cit.*, p. 507.

[36] W. Piotrowski : *Podstawowe prawa socjalne i kulturalne obywateli PRL* [*Les droits sociaux et culturels fondamentaux des citoyens de la R.P.P.*], conférence de l'Université de Poznań, copie dactylographiée, p. 10.

[37] *Ibid.*, p. 11.

du droit au logement dépasserait encore, à l'heure actuelle, les possibilités économiques de l'État.

En règle générale, le catalogue constitutionnel des droits socio-économiques est conforme au catalogue des droits formulés dans le pacte. En prenant en considération l'ensemble des dispositions du droit interne, on peut remarquer que l'étendue de certains droits est plus large que celle qui est prévue dans le pacte [38]. Il paraît pourtant qu'à l'occasion de l'institution des droits socio-économiques il faudrait parler plus souvent que jusqu'à présent des devoirs de l'État ou de ses organes particuliers. Les dispositions de la Constitution ne garantissent directement aucun droit et leur rôle consiste justement à obliger les organes d'État à entreprendre les actions définies. A l'occasion de la rédaction des dispositions respectives, il doit être tiré profit de l'expérience qui résulte de l'application des normes constitutionnelles actuellement en vigueur en Pologne ainsi que des expériences d'autres États socialistes [39].

8. La doctrine socialiste du droit constitutionnel occupe aujourd'hui la position que les dispositions constitutionnelles relatives aux droits et libertés civiques fondamentaux ont le caractère normatif [40]. Par contre, presque toutes les dispositions du pacte économique et plusieurs dispositions du pacte politique, bien qu'elles imposent les devoirs de caractère juridique, sont, dans un certain sens, un programme à l'avenir pour les États particuliers, voté par la société internationale. Et il faut tenir compte de ce caractère des pactes.

Plusieurs dispositions de la Constitution de la République Populaire de Pologne ont le caractère dynamique ; elles contiennent l'ordre adressé au législateur ordinaire d'entreprendre une activité correspondant aux besoins toujours croissants. Il est bien clair en effet que la Constitution ne peut pas régler tous les droits. Elle est un catalogue des droits et libertés reconnus pour fondamentaux dans un pays donné à une étape donnée de son évolution. On ne peut pas donc s'attendre à la conformité absolue des dispositions des pactes avec les constitutions des États qui ont ratifié ces pactes. De plus, il convient de prendre en considération aussi les cas où, quoique l'idéologie de la classe dirigeante et son programme soient conformes aux dispositions des pactes, dans un moment donné il manque cependant de conditions socio-économiques pour la réalisation d'un certain droit. Il serait donc difficile de l'insérer dans la Constitution.

Le rapport entre le droit interne et le droit international est réglé par les normes du droit interne des États particuliers. Dans la littérature

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[38] Cf. les ouvrages cités de K. Kolasiński et M. Matey.

[39] A. Burda : *Rozwój podstawowych praw* ... [*Le développement des droits*...], p. 8.

[40] K. Opałek : *op. cit.*, pp. 137 et suiv.

polonaise on admet presque à l'unanimité que l'accord international produit ses effets dans les relations intérieures *proprio vigore* [41]. Cette thèse a été formulée aussi bien à base des intentions du législateur constitutionnel que de la pratique constitutionnelle. Néanmoins la réglementation constitutionnelle du problème en question est postulée de plus en plus souvent, ce qui est motivé par plusieurs arguments.

La Constitution doit souligner le devoir d'accomplir par les autorités d'État les obligations nées du droit international. Une disposition concrète constituerait la garantie que les traités ratifiés — et parmi eux, à l'avenir, les pactes — seront respectés et appliqués dans les relations régies par le droit interne [42].

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[41] S. Rozmaryn : *Skuteczność umów międzynarodowych PRL w stosunkach wewnętrznych* [*L'efficacité des accords internationaux de la R.P.P. dans les relations intérieures*], « Państwo i Prawo », 1962, n° 12, pp. 951 - 963 ; cf. aussi K. Skubiszewski : *Prawo PRL a traktaty* [*Le droit de la R.P.P. et les traités*] (« Roczniki Prawnicze, Ekonomiczne i Socjologiczne », 1972, n° 3, pp. 1 - 24) où l'auteur analyse les opinions à ce sujet, formulées dans notre littérature.

[42] W. Morawiecki : *Konstytucja a społeczność międzynarodowa* [*La constitution et la société internationale*], Warszawa 1972, INP PAN, ronéotype, pp. 37 - 38.

Legal Foundations of the West Berlin Status

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1. Introductory Remarks

The specific legal and political situation of West Berlin was the cause of particularly dangerous tensions smouldering in the centre of Europe. The Berlin problem was a function of the contradictions rending Europe. Thus, necessarily, any normalization of relations in this area could not sidestep a settlement of the status of West Berlin and its links with the outside world. Complex as it was already, the issue was further bedevilled by the "*Berlin iunctim*" whereby West Germany tied the ratification of the treaties concluded with the Soviet Union and Poland to an agreed formula on West Berlin.[1]

It was matter-of-course for any closer definition of the legal and political status of West Berlin to be dictated by the current political requirements of this or that State, or group of States.

The Federal Republic of Germany was stubbornly committed to the *de facto* and *de jure* incorporation of West Berlin into its legal and economic system and to the conferment on the city of a Land status.

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[1] "Without détente in and around Berlin there cannot be détente in Europe," said Chacellor Willy Brandt. See "Bulletin des Presse-und Informationsamtes der Bundesregierung," (herein after cited as "Bulletin"), 3 Dec., 1970.

This objective was served by special provisions in its Basic Law,[2] its legislation, and a number of executive orders.[3]

For their part, the three Western Powers—the United States, Great Britain and France—refused to treat West Berlin as one of the Länder and reserved the right to issue regulations on the area of the City and to exercise authority within the limits specified by them.[4]

The socialist countries, including the ones directly concerned (GDR and USSR), adhered constantly to the view that "West Berlin possesses a separate status and does not belong to West Germany."[5] This position was enunciated in international agreements to which Poland was also a party.[6]

These differing political and legal attitudes gave rise to endless conflicts and aggravated tensions in the centre of Europe. A solution of the problem was impeded by the vagueness of the legal status of Berlin, a difficulty increased by the fact that any settlement required the approval of at least seven parties: the Four Great Powers, both German States and the West Berlin Senate. Furthermore, needless to say, this was the subject-matter of consultations within the alliances to which they belonged, the Warsaw Treaty in the case of the Soviet Union and the GDR, NATO in the case of the Western Powers and the FRG. This web of contingencies indicate what a tangled issue West Berlin was.

Eventually, on 3 September, 1971, after long and protracted negotia-

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[2] Cf. Arts 23, 127, 144 of the Basic Law—*Grundgesetz für die Bundesrepublik Deutschland von 23. Mai 1949 in der Fassung des 15. Änderungsgesetzes vom 8, Juni 1967,* in the series: *Dokumente des geteilten Deutschland. Quellentexte zur Rechtslage des Deutschen Reiches, der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik,* ed. by I. von MÜNCH, Stuttgart 1968, pp. 91 ff.

[3] For a documentation of this point see: *Problem Berlina Zachodniego (Dokumenty i komentarz) [The Problem of West Berlin (Documents and Commentary)],* Warszawa 1961, pp. 74 ff.

[4] See specifically the Declaration of the Allied Commandatura of the three Western Powers of 5 May, 1955—*Dokumente zur Berlin-Frage 1944—1959,* München 1959, pp. 241—4.

[5] This formulation is to be found in the Budapest Appeal addressed by the Warsaw Treaty States to all the countries of Europe. See "Trybuna Ludu" of 18 March, 1969.

[6] The terms used in Polish, Soviet, GDR, Czechoslovak and other socialist countries' documents was the general one of "an independent political unit situated on the territory of the GDR" or, as formulated in the Treaty of friendship, cooperation and mutual assistance between Poland and the GDR of 15 March, 1967, "a separate political unit" (Art. 6); the same formula is used in the GDR treaties with Czechoslovakia of 17 March, 1967 (Art. 8) and other countries. "Zbiór Dokumentów" ["Collection of Documents"], 1967, No. 3, pp. 303, 311.

tions,[7] a *modus vivendi* was hammered out in the form of an agreement between Four Great Powers, an integral part of which are Four Annexes.[8] The structure of this multilateral agreement is complex and multi-tiered: the text proper is supplemented by specific agreements between the Governments of the German States and between the GDR and the West Berlin Senate[9] and rounded off by a Final Quadripartite Protocol which gives the Four Powers *imprimatur* to the agreements reached by the German authorities. The agreement came into force on 3 June, 1972, the date set in the Final Quadripartite Protocol which was signed as soon as certain specified matters had been settled by "the competent German authorities."[10]

Has the Quadripartite Agreement clarified the legal status of West Berlin completely? Without a doubt certain aspects of its separateness have been made clear by its provisions. Nevertheless the result of the Agreement representing a classic compromise formula is that many of the previous controversies still remain unresolved. The Preamble of the Agreement states:

— first, that the signatories acted "on the basis of their quadripartite rights and responsibilities, and of the corresponding wartime and postwar agreements and decisions of the Four Powers, which are not affected;"

— second, that they reached agreement "taking into account the existing situation in the relevant area;"

— and third, that the agreement is "without prejudice to their legal positions."

This means that the decisions establishing an occupation régime in Germany still remain adequate for defining the current status of West

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[7] Talks opened on 26 March, 1970 in the former headquarters of the Allied Control Council in the American sector of Berlin and ended after 17 months of intensive negotiations with the conclusion of a quadripartite agreement on 3 Sept., 1971.

[8] Annex I: Communication of the Government of the USSR to the Governments of France, Great Britain and the United States; Annex II: Communication of the three Western Governments to the USSR Government; Annex III: Communication of the USSR Government to the three Western Governments; Annex IV: Exchange of communications between the USSR Government (A) and the three Western Governments (B). The original texts were published by the weekly "New Times," No. 37, 13 Sept., 1971 (in Russian, English and French). Different German versions have been published in the FRG and GDR: cf. *Das Viermächte-Abkommen über Berlin vom 3. September 1971* (publication of the Federal Government Press and Information Office) and the ADN version in "Neues Deutschland," 4 Sept., 1971.

[9] All texts in the Federal Office of Press and Information publication—*Die Berlin Regelung. Das Viermächte-Abkommen über Berlin und die ergänzenden Vereinbarungen,* Bonn 1971.

[10] "Bulletin," 6 June, 1972.

Berlin, the signatories of the Agreement having retained their quadripartite rights and responsibilities with regard to Germany and Berlin. The formula " without prejudice to their legal positions " means first and foremost that the legal issues which have been the subject of major disputes are excluded from the scope of the Agreement. In this way the Four Powers have left themselves leeway for a flexible approach : either the maintenance of the unchanged legal interpretations represented by them to date or a re-appraisal of their views and adjustment to a changed situation. For in essence the negotiated settlement, though expressed in the form of a multilateral international agreement and so of an instrument of international law, amounts to a political compromise. Its basis is a realistic assessment of the situation which has developed in West Berlin and " a desire to contribute to practical improvements " (Preamble) in the circumstances of this city and its inhabitants.

In other words, the separate status of West Berlin was not established on 3 September, 1971 since the signatories of the Agreement expressly refer to their rights and responsibilities as specified in the wartime and postwar decisions of the Four Powers. In the light of the Preamble, the Agreement must be seen as an amendment of the previous legal status and an adaptation of international obligations to the new situation.

Thus, in order to identify the new elements introduced by the Quadripartite Agreement of 3 September, 1971, it is necessary to give a general outline of the legal principles by which West Berlin was governed before this date.

2. The Concept of " Berlin " in International Treaties and the Actual State of Affairs

The first point which requires clarification is the territorial scope of the international agreements which defined the separate status of the capital of defeated Germany. It will be recalled that the socialist states demanded a settlement of the status of West Berlin on the grounds that since 7 October, 1949 the eastern part of the City had become an integral part of the German Democratic Republic whose capital it was. On the other hand, the Federal Republic and its Allies equated " Berlin " with the area of the municipality of Greater Berlin set up by the Lew of 27 April, 1920. This difference in viewpoints had its roots in the origins of the separate status of West Berlin which the Allies had decided in 1944 to exclude from the occupation zones in Germany and place under a joint occupation regime. This was reflected in a number of enactments in 1944—45, the crucial one being the American-British-Soviet Protocol of

12 September, 1944,[11] together with the amendments of 14 November, 1944[12] and 26 July, 1945.[13] Following the accession of France to this Protocol the final text of Article 1 dealing with the occupation zones in Germany and the administration of Berlin read :

" Germany, within her frontiers as they were on the 31 December, 1937, will, for the purposes of occupation, be divided into four zones, one to be alloted to each Power. Berlin will be a separate region occupied jointly by the Four Powers."

The document also specified the area embraced by Berlin which was to be placed under joint occupation and stated :

" An Inter-Allied Governing Authority, consisting of four Commandants, appointed by their respective Commanders-in-Chief, will be established to direct jointly its administration."

By thus placing the former capital of the Third Reich under joint occupation the Four Powers of the anti-Hitler coalition indicated that they intended to preserve the state unity of Germany. This intention was given formal expression in an Agreement on control machinery in Germany which provided that supreme authority in Germany was to be exercised by each of the Commanders-in-Chief of the Soviet, American, British and French armed forces in his respective zone of occupation " and also jointly, in matters affecting Germany as a whole."[14] An Allied Control Council was formed to discharge these joint supreme powers, while the joint administration of " Greater Berlin " was placed in the hands of a special, unified organ, the Inter-Allied Commandatura, subordinated to the Allied Control Council. These joint organs established by the occupying Powers were based in Berlin.

The establishment of a special status for Berlin, situated as it was inside the Soviet zone of occupation, implied the necessity of a separate regulation of traffic service between the Western Powers' Berlin garrisons and their zones of occupation. From an analysis of the agreements concluded in this period and the way in which the quadripartite occupation of Berlin operated it is clear that the Great Powers were not planning to create on the area of the City a fifth zone of occupation, but wanted, if anything, to emphasize their wish to maintain the State unity of Germany. On 7 July, 1945 an agreement was reached on the administration of Berlin[15] under which each Commander-in-Chief of the Allied Forces in Berlin

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[11] *UN Treaty Series*, vol. 227, p. 287.

[12] *Ibid.*, pp. 289—90.

[13] *Ibid.*, pp. 298—304. See also " Sbornik deystvuuščih dogovorov, soglašenij i konventsij zaklučennyh SSSR z innostrannymi gosudarstvami ; vol. 11, documents 451 and 452.

[14] *Ibid.*, doc. 453, pp. 62—65.

[15] *Documents on Germany under Occupation, 1945—1954*, London 1955, p. 39.

would act in turn as head of the Inter-Allied Military Commandatura for a period of 15 days. The Inter-Allied Commandatura took charge of the administration of Berlin on 11 July, 1945. Actually the system of quadripartite occupation continued until 16 June, 1948 and formally until 1 July, 1948.[16]

This date marks a turning point in the postwar history of the City. It ushered in a systematic disintegration of the uniform organization of Greater Berlin and the appearance of separate Magistrats. This division was sealed not only by the dissolution of the unified occupation organs for Germany (the Allied Control Council) and Berlin (the Allied Commandatura), but also by the termination of the joint German administration of the City.[17]

During the Berlin crisis (1948—1949) the principal issue became the question of access to the Western Sectors of Berlin. For in response to the Western Powers' separatist currency reform, the Soviet authorities imposed severe restrictions on communications with the Western zones of occupation. Berlin focussed the greatest tensions brought by the cold war in the relations between the one-time Allies of the anti-Hitler coalition. It has been noted in the literature of the subject that this was the first direct confrontation "from the position of strength" between the United States, Great Britain and France, and the Soviet Union.[18]

As a result of direct contacts between the Soviet and American UN representatives, Malik and Jessup, an agreement was eventually reached

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[16] *Ibid.*, pp. 314—315. The disturbances in cooperation between the occupying Powers were connected with the decisions taken by the London Conference of the Three Western Powers and Benelux (9 Feb.—6 March, 1948) regarding Germany. The refusal of the Western representatives on the Allied Control Council to provide an account on this Conference led Marshal V. D. Sokolovsky to announce the suspension of the Council activities on 20 March, 1948. *Ibid.*, pp. 284—5.

[17] *Ibid.*, pp. 346—349.

[18] R. Frelek, *Historia zimnej wojny* [*A History of the Cold War*], Warszawa 1971, pp. 99—102, regards this crisis as a particularly fateful development in the entire pattern of post-war international relations. By taking so strong a stand on the Berlin issue, he says, the Soviet Union was seeking to check the emergence of a separatist West German State and its inclusion in the nascent anticommunist grouping. Probably it also wanted to hasten the polarization of forces in Germany. The Western Powers, on the other hand, exploited the crisis for a show of strength, the consolidation of Western Europe under the leadership of the United States and the acceleration of the construction of a West German State. In addition the crisis was used as a clinching argument for the existence of a "communist peril." Finally it spurred the expansion of the armed forces of the West and contributed to the acceleration of the arms race. The English historian Louis Halle writes: "Throughout the first Berlin crisis the outbreak of a third world war, involving military combat on a vast scale all around the globe, seemed an imminent possibility." See *The Cold War as History*, London 1967, p. 167.

between the Four Powers on 4 May, 1949. Eight days later, all the restrictions introduced by the Soviet Government on 1 March, 1948 and, for their part, by the American, British and French Governments[19] in the sphere of communications, transport and trade between Berlin and the occupation zones of Germany were lifted. This averted the crisis, but at the same time it consolidated the new actual and legal situation which had arisen in the two parts of Berlin.[20] The only principle which survived in these altered circumstances was that of Four-Power responsibility for Germany and Berlin, but this had never, despite the commitments made during and after the war, been discharged jointly by all the occupying powers as far as Berlin was concerned, but separately, by the Western Powers in their sectors of the City and the Soviet Union in its.

3. The Shaping of the Separate Status of West Berlin

Any description of the present status of West Berlin must take account of a number of enactments by the three Western Powers, the German authorities in West Berlin and the Federal Republic, which were the corollaries of a policy that ran counter to what the Four Powers had agreed were the aims of the occupation of Germany with regard to this country "as a whole."

1. The original version of the Basic Law of the Federal Republic of Germany as drafted by the Chief Commission of the Parliamentary Council,[21] envisaged the inclusion of Berlin in the West German State as a 12th Land. On 22 April, 1949 the Foreign Ministers of the United States, United Kingdom and France advised the Parliamentary Council in Bonn to introduce into the draft an amendment deleting this clause in the forthcoming constitution of West Germany.[22] The result was that, though Greater Berlin

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[19] For the text of the Communiqué see "Zbiór Dokumentów," 1949, No. 4, p. 568.

[20] H. ZINK, [*United States in Germany 1944—1955*, Princeton 1957, p. 349], has pointed out that "with the breaking of the blockade American relations with the Russians never resumed even the unsatisfactory character of the 1945—48 period [...] West Berlin increasingly became a Western outpost in the Russian Zone and in the German Democratic Republic."

[21] A body set up on the decision of the London Conference of June 1948 and treated by the three Western Powers as the representative assembly of the people of the Western zones of occupation.

[22] A protest by the Soviet Military Administration in Germany was delivered in a communiqué issued on 11 Feb., 1949. See "Zbiór Dokumentów," 1949, No. 4, p. 359. Cf. L. PASTUSIAK, *Problem Berlina Zachodniego w latach 1949—1958* [*The Problem of West Berlin in the Years 1949—1958*], "Komunikaty Instytutu Bałtyckiego," 1971, No. 14, p. 3. For more see also this author's *Amerykanie w Berlinie Zachodnim: polityka Stanów Zjednoczonych wobec Berlina Zachodniego* [*The Americans in West Berlin: the Policy of the United States towards West Berlin*], Warszawa 1972.

appeared among the Länder subject to the Basic Law of the Federal Republic (Arts 23 and 127) certain qualifications were made in Article 144. The gist of these was clarified in a letter issued by the three Western Military Governors on 12 May, 1949, approving the Basic Law.[23] The United States, Great Britain and France declared that:

(1) The powers vested in the Federation by the Basic Law, as well as the powers exercised by Länder, are subject to the provisions of the Occupation Statute (point 2);

(2) The reservation regarding the effect of Articles 23 and 144 of the Basic Law is that Berlin, whose deputies were not accorded voting membership in the Bundestag or Bundesrat but left with the right to "designate a small number of representatives" to attend the meatings of the legislative bodies, was not to be "administered by the Federal Republic.[24]

On 1 September, 1950 the West Berlin City Council adopted the so-called "Berlin Constitution"[25] which (subject to subsequent amendments and reservations of the Western Powers) is still in force. It is significant that the Western Commandatura in approving on 29 August, 1950 this Constitution suspended Article I.2 and I.3[26] which, as submitted by the City Council had stated respectively that Berlin was a Land of the Federal Republic of Germany and that its Basic Law and legislation were binding on Berlin. Furthermore, the provisions of Article 87 of the West Berlin Constitution, which had envisaged full application of the Basic Law and Federal law order to Berlin, acquired by the statement of the Western Commadatura of 29 August, 1950 an interpretation unequivocally dismissing the demand that the Western Sectors of Berlin be included in the legal and political system of the Federal Republic.[27] In keeping with this

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[23] *Documents on Germany under Occupation*, pp. 390—391.

[24] *Ibid.* On 14 May, 1949 the basic principles of relations between the Western Sectors of Berlin and Western Zones of occupation were announced (the so-called Small Occupation Status). This document—and many later ones as well—still used the terms "Allied Commandatura," "Greater Berlin," even though they had become irrelevant, the one having in effect ceased to function and the other having ceased to exist as a result of the division of Berlin. On 21 June, 1949 the West Berlin City Assembly voted for the re-instatement of Article 23 of the Basic Law and "the incorporation of Berlin into the Federal Republic of Germany as its 12th Land" on the same footing as the other Länder. This demand was, however, rejected by the Western occupation authorities on 21 June, 1949. *Dokumente zur Berlin-Frage, 1944—1959*, München 1959, p. 130.

[25] Text in: I. von Münch, *op. cit.*, p. 159.

[26] *Documents on Germany under Occupation*, pp. 509—10.

[27] "Article 87 is interpreted as meaning that during the transitional period Berlin shall possess none of the attributes of a twelfth Land. The provisions of this Article"—according to the statement of the Western Commandatura of 29 Aug., of 1950—"concerning the Basic Law will only apply to the extent necessary to prevent

interpretation a number of amendments was introduced on 8 March, 1951 to the so-called Small Occupation Statute,[28] of which it is worth noting the substitution of " Greater Berlin " (Art. 4) by " Berlin " and the introduction of the following text of Article 5 :

" Any amendment to the Berlin Constitution and any new Berlin Constitution become effective only after they have been explicitly approved by the Allied Commandatura. All other legislation becomes effective without previous review by the Allied Commandatura but may be repealed or suspended by it."[29]

Thus these enactments reflected the fact that the existing provisions were to be applied only to the area actually under the occupation of the Western Powers, and also the explicit will to maintain a separate status of West Berlin, whereas the West German authorities and the organs of the West Berlin administration related to them, aimed at the incorporation of that part of the City into the legal and political system of the Federal Republic. To prevent the extension of the FRG legislation to the area and population of West Berlin, the Western Commandatura addressed (on 8 October, 1951) to the burgomaster of West Berlin and the Chairman of the West-Berlin House of Representatives a letter interpreting the respective provisions of the West Berlin Constitution.[30] It left no room for doubt that the FRG legislation is of no effect on the West Berlin area. A FRG law may become effective in West Berlin only through a resolution of the West-Berlin House of Representatives stipulating that " the provisions of the respective Federal law shall apply to Berlin." The same refers to the executive orders ; their transformation to the West Berlin area may occur only by a West-Berlin decree. Moreover, such a resolution or decree must explicitly indicate the appropriate West Berlin offices being counterparts to the Federal offices mentioned in the FRG legislative acts. " As long as the application of Article 1 paragraph 2 and 3 of the Berlin Constitution is suspended "—stated the letter of 8 October, 1951— " Berlin is not to be regarded as a Land of the Federal Republic."

2. Also reservations introduced by the Western Powers with regard to the extension to West Berlin of international agreements and obligations

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a conflict between this law and the Berlin Constitution. Furthermore, the provisions of any Federal law shall apply to Berlin only after they have been voted upon by the House of Representatives and passed as a Berlin Law." *Ibid.*

[28] Quoted after *Problem Berlina Zachodniego* [*Problem of West Berlin*], p. 85.

[29] The new version of Article 5 also stated that the Western Commandatura would abrogate or suspend legislative acts only in cases when they would be—according to its assessment— inconsistent with the amended Small Occupation Status and other enactments or regulations of the occupation authorities, or would seriously endanger basic occupation aims.

[30] *Dokumente zur Berlin-Frage,* pp. 174—175.

of the FRG Government were very significant. The Western Commandatura Declaration of 21 May, 1952[31] imposed the following conditions restricting in relation to the West Berlin area the validity of international agreements concluded by the Federal Republic :

(a) An agreement was to be reached between the FRG Government and the West Berlin Senate, according to which the Federal Government would include West Berlin in its commitments and the Senate would meet these commitments within the City area " without encroaching either upon the powers of the Allied Commandatura or the Berlin Constitution."

Furthermore, the Western Powers stipulated that the extension to Berlin of these agreements and arrangements should be explicitly mentioned in their texts or—if this should prove impossible—in additional declarations issued by the FRG upon signing any specific document.[32] Besides, the FRG was bound to inform the West Berlin Senate about entering into negotiations on any important international agreement which referred to the City's interests. At the same time the Western Powers authorized the FRG Government to include the Senate's representatives in international negotiations aimed at the conclusion of agreements having effect in West Berlin.

(b) The West Berlin Senate was bound to inform the Western Commandatura about any agreement operative in Berlin prior to, or—at the very latest—after, its signature. Concurrently, the Senate was to furnish 15 copies of any agreement, protocol or other document which was to be binding upon West Berlin. This procedure was aimed at creating for the Occupation Powers a possibility to submit objections with regard to extending any of such agreements to West Berlin. If within the period of 21 days, beginning the day after the text of the agreement had been delivered by the Senate, an objection was presented by the " Allied Commandatura,"[33] West Berlin became automatically excluded from under its binding power.

In sum, the Western Powers have reserved for themselves an unlimited right of interference both in the internal matters of the City and in its international obligations.

3. The here outlined divergence of views and legal conceptions on the West Berlin status was a function of different aims, aspirations and politi-

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[31] *Ibid.*, pp. 183—185.

[32] With reference to trade and payment agreements it has been accepted that they are effective in West Berlin if they contain a clause that they are operative on the West-German Mark currency area (*Währungsgebiet der DM-West*).

[33] Such a procedure was to be applied with regard to the agreements newly concluded by the FRG, as well as to agreements concluded by the former German Reich and being restored to effectiveness, and finally to acts of accesion of the FRG to multilateral agreements and international organizations.

cal attitudes of the Western Powers on the one hand and of the created with their collaboration West German State on the other. The United States, Great Britain and France, interested for various reasons in maintaining the occupation status (as justifying their political and military presence in the middle of Europe and in Germany, as well as enabling them to exercise a direct influence on the course of events in West Berlin), approved and inspired an extensive development of the numerous, mainly financial and economic, but also political, social and legal ties between West Berlin and the Federal Republic of Germany. Moreover, West Berlin, having been—in view of its geographical position—transformed into the centre of espionage and sabotage directed against the German Democratic Republic and other socialist countries, played a sinister part of a "front city."[34]

Formally, the Western Powers reserved for themselves within the occupation order the unlimited freedom to define legal norms, the scope of freedoms, and the structure of political, economic and social life of West Berlin. Actually, they not only tolerated but also encouraged the Federal Republic of Germany to pursue a policy of incorporation of West Berlin. Actually, but not formally, since the multitude of reservations restricting the existing laws, and thus giving the right of interfering in all the City's activities, enabled the Western Powers to manipulate the instrument of occupation of West Berlin in a manner which was both flexible and corresponding with the current needs of their policy.

4. This complicated state of relations between the Federal Republic of Germany and the Western Powers is illustrated best by the provisions of the Paris Agreements[35] and a series of accompanying documents (of 26 May, 1952, which came into force in a changed versions on 23 October, 1954) concerning West Berlin. The agreement on the relations between the United States, Great Britain and France, and the Federal Republic states that the Three Western Powers retain the rights and responsibilities heretofore exercised or held by them "relating to [...] Berlin and Germany as a whole" (Art. 2), including the re-unification of Germany and conclusion of a peace treaty. Also the rights and responsibilities concerning the stationing of armed forces (Arts 4 and 5) have been retained. But inasmuch as the presence of the Western Powers' armed forces on the territory

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[34] Cf. Drew MIDDLETON in the "New York Times," 9 April, 1950. A detailed characteristic of West Berlin's political role and its place in the USA policy is presented in an extensive monography by L. PASTUSIAK, *Amerykanie w Berlinie Zachodnim* [*Americans in West Berlin*].

[35] For the texts in original languages and political and legal analysis see H. BRANDWEINER, *Die Pariser Verträge (in deutscher, englischer und französischer Sprache)*, Berlin 1956.

of the FRG—after the Paris Agreements had come into force—was legally based on the allied agreements resulting from the FRG's access to the NATO, the area of West Berlin retained its occupation status.[36]

The present legal position of the Three Western Powers and of the Federal Republic of Germany cannot be properly understood without the Western Powers' Declaration of 26 May, 1952, which became effective together with the entry into force of the so-called General Agreement (otherwise called " German Agreement ") on 5 May, 1955.[37] In this document, the Western Occupation Powers reiterated the reservations previously submitted by the " Allied Commandatura " [38] and stated that they reserve for themselves (" if they will deem it necessary ") the right to issue such regulations that would be necessary for carrying out their international obligations, safeguarding public order, and preserving the status and security of Berlin, as well as its " economy, trade, and communications lines." In other words the Western Powers, having decided to liquidate progressively the still remaining elements of occupation regime in the Federal Republic, stipulated that the occupation status of West Berlin would be fully preserved. The wording of this still binding Declaration, suggesting a liberalization of the occupation regime, is very significant. For instance, Article III states that

" in normal circumstances the Allied authorities will exercise their power only in the following fields [. . .]."

Then an enumeration of these fields follows :

(a) security, interests and immunities of the " Allied " (that is, occupy-

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[36] The final act of the London Conference of 3 Oct., 1954, which was a forerunner of the Paris Agreement, contains a Declaration of the US, British and French Governments stating in its point 5 : " The security and welfare of Berlin and the maintenance of the position of the Three Powers there are regarded by the Three Powers as essential elements of the peace of the free world in the present international situation. Accordingly they will maintain armed forces within the territory of Berlin as long as their responsibilities require it. They therefore reaffirm that they will treat any attack against Berlin from any quarter as an attack upon their forces and themselves." *Documents on Germany under Occupation*, p. 607.

[37] I. von MÜNCH (*op. cit.*, p. 173) quotes a leading letter of the three Western Commandants addressed with a copy of the Declaration to the burgomaster of West Berlin, the President of the House of Representatives, and the President of the Tribunal, it stated that the Declaration repeals the Small Occupation Statute of 14 May, 1949 and the document of 7 March, 1951 and defined the basic principles of relations between Berlin and the Allied Commandatura (of the three Western Powers).

[38] This refers particularly to the Declaration of the Western Commandatura approving the Berlin Constitution of 1950. For the text see *Documents on Germany under Occupation*, pp. 509—510.

ing) Armed Forces, including their representatives, family members and non-German employees ;[39]

(b) disarmament and demilitarization, including the corresponding scientific research, and civil aviation, including the corresponding bans and restrictions concerning industry ;

(c) West Berlin relations with foreign countries ;[40]

(d) coverage of occupation costs ;

(e) peremptory authority with regard to the West German Police " inasmuch as it is necessary to safeguard the security " of the City.

In this way the Western Powers have reserved for themselves a decisive say in all vital matters connected with the functioning and development of the City. At the same time the West Berlin Commandatura asserted that it " will not oppose " the transference of the Federal Republic legislation carried out " in the course set down by the Allied Commandatura." In this connection the Declaration mentions in particular the laws concerning finances, nationality, passports, emigration and immigration, and agreements on shipping, trade turnover, commerce and international payments. Further on, the Western Powers announced that the scope of their activity will also embrace " restitutions, reparations, decartelization," international transactions concluded in West Berlin and " claims on Berlin and its inhabitants," deported persons and the admission of refugees, and finally the supervision of prisons (subordinated to the German authorities in West Berlin) with respect to treatment of persons indicted or sentenced by the occupation courts (Art. I). This scope of activity has been limited by the principles which constitute the basis—in accordance with the Paris Agreements—of the new relations between the Western Powers and the Federal Republic. Furthermore, this activity shall not contravene the Allied legislature " being in force in Berlin " and is allowed only if the way of conduct of the West Berlin authorities " will be incompatible with these principles or this legislation." The final clauses of the Declaration (Arts VI and VII) [41] leave no doubt whatsoever that the occupation author-

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[39] Germans employed by the US, British and French armed forces also enjoy immunity from jurisdiction, but only in matters connected with exercising of their official duties for these forces. See I. von MÜNCH, *op. cit.*, p. 174.

[40] In this respect, however, the Western Commandatura stipulated that it will permit the West Berlin authorities to represent the interests of the city and those of its inhabitants abroad. *Ibid.*

[41] Article VII of the Declaration states that the Berlin legislation enters into force in conformity with the procedure envisaged by the provisions of the Berlin Constitution. In the event of inconsistencies with the Allied legislature or other enactments by the Allied authorities or rights of Allied authorities resulting from this Declaration, the Berlin legislation may be suspended or considered null and void. I. von MÜNCH, *op. cit.*, p. 175.

ities have preserved for themselves the full freedom of suspending, amending or repealing those laws and regulations issued by the West Berlin authorities that are subordinated to the supervision, control and approval of the Western Commandatura.

5. In this context—as an illustration of the dependence of West Berlin on the Three Occupation Powers—it is worth noting that the Western Sectors of the City have become a party to the Rome Treaties (of 25 March, 1957) which have called into being the European Economic Community and the European Atomic Energy Community.[42] On 25 March, 1957 the participants in the Rome Conference signed a protocol on the so-called " small-scale internal trade " which comprises the FRG trade relations both with West Berlin and the German Democratic Republic.[43] On 18 November, 1957 the Western Commandatura addressed a letter to the burgomaster of West Berlin consenting that the City area adopt the FRG obligations resulting from its participation in the EEC and EURATOM " inasmuch as this could be reconciled with the rights and duties of the Allied authorities as established in the Declaration on Berlin of 5 May, 1955." In the event of a difference of opinions as to the carrying out of the commitments resulting from this document, the priority of the rights and duties of the Western Powers is to be preserved. Besides—as the letter stated—the inclusion of West Berlin in the Agreement on the EEC should not be interpreted as an abrogation or amendment of the Allied legal regulations.

Thus in accordance with the procedure envisaged by the Declaration of the Western Commandatura of 21 May, 1952, the FRG Government made on 9 December, 1957—upon depositing the ratification instruments connected with the establishment of the EEC and EURATOM—a formal statement to the effect that the Rome Treaties also embrace the area of West Berlin.[44]

6. A specific interpretation of the West Berlin status was expressed in the known decision of the Federal Constitutional Court (of 21 May, 1957) which stated categorically that " Berlin is a Land belonging to the Federal Republic."[45] More complex was the Court's motivation contained in its

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[42] The final Act of the Conference of 25 March, 1957 contains a " Common Declaration relating to Berlin." See " European Yearbook," The Hague 1958, vol. 4, p. 635.

[43] See *Bundesgesetzblatt* 1957, vol. 2, p. 984.

[44] " This Declaration "—we read in the text—" is without prejudice to the rights and responsibilities of France, the United Kingdom and the United States relating to Berlin." See *Dokumente zur Berlin-Frage,* p. 191.

[45] In its further expositions the Court stated that the FRG Basic Law was also operative in Berlin " inasmuch as the enactments of the Three Powers originating in the occupation period and still in power do not limit its application." From this it may be deduced that according to the Court the West Berlin area was no more

judgment of 20 January, 1966[46] with regard to its own competence for pronouncing on the " Berlin problem " and on whether the Federal laws are effective in Berlin. Its gist, however, did not depart from the basic West German political practice and jurisprudence as the Court had recognized its competence and stated that " Federal legislature adopted in Berlin is also effective there as Federal law." Thus from the formal and legal viewpoint there is—this formula accordingly—no difference between the area of the Federal Republic and that of Berlin. The Western Powers' position was different. In connection with the above-mentioned decision of the Constitutional Court, the Allied Commandatura in Berlin addressed on 24 May, 1967 a letter to the burgomaster and to the Chairman of the House of Representatives of West Berlin.[47] The gist of the Western Powers' position is expressed by the following phrase : " It has been and remains the Allied intention and opinion that Berlin is not to be regarded as a Land of the Federal Republic and is not to be governed by the Federation."[48] Similarly, with respect to law effective on the West Berlin area, the Western Commandatura reiterated its view that the provisions adopted from Federal law " are legislative acts of the Berlin House of Representatives and are legally distinct from such Federal law."[49] And finally, the jurisdiction of the FRG Constitutional Court did not—as stated in the letter of the Allied Commandatura—extend to Berlin and therefore this Court could neither examine the constitutionality of the enactments of the West Berlin authorities nor the constitutionality of the law of this City, even if it had been adopted from the Federal law system by way of transformation. In this way an essential difference has been underlined between the Federal legal system and that of the City, both being alike but not identical. For there are many well-known instances of laws or even constitutions being adopted by one country from another (for example, the post-colonial States in Africa adopted the legislature of their

subject to occupation, though " enactments [...] originating in the occupation period " were still there effective (*Dokumente zur Berlin-Frage*, p. 136). This is the result of accepting a false premise that West Berlin is a constituent part of the Federal Republic : since the occupation status was abolished on the FRG area, occupation of West Berlin ceased to exist as well. The Western Powers represented before and after the Berlin Agreement the position that relations between the West Berlin authorities and the Western Commandatura had been founded on the occupation legislation, hence the supreme power in the City was to be exercised by the occupying Powers.

[46] I. von MÜNCH, *op. cit.*, pp. 189—200.

[47] *Ibid.*, pp. 200—201.

[48] *Ibid.*, p. 201.

[49] *Ibid.*, see also L. GELBERG, *Niemcy po II wojnie światowej. Refleksje o sytuacji prawnej* [*German States after the II World War. Reflections on Their Legal Situation*], Wrocław 1971, pp. 128—129.

former metropolitan countries, the French Commonwealth countries based their legal systems on French law, and those of the British Commonwealth—on British law), which does not mean that this adopted legislature should be identical or automatically effective in other countries. Such was the situation of West Berlin in the light of existing agreements and regulations.

7. In the over twenty-years' period (1949—1971) of relations between West Berlin, the occupying Powers and the FRG, various trends had come to light. It seems that, unlike the FRG, the Western Powers did not intend to effectuate a formal change of the legal status of the City's Western Sectors, but rather to create there a specific *de facto* situation. Dominant, however, was the trend of a gradual incorporation of West Berlin in the political,[50] legal, economic and financial system of the Federal Republic, without renouncing at the same time the formal elements of the Occupation Statute.

It must be also recalled that West Berlin was utilized for staging ventures incompatible with its status, for instance, by installing there espionage centres, exercising conspicuously on its territory the FRG State authority, convening the Federal Parliament meetings, and so on. As these activities have been already described at great length,[51] there is no need here to delve into them any more.

4. Attempts at Normalization of the West Berlin Situation

A critical reappraisal of the situation[52] led the Warsaw Treaty countries to put forward proposals for a peaceful settlement of the problems which had evolved in and around West Berlin. In particular, the Soviet

[50] Suffice it to state here that the number of Federal civilian officials in West Berlin amounted in 1971 to nearly 22 thousands. K. Rush (Ambassador of the United States to the Federal Republic during the Berlin negotiations) disclosed this fact in a lecture delivered at the Chamber of Industry and Commerce in West Berlin on 22 Sept., 1971. The text of the lecture was published by the US Embassy in Bonn—Bad Godesberg. Presseverlautbarung, No. 75 A.

[51] Cf. documentary publications of the GDR's Ministry of Foreign Affairs, for instance, *Documentation on the Question of West-Berlin,* Berlin 1964, p. 13 ; *Berlin im Blickpunkt der Welt. Eine Dokumentation über Recht und Unrecht um und in Berlin 1944—1959,* Berlin 1959 ; A Soviet documentation—*Kniga faktov o podrivnoi dejatelnosti iz Zapadnovo Berlina protiv sotcjalističeskih stran,* Moskva 1962 ; A Polish documentation—*Problem Berlina Zachodniego* ... [*Problem of West Berlin*], pp. 141—155.

[52] From the documents of the Polish foreign policy, cf. Communiqué from the talks of the GDR and Polish Party and Government Delegations of 14 Dec., 1958. "Zbiór Dokumentów," 1958, No. 12 and a note of the Polish Government (in reply to the Soviet proposal) of 9 March, 1961, "Zbiór Dokumentów," 1959, No. 3, p. 241.

proposals which had been submitted since autumn of 1958 and had aimed at the normalization of the Berlin situation and settlement of the traffic problems between the Western Sectors of the City and the Federal Republic of Germany were of paramount importance for the further development of events.[53] They gave rise to new discussions on the Berlin status. On 27 November, the Soviet Government addressed to the US, British and French Governments three identical notes, copies of which were transmitted to all Governments with whom the Soviet Union maintained diplomatic relations and to the Governments of the UN member-States.[54] These notes contained a proposal to transform West Berlin into an independent political unit—a Free City, the territory of which would be demilitarized and neutralized after the Austrian pattern. The Four Great Powers and both German States would undertake to respect the Free City status. The Soviet Government did not also exclude the possibility that the United Nations may take part in watching over its observance.[55] At the same time the notes envisaged the necessity of undertaking direct talks between the GDR and FRG authorities, and between the municipal authorities of Democratic Berlin and West Berlin, as well as the possibility of transferring at a later date to the GDR Government all functions with regard to

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[53] On 10 Nov., 1958, during a Polish—Soviet friendship meeting, the Chairman of the Soviet Council of Ministers, N. S. KHRUSHCHOV, stated that the Western Powers observed the quadripartite agreements only with regard to Berlin because it was advantageous solely to their positions. " The Western Powers have actually perpetuated such Allied privileges, though they have long ago "—said the Prime Minister of the Soviet Union—" destroyed the legal basis of their stay in Berlin." (" Trybuna Ludu " of 11 Nov., 1958). Khrushchov demanded that the occupation regime in Berlin be liquidated and announced that the Soviet Union will transfer to the GDR " those functions in Berlin that are still reserved for the Soviet authorities."

[54] In a note addressed to the United States Government, the Soviet Government officially informed that " The Soviet Government considers devoid of any legal power the Protocol of agreement between the Governments of the Soviet Union, the United States and Great Britain on occupation zones in Germany and administration of Great Berlin of 12 Sept., 1944 and related to this agreement accompanying decuments, including the agreement on control apparatus in Germany concluded between the Governments of the Soviet Union, the United States, Great Britain and France on 1 May, 1945, that is, all agreements which were to be operative during the first years following Germany's capitulation [...] " (" Trybuna Ludu " of 28 Nov., 1958).

[55] At the same time the Soviet Government indicated that the best solution of the Berlin problem would consist in the return of all the members of the Great Anti-Nazi Coalition to Potsdam principles which would mean in practice the necessity for both German States to withdraw from military alliances (the FRG from NATO and the GDR from the Warsaw Treaty) and a considerable demilitarization. If the Governments of the Western Powers are disinclined to accept such a solution—stated the note—" there is no legal or moral justification to persist in maintaining the quadripartite status of Berlin." (" Trybuna Ludu " of 28 Nov., 1958).

traffic control which were temporarily exercised by the Soviet organs. In reply,[56] the GDR Government declared its readiness to enter into talks with the FRG Government and the West Berlin Magistrat and to take over the functions temporarily exercised by the Soviet organs. The Western Powers expressed their strong disapproval of the Soviet proposal, though its only purpose had been to redress the balance in the most troublesome point of Europe.[57] On 14 December, 1958 the Foreign Ministers of the United States, France, Great Britain and the Federal Republic of Germany assembled in Paris, having heard a statement by the then burgomaster of West Berlin, Willy Brandt, and having discussed the Soviet notes of 27 November, rejected the Soviet Government's proposals and questioned its right to transmit its powers to the competent GDR authorities.[58] This attitude got the support of the NATO Council.[59] A further exchange of diplomatic notes and a discussion at the Geneva Conference of the Foreign Ministers of the Four Great Powers (11 May—20 June and 13 July—5 August, 1959) did not contribute to the *rapprochement* on Berlin. They gave only an opportunity for a detailed presentation of contradictory legal conceptions.[60]

In reply to the proposal that West Berlin should be granted a Free City status, the United States submitted to the Geneva Conference (on 26 May,

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[56] The GDR's reply was contained in a note addressed to the Soviet Government on 7 Jan., 1959. See *Dokumentation der Zeit* of 5 Feb., 1959.

[57] In the Soviet Government's not to the FRG Government we read : " The Soviet Government does not take into consideration the inclusion of West Berlin in the German Democratic Republic, or it wishes to aquire territorial gains or any others. A mechanical unification of both parts of the City is out of the question if only for the fact that on both sides of the Brandenburger Tor there are two systems in existence : in East Berlin a socialist system, and in West Berlin a system based on private ownership. In other words, the Soviet Union stands up not for destroying the existing relations, but for Berlin inhabitants to be living in conditions they desire." See " Trybuna Ludu " of 28 Nov., 1958.

[58] See *Documentation Française* of 20 Dec., 1958.

[59] *Ibid.*

[60] Specifically—in view of the Ambassador RUSH's assurances that the American legal interpretation of the Berlin status remained unaltered—it is worth to draw attention to the Memorandum of the US Department of State on Legal Aspects of the Berlin Problem (of 19 Dec., 1958) and the legal argumentation contained in the speach by the US Secretary of State, Ch. HERTER, delivered on 26 May, 1959 at Geneva. The Memorandum recalled the circumstances and legal foundations of the division of Germany and Berlin into occupation zones, as well as of the agreement on the right of access of the occupying Powers to Berlin. The gist of the American position is expressed by the viewpoint that the rights of each occupying Power are independent and that they lie at the foundations of a series of agreements specifying areas and methods by which these rights may be exercised. See " The Department of State Bulletin " of 5 Jan., 1959.

1959) a plan of reunification of Great Berlin.[61] The American proposal described in detail the procedure of all-Berlin elections, drawing the City constitution, and forming a Great Berlin Government. At the same time the plan envisaged the maintenance of the essential elements of the quadripartite occupation and assumed that Berlin would become capital of the reunified Germany after a German constitution had been adopted and an all-German government formed. From this viewpoint the Berlin problem was subordinated to the basic conception of the Western Powers endeavouring at that time to solve the German problem by the " reunification," that is, by the annexation of the GDR by the FRG. " Free elections "—initially in both parts of Berlin—were thus to bring about the status of the Berlin Western Sectors extended to the whole City. In turn the Soviet Minister of Foreign Affairs A. Gromyko, stated that the " Western Powers' proposals are from first to last unacceptable. They could not be open to discussion."[62] The US Secretary of State, however, put forward a thesis that, supposedly, " in practice the Great Berlin area has been actually recognized as an area separated from the territory of the so-called German Democratic Republic [. . .] " and that in consequence there were no legal obstacles to the reunification of Berlin.[63]

Was that so in fact ? The problem is related to the legal status of Democratic Berlin and cannot be solved before getting a reply to the following questions : does the legal situation of East Berlin differ in no respect from that of the rest of the GDR territory ? And if there are differences, what is their nature ? The solution of this problem shall allow us to ascertain whether the Quadripartite Agreement of 3 September, 1971 regulates the situation of the City's Western Sectors only, or—as the American negotiator stated after the conclusion of the Berlin talks—" the Agreement is effective in the whole Berlin and not only—as some say—in its Western Sectors."[64]

5. The Status of Democratic Berlin—Capital of the GDR

All considerations on the legal situation of Berlin must take into account the basic difference between the geographical position of the Eastern

[61] See " Press Bulletin of the Embassy of the United States of America," Warszawa 27 May, 1959. Quoted after *Problem Berlina Zachodniego* ... [*The Problem of West Berlin* . . .], p. 257.

[62] See " Trybuna Ludu " of 31 May, 1959.

[63] See " Press Bulletin [. . .] " of 27 May, 1959.

[64] K. Rush, *Das Berliner Abkommen,* a lecture delivered on 22 Sept., 1971 at the West Berlin's Chamber of Industry and Commerce, *op. cit.*, p. 3.

Sector subordinated to the Soviet occupation and that of the Western Sectors subordinated to the US, British and French occupation. The very fact that Berlin is situated within the Soviet zone of occupation was not without significance for the legal situation of the Soviet occupation sector of Berlin, especially after 1 July, 1948 when the joint Allied organs of the Four Powers had ceased to function.

After the German Democratic Republic had been established with a Constitution (of 7 October, 1949) stating that " Berlin is the capital of the Republic " (Art. 2), the Chief of the Soviet Military Administration transferred on 10 October to the GDR Government the administration and governmental functions with regard to the Soviet zone which also comprised the Eastern Sector of Berlin.[65] At the same time the Soviet Military Administration was substituted by the Soviet Control Commission in Germany. The statement on the creation of this Commission announced that " administrative functions in Berlin are transferred to the German democratic authorities."[66] This document also contained a passage limiting the scope of the GDR authority in the capital in consideration of the international obligations of the USSR.[67] On 12 November, 1949 the Military Commandant of the Soviet Sector of Berlin, Major-General Kotikov, transferred to the Great Berlin Magistrat (at that time its scope of competence embraced only the Eastern Sector) administrative functions hitherto exercised by the Soviet Military Commandatura.[68] Thus the creation of the GDR also changed the legal status of the Soviet Sector of Berlin. Having been declared the capital of the new State, Berlin became the seat of the GDR's central authorities and its inhabitants received in 1953 identity cards as the nationals of the German Democratic Republic.[69] A year later also the foreign trade and international relations of Democratic Berlin were integrated into the activities of the competent GDR organs. Finally the economy, finances and liability to military service have been unified,[70] and

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[65] See *Problem Berlina Zachodniego* ... [*The Problem of West Berlin* ...], pp. 156—157.

[66] See *Vnešnaja politika Sovetskovo Sojuza*, Moskva 1949, p. 226.

[67] " In accordance with the known international agreements, the representative of the Soviet Control Commission in Berlin will, on behalf of the Soviet Control Commission conduct the necessary relations with the corresponding representatives of the Western occupation authorities." *Ibid.*, p. 227. See also *Documents on Germany under Occupation*, p. 436.

[68] *Ibid.*, p. 228.

[69] Enactment of the Great Berlin Magistrat of 11 November 1953. For the text see *Dokumente zur Berlin-Frage*, p. 205.

[70] *Ibid.*, pp. 213, 282 and 463.

actually the political and economic life of the GDR capital have become and important ingredient of the whole State organism.[71]

The decisive step in transferring full sovereignty over Berlin to the GDR was made through the Agreement on relations between the GDR and USSR concluded on 20 September, 1955. As a result of this Agreement the German Democratic Republic obtained full freedom of decision on its internal and international policy, including its relations with the Federal Republic of Germany (Art. 1). The stationing of the Soviet armed forces on the GDR territory, as well as in Berlin, was regulated by Article 4 which invoked the " existing international agreements."[72] The Agreement affirmed that the Soviet armed forces would remain temporarily in the GDR with the consent of its Government and on conditions which would be stipulated in an additional agreement between the USSR and GDR Governments.[73] For our considerations the most important are the documents accompanying the Agreement, namely, the letters exchanged between the Under-Secretary of Foreign Affairs of the USSR, V. Zorin, and the Minister of Foreign Affairs of the GDR, L. Bolz. The letters reaffirmed that an agreement had been reached between the Soviet Union and GDR Governments on transferring to the GDR authorities the Soviet attributions in the field of protection and control of the GDR frontiers, including " the exterior borders of Great Berlin and communication lines between the Federal Republic of Germany and West Berlin running through the territory of the German Democratic Republic."[74] The Agreement envisaged that the GDR will arrange with the appropriate FRG authorities

" all matters connected with rail, motor-car and waterways transit of the FRG or West Berlin, of their nationals and residents, as well as of foreign countries and their nationals [. . .]."

The only exception related to the personnel and shipments of the US, British and French armed forces (point 1).

Access to West Berlin of the Western military personnel stationing in this city and of shipments for the Western garrisons is subject to the

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[71] The maintenance of a separate status for the representatives of Berlin in the Volkskammer shows, by way of an exception, a certain difference between the legal position of Democratic Berlin and that of the rest of the Republic. Also the extension of the GRD legislature to Berlin is effectuated through the City Council according to the simplified procedure of 1968. For detailed legal prescriptions with regard to this matter see *Das Viermächte-Abkommen,* pp. 120—121, 166—167, note 25.

[72] For the text of the Agreement see " Zbiór Dokumentów," 1957, No. 9, p. 1951.

[73] The Agreement on the temporary stationing of the Soviet armed forces in the GDR was concluded on 12 March, 1957. See " Zbiór Dokumentów," 1957, p. 333.

[74] See " Zbiór Dokumentów," 1955, No. 9, p. 1955

control of the Headquarters of the Soviet Armed Forces Group in Germany on the understanding that—according to the Zorin-Bolz exchange of letters—this arrangement has a temporary character " until an appropriate agreement is reached." The Western Powers' communication with their garrisons in West Berlin is allowed

" on the basis of the existing quadripartite resolutions by : (a) the Berlin-Marienborn motorway ; (b) the Berlin-Helmstedt railway line and the Berlin-Oebisfeld on return without shipments ; (c) the Berlin-Hamburg, Berlin-Bückeburg, and Berlin-Frankfurt air-corridors."

At the same time the post of the USSR High Commissioner in Germany was abolished and the functions of maintaining appropriate relations with the representatives of the United States, Great Britain and France in the Federal Republic of Germany " in the field of questions concerning Germany as a whole and of those ensuing from the Four Powers' resolutions " were entrusted with the USSR Ambassador to the German Democratic Republic.[75] On the other hand the relations with the Supreme Commanders of the Western Armed Forces in the Federal Germany were left within the competence of the Supreme Commander of the Soviet Armed Forces in Germany.

Finally, in consideration of social and political changes which had occurred in the GDR, the Council of Ministers of the USSR adopted a resolution on abolishing, with regard to the GDR territory, the laws, directives, orders and other enactments issued by the Allied Control Council in Germany between 1945 and 1948 in pursuance of the Four-Power occupation rights. This resolution also embraced the Soviet Sector of Berlin as an integral part of the German Democratic Republic. In this way the occupation regime in the Eastern part of Berlin has been abolished, though some of its basic elements, related to the observance of the quadripartite agreements by the Soviet Union as one of the Powers still responsible for Germany and Berlin, have been preserved.

The practical aspects of the transference of the Soviet administration rights to the GDR authorities were first and foremost those connected with the access to West Berlin. On 28 September, 1955 the Western Powers made a joint statement[76] to the effect that the USSR—GDR agreements could not infringe upon the obligations and responsibilities which the Soviet Union had undertaken in virtue of the agreements and arrangements on Germany and Berlin concluded with the Three Western Powers. " The Soviet Union "—read the statement—" is still responsible for the fulfil-

[75] The resolution of the Soviet Council of Ministers of 20 Sept., 1955. See " Zbiór Dokumentów," 1955, No. 9, pp. 1961—1962.

[76] See *Dokumente zur Berlin-Frage,* p. 250.

ment of these aims." The course of events demonstrated however that—in accordance with the spirit and letter of the Zorin-Bolz Agreement—the freedom of access of the Western Powers to their Sectors in Berlin had remained unimpeded and that the control in this field had been, as before, exercised by the Soviet Union. For its part the GDR recognized that the existing quadripartite agreements on communications " have a temporary and limited character " and did not violate the sovereignty of the GDR.[77] Admittedly, this brough about an exchange of notes between the Soviet Union and the United States on sovereignty over the GDR air space,[78] but the gist of the dispute concerned only the freedom of air transit for individual courier aircraft of the Western Powers bound eastward and not the access to West Berlin in general.

6. Legal Basis of the US, British and French Access to West Berlin

For various reasons[79] the right of access to Berlin by Western Powers had not been established by any of the Allied agreements on the joint administration of the occupied capital of the Third Reich. This is not to say that there were no attempts by the Four occupation Powers to get this matter arranged between themselves. An exchange of letters between the President of the United States, H. Truman, and the Prime Minister of the Soviet Union, J. V. Stalin, had led in June 1945[80] to the recognition that there was a necessity to start negotiations on various technical problems connected with the occupation of Germany, including that of the access to Berlin. The negotiations resulted in an oral agreement concluded between General Clay (USA), General Wells (Great Britain) and Marshall

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[77] Cf. Joint USSR—GDR Statement of 7 Jan., 1957 in : *Die Westberlinfrage und die Vorschläge der Deutschen Demokratischen Republik zu ihrer Lösung,* 1960, pp. 58—59.

[78] Cf. " Neues Deutschland " of 29 Jan., 1958.

[79] Cf. more H. W. Kuhn, *Interallierte Vereinbarungen von 1945 über den Transitverkehr der Westmächte nach Berlin,* Frankfurt-am-Main 1959, pp. 6—11 ; J. Mallet, *Les problèmes juridiques de l'accès aérien des Puissances occidentales à Berlin,* " Revue Générale de l'Air," 1954, No. 3, pp. 235—236 ; in Polish literature the origin of the Western transit rights is treated by A. Skowroński, *Traktat pokoju z Niemcami a sprawa tzw. dostępu trzech mocarstw do Zachodniego Berlina* [*The Peace Treaty with Germany and the Access of the Three Powers to West Berlin*], " Sprawy Międzynarodowe," No. 9, pp. 14—20.

[80] *Korespondencja Przewodniczącego Rady Ministrów ZSRR z Prezydentami Stanów Zjednoczonych i Premierami Wielkiej Brytanii w okresie Wielkiej Wojny Narodowej 1941—1945* [*Correspondence of the Chairman of the Soviet Council of Ministers with the Presidents of the United States and Prime Ministers of Great Britain in the Period of the Great National War 1941—45*], vol. 1 : *Korespondencja z F. D. Rooseveltem i H. Trumanem, sierpień 1941—grudzień 1945 r.* [*Correspondence with F. D. Roosevelt and H. Truman, August 1941—December 1945*], Warszawa 1970, p. 241.

Zhukov (USSR)[81] which stipulated that the Western Powers had the right of transit through the Soviet occupation zone by Helmstedt—Magdeburg—Berlin railway line, by Berlin—Magdeburg—Helmstedt motor-way, and by two air corridors, including the use of two Berlin airfields : Gatow and Tempelhof.

On 26 October, 1945 the Coordination Committee of the Allied Control Council decided to set up a Flight Security Committee with respect to the air space over Great Berlin.[82] A month later, the Four Powers of the Allied Control Council arranged all matters ensuing from the use of air corridors. The corridors connecting Berlin with Hamburg, Bückenburg and Frankfurt-am-Main were set to a breadth of 32 km. Around the seat of the Allied Control Council in Berlin, a control zone (of a 32 km—or 26 English miles) was established where aircraft and civil air-planes of the Four Powers were allowed unrestricted flights (to a height of 3 thousand meters, or 10 thousand English feet).

It is worth noting that—as it has been shown in the literature on the 1945 Agreements and later documents concerning the access of the Western Powers to Berlin—the setting up of the French, British and US occupation sectors in Berlin was not tantamount to the creation of an unconditional right known as the " right of access," but it only created objective premises justifying " the necessity to solve the transit problem."[83] It was the Soviet Union, which exercised supreme power over the territory of the Eastern zone, that was competent to express its consent to access. Thus the opinion of the Department of State, that the USSR had no right of transferring its attributions to a third side seems rather questionable.[84] For the acquisition of transit rights takes place at the moment when a consent for transit is granted by the state which exercises territorial supremacy over a given area.

The American Department of State published on 1 September, 1961[85] (that is, after the GDR Government had introduced on 13 August its frontier regulations) the Soviet standpoint on air communication between Berlin and the Western Zones of Germany as presented at the Allied Control Council on 5 February, 1947. The Soviet delegation expressed at that time the opinion that in accordance with the quadripartite agreement there had been assigned three air corridors (Berlin—Hamburg, Berlin—Bückenburg and Berlin—Frankfurt-am-Main) " for unrestricted flights of Allied

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[81] H. W. Kuhn, *op. cit.*, pp. 18—21 and A. Skowroński, *op. cit.*, pp. 17—18.

[82] See *Dokumente zur Berlin-Frage*, p. 60.

[83] See A. Skowroński, *op. cit.*, p. 19.

[84] See " The Department of State Bulletin " of 5 January, 1959.

[85] Quoted after " Bulletin des Presse- und Informationsamtes der Bundesregierung " of 5 September, 1961.

airships over the Soviet occupation zone in Germany." Flights in other directions, however, required each time a permit by the Soviet military authorities. The Soviet delegation stated that

"these agreed decisions fully correspond with the needs of the Allied occupation authorities in the field of air navigation at the present stage of the occupation of Germany."

Conversely, the proposals of the American, British and French delegations concerning "the freedom of air navigation over Germany" and the setting up of quadripartite "special organs" to organize and control civil air traffic of other countries over Germany were described by the Soviet delegation as "aimless and premature" at the contemporary stage of the occupation of Germany. Thus the documents that were to confirm the absolute and unchanging right of access to Berlin by the Western Powers, emphasized the fact that it was the will of the Soviet Union—whose *ius disponendi* in the field of transit traffic through its occupation zone had been never questioned by the Western Allies—that had been a decisive factor. Inasmuch as the Western States had initially demanded in the European Advisory Commission that the access to Berlin should be of an "unrestricted and uncontrolled" character,[86] later they accepted the principle of a limited transit subject to the USSR control, and—in the field of air navigation—the control of a quadripartite organ embodied in the Flight Security Committee. Of course, the rights of a State benefiting from transit must be exercised in such a manner as to avoid the infringment upon the rights and responsibilities of the State through which transit traffic is running. In this case it was the rights and responsibilities of the Soviet Union with regard to occupation aims and the interests of the Soviet occupation zone that were involved.

The time limit for the effectiveness of the Western Powers' transit rights is closely connected with the maintenance of the occupation status in the Western Sectors of Berlin.[87] As long as the Four Powers of the Anti-Nazi Coalition reaffirm their rights and responsibilities with regard to Germany and excercise in Berlin—even within a limited scope—their occupation rights, it cannot be said that the transit facilitating this occupation has lost its legal basis. Another matter are the consequences of the transference of supreme power over the former Soviet occupation territory

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[86] A. Skowroński (*op. cit.*, p. 20) recalls a memorandum on this matter submitted by one of the members of the USA delegation, Ph. E. Mosely, to the ECE, who also presented his standpoint in the article *The Occupation of Germany. New Light on How the Zones Were Drawn*, "Foreign Affairs," 1949/1950, p. 597.

[87] See A. Skowroński, *op. cit.*, p. 25.

to the competent organs of the GDR Government.[88] Let us also add that the railway traffic between Berlin and the Federal Republic had been regulated—long before the Zorin-Bolz Agreement—by technical agreements between appropriate GDR, FRG and West Berlin institutions.[89]

In other words, up to 3 June, 1972 quadripartite agreements corresponding to the specific situation being maintained by the Four Great Powers in the Western Sectors of Berlin constituted almost solely the legal basis of the existing state of affairs in communication from and to West Berlin. The scope of the GDR control rights embraced civil transit traffic and was regulated by internal enactments and appropriate international agreements.

7. The Origin and Course of the Berlin Negotiations

In looking for the origin of the quadripartite agreement regulating the situation in Berlin, attention should be drawn to the GDR enactments of August 1961 introducing

"on the borders of West Berlin a permanent control similar to that operative on the borders of all sovereign States."[90]

Retrospectively it may be said that these enactments were the turning point in the stabilization process of the status of West Berlin as a separate political and legal organism. The action of the GDR Government, constituting the realization of the territorial sovereignty principle, did not alter—as

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[88] On 15 June, 1960 the Chairman of the GDR State Council indicated that between 1955 and 1961 the GDR extended its control to almost 95 percent of land and water transit transports from the FRG to Berlin. See "Neues Deutschland" of 16 June, 1961.

[89] Agreements on payments in inter-zonal communications between the Deutsche Reichsbahn (GDR) and the Deutsche Bundesbahn (FRG) of 27 Jan., 1951; Agreement on the sale of railway tickets between the Deutsche Reichsbahn und die Deutsche Reichsbüro [...] of 8 July, 1954; Agreement on the mutual use of railway trucks between the Deutsche Reichsbahn and the Deutsche Bundesbahn of 21 July, 1954. Current technical problems are regulated by the West Berlin Senate and the Reichsbahndirektion Berlin (GDR), as well as by the Hauptverwaltung der Deutschen Bundesbahn (FRG) and Reichsbahnleitung (GDR). See *Problem Berlina Zachodniego...* [*The Problem of West Berlin...*], p. 31.

[90] The resolution of the GDR's Council of Ministers of 12 Aug., 1961 ("Trybuna Ludu," of 14 Aug., 1961) has been adopted according to the decision of the Advisory Committee of the Warsaw Treaty Countries which addressed to the Volkskammer and Government of the GDR and to all working people of the GDR a proposal "to establish around the whole territory of West Berlin, including its borders with the Democratic Sector of Berlin, an efficient protection and control." *Ibid.*

a matter of fact—the existing status of Berlin ; it created, however, premises for a normalization of situation in this city.

There is no doubt that the radical measures introduced by the GDR Government, which resulted in closing the hitherto practically open borders between the Western Sectors and the Eastern Sector, had brought about—as the Declaration of the Warsaw Treaty States stated[91]—

" certain inconveniences for the population, but in view of the situation that has been created it is solely the Western Powers, and specifically the FRG, that are to be blamed ".

The opinion that these enactments had " almost fully liquidated the remnants of the status established by the Four Powers "—as stated by the then burgomaster of West Berlin, W. Brandt, in his letter to the President of the United States, J. F. Kennedy[92]—did not correspond with the reality. The new measures amounted first and foremost to the liquidation of an interim order and, though often painful, created a hopeful perspective of such a settlement of the Berlin Problem in the future that could be accepted by all the States concerned.

The notion to start negotiations, which led to the conclusion of a quadripartite agreement on 3 September, 1971, had been produced in the atmosphere of a lessened tension and during the all-European discussion on convening an European conference on security and cooperation, which had been initiated by the Budapest Appeal. On 10 July, 1969, the Minister of Foreign Affairs of the USSR A. Gromyko, expressed on behalf of the Soviet Government its readinees for an exchange of opinions which would eventually lead to the establishing for West Berlin conditions of an ordinary existence as an independent political unit. On 6—7 August, 1969 the Western Powers submitted to the Soviet Foreign Ministry three identical documents defining their position on Berlin and indicating the readiness of the GFR Government to enter into talks with the GDR on communication matters.[93] After a further exchange of diplomatic correspondence,[94] the Ambassadors of the Four Great Powers started on 26 March, 1970 talks which took place in a building which had been formerly the seat of the Allied Control Council in the American sector of Berlin.

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[91] *Ibid.*

[92] The excerpt of the letter (of 16 Aug., 1961) is quoted after the " Frankfurter Allgemeine Zeitung," of 19 Aug., 1961.

[93] See *Das Viermächte-Abkommen*, pp. 159—160.

[94] The Soviet Government reaffirmed on 12 Sept., 1969 its readiness to enter into talks. *Ibid.*, p. 160.

The talks were confidential. While they lasted, several regular consultations were carried out between the Western Powers and the FRG,[95] as well as between the Soviet Union and the GDR. The signing of the Moscow Agreement, which rounded off the Soviet-West German negotiations, created a chance for an understanding on Berlin too. The more so as this problem, though it did not enter into negotiations between the USSR and FRG, was mentioned by the West-German side which presented its viewpoint[96] to the Soviet Foreign Minister. On 23 September, 1970 the talks came out of the deadlock: for the first time the Western Powers and the Soviet Union exchanged their viewpoints presented in the form of working documents.[97] Since 7 October, 1970 the ambassadorial talks were being prepared by experts. For the first time a joint list of problems had been prepared which—in accordance with the opinion of all the negotiating participants—required a solution. This period also brought about the decision that the future understanding shall have the form of a multilateral, three-tiered agreement.[98]

The actual basis for the negotiations in their final stage was provided by two documents: the proposal of the Western Powers of 5 February, 1971 and those of the Soviet Union of 26 March, 1971. The Western position presented in the form of a draft agreement and three annexes reaffirmed the necessity to abandon the use of force,

> "to respect the existing laws and obligations in Berlin, to restore the freedom of movements for the West-Berlin residents within the whole City, and to improve the communication lines between the Federal Republic and West Berlin."[99]

Annexes contained two statements on the access to Berlin and a note of the Western Powers to the Soviet Union on the links between the Federal Republic and West Berlin.

The Soviet document comprised a project of a Four-Power agreement and five annexes, as well as a final act defining the order in which

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[95] On bilateral consultations between the Western Powers and FRG and within the NATO, as well as on informing the parliamentary opposition in the FRG about the course of negotiations—*ibid.*, pp. 160—162.

[96] The spokesman of the FRG Government, C. AHLERS, informed about this in his interpretation of the Agreement of 12 Aug., 1971 published in the documentation of the Federal Office of Press and Information under the title: *Die Verträge der Bundesrepublik Deutschland mit der Union der Sozialistischen Sowjetrepublik und mit der Volksrepublik Polen*, Bonn 1971, p. 50.

[97] The course of negotiations is given by the above-quoted *Das Viermächte-Abkommen*, pp. 157—163.

[98] See "Le Monde" of 30 Oct., 1970.

[99] Cf. "Der Spiegel" of 22 Feb., 1970.

all elements of the regulation shall come into force.[100] In this way all problems discussed during negotiations as well as the proposed structure of an agreement were taken into account. Moreover, the Soviet proposal met many essential claims of the Western Powers, particularly with respect to maintaining broad ties between the Federal Republic and West Berlin, with the exception of the political ones. There was also an essential *rapprochement* on securing advantageous conditions for transit traffic between West Berlin and the Federal Republic, which had been treated by the Western side as the key-stone of the negotiations. The Soviet project envisaged conclusion by the competent German authorities of an agreement providing that

" the transit would go on unimpeded and according to universally accepted international rules."[101]

An ample evidence of the Soviet Union's readiness to seek a compromise formula that would satisfy the Western side was not only provided by the assumption that " the transit will be going on in the most simple and expeditious manner," but also by the assurance that the means of transportation used for transit would be sealed by the addressee and that the inspection would be, as a rule, limited to transportation documents. In practice these proposals took into account all basic wishes forwarded by the Western side with regard to improving the communications of West Berlin with the external world. They also opened good prospects for free visiting of the permanent West-Berlin residents. And finally the Soviet proposals concerning representation of the West Berlin's foreign interests were greeted

" as an extremely important step of the Soviet Union towards meeting the wishes of the three Western Powers and the Federal Republic ".

According to these proposals, the Soviet Union consented to withdraw its objections against the exercise by the Federal Republic of consular services for permanent residents of West Berlin and protection of their interests abroad. Moreover, the Federal Republic of Germany was also to be allowed to extend the binding force of its international agreements over the area of West Berlin, provided that such an extension would be consented to by the States entering into these agreements. On the other

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[100] An extensive relation about the Soviet document which like all remaining negotiation materials had been of a confidential character, was published with reference to informations obtained from " reliable political circles in Brussels " by the Polish daily " Życie Warszawy " of 15 April, 1971 in an article under the title *Negotiations on West Berlin.*

[101] See " Życie Warszawy " of 15 April, 1971.

hand, all political and security matters related to this area were to be, as before, represented by the Western Occupation Powers. The Soviet document also mentioned problems connected with respecting the interests of the USSR in West Berlin.

An analysis of the Soviet draft submitted on 26 March, 1971 leads to a conclusion that it had produced a turning-point in negotiations as many of its elements entered unchanged into the Quadripartite Agreement proper.[102]

8. An Analysis of the Quadripartite Agreement

On 3 September, 1971 the Agreement had been signed and the Final Quadripartite Protocol initialled. This had closed the first and most important stage of negotiations aimed at the normalization of the situation in West Berlin. The entering into force of this multilateral and multiple international agreement was, however, dependent on the successful accomplishment of negotiations between the German Democratic Republic and the Federal Republic of Germany, as well as between the GDR and the West Berlin Senate.

The three-tiered structure of the Agreement (Quadripartite Agreement concluded by the Western Powers, agreements between the competent German authorities and with West Berlin, and the Final Protocol concluded by the Western Powers), as well as the three-phased procedure of the conclusion and entering into force of the Agreement : (1) the signing of the Quadripartite Agreement and initialling of the Final Quadripartite Protocol ; (2) the signing of the GDR-FRG and the GDR-West Berlin Agreements ; (3) the signing of the Final Quadripartite Protocol establishing the simultaneous entering into force of all component parts of the Agreement, demonstrate the exceptional complexity of problems that were to be solved and a non-typical legal situation of the parties to the Agreement which had led to a search for specific solutions.

All elements of the Berlin regulation are well-known : the text of the Quadripartite Agreement, Agreements between the GDR and FRG Governments and between GDR and the West Berlin Senate, and finally the text of the Final Quadripartite Protocol. It is the specific legal solutions

[102] After the exchange of documents of 5 Feb. (the Western ones) and of 26 March (the Soviet one) their joint working version was worked out which also mentioned all the unsettled problems requiring solution. A compromise text was hammered out only after the formula stipulating the maintenance by the contracting parties of their legal positions had been accepted and the negotiators had got down to finding practical solutions. See *Das Viermächte-Abkommen*, p. 163.

entering into these Agreements that are worthy of particular attention. And so these solutions are the subject-matter of the present analysis.[103]

The territorial scope of the Quadripartite Agreement has been generally defined in its Preamble and Part I as "the relevant area," and more precisely in Part II as "Western Sectors of Berlin." There is no doubt that the expression "relevant area" should be taken according to the explanation contained in the Preamble. The signatories of the Agreement took into account "the existing situation in the relevant area," were guided by the desire for a practical improvement of this situation and—most important of all—concluded an agreement without prejudicing their "legal positions". And in fact, legal positions of both sides with regard to the status of the area of the former Third Reich's capital were and have remained divergent. In accordance with the existing state of affairs, the Soviet Union treats the former Eastern Sector of Berlin as the capital of the German Democratic Republic and an integral part of its territory. The Western Powers and the Federal Republic, however, are still of the opinion—at least formally—that the area of "Great Berlin" possesses a separate legal status.[104] Thus a compromise formula had been accepted which enabled the Agreement to be concluded without altering the contradictory legal positions. The gist of this compromise is represented by the provisions of Part II of the Agreement—they refer explicitly and ex-

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[103] The following elements make up the structure of the Quadripartite Agreement: *Preamble*; *Part I* contains general provisions; *Part II* comprises provisions regulating the situation of the Western Sectors of Berlin with regard to (a) the so-called access, (b) relations between West Berlin and the Federal Germany, (c) travels and visits by the West-Berlin permanent residents to the GDR and its capital, (d) representation of West Berlin abroad; *Part III* consists of provisions referring to the Final Quadripartite Protocol which defines the date and conditions of entering into force of the whole Agreement; *Four Annexes* deal with all the matters comprised by the accompanying documents: (1) An agreed note addressed by the Ambassadors of the Western Powers to the Soviet Ambassador, accompanied by a copy of a letter to the Federal Chancellor concerning interpretation of Annex II (on relations between the FRG and West Berlin); (2) An Agreed Minute (I) on the documents of permanent residents of West Berlin applying for visas for entering into the USSR; (3) An Agreed Minute (II) on the Soviet presence and Soviet institutions in the Western Sectors of Berlin.

The Quadripartite Agreement is completed by a Final Quadripartite Protocol, which links it formally to the agreements and arrangements concluded between the GDR and FRG as well as between the GDR and West Berlin, proclaims the simultaneous entering into force and joint binding power of the whole contractual structure, and establishes a procedure in the event of an infringement or difficulty in the application of the Agreement.

[104] The already quoted Ambassador Rush stated that "the Agreement extends over the whole of Berlin," *op. cit.*, p. 3. A similar opinion is to be found in the official interpretation of the FRG Government (*Das Viermächte-Abkommen*, p. 93).

clusively to the " Western Sectors of Berlin ".[105] Besides, had the intention been to leave no doubt that " East Berlin is not considered a part of GDR "—and this is K. Rush's viewpoint[106]—there would have been no obstacle to be as clear and precise with regard to East Berlin as to West Berlin. In the Communication of the Western Powers to the USSR (Annex II) we read that the Western Sectors of Berlin " continue not to be a constituent part of the Federal Republic of Germany [. . .]". With regard to Democratic Berlin there is not only no such a formula, but all mentions of this area resort to vague and ambigous descriptions. In effect, the meaning of some fragments of the Agreement is not very clear. For instance, Part II of the Agreement refers to improving the communications between the Western Sectors of Berlin and

" areas bordering on these Sectors and those areas of the German Democratic Republic which do not border on these Sectors."

A glance at the map tells us immediately that the Western Sectors of Berlin border solely on the German Democratic Republic and that West Berlin borders on a considerable stretch closely the GDR capital. It may be thus deduced that the above-mentioned stylistic figure has been invented to satisfy the practical need of hammering out a joint text which would take into account the Western wishes without infringing upon the legal position of the USSR and GDR. In sum, it may be said that the territorial scope of the Quadripartite Agreement is defined by the scope of matters it regulates. And those refer to West Berlin exclusively.

The numerical scope of the subjects of this multilateral agreement is limited not only to the signatories of the Quadripartite Agreement (that is the Soviet Union, the United States, Great Britain and France), but also extends to the signatories of the specific Agreements—GDR, FRG and West Berlin.

In this way, the three German organisms which originated on the area of the former Third Reich, have been once again reaffirmed as separate subjects albeit the legal position of West Berlin—with reference

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[105] The fact that the detailed provisions refer exclusively to West Berlin is also stressed in the Western publications, *Ibid.*, p. 94.

[106] The standpoint that Part II of the Agreement by referring to the Western Sectors implies at the same time " unequivocally the existence of the Eastern Sector " is guilty of verbalism. More important is the information that the Western Powers declared during the negotiations that in their opinion the Agreement would embrace the whole of Berlin. K. Rush, *op. cit.*, p. 3 and " Die Welt " of 23 Sept., 1971. This could mean only that the parties to the Agreement stick to their differing interpretations of its clauses.

to its scope of independence and its existence as a subject of international law—differs from that of both sovereign German States.[107]

Any legal analysis of an international agreement must be based on its text, which expresses the will of the contracting parties, and on factual and legal situations created by this agreement. With respect to the Quadripartite Agreement two facts should be established at the outset: first, whether the principle of sovereign equality of the parties has been preserved and, second, whether all signatories of the agreement have consented to be bound by obligations resulting from the whole and the parts of this Agreement. The Four Powers have agreed that irrespective of the differences in their legal views, the situation existing on the area subject to provisions of the Quadripartite Agreement as well as Agreements mentioned in the Final Protocol (that is, Agreements between the GDR and FRG, and between the GDR and West Berlin) " shall not be changed unilaterally " (Part I). From the legal viewpoint it is meaningless whether the Western Powers have called the contracting parties by their real names or used the term " competent German authorities ".

The contents of the Quadripartite Agreement embrace general provisions and settle the problem of the so-called access, that is, communication from and to West Berlin, relations between West Berlin and the Federal Republic of Germany, representation of West Berlin abroad, freedom of movement of the West-Berlin residents, exchange of territories, and the Soviet Union's presence in West Berlin. The Agreement is rounded off by the Final Quadripartite Protocol envisaging a consultation and entering-into-force procedure.

(a) General provisions (Preamble and Part I) contain several important new elements—above all the reversion to the Four-Power rights and responsibilities. As a consequence of this joint stand an obligation is undertaken that, irrespective of the differences in legal views, the accepted solutions shall not be changed unilaterally. The former Four-Power occupation of Berlin was governed by a similar principle. Then the rights of the respective Powers in their occupation sectors were limited by the principle of unanimity and the obligation to act in accordance with the occupation aims. In the new circumstances, after the unity of Germany and Berlin had been shattered, the adoption of the principle of joint responsibility was tantamount first and foremost to accepting the obligation to work for the relaxation of tension and prevention of conflicts in this area as well as for the application of the provisions of the UN Charter on

[107] *Ibid.*, p. 5. The West German daily " Die Welt " of 28 Sept., 1971 observed that it was only the US Ambassador who supported the Western interpretation and argues against the interpretation of the socialist countries. Other participants of the negotiations remained silent on this issue.

renouncing the use of force. The Four Powers committed themselves that in the area governed by the Agreement there shall be no use of force or threat to use it, and that disputes would be settled solely by peaceful means. Accepting these principles the signatories of the Berlin Agreement undertook that they

" will mutually respect their individual and joint rights and responsibilities, which remain unchanged ".

Considering the course of the past events and the fact that as far as 1948 the joint activities of the Allied Powers with regard to Germany and Berlin were suspended, this last resolution seems to be of the utmost importance.

(b) In fact, *the matters of civilian communications* (the so-called access to Berlin) have been settled only by the Quadripartite Agreement. The provisions of this Agreement have defined the basis and directions for the successive negotiations between the two German states. But in what lies the novelty of the accepted solutions ?

(i) The Soviet Union has declared

" that transit traffic by road, rail and waterways through the territory of the German Democratic Republic of civilian persons and goods between the Western Sectors of Berlin and the Federal Republic of Germany will be unimpeded ; that such traffic will be facilitated so as to take place in the most simple and expeditious manner ; and that it will receive preferential treatment " (Part II, A).

According to Annex I the term " preferential treatment " should be understood as the most advantageous treatment " provided by international practice ".

(ii) For the transport of civilian goods between West Berlin and the Federal Republic conveyances may be used sealed before departure (that is, on the area of the FRG or West Berlin), and inspection procedures will be limited to the inspection of seals and transportation documents. If conveyances cannot be sealed, the inspection will be limited to transportation documents. Only in special cases (the transport of materials intended for disseminating along the designated routes or persons or material put on board along these routes) a possibility is envisaged to inspect unsealed conveyances.

(iii) In trains and buses in transit between the Federal Republic and West Berlin the inspection procedures will be limited to identification of persons.

(iv) A simplification of clearence procedures is envisaged by an annual lump sum paid by the FRG Government.

All specific matters are subject to agreements by the competent German authorities.

The FRG Government circles have described the settlement of communication problems as the most important development since the end of the so-called Berlin blockade in 1949.[108]

(c) From the political and legal point of view *the relations between West Berlin and the Federal Republic* were and still remain the most important problem. This resulted from the long-lasting legislative practice of the FRG aimed at incorporation of the City as a Federal Land. The Western Powers differed in their attitude albeit they supported the development of extensive ties between West Berlin and the Federal Republic. Thus the status of the Western Sectors of Berlin as described in the legal documents of the FRG differs from that described in the regulations of the Western Powers and from both in its practical application. The existence of permanent ties between West Berlin and the Federal Republic with regard to economic life, financial system, and scientific and cultural activities is beyond any doubt. Also legal regulations, transferred in a transformed form by the House of Representatives, brought closer the organization and forms of the social and political life in the FRG to those in the Western Sectors of Berlin. At the same time manifestations of the so-called political presence of the FRG in West Berlin, accentuated by converting it into a place of Bundestag and Bundesversammlung meetings and presidential elections—especially in periods of political tension—led to sharp protests of the socialist countries, aggravated the tension, and created conflicting situations.

The solution agreed by the Four Powers is a compromise. It takes into account (Part II and Annex II)[109] the existing ties between the FRG and West Berlin and envisages their development in the future.

At the same time the document reaffirms the standpoint of all the Great Powers (Annex II, point 1) that the Western Sectors of Berlin

> " continue not to be a constituent part of the Federal Republic of Germany and not to be governed by it ".

And what is more—the provisions of the Basic Law of the Federal Republic and of the Constitution operative in the Western Sectors of Berlin which contradict the Quadripartite Agreement have been suspended and " continue not to be in effect ". The declarative point 1 has been substantiated in point 2 by the stipulation that the FRG President and Government, the Bundesversammlung, the Bundesrat and the Bundestag, including their Committees and Fractions, as well as other FRG State organs will not be

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[108] See *Das Viermächte-Abkommen*, p. 97.

[109] See Communication from the Governments of France, Great Britain and the United States to the Government of the USSR.

able to perform constitutional and official acts which are directed against the separate status of West Berlin.

The meaning of the phrase "will not perform in the Western Sectors of Berlin constitutional or official acts" is explained by the interpretative letter of the three Western Ambassadors to the Federal Chancellor. These acts are "acts in exercise of direct State authority over the Western Sectors of Berlin".

Instead of the "political presence" hitherto developed, the Federal Republic was bound to establish in West Berlin a permanent liaison agency for the representation of the Federal Republic before the representations of the three Occupation Powers and the Berlin Senate. The liaison agency of the FRG Government was to comprise individual departments according to specific liaison functions exercised by these departments.[110] However, the Federal Office of Press and Information diminishes the importance of this provision by stating that in practice it would change nothing since the presence in West Berlin of the Federal institutions and offices will be kept unchanged and the functions of the liaison organ will be exercised by a FRG plenipotentiary.[111]

The letter of the three Ambassadors to the Federal Chancellor concerning the interpretation of Annex II stated that meetings of the Bundesversammlung and plenary sessions of both Houses of the Federal Parliament would not take place in the Western Sectors of Berlin. As to the Bundesrat and Bundestag committees, they may assemble in West Berlin but only in connection with the relations between this part of the City and the Federal Republic. However, the meetings of Fractions cannot be held simultaneously.

The applicability of the FRG legislation to West Berlin remains unchanged, that is, the legislation and other legal acts of the Federal Republic are not automatically operative in the West Berlin area. A West-German law may be introduced into West Berlin solely in accordance with the procedure defined by the Western Occupation Powers in their Declaration of 5 May, 1955, that is, through adopting it by the West Berlin's House of Representatives with the previous approval of the three Western Oc-

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[110] This information is to be found in the interpretative letter of the Ambassadors of the Western Powers to the Federal Chancellor, the copy of which was attached to the note addressed to the Soviet Ambassador and constituted an integral part of the Agreement of 3 Sept., 1971. The letter also explains that the term "state bodies" used in Annex II, point 2, means the Federal President, the Federal Chancellor, the Federal Government, the Federal Ministers and Ministries, the Bundesrat and the Bundestag and all Federal Courts.

[111] The Federal Plenipotentiary Office was established by a decision of the FRG Government of 30 Nov., 1953 to represent the Federal Republic to the West Berlin Senate and the Allied Commandatura. See *Das Viermächte-Abkommen*, p. 105.

cupation Powers and under the stipulation that it may be suspended, abrogated or amended on the Western Commandatura request.

A publication of the Federal Government,[112] assessing gains and losses resulting from this part of Agreement, underlines first and foremost the FRG gains: recognition by the Soviet Union of close ties between the Federal Republic and West Berlin and the right to develop them further. But the West-German interpretations consciously belittle the importance of restrictions and barriers, embodied in the form of an international act, which were to put a stop to the policy of incorporation of West Berlin into the Federal Republic.

On the whole, however, the Agreement has created premises for the stabilization of West Berlin as an independent political and legal unit. It is worth noting in this context that among many conceptions and models that were discussed with regard to the possible status of West Berlin and its connections with the Federal Republic of Germany, there appeared the idea to make use of patterns that had been supplied by functional and legal settlements of relations between European mini-States and their neighbours. In particular a possibility was considered to solve the problem of the representation of West Berlin along the principles governing the relations between Switzerland and Liechtenstein.[113] Without embarking upon an appraisal of these suggestions, and taking into account important differences in origin and present-day situation between West-Berlin and Liechtenstein, Monaco or San-Marino, it would seem that the accepted Agreement contains an outline of the future status of the City as an independent organism bound to the FRG by the same economic system and developing extensive contacts with the GDR and other socialist countries.

(d) *Representation abroad of West Berlin.* This issue had caused many disputes and controversies before the Quadripartite Agreement came into force. The socialist countries had disputed—as a matter of principle—the right of the FRG to represent the Western Sectors of Berlin regarding it as one of the instruments of a policy aimed at transforming these Sectors into a Federal Land. In practice, this state of affairs had hampered the development of cooperation in all fields, particularly with regard to cooperation regulated by those international agreements, that were, as a rule, frustrated by the problem of the so-called Berlin clause. The residents of West Berlin were deprived of consular protection in the

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[112] *Ibid.*

[113] Cf. the interview with the CDU politician, H. Kohl, "Der Stern" 1971, No. 3, pp. 113—114. More cf. B. Sikorska, *Sytuacja prawnomiędzynarodowa europejskich państw karłowatych* [*International Legal Situation of the European Mini-States*], "Sprawy Międzynarodowe," 1971, No. 4, pp. 77—90.

socialist countries.[114] Also its possibilities of developing international contacts were considerably limited.

The Agreement concluded between the USSR Government on the one side and the three Western Governments (which held consultations with the Federal Government) on the other, created a new international basis for the representation of the West Berlin interests abroad. Provisions to this effect have been specified in the exchange of communications (Annex IV A and IV B) amplifying the general formula of the Agreement (Part II D). Communication of the French, British, and US Governments to the Soviet Government (Annex IV A) states that:

first—the Western Powers continue to maintain their rights and responsibilities relating to the representation abroad of the interests of West Berlin and its permanent residents, including those rights and responsibilities concerning matters of security and status, both in international organizations and in relations with other countries. In other words, it is not the Federal Government, but the Occupation Powers that represent West Berlin with regard to its vital interest;

second—the Western Powers have agreed—and this could be interpreted as a partial transference of their rights—to Federal Germany performing consular services for permanent residents of West Berlin;[115]

third—the extension to West Berlin of international agreements concluded by the Federal Republic has been settled in a similar way, that is, the Western Powers have agreed that "in accordance with established procedures" (laid down by the Declaration of the Western Powers of 5 May, 1955) such agreements may be extended to the Western Sectors of Berlin provided that the extension is in each case specified in the text;

fourth—the three Western Powers have agreed to Federal Republic representing the West Berlin interests in international organizations and international conferences;

fifth—permanent residents of West Berlin may be included in international exchange of the Federal Republic, for instance to take part in exhibitions, and Western Sectors may be used as a place for meetings of international organizations, conferences, exhibitions to which invitations may be issued either by the West Berlin Senate or by the Senate and the appropriate FRG organs jointly.

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[114] Since 1960 the Soviet Union did not recognize the FRG foreign passports as identification documents of the West Berlin residents.

[115] The text does not specify whether this provision refers only to permanent residents of German nationality, who are not entitled to consular protection as nationals of one of both German States, or to all persons having domicile in West Berlin, including stateless persons, refugees and other categories of permanent residents.

The USSR Government took note of the above mentioned Communication (Annex IV B) underlining at the same time the maintenance of the rights and responsibilities of the Great Powers and stating that with regard to the representation of West Berlin by the FRG " it will raise no objection provided that matters of security and status are not affected."[116]

(e) *The freedom of movement of the West Berlin residents* was—besides the freedom of communication—treated by the Western side as the most important problem of the negotiations. In practice, the resolution of the GDR Council of Ministers of 13 August and the regulations of 22 August, 1961 had considerably restricted the visits of the West-Berlin residents to the capital of the GDR. The agreements on permits of 1963 and 1966 were temporary and did not solve the existing problem. The novelty of the Quadripartite Agreement consists in consenting that permanent residents of West Berlin will be allowed " for compassionate, family, religious, cultural or commercial reasons, or as tourists " to visit the GDR and its capital,[117] under conditions comparable to those " applying to other persons " arriving in the GDR.

What does it mean ? The explanation is to be found in Annex III containing a communication of the Soviet Government to the Governments of France, Great Britain and the United States. The Soviet Union, having consulted and acting in agreement with the GDR Government, stated that :

— communications between West Berlin and the GDR and its capital will be improved,

— permanent residents of West Berlin will be able to visit all the territory of the GDR under the same conditions that apply to the FRG nationals,

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[116] In addition to the documents accompanying the Quadripartite Agreement there is the " Agreed Minute I " according to which persons being permanent residents of West Berlin and applying for entry visas to the USSR may present a passport bearing the stamp " issued in accordance with the Quadripartite Agreement of 3 Sept., 1971 " or an identity card or other document confirming their permanent residence in West Berlin, and containing the bearer's full address and his personal photograph. The agreed stamp is obligatory in all passports used by permanent residents of West Berlin " for journeys to such countries as may require it." In this way the separate status of West Berlin and its residents has been once more reaffirmed for whom the FRG nationality and possession of a FRG passport does not constitute a sufficient basis for obtaining entry visas into a socialist country. " Impressing upon Federal Passports issued for West-Berliners a special stamp expresses the fact that the right of the Federal Republic of Germany to represent West Berlin abroad is limited by the Allied rights." See *Das Viermächte-Abkommen*, p. 110.

[117] It is in this point where the reference is made to areas which border on the Western Sectors of Berlin, as well as to those GDR areas which do not border on these Sectors.

— to facilitate visits between East and West Berlin additional crossing points will be opened, and finally

— telephonic, telegraphic, transport and other external communications of West Berlin will be expanded.

All these matters have been directly agreed between the GDR Government and the Senate of West Berlin.

(f) *The exchange of territory* was not a key problem as it concerned only small enclaves on the GDR territory. These enclaves had been created in connection with the Four-Power occupation of the whole of Berlin. Along with the liquidation of the joint administration and ensuing decomposition of the City, there remained the awkward problem of small areas bordering on all their sides with the territory of the GDR. The Quadripartite Agreement stipulated that the problem of all those enclaves may be solved by an exchange of territory agreed between the West Berlin Senate and the GDR Government.

(g) *The Soviet presence in West Berlin* has been regulated by the provisions of Part II D of the Agreement and by the arrangements contained in Communications between the three Western Powers and the Soviet Union (Annex IV A and IV B). In effect, the three Western Powers have consented that a Soviet Consulate General be established in West Berlin which would be accredited, " in accordance with the usual procedures applied in those Sectors," to the appropriate authorities of the three Western Governments.

The activities of the Soviet Consulate General have been defined by Agreed Minute II to the effect that they will not include political functions or any matters related to quadripartite rights and responsibilities. In other words, it is restricted in its functions to typical consular activities.

Moreover, the Western Powers have consented to indefinite extension of Soviet commercial activities in West Berlin provided that these activities will be conducted in accordance with pertinent legal regulations of the Western Commandatura and the West Berlin Senate. A possibility of adequate consultations has been envisaged. The Soviet enterprises authorized to conduct commercial activities have been enumerated and the scope of their activities defined. Similarly the activities of the Intourist and Aeroflot offices have been limited. The number of Soviet nationals who may be—subject to agreement with the appropriate authorities of the three Western Powers—directed to work in the Consulate General and in Soviet commercial organizations has been restricted. It should not exceed 20 people in the Consulate General, 20—in the office of the Soviet Foreign Trade Associations, 6—in the Intourist office and 5—in the Aero-

flot office. Also the status of the Soviet properties in West Berlin is regulated by Agreed Minute II.[118]

Consultation procedures and the entering into force of the Agreement is regulated by the Final Quadripartite Protocol. The importance of this document is underlined by the fact that all agreements and arrangements concluded between the Four Powers, as well as those concluded between the GDR and FRG organs and between the GDR and West Berlin, form a single international agreement of a multilateral character. The consultation clause reaffirms as it were the Four-Power status and responsibilities in a region where the Agreement is to be effective. As a matter of fact, the consultations will perform the role of a Four-Power arbitration and manifest once more the joint quadripartite responsibility for Berlin.

9. Agreement between the GDR and FRG Governments

In accordance with the announcement contained in the Quadripartite Agreement (Part II), detailed arrangements concerning transit traffic between West Berlin and the Federal Republic have been agreed in direct negotiations between the representatives of both German States. Official negotiations between the GDR and FRG had started on 29 October, 1970. The text of the first inter-German international agreement (*Abkommen*) was signed in Bonn on 17 December, 1971 by the Secretaries of State of the GDR and FRG (M. Kohl and E. Bahr).[119] It refers to transit traffic of civilian persons and goods by road, rail and waterways " through the sovereign territory of the German Democratic Republic " (*durch das Hoheitsgebiet der Deutschen Demokratischen Republik*).[120]

Solutions adopted in this Agreement were anticipated by the Communication of the USSR Government to the three Western Powers Governments worked out after consultation and in agreement with the GDR Government (Annex I to Part II A of the Quadripartite Agreement). This document stated that transit traffic through the territory of the GDR between West Berlin and the Federal Republic would be unimpeded, facilitated and—to make it most simple and expeditious—would receive " preferential treatment ". Accordingly, the Kohl-Bahr Agreement states that

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[118] Details of this arrangement were agreed upon between the Ambassadors in the period between 3 September 1971 and the signature of the Final Quadripartite Protocol.

[119] The text of the Agreement and accompanying documents—see *Die Berlin Regelung.*

[120] Art. 1, *ibid.*, p. 14.

„Der Transitverkehr wird erleichtert werden und ohne Behinderung sein. Es wird in der einfachsten, schnellsten und günstigsten Weise erfolgen, wie es in der internationalen Praxis vorzufinden ist".[121] According to these principles—substantiated by further provisions of the Agreement—travellers using individual vehicles will obtain the GDR transit visas on the frontier crossing points and at their vehicles, and those travelling by bus or in transit trains—inside these conveyances (Art. 4). The transit of sealed goods is subject to a simplified inspection and enjoys special facilities (Arts 5, 6, 7—inspection procedures are limited to the inspection of seals and accompanying documents).

The contracting parties have also established procedures for the purpose of preventing the abuse of transit ways and in the event of offences having been committed in transit traffic (Arts 16 and 17) ; furthermore, the amount of the lump sum has been set up and the form in which the FRG Government will bear costs related to transit traffic to and from West Berlin (Art. 18).[122] Ways of solving difficulties and differences of opinions, which may arise in the application or interpretation of this Agreement, are stipulated in Articles 19 and 20. According to the final clause (Art. 21), the Agreement came into force simultaneously with the Quadripartite Agreement,[123] and its effectiveness was made dependent on how long the Quadripartite Agreement of the Four Powers would remain effective.

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[121] *Ibid.*, Art. 2, point 1. At the same time Art. 2, point 2 reads: "*Im Transitverkehr finden die allgemeinen üblichen Vorschriften der Deutschen Demokratischen Republik bezüglich der öffentlichen Ordnung Anwendung, soweit dieses Abkommen nich anderes bestimmt.*"

[122] On 17 Dec., 1971, during the ceremony of signing the Agreement, both the Secretaries of State, Kohl and Bahr, had exchanged letters on making operative, before the Agreement came into force formally, the provisions of Art. 18 (on lump sums paid for the use of roads and for transit visas) from 1 Jan. 1972. The text of the letters *ibid.*, pp. 56—58. Moreover, the Agreement is supplemented by a *Briefwechsel den Abteilungsleiters im Bundeskanzleramt der Bundesrepublik Deutschland, dr U. Sahm und des Abteilungsleiters beim Ministerrat der DDR, K. Seidel, über die Ausfertigung und Behandlung von Warenbegleitscheinen für zivile Güter im Transitverkehr zwischen der Bundesrepublik Deutschland und Berlin (West), ibid.*, p. 59. On 18 Dec., 1971 the Chief of the Western Commandatura, General Routier, addressed a letter to the burgomaster of West Berlin informing him that the Federal Government was also authorized to conduct negotiations on behalf of the Senate of West Berlin. *Ibid.*, p. 104.

[123] The signing of the Final Quadripartite Protocol, which took place on 3 June, 1972 at the building formerly occupied by the Allied Control Council in the American Sector of Berlin, brought into force the Quadripartite Agreement (point 1) simultaneously with the Agreements concluded between the GDR and FRG, as well as between GDR and West Berlin (point 2) ; all these understandings were to remain in force together (point 3). If any of the signatories of the Quadripartite Agreement should consider that the application of any of the above-mentioned understandings

For many reasons the significance of this Agreement transcends its letter and spirit. For it was the first agreement between the GDR and FRG corresponding with the usual practice in international relations. And although it regulates only one issue—transit between the FRG and West Berlin—the signatories were unanimous in stressing[124] that (1) the Agreement had contributed to the conclusion of the basic Agreement regulating the bulk of relations between the GDR and FRG ; (2) for the first time, in an bilateral act between the two German States, principles of international law had been adopted in accordance with the usual practice in relations between sovereign States ; (3) the way had been paved to a general communication agreement between the GDR and FRG.[125]

The provisions relating to transit between the FRG and West Berlin are of a detailed character. But—as one of the negotiators explained[126]—both sides had occupied themselves more with procedures related to exceptional situations than with the setting up of rules.

In assessing this act from the legal and international viewpoint, it was underlined that—taking into account the existing state of affairs and specific legal situation of West Berlin—both States, the GDR and FRG, had started the process of shaping their relations " on the basis of full equality, non-discrimination, and respect of independence and selfsupport in matters concerning their internal competence."[127] It is no accident that

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is meeting with difficulties, that signatory may conduct—according to point 4 of the Protocol—appropriate quadripartite consultations " in order to ensure the observance of the commitments undertaken." In other words, the consultation clause refers only to the signatories of the Quadripartite Agreement and does not envisage the participation of other parties to the understanding (that is, of both German Governments and the West-Berlin Senate).

[124] Cf. statements of the Secretaries of State, M. KOHL and E. BAHR, made at the initialling ceremony (11 and 17 Dec., 1971). See *Die Berlin-Regelung*, pp. 53 ff and 123 ff.

[125] The Agreement on Communications between the GDR and FRG, initialled on 12 May and signed on 26 May, 1972, was published in the *Aussenpolitische Korrespondenz* of 15 May, 1972 and in the Bulletin des Presse—und Informationsamtes der Bundesregierung of 13 May, 1972. The Agreement entered into force on 18 October 1972 after the exchange of ratification documents. At the same time appropriate executive orders were issued in the GDR.

[126] E. BAHR stated that 99.9 percent of the users of the communication routes between the FRG and West Berlin have no other desire than to be able to travel on transit roads as quickly and undisturbedly as possible. But even against those few who would transgress the regulations, unequivocal rules of conduct were established. *Ibid.*, p. 124.

[127] The negotiator on behalf of the FRG Government, E. Bahr, stated : " It will be a further step in shaping the relations between both States on the basis of full equality, non-discrimination, respect for independence and self-support in matters related to their competence." *Ibid.*, p. 52.

the first international agreement between both German States is connected with Berlin. And what is more, the provisions of this agreement go further towards the normalization of relations between the GDR and FRG than it was necessary from the point of view of the Quadripartite Agreement on 3 September, 1971.

10. Agreements between the GDR Government and the West Berlin Senate

Parallel to the GDR-FRG negotiations, talks between the representatives of the West Berlin Senate and the GDR Government also took place. They led to agreements signed (on 20 December, 1972) on behalf of the West Berlin Senate by U. Müller, and on behalf of the GDR Government by G. Kohrt.

(a) The first Agreement (*Vereinbarung*) refers to travel facilities, travel improvements and visits by permanent residents of West Berlin.[128] They may—according to Article 1—visit the GDR and its capital once a year during a 30-days global period. The reasons for such a travel may be of compassionate, family, religious, cultural or tourist character. Residents of West Berlin are liable to show a valid identity card (*Personalausweis*) and an appropriate entry and exit permit issued by the GDR authorities (Art. 2). The remaining provisions of this Agreement settle the conditions of its realization and procedure for solving controversial situations.[129] Detailed provisions may be found in the following annexes: the protocol on travel improvements and travel facilities, the protocol on the activities of travel offices, the exchange of letters (P. Florin—U. Müller) on defining frontier crossing points, and the protocol on the continuation of talks between the competent GDR authorities and the West Berlin Senate concerning further improvement of communications.[130]

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

[129] A Declaration made by the Secretary of State, G. Kohrt, on 20 Dec., 1971 stated that a permission to enter the GDR is dependent upon the observance of the conditions laid down in the statement of the GDR Government and in its regulations. "That means that persons who, according to the laws of the German Democratic Republic, have committed penal acts, and especially those who are prosecuted, will get no permission to enter the German Democratic Republic." It also refers to persons who having infringed legal order, left the GDR after the frontier regulations of 13 Aug., 1961 had been introduced. On this occasion G. Kohrt drew attention to the Declaration No. 10 of the GDR Government. *Ibid.*, p. 72. The text of the Declaration after ADN, *ibid.*, pp. 141—144.

[130] See *Protokollvermerk, Schriftwechsel, ibid.*, pp. 73—84.

(b) The second agreement (*Vereinbarung*) between the GDR Government and the West Berlin Senate settles the problem of mutual exchange of small enclaves and financial settlements connected with this exchange.[131] In accordance with the announcement contained in the Quadripartite Agreement of 3 September, 1971, agreements were concluded and carried out on the exchange of territories: the GDR took over an area of 15.6 hectares and West Berlin—17.1 hectares. According to Article 4, the West Berlin Senate paid the GDR a recompensation amounting to DM 4 million.[132]

The text of both agreements, initialled on 11 December and signed on 20 December, 1971, was said to be "clear and intelligible" (*klar und verständlich*).[133] The West-Berlin signatory to the agreements, the Chief of the Senate Chancery, stated that he had been authorized by the Allied Commandatura to conduct negotiations and sign the agreements.[134] He also stated that the Quadripartite Agreement of 31 September, 1971 had facilitated to overcome obstacles of a formal and substantial nature with regard to the normalization of relations between the GDR and West Berlin. Notwithstanding this the burgomaster of West Berlin K. Schutz, addressed a letter to the Western Commandatura[135] enclosing the texts of initialled agreements and accompanying documents. In this way also on this occasion there has been—in accordance with the Quadripartite Agreement and the earlier practice—reaffirmed the binding procedure of concluding international agreements by the West Berlin Senate. In his reply the Chief of the Commandatura General M. Routier, not only expressed his approval of these agreements, but also stressed their consistence with the Quadripartite Agreement, which "constitutes a basis for their interpretation and implementation" (*die Grundlage für ihre Auslegung und Durchführung bildet*).[136] On the whole, the West-Berlin side recognized the Agreement

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[131] See the text pp. 85—88. Details have been settled in the interpretative protocol—pp. 89—93. The West Berlin Senate concluded an additional agreement on 21 July, 1972 on the purchase of 8.5 hectares and on 30 August the Steinstücken enclave obtained direct connection with West Berlin, See "International Herald Tribune" of 1 April, 1972.

[132] In carrying out Part II C and Annex III (points 1, 2 and 3) of the Quadripartite Agreement of 3 Sept., 1971.

[133] This is the opinion expressed on 11 Dec., 1971 by G. Kohrt. He also stated that the Agreement "could produce, when accompanied by mutual readiness for understanding, a starting point for further steps towards the normalization of relations between German Democratic Republic and West Berlin." *Ibid.*, p. 97.

[134] See U. Müller's statement of 20 Dec., 1971, p. 99.

[135] See the text of the letter, *ibid.*, p. 101.

[136] Cf. the text of the reply in German language, *ibid.*, pp. 102—103.

not only as an improvement of the previous situation, but even as a solution better than that achieved by the Quadripartite Agreement.[137]

It is worth noting that inasmuch as the complex problems of transit between the FRG and West Berlin were solved in a relatively detailed and clear manner by the Quadripartite Agreement of the Four Powers, the matters due to be settled with regard to the GDR and West Berlin were negotiated directly between the parties concerned. This explains to some extent the difficulties connected with the conclusion of agreements. The solutions adopted constitute an important progress since they regulate within the system of international law a huge and complicated set of problems related to the specific situation of West Berlin in its relations with both German States—with the approval of all the parties concerned.[138]

11. Final Remarks

1. The regulation of the West Berlin status and of the access to this city, effectuated by the Quadripartite Agreement and the agreements between the GDR and FRG as well as between the GDR and the West Berlin Senate (mentioned in the Final Quadripartite Protocol), and derived, legally speaking, from the existing state of affairs, brings about a solution of practical problems, but does not solve all the legal controversies.[139]

2. The Quadripartite Agreement has solved one of the political key problems by reaffirming *expressis verbis* the legal position represented by the socialist countries, according to which West Berlin never was and continues not to be a constituent part of the Federal Republic of Germany and cannot be governed by it.

3. Equal treatment of both German States, and especially the recognition of the GDR's exclusive competence on the area subject to its sovereign power, has been one of the corner stones of the regulation of West Berlin's legal position. This has been first and foremost expressed by agreements concluded between the GDR and FRG Governments and between the GDR and the West Berlin Senate.

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[137] On 11 Dec., 1971 the burgomaster of West Berlin, K. SCHUTZ, stated openly: "The Agreements, compared with what happened before—in the past years—and with the Quadripartite Agreement itself, are more than satisfactory. I say consciously: more than satisfactory." *Ibid.*, p. 108.

[138] The Four-Power Statement made after signing of the Agreement, *ibid.*, pp. 121—122. Cf. also E. MENZEL, *Die Ostverträge von 1970 und der "Deutschland"-Begriff des Grundgesetzes. Die öffentliche Verwaltung*, January 1972, No. 1—2, p, 11.

[139] See R. RYBICKI, *Status prawny Berlina Zachodniego* [*The Legal Status of West Berlin*], Warszawa 1972.

4. West Berlin's relations with both German States have become institutionalized.[140] This fact could be interpreted as a step towards acquiring by this city, which continues to be subject to a limited occupation regime, the status of a subject of international law.

The problem of access to West Berlin has been solved according to preferential international transit rules; its detailed solutions have been defined by the provisions of the Agreement of December 1971.

5. The Agreement on West Berlin restores the functioning of the quadripartite responsibility of the Four Powers, which assumes a new content in view of the existence of the two German States and a separate West Berlin status.

Generally speaking, the Quadripartite Agreement on West Berlin and the accompanying agreements form an important link in the chain of international legal acts and political decisions shaping the process of détente, stabilization and normalization of the East-West relations, and the construction of a system of security and cooperation in Europe.

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[140] The fact that West Berlin's financial, economic, cultural and other links with the Federal Republic have been recognized as being of a limited character could hardly be interpretated as meaning that—according to E. MENZEL's suggestion—we can treat West Berlin as a Land associated with FRG (*West-Berlin als "assoziertes Land der BRD"—op. cit.*, p. 11). In his opinion such kind of association would make any link with other states or groups of states impossible ("*eine Bindung an andere Staaten oder Staatsgruppen ausgeschlossen ist*"). A similar opinion is also presented by H. KLOSS, *West-Berlin als "assoziertes Land,"* "United Nations," 1972, No. 4, p. 117.

Jus Cogens in International Law
(Regulation and Prospects)

by KAROL WOLFKE

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I

Among the numerous difficult problems which had to be solved at the codification of the law of treaties, the invalidity of treaties conflicting with the so-called peremptory norms of international law numbers among the most controversial.

In the International Law Commission as well as at the two sessions of the Conference of Vienna in 1968 and 1969 this problem gave rise to a wide divergency of opinion. There is already a rich literature on this subject and eminent scholars representing different legal and political systems of all continents discussed it at the special conference organized by the Carnegie Foundation at Lagonissi in 1966.[1]

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[1] For a review of the practice and opinions, see E. SUY, *Le jus cogens en droit international*, in: *Rapport, Conférence de droit international, Lagonissi (Grèce) (3—8 avril 1966)*, Centre Européene de la Dotation Carnegie, Genève (mimeographed); G. I. TUNKIN, *Teoria meždunarodnogo prava*, Moskva 1970, pp. 168—183; J. A. BARBEREIS, *La liberté de traiter des Etats et le jus cogens*, "Zeitschrift für ausländisches öfftentliches Recht und Völkerrecht", vol. 1, April, 1970, pp. 19—45; K. MAREK, *Contribution à l'étude du jus cogens en droit international*, in: *Recueil d'études de droit international en Hommage à Paul Guggenheim*, Genève 1968, pp. 426—459; E. SCHWELB, *Some Aspects of International Jus Cogens as Formulated by the International Law Commission*, AJIL, vol. 61 (1967), pp. 946—975; M. SCHWEITZER, *Jus Cogens im Völkerrecht*, "Archiv des Völkerrechts," vol. 15, (1971), No 2, pp. 197—223; H. B. REIMANN, *Jus cogens im Völkerrecht. Eine quellenkritische Untersuchung*, Zürich 1971; *Conference on International Law Lagonissi, April 3—8, 1966, Papers and Proceedings*, Geneva 1967.

The final outcome of those official proceedings and scientific discussions consists of two articles in the Vienna Convention on the Law of Treaties: Article 53: "Treaties conflicting with a peremptory norm of general international law (*jus cogens*)" reads:

"A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international Law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Article 64: "Emergence of a new peremptory norm of general law (*jus cogens*):"

"If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates."[2]

These articles constitute a compromise which it has been possible to reach between the States which supported the insertion of appropriate provisions on *jus cogens* without reservations[3] and those which, to be sure, also admitted the existence of peremptory norms in international law but, at the same time, expressed various doubts and anxieties.[4]

Most criticism concerned the wording of Article 53. The International Law Commission itself admitted in its Comment to the final Draft of Article 50 corresponding to the above Article 53 that "the formulation is not free from difficulty, since there is no simple criterion by which to

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[2] AJIL, vol. 63, (1969), pp. 875—903.

[3] Among them the socialist States and the majority of Afro-Asian States. See G. I. TUNKIN, *op. cit.*, pp. 176—177. See also, for instance, the pronouncement by the Polish representative, professor Nahlik, *United Nations Conference on the Law of Treaties, Second Session*, Official Records (A/CONF 39/11/Add. 1), pp. 99—100.

[4] Art. 53 was approved by 87 votes to 8 with 12 abstentions. Against were: Switzerland, Turkey, Australia, Belgium, France, Liechtenstein, Luxembourg and Monaco. *Ibid.*, p. 107. Art. 64 was adopted by 84 votes to 8, with 16 abstentions. Against were the same States. *Ibid.*, p. 125. E. g. ELIAS writes of "four main lines of attack": (1) that the international society has not evolved to the stage of having a concept of international law based on the idea of public policy (2) that the rule of *jus cogens* in the Vienna Convention lacks precision or definition and precedents hardly existed, (3) inadequacy of the foreseen dispute settlement procedure, (4) that the rule does not contain a specific indication that it is non-retroactive in character. T. O. ELIAS, *Problems Concerning the Validity of Treaties*, "Recueil des Cours," vol. 194, (1971—III), pp. 394—410.

identify such (peremptory) rules."[5] It has been also rightly noted that this article constitutes in fact a *petitio principi*[6] or tautology.[7]

Neither the International Law Commission nor the Conference of Vienna endeavoured to draw a list of international peremptory norms. Instead, the former considered " the right course to be to provide only in general terms that a treaty is void if it conflicts with a rule of *jus cogens* and leave the full content of this rule to be worked out in State practice and in the jurisprudence of international tribunals."[8]

Several States saw in the lack of precise determination of the criteria of discerning peremptory norms in international law a threat to the legal security, an undermining of the fundamental principle *pacta sunt servanda* and, in general, a source of arbitrariness.[9]

No doubt, these anxieties are exaggerated. Any text can give rise to abusive interpretation.[10] It can be hardly denied, however, that such critical attitudes, considering their number and consistency, should not be ignored, since they may weaken the concept of *jus cogens* in international law and, in particular, make the future application of this concept in practice problematic.

In fact, the achievement of the International Law Commission and of the Conference of Vienna in the regulation of *jus cogens* in the law of treaties constitutes only the first, though certainly a very important, step consisting in a breakthrough in the up to recently general view that international law is entirely *jus dispositivum*.[11] The insertion in the Convention of Article 53 and 64 means the end of the heated discussions of such questions as whether there can be peremptory norms in international law at all, whether *jus cogens* is a new concept in this law, etc.

Now, in face of the growing chance that the Convention will enter

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[5] *Reports of the International Law Commission on the Second Part of its Seventeeth Session*..., GA Official Records, Twenty-First Sess., Suppl. 9/A/6309/Rev. 1/, pp. 76—77.

[6] See pronouncement by the Delegate of Mexico, *United Nations Conference on the Law of Treaties, First Session,* (A/CONF. 39/11), p. 294 ; J. Nisot, *Le " jus cogens " et la Convention de Vienne sur les Traités*, RGDIP, 1972, vol. 3, p. 694.

[7] R. Ago, *Droit des traités à la lumière de la Convention de Vienne,* " Recueil des Cours," vol. 134, (1971—III), p. 322.

[8] *Reports*, pp. 76—77.

[9] See especially the pronouncements by the representatives of France, Australia, United Kingdom and Switzerland, *United Nations Conference on the Law of Treaties, Second Session*, pp. 93, 94 and 97.

[10] See the pronouncement by the representative of Bulgaria and Ceylon, *ibid.*, pp. 102—103, 122.

[11] See the pronouncement by the representative of Ceylon, *United Nations Conference on the Law of Treaties, First Session*, pp. 319.

into force much earlier than it has been expected,[12] the next step to make the application of the provisions on *jus cogens* in practice possible becomes topical.[13]

It is true that judging by the past practice Part V of the Vienna Convention will have a rather rare application. It has in fact, a mainly a preventive function.[14] Its importance lies, however, also in that it constitutes a measure of the development of international law and, more generally, of the consolidation of the international community of nations. Moreover, those provisions on *jus cogens* constitute an evident acceptance of common superior values and norms of conduct and, therefore, the progressive world opinion attaches such a great importance to them.[15]

At the present stage, the following questions seem to require yet particular consideration :

1. How should the not very happy wording of Article 53 be interpreted, or, in other words, what are, in fact, the criteria of distinguishing international peremptory norms ?
2. How can in present international law such norms arise at all ?
3. How to ascertain them ?
4. Do the most unquestioned peremptory norms of international law fulfil the required criteria ?
5. What are the conditions of making the application of the articles on *jus cogens* in the Vienna Convention possible ?

II

As regards the first question, it follows from the content of Article 53 that a peremptory norm of general international law is a norm (a) accepted and recognized by the international community as a whole, (b) from

[12] See S. E. NAHLIK, *The Grounds of Invalidity and Termination of Treaties*, AJIL, vol. 65, (1971), p. 756 ; R. AGO, *Droit des traités à la lumière de la Convention de Vienne*, " Recueil des Cours," vol. 134, (1971—III), p. 328. According to Art. 84 of the Convention it " shall enter into force on the thirtieth day following the of deposit of the thirty-fifth instrument of ratification or accession."

[13] As e. g. VIRALLY rightly noted : "*Il s'agit [...] d'établir une notion utilisable dans le droit positif et non pas simplement d'élaborer un pur concept doctrinal*", M. VIRALLY, *Reflexions sur le "Jus Cogens"*, " Annuaire Français de Droit International," vol. 12, 1966, p. 8.

[14] See the pronouncement by the representative of Roumania, *United Nations Conference on the Law of Treaties, First Session*, p. 313.

[15] E. g. the representative of Sierra Leone described the provision on *jus cogens* as a " logical step in the progressive development in international law (which) provided a golden opportunity to condemn imperialism, slavery, forced labour and all practices that violated the principle of the equality of all human beings and of the sovereign equality of States [...] ", *ibid.*, p. 300.

which no derogation is permitted and which (c) can be modified only by a subsequent norm of general international law having the same character.

The first element of this definition applies, as a matter of fact, to all rules of general international law. Troublesome is only the condition, added by the Conference, that the norm must be accepted and recognized by the international community " as a whole." This, however, only means, as the Chairman of the Drafting Committee explained, that there is no question of requiring a rule to be accepted and recognized as peremptory by all States.[16] Neither can it mean that such a peremptory norm of general international law is binding all States, that is, those which have not accepted it but, on the contrary, expressly refused to recognize it. Such automatic universal validity is excluded, because it would mean a departure from the present concept of international law, in particular, it would be incompatible with the principle *pacta tertiis nec nocent prosunt*, recognized in the very Vienna Convention (Art. 34). Another confirmation that such universal validity, without at least implied consent of all States, is out of the questions lies in the fact that Article 53 has been supported without reservations by the socialist States and numerous developing countries, which consider the principles of sovereignty, equality and consent as pillars of present international relations.

In connection with the range of validity of the norms under discussion, one should add yet that the scope of the definition in Article 53 is expressly limited to " the purposes of the present Convention." This means that, on principle, regional peremptory norms are not excluded.[17]

The second and third element of the definition in Article 53 also apply to the majority of all legal rules. As a matter of fact, unilateral derogation is not permitted from any legal rule. The formal difference between an international peremptory norm and other norms consists precisely in different consequences of such a derogation. A treaty conflicting with a peremptory norm is void, whereas one conflicting with other rules, if it infringes the rights of another State, may be a ground for withdrawal or at

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[16] *Ibid.*, p. 472 : " by inserting the words " as a whole " in Art. 50 the Drafting Committee had wished to stress that there was no question of requiring a rule to be accepted and recognized as peremptory by all States. It would be enough if a very large majority did so ; that would mean that, if one State in isolation refused to accept the peremptory character of a rule, or if that State was supported by a very small number of States, the acceptance and recognition of the peremptory character of the rule by the international community as a whole would not be affected."

[17] There is no reason for excluding the possibility of regional peremptory norms, on condition that they are not incompatible with general norms of this character. In fact, it seems quite possible that a group of States raises a norm of conduct to the rank of a peremptory norm valid as such only in this group of States. Cf. e. g. E. SUY, *op. cit.*, p. 94 ; M. VIRALLY, *op. cit.*, p. 14.

most engage responsibility of the guilty party.[18] Consequently, the invalidity of treaties conflicting with a peremptory norm of general international law constitutes the main formal *differentia specifica* distinguishing such norms from the others.

The International Law Commission, however, has stressed in its Comment that a formal criterion is not sufficient, since, such a stipulation

> "may be inserted in any treaty with respect to any subject matter for any reason which seem good to the parties [...]." In the opinion of the Commission, therefore, "it is not the form of a general rule of international law but particular nature of the subject matter with which it deals that may [...] give it the character of *jus cogens*."[19]

Unfortunately, as has already been noted, such "particular nature of the subject matter" has not been defined in the Convention. At present, one might only infer it from the concordant views expressed by State representatives and publicists in the official records and in the doctrine.

Most accepted seems to be the opinion that peremptory norms of general international law protect other interests than those of individual States.[20] This very convincing criterion does not, however, entirely remove the difficulty of determining where is the border line between the rules which to be sure protect the interests of the international community as a whole and cause invalidity of treaties violating them and those rules which do not. Consequently, only a combined formal and material criterion could, as it seems, be fully satisfactory.[21] Neither the Commission nor the Conference have, however, formulated it. Instead, as has been already noted, the Commission considered the right course to be to leave the full content of Article 53 to be worked out in State practice and in the jurisprudence of international tribunals.[22]

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[18] See the comment to Articles 26 and 50 of the final Draft of the International Law Commission, *Reports*.

[19] Comment to Article 50 of the final Draft (2), *ibid.*, pp. 76—77.

[20] In this connection the opinions by professors LISSITZYN and TUNKIN at Lagonissi deserve quotation. The first believed that "the criterion for identification of *jus cogens* rules could be traced to the fact that they protected interests other than those of sovereign States as such", *Conference on International Law, Lagonissi (Grece), April 3—8, 1966, Papers and Proceedings*, Geneva 1967, pp. 91—92. This opinion has been developed by TUNKIN: "The sociological foundation of *jus cogens* rules (is) that they protect interests which (are) not limited to a particular State or group of States, but belong to the community as a whole and, consequently, to every State in it. This also explains the legal effect of these rules, which is that States cannot contract out of them *inter se*." *Ibid.*, pp. 96—97.

[21] E. g. general interest and prohibition of derogation.

[22] See above p. 147.

As regards the jurisprudence, it is yet very poor and probably will remain scarce in the next future.[23] Most decisive for the international lawmaking process is the State practice, which consists of express agreements and of all sorts of unilateral acts from which the recognition of a peremptory norm can be inferred.

III

The role of State practice is closely combined with the second question : how can peremptory norms of international law arise at all ?

Two principal international lawmaking processes come into play : treaty and custom. Moreover, the so called general " principles of law recognized by civilized nations " (Art. 38.1(c) of the Statute of the International Court of Justice) and the resolutions of international organizations should yet be considered, since they play a certain role in the arising of peremptory norms.

Treaties constitute undoubtedly the most basic instrument of international lawmaking today. They arise by means of distinct expressions of the will of at least two States. According to the essence of a treaty and the above discussed definition in Article 53 of the Vienna Convention we should have to do with such a conventional peremptory norm of general international law when it follows from the content of the treaty that the parties accept its provisions as such norms. Considering that an extensive interpretation in this case is out of the question,[24] the peremptory character of a conventional rule *sensu stricto* must be expressed and not merely implied. E.g. one cannot number among such norms the provisions of treaties which permit unilateral withdrawal, that is, contain denunciation clauses.[25] On the contrary, treaties of peremptory character should distinguish themeselves by a kind of *clausula juris cogentis* stipulating, for instance, that the provisions of the treaty in question or some of them constitute peremptory norms in the meaning of Article 53.

As regards the range of validity of true conventional peremtpory norms, there is no doubt that as such they are binding only the parties. True, as

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[23] See J. A. BARBEREIS, *op. cit.*, p. 29 ; P. CAHIER, *Les caractéristiques de la nullité en droit international et tout particulièrement dans la Convention de Vienne de 1969 sur le droit des traités*, RGDIP, 1972, vol. 3, p. 646 ; K. MAREK, *op. cit.*, p. 432 ; E. SCHWELB, *op. cit.*, p. 949.

[24] This has been confirmed lately in the Judgement in the *North Sea Continental Shelf Case*, " ICJ Reports," 1969, pp. 25, 28 and 31.

[25] The possible argument that denunciation clauses do not concern the peremptory norm but only certain procedural clauses is not convincing. At any rate, if this is the case, it should be expressly stated.

practice shows, it is very difficult to reach universal acceptance of a treaty by the international community as a whole. At any rate, it sometimes takes many years to obtain such a universal acceptance. However, as has been already noted, regional peremptory norms are not excluded. Every number of States may create rules of great importance to the universal (or a regional) community of nations from which unilateral derogation would not be permitted. Such particular peremptory norms may in time become true general norms of peremptory character as result of later formal or customary accessions.[26] In the latter case, the resulting peremptory norm would be a kind of intermediary or mixed norm, conventional-customary, which would bind the parties of the treaty as a conventional norm and the other States as a customary.[27]

The second principal lawmaking process—custom, which is based only on implied acceptance of a practice as law, gives more chance of the emerging of a truly general peremptory norm. According to Article 38.1(b) of the Statute of the International Court of Justice the emergence of a customary norm of international law requires the existence of two elements : (1) a practice and (2) its acceptance as law,[28] by which mainly such circumstances accompanying the practice are meant which enable the implication that States consider the practice as legally binding them.

It exceeds the scope of the present article to deal with the still divergent views on how and when both elements are fulfilled, that is, when we have already to do with a ripe international custom. In any event, the element of practice cannot be reduced to ascertions or declarations, however solemn they may be, that a given peremptory customary norm already exists. Custom is based primarily on positive behaviour of the State organs. Declarations can serve as evidence of the second element of acceptance of a practice or, under certain conditions, can lead to a kind of agreement, but do not constitute the practice in the meaning of paragraph 1 (b) of the above Article 38. On the other hand, the second element of acceptance as law need by no means be express, but can be implied from the circumstances of the practice.[29]

These requirements in the case of customary peremptory norm must be, of necessity, much more rigourous than with ordinary customary rules.

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[26] This has been expressly confirmed in the Judgement in the *North Sea Continental Shelf Case, ibid.*, p. 71. See also Art. 38 (*Rules in a treaty becoming binding on third States through international custom*) in the Vienna Convention.

[27] See G. Tunkin, *Voprosy teorii meždunarodnogo prava*, Moskva 1962, pp. 110—112. On the necessity to discern intermediate rules, see the present author's *Custom in Present International Law*, Wrocław 1964, pp. 104—109.

[28] Art. 38 mentions only "general" practice. This adjective is no more essential, since there may be also particular international customs. *Custom, op. cit.*, pp. 89—92.

[29] *Ibid.*, pp. 57—58.

The practice and its acceptance as law must show that the conditions embodied in Article 53 of the Vienna Convention on the Law of Treaties are fulfilled. In particular, we have to do with such a norm only when there are sufficient univocal precedents showing that States have not been permitted to derogate from an international norm of conduct, essential to the interests of the whole or, at least, a regional, community of nations. The acceptance as law will manifest itself mainly in the attitude of the members of the community towards this practice, for instance, in protests againts unilateral derogations.

Considering that such precedents are practically yet non-existent, it is very difficult to name a purely customary peremptory norm in present international law. It seems also unlikely that many such norms will emerge in the future.

Among peremptory norms of international law sometimes the so-called " general principles of law accepted by civilized nations " (Art. 38.1 (c) of the Statute of the International Court of Justice) are mentioned. The nature and origin of such principles is still very controversial in the literature. Whatever they are, one thing seems unquestionable, the binding force of such principles in international law cannot be based solely on a concordance of municipal laws. There must be at least an implied acceptance of such principles of internal origin as general principles in international law.[30]

Certainly, most, if not all, municipal legal systems include a kind of norms *juris cogentis* or a general concept of public policy which declares legal actions, contrary to certain more or less generally defined criteria, invalid.[31] This, however, by itself, is not a sufficient argument for the acceptance of such norms in the international legal order. Even less grounded is the transference of the criteria themselves, since they differ from State to State.[32]

The provisions in municipal law of various countries can, however, together with other facts, constitute valuable evidence that a given State or group of States recognize a given principle.

Among modern international lawmaking processes yet the decisions of international organizations should be mentioned. Undoubtedly, certain,

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[30] *Ibid.*, p. 112.

[31] See K. MAREK, *op. cit.*, p. 431. E. g. Art 58. 2 of the Polish Civil Code reads as follows: " A legal action incompatible with the principles of social life is void." In the Polish private international law, Art. 6 speaks of "fundamental principles of the legal order of the Polish People's Republic ". Foreign laws conflicting with these principles cannot be applied in Poland ". See W. LUDWICZAK, *Międzynarodowe prawo prywatne* [*Private International Law*], Warszawa 1967, pp. 81—83.

[32] See K. MAREK, *op. cit.*, pp. 432—36 ; E. SUY, *op. cit.*, p. 99 ; G. SCHWARZENBERGER, *International Jus Cogens ?*, " Texas Law Review," March 1965, p. 456.

though still rather few, categories of such resolutions have at once binding force in respect to all members of the organization, without additional acts of acceptance or ratification.[33] Even if some resolutions, especially those unanimously taken, for instance, by the General Assembly of the United Nations, enjoy already high authority, it is much too early to assert that exclusively by means of such resolutions peremptory norms of general international law could be created. Resolutions can, however, contribute to the emergence and ripening of such norms. In this respect, their role may even be described already as very important.[34]

The review of the existing international lawmaking processes leads to the conclusion that at present none of them is, by itself, likely to create truly peremptory norms of general international law in the meaning of Article 53 of the Vienna Convention. Either there will be a deficiency in the content, for instance, insufficient univocal agreement to consider the provisions of a treaty or the practice of an emerging custom as peremptory in character, or a too narrow range of validity of such an emerging norm. Most often, however, both will be the case.

In this connection, the discernment of yet another kind of international lawmaking process, that is, a kind of mixed or intermediary norms, seems to be very useful. Such norms are neither purely conventional, since treaties are rarely accepted by the entire international community at once, nor typical customary rules, because expressions of active will of States in the form of treaties or decisions of international organizations play an important role in the consolidation of such rules as peremptory norms of international law.[35] In fact, as closer analysis shows, the international peremptory norms in respect to which there is most agreement like, for instance, those mentioned in the Comment of the International Law Commission, are norms to whose emergence various factors contributed, conventional, customary, resolutions, the jurisprudence of international courts, etc., and only the combination of all these elements may authorize the conclusion that true peremptory norms of general international law have come into being.

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[33] See K. Skubiszewski, *Forms of Participation of International Organizations in the Law-Making Processes*, "International Organization," vol. 18, 1964, No. 4.

[34] It suffices to mention the Universal Declaration of Human Rights of 1948 and the Declaration on Granting of Independence to Colonial Countries and Peoples of 1960. One should not, however, overestimate the unanimity of resolutions, since it often only simulates a uniformity of the opinions of governments. W. Morawiecki, *Funkcje organizacji międzynarodowej* [*Functions of the International Organization*], Warszawa 1971, p. 137.

[35] See *supra* note 27. See also *North Sea Continental Shelf Case*, p. 41.

One might, of course, classify these norms according to the prevailing element which has contributed to their peremptory character.[36] This, however, would blur the true origin of such norms, and, in fact, of the great majority of all most settled norms of general international law.

IV

The answer to the the third question, how to ascertain in practice the existence of peremptory norms in international law, is closely related to the process of arising of such norms and of the criteria which they must fulfil. It is simply the problem of proof that the required conditions of the emergence of such norms are fulfilled.

In the case of univocal conventional norms, like in the case of any treaty, the task will be simple, since a clear text is available. Much more difficult will be the case of customary peremptory norms. The ascertainment of an ordinary international custom has already been difficult. If we have to prove additionally that a practice is accepted not only as law but as peremptory law, the difficulty may appear unsurmontable, especially if the burden of proof rests with the party impeaching the treaty. As a matter of fact, there is no State practice which could suffice as basis for a true customary peremptory norm.[37]

As far as subsidiary means of determination of customary rules are concerned, there are no unequivocal decisions either[38] but only relatively numerous views of publicists of various nations, who are unanimous, however, on the peremptory character of only a very small number of norms.[39] To be sure, concordant opinions of " most highly qualified publicists ", if they are based on the analysis of sufficiently rich objectively verifiable data, that is, mainly State practice, constitute a very strong argument for the existence of a customary peremptory norm of general international law. Such material lacking, the opinions, of necessity, boil down to more or less subjective convictions or even to a wishful thinking of the authors.[40]

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[36] E. g. the International Court of Justice seems to number such rules among customary rules. *Ibid.*

[37] See P. CAHIER, *op. cit.*, p. 683 ; K. MAREK, *op. cit.*, p. 453.

[38] J. A. BARBEREIS, *op. cit.*, pp. 37—39 ; E. SCHWELB, *op. cit.*, pp. 949—950 ; M. SCHWEITZER, *op. cit.*, pp. 214—215. The few examples quoted in the literature are mainly separate opinions and not decisions.

[39] This divergence of opinions, among other things, forced the International Law Commission to relinquish the drawing up of a list of international peremptory norms.

[40] As illustration, the opinion of one of the eminent pioneers of the concept of *jus cogens* in international law Professor Verdross has been quoted in which he numbers among immoral treaties the Peace Treaty of Versailles (" Friedensdiktat "),

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In such a situation, the answer to the fourth question: which of the most mentioned allegedly peremptory norms of general international law already fully conform to the above criteria, is not easy.[41] This can be illustrated by a few examples of norms in respect to which there is least controversy in the doctrine, above all those mentioned in the Comment of the International Law Commission.[42]

As far as conventional peremptory norms are concerned, it would be hard to point to such norms *sensu stricto*. For instance, professor Suy in his report for the Lagonissi conference drew a list of 14 conventions which included provisions more or less explicitly derogating all agreements conflicting with those conventions.[43] In none of them, however, all the elements of the definition in Article 53 of the Vienna Convention can be found. Among those closest to the requirements of true peremptory norms of international law seems to be the Convention on International Civil Aviation of 1944. Its Articles 82 and 83 read as follows:

"The contracting States accept this Convention as abrogating all obligations and understandings between them which are inconsistent with its terms, and undertake not to enter into any such obligations and understandings [...]".

"Subject to the provisions of the preceding Article, any contracting State may make arrangements not inconsistent with the provisions of this Convention [...]".[44]

Even if such articles could be considered as an equivalent to a *clausula juris cogentis*, the validity of such conventions is limited to the parties, that is, very rarely to the community of nations as a whole.

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because the German Government recognized by it the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war and that government undertook to hand over the accused persons. A. VERDROSS, *Völkerrecht*, Berlin 1937, p. 90. See E. SCHWELB, *op. cit.*, pp. 966—968; A. M. FAHNI, Peremptory Norms as General Rules of International Law, "Österreischische Zeitschrift für öffentliches Recht," vol. 22, 1971, No. 3/4, p. 388.

[41] E.g. REIMANN in his doctoral thesis enumerates as many as 30 norms of allegedly peremptory character which have been described as such in the organs of the United Nations or in the literature. He himself is, however, not certain if they belong to *leges latae* or *leges ferendae*. H. B. REIMANN, *op. cit.*, pp. 44—45.

[42] In the comment of the International Law Commission, it has been only stated that "examples suggested included (a) a treaty contemplating an unlawful use of force contrary to the principle of the Charter, (b) a treaty contemplating the performance of any other act criminal under international law, and (c) a treaty contemplating or conniving at the commission of acts, such as trade in slaves, piracy or genocide, in the suppression of which every State is called upon to cooperate." *Reports*, p. 76.

[43] E. SUY, *op. cit.*, pp. 84—89.

[44] *Ibid.*, pp. 86—87.

Among the examples quoted by E. Suy, special attention should be given to Article 103 of the United Nations Charter, since it might suggest the peremptory character of the Charter as a whole.[45] This article reads :

> " In the event of conflict between the obligations of the members of the United Nations under the present Charter and the obligations under any other international agreement, their obligations under the present Charter shall prevail."

There is no doubt that the logical interpretation of this article speaks for an automatic abrogation of all obligations of the members inconsistent with the obligations under the Charter, since contradictory obligations cannot be simultaneously valid and the obligations under the Charter should prevail. However, the intentions of the drafters of the Charter do not confirm this conclusion. On the contrary, they considered the automatic abrogation of obligations inconsistent with the Charter as " undesirable ".[46] Thus the peremptory character of the Charter as a whole can raise doubts until the practice does not add new elements.

Much more convincing is the opinion that if not the whole Charter of the United Nation then at least the fundamental principles enumerated in it constitute peremptory norms of general international law, binding all the Members and even non-members of the Organization.[47] This opinion is certainly sound, but also not without certain reservations. First, the high authority of those principles is not based on purely conventional elements but on various grounds, mainly customary.[48] Besides, their wording is very general if not vague, and there is a legitimate doubt whether in a more precise form they would be accepted by the whole community of

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[45] *Ibid.*, p. 85 See e.g. the pronouncement by the representative of Poland, Professor Nahlik, *United Nations Conference on the Law of Treaties, Second Session,* p. 99 ; M. BARBEREIS, *op. cit.*, p. 30 ; K. MAREK, *op. cit.*, p. 442 ; M. SCHWEITZER, *op. cit.*, p. 216; E. SCHWELB, *op. cit.*, pp. 957—959.

[46] In his Report the Rapporteur of Committee IV/2 of the San Francisco Conference stated among others things : " the committee has decided that it would be inadvisable to provide for the automatic abrogation by the Charter of obligations inconsistent with the terms thereof." " San Francisco Conference," vol. 13, p. 707. Noteworthy is also the pronouncement by the representative of Switzerland which has not met with any reaction on the part of other States : " [...] as [Switzerland] was not bound by the Charter, its signature of the [Vienna] Convention being prepared would have to be made subject to the reservation concerning Article 103. " *United Nations Conference on the Law of Treaties, First Session,* p. 164.

[47] This opinion may be considered as generally accepted.

[48] It suffices to mention the obligation to " refrain from the threat or use of force against the territorial integrity or political independence of any State " or " the inherent right of individual or collective self-defense " in Arts 2 and 51 of the Charter.

nations at all. For a confirmation of such doubts it suffices to study the attempts at codification of the principles of peaceful coexistence.[49]

This remark applies even more to the principles mentioned in Chapter I—" Aims of the Charter," which have lately been developed, for instance in the two Covenants of Human Rights and other multilateral law-making conventions. These conventions prove that the provisions of Chapter I of the Charter cannot yet be considered as peremptory norms *sensu stricto*, but only as very important postulates which the Organization is to realize. Besides, not all of these conventions are accessible to all the members of the community of nations and some of them foresee the right of unilateral denunciation by the parties.[50]

Among the norms whose peremptory character is universally accepted by the world opinion one should above all mention those referring to international crimes, especially to the crimes against peace, humanity and to war crimes. Even here the legal basis of that universal conviction is not free from certain lacunas. The conventions upon which the validity of those norms are mainly based, like the Hague Conventions of 1907, the Geneva Conventions of 1949 or the Convention on the Prevention and Punishment of the Crime of Genocide contain denunciation clauses.[51] The purely conventional basis of the peremptory character is in this case out of the question. On the other hand, however important the international practice with the resolutions of the General Assembly of the United Nations and the Nuremberg Judgment at the head, an act which would finally seal the peremptory character of the norms requiring prosecution and punishment of international crimes is still lacking. This statement applies even more to the remaining important rules of general international law, for instance, referring to the fundamental principles of the law of the sea, diplomatic relations, etc.[52]

The brief survey of the most unquestioned peremptory norms of general international law leads to the conclusion that in the present inter-

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[49] E. Suy, *op. cit.*, pp. 97—98. See R. Bierzanek, *Zasady prawne pokojowego współistnienia i ich kodyfikacja* [*Legal Principles of Peaceful Coexistence and their Codification*], Warszawa 1968.

[50] E.g. there are denunciation clauses in the Convention on the Prevention and Punishment of the Crime of Genocide (Art. XIV), and the Convention on the Political Rights of Women (Art. VIII). Both these conventions and, e.g., the Covenants on Human Rights make the accession to them by non-members of the United Nations conditional.

[51] E.g. the principal Convention on the Law and Customs of War on Land constitutes, in fact, only a codification of existing customs. Schwelb discerns in the limited right of the parties to withdraw from the Geneva Conventions of 1949 " something akin to *jus cogens*," *op. cit.*, pp. 957.

[52] See E. Schwelb, *op. cit.*, pp. 953—956.

national law, even if the peremptory character of certain norms can by no means be questioned, it is hard, or even impossible to prove this character univocally. At any rate, the basis of this peremptory character of the most often enumerated norms is to be sought neither exclusively in the active will of the States, that is in treaties, in the State practice accepted as law, that is, custom, nor in the decisions of international organizations. At most, such a basis might be found in a complex of various elements which together might constitute the so-called source and, at the same time, evidence of those peremptory norms.

Certainly, it seems obvious that, for instance, treaties in which the parties agree to commit an international crime should be considered void *ab initio*, without additional evidence. This is, however, still only a conclusion based on views and not juridical criteria, required, for instance, by Article 53 : " accepted and recognized." The argument that such obvious norms need no proof is not entirely convincing.[53] If such reasoning was correct, the provisions of the Vienna Convention on the invalidity of treaties whose conclusion had been procured under the threat or use of force (Art. 52) or even the convention on genocide should also be considered superfluous. Too optimistic seems also the opinion that the possibility of a treaty violating such obvious peremptory norms is unlikely or purely theoretical.[54] Here, in turn, it suffices to remind the example of the Munich agreement of 29 September, 1938,[55] which has been only lately, after 35 years declared as " coerced by the threat of force on the Czechoslovak Republic by the Nazi regime."[56]

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[53] See E. SUY, *op. cit.*, pp. 92—93.

[54] E.g. KEARNEY and DALTON agree that "it would be very difficult to make a sustainable case that two States are free to make a treaty in which they agree to attack and carve up a third State" but, at the same time, quoting Minagava they share his opinion that such examples appear to concern merely "*une pure hypothèse d'école*" R. D. KEARNEY, R. E. DALTON, *The Treaty on Treaties*, AJIL, vol. 64, 1970, p. 536 ; see MINAGAWA, *Jus Cogens in Public International Law*, " Hitotsubashi Journal of Law and Politics," 1968, p. 17.

[55] *Allemagne, Grande Bretagne, France, Italie, Accord concernant la cession à l'Allemagne des territoires des Allemands des Sudètes : signé à Munich, le 29 septembre 1938*, "Nouveau Recueil Général de Traités [...]," Troisième Série, tome XXXVI, pp. 26—28.

[56] *Vertrag über die gegensitigen Beziehungen zwischen der Bundesrepublik Deutschland und der Tschechoslovakischen Sozialistischen Republik. Päamble [...] : annerkennend, daß das Münchener Abkommen [...] durch das nationalsozialistische Regime unter Androhung von Gewalt aufgezwungen wurde [...] Artikel I : Die Bundesrepublik Deutschland und die Tschechoslovakische Sozialistische Republik betrachten das Münchener Abkommen [...] in Hinblick auf ihre gegenseitigen Beziehungen nach Maszgabe dieses Vertrages als nichtig."*—" Frankfurter Allgemeine Zeitung," D Ausgabe, 23 Juni 1973, p. 6.

Summing up, the present situation as regards *jus cogens* in international law seems to lead to the following alternative: either to resign of strict legal criteria of the existence of peremptory norms in this law or to admit that there are no such norms *sensu stricto*, that is, which fulfil the required criteria.

Naturally, neither is acceptable.

To resign from objective legal proof of the validity of international peremptory norms and contend with opinions would be contrary to the modern concept of law in general, contrary to the requirement of a minimum of legal security in international relations. Besides, being contrary to the principle of sovereignty and consent, it would be unacceptable to the majority of nations particularly attached to these principles. In this connection, it should be stressed again that the concept of *jus cogens* in the Vienna Convention is one of strictly positive law, "accepted and recognized", that is, created or changed by the States concerned.[57]

The other alternative is even less realistic. After so many efforts to introduce the concept of *jus cogens* into the law of treaties and on its final, though only general, recognition, it is no longer possible to deny the existence of peremptory norms in international law.

The solution of the dilemma proposed by the International Law Commission to leave the working out of the full content of Article 53 in State practice and in the jurisprudence of international tribunals is also not satisfactory. True, the Conference of Vienna has finally accepted a kind of limited compulsory jurisdiction (Art. 66) but is has met with strong opposition on the part of the socialist States and numerous developing States.[58] Among the other States the objection has been raised that international tribunals are not competent to decide in such an important matter consisting, in fact, in lawmaking.[59] As regards the State practice, judging by the past experiences, it would last very long before a sufficiently rich and universal practice arised, permitting the conclusion that a customary general peremptory norm of international law has emerged.

The solution based on an analogy with public policy in municipal law, though attractive because of its simplicity, would have serious disadvantages, too. Undoubtedly the wording of Article 53 would gain much by replacing the not very happy definition by a criterion based on sub-

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[57] See e.g. the pronouncements by the expert of the Conference of Vienna, Professor WALDOCK and the representative of Hungary BOKOR-SZEGÖ, *United Nations Conference on the Law of Treaties, First Session*, pp. 326 and 311.

[58] See R. D. KEARNEY, R. E. DALTON, *op. cit.*, pp. 545—561.

[59] E.g. United Kingdom and France, *ibid.*, pp. 304—305, *ibid.*, *Second Session*, p. 94.

ject matter, similar to that encountered in municipal law. For instance, such a clause could read: treaties inconsistent with the fundamental principles of coexistence in the community of nations are void. This, however, would need an amendment of the so hard won article in the Vienna Convention. Besides, it would have the defects already mentioned in connection with the jurisprudence of international tribunals and the essential differences between such tribunal and municipal courts.

VI

In the light of the outlined here *status quo*, the answer to the last question, how to make the application of the provisions on *jus cogens* in the Vienna Convention in practice possible, is to be sought above all in the modern tool of international lawmaking, the multilateral treaty. Though the other lawmaking factors certainly play, and will continue to play, a more or less important role, mainly in the widening of the scope of validity of international peremptory norms, solely the conventional basis of such norms can ensure them their unquestionable peremptory character.

The reassuring achievements in the progressive development of international law and its codification under the aegis of the United Nations in the last decades and the existence of treaties containing already a kind of *clausulae juris cogentis* remove the anxiety that the codification or creation of conventional peremptory norms is impossible or very difficult in the present divided world. Considering the recent successes in reaching agreement even on such highly political controversial questions as the ban of tests with nuclear weapons or the non-proliferation of such weapons and the symptoms of more and more effecitive cooperation of States belonging to different ideological blocks, there is no more ground for pessimism that States will not be inclined to seal the peremptory character of norms of unquestionable authority in the world opinion.

Some doubt may arise whether the codification of certain peremptory norms would not weaken the validity of other such norms according to the maxim *expressis unius exclusio alterius*. This problem exists in respect to all customary rules. In the case of peremptory norms of international law the situation is clear in this sense that such uncodified norms are in most cases inapplicable, anyhow, because the party impeaching a treaty is practically unable to prove such a norm.

The latter eventuality, however, need not happen at all, since it is by no means very difficult to give a univocal content to a peremptory

norm of international law. Every, even a small, group of States which truly support the concept of *jus cogens* can effectively contribute to the univocal formulation and consolidation of such a norm by embodying it in a treaty and inviting the other States to acceed. As a matter of fact, this has been the mechanism of codification and creation of many important and, at present, already universally recognized rules of international law.

Protection de l'environnement humain au regard du droit international

par JANUSZ SYMONIDES

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De même que pour les États particuliers l'existence de la législation interne déterminant les devoirs des personnes physiques et morales, établissant les mesures, les structures et les cadres d'organisation et prévoyant les sanctions pour l'infraction contre les règles juridiques instituées en matière de protection de l'environnement humain, constitue une des conditions essentielles pour réaliser les effets en vue, ainsi l'existence des règles respectives et de la coopération internationale constitue cette condition à l'échelle régionale ou globale [1].

La présentation des aspects de droit international en matière de protection de l'environnement naturel de l'homme doit aboutir à donner une réponse aux questions suivantes : premièrement, est-il permis de parler en droit international du devoir de la protection, deuxièmement, existe-t-il déjà et quelle est l'étendue du droit international en matière de protection de l'environnement et troisièmement, quels sont les tendances et les moyens de son développement ultérieur.

I. Le devoir de la protection de l'environnement naturel

A. Le devoir de la protection de l'environnement en tant qu'une règle générale de droit aux termes de l'art. 38 de la Cour Internationale de Justice. L'absence jusqu'à présent d'un accord international général instituant le code de la protection de l'environnement ne signifie nullement

[1] Cf. à ce sujet : *Problems of the Human Environment, Report of the Secretary-General,* UN Doc. E/4667, pp. 15 - 16.

qu'il ne soit pas permis de parler en droit international du devoir de la protection de l'environnement. Conformément à l'art. 38 du Statut de la Cour Internationale de Justice, une source du droit international, en dehors des conventions internationales générales ou spéciales et de la coutume, peuvent être aussi les principes généraux de droit reconnus par les nations civilisées.

La question de savoir comment faut-il interpréter cette disposition, est une des questions les plus discutables en doctrine du droit international. Parmi plusieurs façons de comprendre les principes généraux, il y en a deux qui sont les plus répandues. Conformément à la première, pour principes généraux il faut reconnaître les principes généralement acceptés dans les législations internes des États particuliers. Conformément à la seconde, les principes généraux ce sont tout simplement les règles du droit international étant une généralisation et une mise en relief de certaines dispositions conventionnelles ou règles coutumières déjà existantes. Les deux façons de comprendre les principes généraux mènent à la conclusion identique, c'est-à-dire à la reconnaissance du devoir de la protection de l'environnement pour tel principe.

Il est vrai que les lois complexes — sous forme d'un seul document — qui traitent de la protection de l'environnement, n'apparaissent que ces dernières années, en prenant pour point de départ la loi suédoise de 1969 [2], pourtant les actes établissant la protection fragmentaire, celle des eaux contre la pollution, la protection de la nature, la protection de l'air, remontent au XIXe siècle et même à l'Antiquité et au Moyen Age [3]. De l'universalité de la législation qui porte sur la protection de la nature témoigne ne fût-ce que le fait que plus de quarante États possèdent les actes juridiques concernant la pêche et la conservation des ressources biologiques des mers [4].

Bien qu'il soit permis de reprocher à la législation en vigueur qu'elle continue à être fragmentaire, qu'elle est parfois vieillie [5] et non efficace, pourtant il est incontestable qu'elle porte un caractère universel. Cette universalité confirme la thèse que, dans la sphère du droit national, s'est déjà établi le devoir de la protection de l'environnement, qui peut être

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[2] *National Legislation Relating to Environment, ECE Symposium on Problems Relating to Environment,* New York 1971, p. 113.

[3] *Ibid.*

[4] *National Legislation and Treaties relating to the Territorial Sea, the Contiguous Zone, the Continental Shelf, the High Seas and Fishing and Conservation of the Living Resources of the Sea,* New York 1970, pp. 560 - 710.

[5] Les États s'efforcent pourtant de promulguer les actes législatifs correspondant aux conditions contemporaines. L'exemple en sont les lois sur la protection de la pureté de l'air, adoptées dans les années soixante, entre autres, par la Belgique, la France, l'Italie, la R.F.A., la Tchécoslovaquie, la Pologne, les États-Unis et le Japon.

reconnu pour le principe général de droit aux termes de l'art. 38 précité. De même, en devançant les argumentations suivantes, il est permis de constater qu'un grand nombre d'accords internationaux réglant les aspects particuliers de la protection de l'environnement prouve que ce principe peut être déduit des règles conventionnelles déjà en vigueur.

Le devoir d'entreprendre les mesures en vue de protéger l'environnement naturel, étant donné l'absence de concrétisation appropriée, joue en premier lieu un rôle inspirateur. En effet, les sujets de droit ne peuvent soumettre leurs prétentions juridiques mutuelles qu'en cas où les actions de l'autre partie causent des dommages directs à leur environnement ou en cas où l'accord international étant en vigueur entre elles les autorise à soumettre de telles prétentions. Jusqu'à l'heure actuelle, faute d'un accord international général, conformément au principe de souveraineté et de non-intervention dans les affaires intérieures, tout État décide lui-même quelles conséquences résultent pour lui du devoir général de la protection de l'environnement.

B. La protection de l'environnement et la protection internationale des droits de l'homme. Le déplacement de l'accent, ces dernières années, de la protection de la nature sur celle de l'environnement naturel de l'homme a abouti d'une manière en quelque sorte naturelle à traiter la protection de l'environnement comme une condition essentielle pour assurer le respect des droits de l'homme. Cela a trouvé l'écho dans l'activité des organisations internationales, notamment de l'Organisation des Nations Unies ainsi que dans les travaux préparatoires et dans la déclaration finale de la conférence de Stockholm.

Le premier document dans lequel les Nations Unies ont souligné ce rapport a été la résolution du 3 décembre 1968 [6]. Dans ce document, l'Assemblée Générale a exprimé son préoccupation de l'influence qu'exercent les transformations ayant lieu dans l'environnement naturel sur la réalisation des droits fondamentaux de l'homme, sur son développement physique, intellectuel et social.

La dépendance mutuelle de la protection de l'environnement et des droits de l'homme a été également soulignée dans la Déclaration sur le Progrès Social et le Développement du 11 décembre 1969 [7]. Ladite Déclaration a proclamé que le progrès social et le développement doivent tendre, en respectant les droits de l'homme, entre autres, à la protection et l'amélioration de l'environnement humain. Dans la partie traitant des mesures et méthodes visant à réaliser le progrès social et le développement, la Déclaration a également souligné la nécessité d'entreprendre les mesures

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[6] Rés. 2398/XXIII.

[7] Rés. 2542/XXIV.

juridiques et administratives en vue de sauvegarder et d'améliorer l'environnement humain, et cela aussi bien à l'échelle nationale qu'à l'échelle internationale. Dans la résolution spéciale relative à la mise en vigueur de la Déclaration sur le Progrès Social et le Développement [8], l'Assemblée Générale a recommandé à tous les gouvernements de prendre en considération, lors de la fixation de leur politique de plans et de programmes, les principes, buts, moyens et méthodes y formulés.

Une tentative de formulation plus détaillée des droits de l'homme dans le contexte de la protection de l'environnement a été entreprise par la conférence du Conseil de l'Europe, tenue en février 1970 [9], qui parmi les programmes d'action proposés à l'échelle internationale avait recommandé la préparation du protocole à la convention européenne des droits de l'homme. Il aurait pour but d'assurer à chacun le droit de jouir de l'environnement dont les valeurs naturelles n'ont pas été contaminées au détriment de la santé, d'assurer le droit à respirer l'air pur et boire l'eau non contaminée, de même que le droit à la protection contre le bruit insupportable.

La conception qui fait rapport entre la protection de l'environnement et les droits de l'homme est acceptée, paraît-il, par la société internationale. Les preuves en sont aussi bien les commentaires gouvernementaux portant sur les projets de la Déclaration sur l'Environnement de l'Homme [10] que la première des règles qui a été approuvée par cette Déclaration [11]. La Déclaration de la conférence de Stockholm ne se limite pas pourtant à proclamer le droit de l'homme à l'environnement lui permettant de vivre convenablement dans le bien-être, mais elle précise en même temps que l'homme assume une grave responsabilité pour la protection et l'amélioration de l'environnement naturel devant les générations présentes et futures. Il est vrai que cette formulation peut être commentée par une remarque que l'homme n'est pas le sujet des relations régies par le droit international et qu'au regard du droit international la responsabilité pour la protection et l'amélioration de l'environnement repose sur les États et les organisations internationales, pourtant c'est l'homme qui, par la nature des choses, est le destinataire définitif et réel de la responsabilité pour son environnement.

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[8] Rés. 2543/XXIV.

[9] *Conseil de l'Europe, Strasbourg 9 - 12 février* 1970, p. 3.

[10] UN Doc. A/CONF. 48/PC/9, p. 16.

[11] « L'homme a le droit fondamental à la liberté, à l'égalité et aux conditions convenables de la vie dans un tel milieu qui lui permettrait de vivre convenablement dans le bien-être. L'homme assume une grande responsabilité pour la protection et l'amélioration de l'environnement naturel en faveur des générations présentes et futures [...] ».

C. La conception de l'héritage commun de l'humanité. Elle a été soulevée dans les travaux du Comité pour l'utilisation pacifique du fond des mers et des océans hors des limites de juridiction nationale et ensuite acceptée par la Déclaration de l'Assemblée Générale à ce sujet [12]. Ladite conception suscite plusieurs doutes et polémiques, surtout en raison de son contenu peu clair. En effet, elle admet la reconnaissance du fond des mers pour l'espace international qui n'est pas soumis à l'appropriation, l'espace qui doit être administré par une organisation internationale spécialement fondée à cette fin, effectuant aussi une répartition équitable des profits d'exploitation.

La notion d'« héritage commun de l'humanité » n'est pas, jusqu'à présent, une règle de droit, étant donné le caractère non obligatoire des résolutions de l'Assemblée Générale. Il est difficile de prévoir si elle sera généralement acceptée par le droit positif et quelle forme définitive prendra-t-elle dans le projet d'un accord international actuellement en préparation.

Si pourtant à l'égard du fond de mer, qui ne relève pas de la juridiction nationale, un système d'administration de ses ressources naturelles peut être établi par une organisation internationale spécialement fondée à cette fin, il est par contre tout à fait irréel d'élaborer un projet qui porterait reconnaissance juridique de la conception de l'héritage commun de l'humanité pour une base générale du système de protection de l'environnement humain. Une telle tentative serait contraire notamment aux principes de souveraineté, de juridiction territoriale, de non-intervention et de compétence intérieure. La réalisation de ce projet d'une manière globale, par la subordination des États à une organisation supranationale, ne signifierait rien d'autre que la transformation de la société internationale en État mondial. Les projets de cette sorte ont été déjà plusieurs fois rejetés.

Il n'y a pas de doute par contre, au regard du droit international, quant à l'interprétation restrictive de la conception de l'héritage commun de l'humanité. Conformément à celle-ci, pour l'héritage commun seraient reconnus les espèces animales en disparition et les phénomènes exceptionnels de la nature [13]. Les gouvernements devraient agir dans de telles situations en qualité de mandataires de toute l'humanité. A titre d'exemple, on cite ici la plaine de Serengeti en Tanzanie ou les Iles Galapagos. La reconnaissance pour l'héritage commun de l'humanité ne signifierait pas la limitation de la souveraineté nationale d'un pays intéressé mais l'octroi

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[12] Rés. 2749/XXV.

[13] N. A. Robinson, *Problems of Definition and Scope*, dans : *Law, Institution and the Global Environment*, Leiden 1972, pp. 56 - 57.

à celui-ci d'une aide technique et financière en vue de protéger ou maintenir un phénomène ou une espèce ainsi qualifiés. Conformément à cette conception, une convention internationale convenable, portant aussi sur les monuments historiques et culturels, tels que les pyramides ou Acropole, a été élaborée par l'UNESCO en 1972.

II. L'étendue du droit international de la protection de l'environnement naturel

A. Accords internationaux. En dépit des opinions parfois formulées, le nombre des conventions internationales, aussi bien bilatérales que multilatérales relatives à la protection de l'environnement, est assez important [14]. Il est possible de constater à la base des recueils de traités généralement accessibles, surtout de ceux publiés par la Société des Nations, et actuellement par les Nations Unies, que le nombre des conventions au-dessus mentionnées s'élève à plus de cent. Du point de vue formel, c'est le nombre suffisant afin qu'on puisse avancer une thèse sur l'existence d'un nouveau domaine du droit conventionnel relatif à l'environnement humain. Une analyse approfondie du sujet des accords particuliers mène pourtant à la conclusion que le droit international de la protection de l'environnement humain porte toujours encore le caractère rudimentaire et se trouve dans la première étape de son évolution. Il s'avère en effet que les accords internationaux ne renferment pas tous les problèmes de l'environnement humain, par contre ceux des problèmes qui sont déjà l'objet des dispositions conventionnelles, sont réglés d'une manière fragmentaire.

Le groupe sans doute le plus nombreux constituent les accords consacrés à la conservation de la faune, surtout à la protection des espèces de poissons et de mammifères maritimes. Les accords en vigueur règlent d'habitude la manière d'exercer la pêche et la protection des espèces dans les parties particulières d'océans et de mers. Ainsi, à titre d'exemple, on peut citer les accords relatifs aux pêcheries de l'Atlantique Nord-Ouest [15], Nord-Est [16] et Septentrional [17] et un règlement séparé concernant la protection du thon atlantique et des phoques de l'Atlantique Nord-Est. Il n'existe pas par contre de convention qui réglerait l'ensemble des problèmes du milieu de l'Océan Atlantique, sans parler du système écologique de l'océan mondial.

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[14] *Problems of the Human Environment* ..., p. 22.

[15] *United Nations Treaty Series*, vol. 157, p. 157.

[16] *Ibid.*, vol. 486, n° 7078.

[17] *National Legislation* ..., p. 869.

Les accords internationaux établissant la protection de l'environnement contre la pollution sont peu nombreux. Proportionnellement, le plus grand nombre parmi eux concerne la protection contre la pollution des eaux fluviales, ensuite des eaux maritimes, et enfin de l'espace atmosphérique et cosmique. Il n'existe pas par contre de conventions qui régleraient la protection de l'environnement contre le bruit.

Là aussi apparaît le caractère fragmentaire des solutions proposées. Les eaux maritimes ne sont protégées par les dispositions de la convention du 12 mai 1954 [18] (completée en 1962) et aussi de la convention de Bruxelles du 28 novembre 1969 [19] que contre la pollution par les hydrocarbures, causée par les navires. Ainsi les articles 24 et 25 de la convention de Genève sur la haute mer du 29 avril 1958, disposent d'une manière très générale sur la prévention de la pollution des mers par les hydrocarbures répandus par les navires et de la pollution due à la déposition de déchets radioactifs. Dans la mesure plus restreinte sont par contre réglées d'autres manières de pollution des eaux maritimes, surtout par les déchets industriels et les eaux usées communales et aussi la pollution due à l'activité extractive. Il convient de citer ici la convention signée en février 1972 à Oslo par douze États européens, relative à la prévention de l'immersion des déchets dangereux par les navires et les aéronefs dans l'Atlantique Nord-Est et dans la Mer du Nord.

La pratique conventionnelle actuelle en matière de protection de l'environnement ne mène pas à la formation de clauses et solutions homogènes. Ainsi, par exemple, les dispositions relatives à la pollution des fleuves comprennent soit l'interdiction absolue de pollution [20] soit le devoir de la lutte seulement contre la pollution croissante ou excessive [21], soit enfin l'interdiction de certaines pollutions définies [22].

B. Les règles du droit international applicables à la protection de l'environnement humain. En cas de différends internationaux portant sur la protection de l'environnement humain, les États, en dehors des normes conventionnelles déjà en vigueur, peuvent recourir aux principes généraux du droit international. Parmi ceux qui peuvent influencer directement le

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[18] *United Nations Treaty Series*, vol. 327, n° 4714.

[19] AJIL, 1970, pp. 471 - 491.

[20] Il est permis de citer ici l'accord conclu entre les Pays-Bas et l'Allemagne en 1922 et entre la Belgique et l'Allemagne en 1929.

[21] L'accord concernant l'Indus, conclu en 1960 entre l'Inde et le Pakistan.

[22] L'arrangement signé entre les États-Unis et le Canada en 1959 porte sur des hydrocarbures et le traité de 1957 instituant l'Euroatom établit, dans les articles 35 - 38, une protection des eaux contre la contamination radioactive. Une position particulière à cet égard occupe l'accord sur la protection contre la pollution des Grands Lacs, signé par les États-Unis et le Canada le 15 avril 1972 à Ottawa. Il prévoit cinq libertés (interdictions de pollutions).

comportement des États, même à défaut d'un accord international approprié, il faut mentionner, en premier lieu, *le principe de responsabilité*. Ledit principe résulte de la souveraineté territoriale car l'exercice de celle-ci accorde non seulement les droits mais il impose à l'État les devoirs et la responsabilité pour les dommages causés à d'autres sujets du droit international. Le principe en question a été souligné dans le règlement arbitral de l'affaire de Trail Smelter [23] entre les États-Unis et le Canada. La Cour avait alors constaté qu'aucun État n'a le droit d'utiliser ou permettre d'utiliser son territoire d'une manière qui porte préjudice à un autre État, à la propriété ou aux personnes qui s'y trouvent. Par suite de cela, le Canada a été obligé de payer une somme en compensation des dommages causés aux États-Unis par les fumées de cuivre dégagés par la fonderie privée canadienne. C'est également dans son arrêt relatif à l'affaire du Détroit de Corphou [24] que la Cour Internationale de Justice a souligné le devoir de chaque État d'interdire que son territoire soit utilisé pour les actions contraires aux droits d'autres États.

L'opinion que les États sont responsables de leurs actions préjudiciables à l'égard d'autres sujets du droit international ou des territoires se trouvant au-delà des limites de leur juridiction nationale, a été approuvée par la convention de Stockholm dans le point 21 de la déclaration finale. De même l'Assemblée Générale de l'ONU, dans sa résolution 2995/XXVII, avait souligné que les travaux entrepris par les États en vue d'examiner, d'exploiter ou de développer leurs ressources naturelles, ne peuvent pas produire des effets préjudiciables essentiels dans les régions situées hors des limites de leur juridiction nationale. L'Assemblée Générale a jugé utile de publier les données techniques concernant les travaux de cette sorte.

La reconnaissance universelle de la responsabilité de l'État pour les préjudices causés à l'environnement naturel d'autres sujets du droit international n'est pas pourtant accompagnée de détermination précise de nombreux problèmes détaillés. La liste des doutes est ouverte par la question de savoir si la responsabilité de l'auteur est engagée en cas de n'importe quel préjudice ou en cas de préjudice substantiel seulement. L'adoption de cette seconde éventualité entraîne à son tour la nécessité d'expliquer qu'est-ce qu'il faut entendre par un préjudice substantiel. Par voie d'analogie aux règles adoptées lors de la session de l'Association du Droit International tenue à Helsinki en 1966, il est permis d'admettre que le préjudice porte le caractère substantiel en cas où il entrave ou rend difficile, d'une manière matérielle, l'exploitation rationnelle des ressources

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[23] AJIL, 1941, p. 684.

[24] ICJ, Reports 1949, p. 22.

naturelles. Les difficultés liées à l'adoption d'une définition générale et efficace de la notion du « préjudice substantiel » font présumer que la détermination du préjudice subi doit avoir lieu par voie de recours aux moyens de règlement pacifique des différends.

L'État assume la responsabilité aussi bien pour sa propre action que pour celle des personnes physiques et morales se trouvant sur son territoire. Dans ce dernier cas cependant, l'État est responsable de la non-application des mesures administratives et législatives appropriées.

Le versement d'une somme d'argent convenable est une forme généralement adoptée d'indemnisation des préjudices substantiels. Cela trouve sa confirmation dans la pratique. Une indemnisation de ce genre a été payée par le Canada en faveur des États-Unis dans l'affaire de Trail Smelter. Le payement d'une certaine somme d'argent ne règle pas le problème dans tous les cas. Le droit international exige en effet surtout la restitution en entier (*restitutio in integrum*), et lorsque cela est irréalisable — le payement d'une indemnisation. En cas de préjudices causés à l'environnement naturel, il est impossible, en règle générale, de restituer en entier et c'est pourquoi l'État est obligé de payer une indemnisation. Pourtant l'État est obligé de prévenir à l'avenir les préjudices de cette sorte et ce devoir ne peut pas être remplacé par une indemnisation versée périodiquement. Dans certaines circonstances, où les préjudices causés à l'environnement naturel sont si importants qu'ils produisent un grave danger pour la vie des habitants d'un autre pays, et cela au degré motivant le recours à la conception de génocide ou d'agression indirecte, dans ce cas apparaît déjà le problème de sanction et non pas de compensation financière.

Des doutes apparaissent aussi quant à la question de savoir si la responsabilité est objective, c'est-à-dire si elle résulte de l'effet produit ou bien plutôt elle s'appuie sur la faute. Pour certaines raisons, la théorie de la responsabilité objective mérite davantage d'être acceptée. La détermination de la faute en matière si compliquée qu'est l'environnement naturel, n'est pas toujours possible à réaliser. D'ailleurs l'État qui élève une prétention doit alors rechercher les preuves dans la sphère qui relève, dans une grande mesure, de la compétence intérieure d'autre sujet du droit international. Quant à la responsabilité objective, il suffit de constater l'existence du préjudice substantiel et cela sur son propre territoire. L'effet, en tant que base de la responsabilité, est d'ailleurs au degré de plus en plus fréquent pris en considération en droit international. Cela concerne les nouveaux domaines tels que l'activité nucléaire et cosmique. Certaine importance possède enfin le fait qu'en droit national la responsabilité pour les préjudices causés à l'environnement naturel porte d'habitude aussi le caractère objectif.

Ces dernières années s'est formé en droit international *le principe de bon voisinage*. Ce principe, reconnu pour obligatoire en droit des gens, constitue une illustration de la maxime *sic utere tuo ut alienum non laedas*. Elle souligne l'interdépendance des intérêts d'États limitrophes, de même que la nécessité de respecter l'intégrité territoriale d'un État voisin. Son partisan ardent est J. Andrassy [25] ainsi que G. Sauser-Hall [26].

Du principe de bon voisinage résulte l'impératif de limitation des actions qui peuvent produire les préjudices en dehors du territoire national. Mais cet impératif possède le caractère mutuel. Les droits et devoirs des États sont traités d'une manière complexe. C'est pourquoi pour qu'on puisse établir si une des règles des relations de bon voisinage avait été violée, il est indispensable de prendre en considération les effets des actions définies et les prétentions déterminées d'un État voisin ainsi que le degré de satisfaction de celles-ci. Il est également nécessaire d'évaluer les dommages et les avantages éventuels. Le principe de relations de bon voisinage provient donc du fait que les compétences des États entrent, à travers les frontières, en contact et parfois même en conflit. Ledit principe prend aussi en considération le fait que les sujets du droit international ne peuvent pas limiter strictement à leurs territoires les conséquences résultant des actions qu'ils ont entreprises.

Le principe de bon voisinage peut servir de base appropriée pour la solution des problèmes surgissant parfois en Europe entre les États situés dans le cours inférieur et supérieur du fleuve international ou au bord du même espace maritime.

Le principe qui peut exercer une influence effective sur l'activité des États liée à la protection de l'environnement naturel est *le principe de la liberté des recherches scientifiques*. Il produit ses effets sur les territoires se trouvant hors de la juridiction nationale. Le champ d'application territorial dudit principe est donc limité à la haute mer, au fond des mers et des océans étant hors des limites de la juridiction nationale [27], à l'espace cosmique et à l'Antarctique. Ce principe a été formulé entre autres dans le traité du 1er décembre 1959 relatif à l'Antarctique [28] et dans l'accord du 27 janvier 1967 concernant les principes qui règlent l'activité des États dans l'exploration et l'exploitation de l'espace cosmique [29].

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[25] J. Andrassy, *Les relations internationales de voisinage*, RCADI, Vol. 79, 1951, p. 4.

[26] G. Sauser-Hall, *The Industrial Use of International Rivers*, RCADI, 1953, p. 553.

[27] Le droit de mener des recherches scientifiques est prévu également par la convention sur le plateau continental du 29 avril 1958 (art. 5), mais il dépend de la délivrance d'une autorisation par l'État riverain.

[28] AJIL, 1960, pp. 476 - 483.

[29] « Zbiór Dokumentów », 1967, n° 1/2, p. 517.

Pour qu'elles soient conformes au droit international, les recherches scientifiques doivent être menées dans l'intérêt de tous les États et de toute l'humanité. Le principe en question prévoit également le devoir de la coopération internationale de même que celui de l'échange et de la mise à la portée de tous des observations scientifiques et des résultats de recherches [30]. Il mérite d'être soulignée la formule de l'art. IX de l'accord de 1967 qui dispose que si une partie contractante a des raisons pour présumer que l'une de ses actions ou expériences pourrait produire un effet préjudiciable sur l'activité d'autres États dans le domaine d'exploration et d'exploitation pacifiques de l'espace cosmique, elle doit entreprendre des consultations internationales appropriées. Les devoirs résultant du principe de la liberté des recherches scientifiques s'étendent sans doute aux recherches menées dans le domaine de l'environnement naturel.

Une telle position a été prise par la conférence de Stockholm qui, dans le point 20 de la déclaration finale, a formulé une opinion suivante : « Les recherches scientifiques et de développement menées dans le contexte des problèmes de l'environnement naturel, aussi bien nationaux que multinationaux, doivent être appuyées dans tous les pays, en particulier dans les pays en voie de développement. Par suite de cela *il faut promouvoir la circulation des informations actuelles et des expériences scientifiques en vue de rendre facile la solution des problèmes relatifs à l'environnement naturel* [soulignement — *J. S.*] : les technologies en cette matière doivent être mises à la portée des pays en voie de développement dans les conditions qui encourageraient à une large application, sans être à ces États un fardeau économique ».

De même l'Union Soviétique et les États-Unis, dans l'accord sur la coopération en matière de protection de l'environnement du 23 mai 1972, ont déclaré dans l'art. 2 qu'ils étaient prêts — d'un commun accord — à mettre à la portée d'autres États les résultats de leur coopération concernant notamment le perfectionnement des technologies déjà existantes et le développement de nouvelles technologies qui n'infectent pas l'environnement naturel [31].

III. Les directions et moyens de développement du droit international de la protection de l'environnement naturel

Les directions dans lesquelles doit se développer le droit international de la protection de l'environnement naturel sont indiquées par une analyse

[30] Les articles III et IX de l'accord relatif à l'Antarctique et les articles I et IX de l'accord de 1967.

[31] Texte : *Environmental Quality, The Third Annual Report of the Council on Environmental Quality,* Washington 1972, p. 106.

de l'étendue objective des normes conventionnelles et des règles coutumières actuellement en vigueur. Ce développement doit viser surtout à englober, dans la mesure du possible, tous les problèmes de l'environnement naturel ayant le caractère international. Ce qui est le plus urgent à l'heure actuelle, c'est faire soumettre à la protection les territoires qui ne relèvent pas de la souveraineté nationale. Il s'agit notamment de la nécessité d'instituer la pleine protection des eaux maritimes contre la pollution — également par l'atmosphère et par les fleuves — et d'élaborer un système approprié de protection des ressources biologiques des mers.

L'absence d'accords internationaux et de coopération des États en la matière mène non seulement à une menace progressive pour cet écosystème, mais aussi à l'institution par voie d'actes unilatéraux des zones de protection contre la pollution [32], des zones de protection de la pêche [33] ou même à l'élargissement de la mer territoriale jusqu'à 200 milles [34]. Il ne semble pas que les décisions unilatérales puissent apporter une solution souhaitable des problèmes de l'environnement maritime. Au contraire, les actions unilatérales mènent inévitablement à un chaos, de plus, elles rendent difficile la réalisation dans l'avenir des conventions respectives.

La solution des problèmes globaux et régionaux de l'environnement exige certainement un développement progressif du droit international, c'est-à-dire une introduction des mesures efficaces de la protection de la faune [35], de la flore, de l'eau et de l'air, des mesures ayant le caractère

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[32] L. Henkin, *Arctic Anti-Pollution : Does Canada Make — or — Break International Law,* AJIL, 1971, p. 131.

[33] Une telle zone a été instituée par le Ceylan, le Costa Rica, le Ghana, l'Inde, le Pakistan.

[34] Cela concerne les États tels que : l'Argentine, le Brésil, le Chili, l'Équateur, El Salvador, la Nicaragua, le Panama, le Pérou, l'Uruguay.

[35] Parmi les espèces menacées d'extermination, il faut compter notamment les mammifères maritimes : les baleines, les dauphins, les phoques et les ours polaires. Étant donné le danger particulier apporté par le développement de la technique de la chasse à la baleine, la conférence de Stockholm, dans une de ses résolutions, a lancé un appel à l'établissement de l'interdiction décennale de chasse à ces mammifères. Il est vrai que la Commission internationale pour les Baleines a rejeté, en juin 1972, la période de suspension proposée, pourtant elle a approuvé une réduction importante des limites de la pêche ainsi qu'elle a maintenu l'interdiction de chasse à certaines espèces de baleines. La nécessité d'instituer la protection des dauphins résulte, d'une part, du changement du système de pêcher les thons — c'est-à-dire de l'application des filets, ce qui a produit le danger aussi pour des dauphins qui sont en outre menacés du fait que certains États, en particulier le Japon, les pêchent à des fins commerciaux. Il est nécessaire de signer un accord international approprié ayant pour but la protection de l'ours polaire. C'est le cas des États arctiques : l'Union Soviétique, les États-Unis, le Canada, le Danemark, la Norvège. L'Union Soviétique a déjà interdit de chasser les ours sur son territoire, mais cela s'est avéré insuffisant, car les ours se déplacent sur les glaçons flottants. Il est donc indispensable d'établir

aussi bien préventif que de contrôle. Cela est lié à l'adoption des normes appropriées.

Il est également nécessaire de dissiper des doutes actuels et de définir les notions de préjudice et de préjudice substantiel causé à l'environnement ainsi que de faire baser la responsabilité sur l'effet, c'est-à-dire l'objectiver. Cette nécessité a été mentionnée par la conférence de Stockholm qui avait disposé dans le point 22 : « Les États doivent coopérer au développement ultérieur du droit international en matière de responsabilité et de compensation des préjudices causés aux victimes des pollutions et d'autres dommages subis par l'environnement, produits par l'activité dans le cadre de la juridiction ou du contrôle d'un État sur les territoires étant hors des limites de sa juridiction ».

Le développement du droit international ne peut pas cependant porter atteinte au principe de souveraineté et introduire des solutions ou institutions de caractère supranational. Les conceptions de cette sorte ont été formulées par suite des projets de fondation d'une organisation internationale ayant pour but de mener les travaux dans le domaine de la protection de l'environnement. Lesdites conceptions ont été pourtant rejetées lors de la conférence de Stockholm qui a présenté à l'Organisation des Nations Unies une proposition de fonder une institution internationale et non pas supranationale.

Lors de sa XXVIIIe session, l'Assemblée Générale de l'ONU a créé un Conseil d'Administration du Programme d'Environnement des Nations Unies, qui se compose de 58 membres. La Pologne s'y trouvait parmi eux pour la période de 3 ans. Conformément à la règle de répartition géographique équitable, 18 places ont été attribuées aux pays africains, 13 aux pays asiatiques, 6 aux pays de l'Europe d'Est, 10 aux pays de l'Amérique Latine et 11 aux pays de l'Europe d'Ouest et aux autres membres [36]. Le Conseil se propose entre autres de développer la coopération internationale dans le domaine de l'environnement naturel, de coordonner les programmes concernant la protection de l'environnement dans le cadre du système des Nations Unies, de développer l'échange d'informations, de veiller à ce que les programmes particuliers de protection ne soient pas contraires aux plans de développement des pays en voie de développement, de même que

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les interdictions respectives par les autres États. Pour ce qui est des phoques, ce problème ne concerne que les phoques antarctiques qui ne sont pas soumises à la protection. La convention respective a été signée en juin 1972. La conclusion des accords appropriés est indispensable aussi en cas de la plupart des félidés tachetés, exterminés en règle générale en raison de leurs fourrures précieuses, de même qu'en cas d'animaux migrateurs, lorsque les mesures de protection appliquées par un seul État sont insuffisantes.

[36] Rés. 2997/XXVII.

de fixer les façons d'utiliser le fonds spécial alimenté par les dotations gouvernementales volontaires.

De plus, on a prévu la fondation du petit secrétariat dirigé par un directeur exécutif. Sur demande du Secrétaire Général de l'ONU, l'Assemblée Générale a confié cette fonction à M. P. Strong. Le rôle du Secrétariat consiste à prêter une aide pratique au Conseil d'Administration dans l'exercice de ses fonctions. Il a été localisé à Nairobi, capitale du Kenya [37].

La fondation d'une nouvelle organisation internationale, concentrée spécialement sur la problématique de l'environnement naturel, permettra sûrement d'obtenir de meilleurs résultats également dans le développement du droit international de la protection de l'environnement naturel, bien que la dernière parole, comme cela a lieu dans plusieurs autres domaines de la coopération internationale, appartienne aux États.

Le plein respect du principe de souveraineté ne doit pas pourtant signifier l'impossibilité de subordination de l'intérêt national aux intérêts de toute la société internationale ni l'impossibilité de limitation mutuelle et égale de l'exercice des droits souverains, ne serait-ce que, par exemple, par l'adoption d'une conception de répartition équitable des ressources naturelles du fond des mers et des océans. Ces limitations, par la nature des choses, peuvent être plus larges sur les territoires qui ne relèvent pas de juridiction nationale, et proportionnellement moindres sur les territoires des États particuliers. Cette observation est applicable également aux moyens et organes de contrôle.

Le création du code international de la protection de l'environnement et le développement progressif du droit international doivent être le résultat des efforts entrepris aux différents échelons, un accord international étant un instrument définitif mais non pas unique qui reste à la disposition des États. Étant donné la longue durée de la procédure de conclusion, la petite élasticité en ce qui concerne les modifications et les amendements, un accord, pour qu'il puisse jouer un rôle approprié dans les conditions de la révolution scientifique et technique, doit être complété par un système de standards élastiques de caractère technique, qui seraient adoptés par voie de résolutions des organisations internationales [38]. Parmi les organisations spécialisées qui établissent ces standards il y a, entre autres, l'Organisation Mondiale de la Santé, l'Organisation des Nations Unies pour l'Alimentation et l'Agriculture ainsi que l'Organisation de l'Aviation Civile Internationale. En Europe, de tels standards, qui portent déjà sur la protection de l'envi-

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[37] Rés. 3004/XXVII.

[38] P. Contini, P. H. Sand, *Methods to Expedite Environment Protection : International Ecostandards*, AJIL, 1972, p. 37.

ronnement naturel, sont adoptés par la Commission Économique Européenne, par le Conseil d'Assistance Économique Mutuelle et par l'Organisation de Coopération Économique et de Développement.

Il ne faut pas pourtant faire peu de cas des résolutions et déclarations qui, en matière de protection de l'environnement, sont et seront adoptées par les organisations internationales. Il suffit de mentionner que plusieurs accords internationaux d'importance particulière : pactes des droits de l'homme, accord relatif au cosmos ou convention antiraciste, ont été précédés des déclarations de l'Assemblée Générale des Nations Unies. C'est pourquoi l'adoption de la déclaration des principes du droit international en matière de protection de l'environnement naturel serait d'une importance essentielle pour le développement ultérieur de ce droit.

Le système juridique global de protection de l'environnement naturel pourrait donc être construit à partir des résolutions et déclarations, en passant par les standards, pour parvenir enfin aux accords internationaux. Cela concerne également les différentes formes de coopération internationale. Les solutions globales devraient souvent être précédées des solutions régionales résultant de la coopération internationale s'effectuant aux différents échelons.

Le tourisme et le droit international

par KAZIMIERZ LIBERA

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Introduction

Les auteurs de l'*Étude sur l'incidence économique du tourisme sur les économies nationales et le commerce international* soulignent qu'il est « surprenant de constater le peu d'attention [...] qui a été consacrée aux facteurs économiques essentiels qui ont dominé par le passé la croissance du tourisme et dont on peut attendre qu'ils modèleront son développement dans l'avenir ». Ils en voient les raisons, d'une part, dans le caractère puritain que la science économique persiste à manifester et qui, semble-t-il, fait du tourisme un domaine peu attirant pour des études économiques sérieuses et, de l'autre, dans l'hétérogénéité du phénomène touristique, extrêmement complexe et diversifié [1].

Cette constatation semble entièrement justifiée, bien que depuis quelques dizaines d'années un nombre toujours croissant d'économistes se vouent à l'étude et à l'analyse scientifique de différents aspects économiques du tourisme. Ce sont jusqu'à présent encore des efforts sporadiques, mais l'importance économique du tourisme commence par s'imposer et par

[1] *Étude sur l'incidence économique du tourisme sur les économies nationales et le commerce international* [cité plus loin : *Étude*...], UIOOT, Genève 1966, p. 11.

vaincre, peu à peu, « cette manière absurde de voir », comme on le dit dans l'*Étude*, que le tourisme est un domaine peu attirant pour des études sérieuses.

Si telle est la situation en ce qui concerne l'économie du tourisme, elle est encore plus nettement défavorable dans le domaine des sciences juridiques. Les représentants de ces dernières, peut-être encore plus « puritains » que les économistes, admettent difficilement le tourisme dans l'enseignement universitaire et trouvent rarement que les problèmes qu'il soulève présentent un intérêt théorique sérieux [2].

Sur le plan national, il y a déjà cependant certains essais, bien qu'assez timides, d'analyser le droit concernant le tourisme. Il y a même des recueils, comme en Italie, de la « législation touristique », il y a aussi des manuels pratiques à l'usage des organes intéressés ou des touristes eux-mêmes contenant les textes, parfois accompagnés des commentaires, des lois et règlements relatifs à l'entrée des étrangers ou à la sortie des nationaux dans un pays donné, aux formalités douanières ou de la police, à la réglementation hôtelière ou au droit de circulation.

De toute façon un certain intérêt pour les problèmes juridiques soulevés par le développement extraordinaire du tourisme commence à se faire sentir, bien que très timidement encore, parmi les représentants de différentes disciplines du droit interne [3].

Il n'en est pas de même en ce qui concerne le droit international. Si les spécialistes du droit interne consacrent relativement beaucoup d'attention aux problèmes qu'entraine le tourisme et commencent même à s'occuper de la législation touristique comparée [4], les théoriciens du droit international public ne s'occupent, sauf de très rares exceptions, que de la circulation internationale des personnes en général, c'est-à-dire du droit de l'homme de s'expatrier, d'être admis par les États étrangers et de circuler librement à l'intérieur du territoire de ces États ou de s'y établir [5].

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[2] V. U. Fragola, *La posizione del giurista dimanzi alla legislatione turistica*, « Revue de Tourisme », 1966, n° 1.

[3] V. p. ex. F. L. Auerbach, *Immigration Laws of the United States*, Indianopolis 1955 et les intéressantes études du Centre de Droit du Tourisme de l'Université de Grenoble et notamment : *Les associations sans but lucratif organisant des voyages et séjours* (1972) et *Institutions touristiques et droit du tourisme*, vol. 1 : *Organisation du tourisme* (1972) et vol. 2 : *L'activité touristique* (1973). V. aussi J. Charpentier, *Rola państwa w rozwoju turystyki we Francji* [*Rôle de l'État dans le développement du tourisme en France*], « Ruch Turystyczny », 1967, n° 3.

[4] V. notamment J. B. Correa, *La legislación turística comparada y su evolución actual*, Madrid 1965.

[5] Ceux qui s'en occupent envisagent la liberté de la circulation surtout comme un des droits de l'homme, v. entre autres : P. N. Drost, *Human Rights as Legal Rights*, Leyden 1965 et A. N. Holcombe, *Human Rights in the Modern World*, New

La raison principale de cet état de choses est peut-être l'idée, assez répandue dans la doctrine contemporaine, que la question du mouvement des personnes relève uniquement du droit interne des États intéressés [6] et que, par conséquent, il n'y a pas de règles de droit international se rapportant directement à la circulation internationale des individus. Or, cette conception n'est pas bien fondée [7]. En effet, sans parler de certaines règles de droit coutumier en cette matière, généralement reconnues et appliquées, surtout en ce qui concerne l'admission des étrangers sur le territoire de l'État, ou du moins des catégories déterminées d'étrangers [8], il existe un droit international conventionnel bien développé, relatif à la circulation des personnes, aux formalités concernant le voyage international, au transport international des passagers [9], etc. Il y a aussi un grand nombre de recommandations des organisations internationales intergouvernementales, acceptées et mises en application par les États membres, entre autres en matière d'assouplissement des formalités qui gênent le trafic international des personnes [10].

La circulation internationale des personnes peut être définie, au sens juridique de cette expression, comme tout déplacement des personnes

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York 1948. D'autres analysent le droit concernant toutes les catégories de migrations internationales et surtout l'immigration. Voir notamment à ce sujet R. PLENDER, *International Migration Law*, Leiden 1972 ; A. CHANTRE, *Du séjour et de l'expulsion des étrangers*, Genève 1911 ; W. CZAPSKI, *Dopuszczanie cudzoziemców na terytorium państwa* [*De l'admission des étrangers*], « Ruch Turystyczny », 1965, n° 1 ; W. SCHATZEL, *Les limites à la souveraineté de l'État en matière d'immigration et de naturalisation*, « Revue Internationale Française du Droit des Gens », Vol. 23, 1954.

[6] V. p. ex P. GUGGENHEIM, *Traité de droit international public*, vol. 1, Genève 1953, p. 365 ; A. KLAFKOWSKI, *Prawo międzynarodowe publiczne* [*Droit international public*], 2e éd., pp. 181 185 ; M. SØRENSEN, *Principes de droit international public*, « Recueil des Cours de l'Académe du Droit International » [plus loin : RCADI], Vol. 101, IVe partie, 1960, p. 145.

[7] V. à ce sujet K. LIBERA, *Międzynarodowy ruch osobowy* [*Circulation internationale des personnes*], Warszawa 1969, pp. 56 - 87.

[8] V. R. PLENDER, *op. cit.*, ch. III.

[9] Notamment la question des passeports à suscité l'intérêt des juristes. V. à ce sujet : F. BORELLA, *Le passeport*, « Revue Générale de Droit International Public » [plus loin : RGDIP], 1960, n° 2 ; E. REALE, *Le problème des passeports*, RCADI, Vol. 50, IVe partie, 1934 ; D. C. TURACK, *The Passeport in International Law*, Lexington 1972. En ce qui concerne le transport des passagers v. notamment : A. HAULOT, *The Conditions Governing the Development of Tourism*, Institut du Transport Aérien, Doc. 4-E/1968 ; I. TARSKI, *Kryteria wyboru środka transportu w turystyce* [*Les critères du choix des moyens de transport dans le tourisme*], « Ruch Turystyczny », 1966, n° 3 ; M. ŻYLICZ, *Transport w międzynarodowym obrocie osobowym* [*Le transport et la circulation internationale des personnes*], « Ruch Turystyczny — Monografie », 1967, n° 2 ; M. ŻYLICZ, *Międzynarodowy obrót lotniczy* [*Le trafic aérien international*], Warszawa 1972.

[10] K. LIBERA, *op. cit.*, pp. 87 - 127, 268 - 300 et 318 - 323.

physiques au cours duquel il faut franchir une ou plusieurs frontières pour se rendre du territoire d'un État sur le territoire d'un autre ou des autres États.

Cette définition s'applique à tout déplacement quel que soit son but, quel que soient la nationalité, la qualité ou le statut de la personne en cause, quelle que soit la durée de son voyage ou de son séjour dans le ou les pays étrangers. Il y a cependant des différences profondes du point de vue juridique entre les différentes catégories de personnes qui quittent l'État dont elles sont ressortissants ou dans lequel elles ont leur résidence habituelle pour se rendre dans un autre État. Ces différences concernent aussi bien les conditions et les formalités à remplir pour quitter son pays que le droit d'accès du territoire de l'État d'admission ainsi que la situation juridique dans ce dernier et qui n'est pas la même suivant qu'il s'agisse d'un immigré qui vient dans un pays pour s'y établir ou d'un travailleur saisonnier, d'une personne qui habite une zone frontalière ou enfin d'un visiteur temporaire à un autre titre.

Nous devons laisser entièrement de côté le problème des immigrants, c'est-à-dire des individus qui quittent leur pays natal pour aller s'établir dans un pays étranger, en général sans esprit de retour, pour ne nous occuper que de déplacements temporaires. Mais, en ce qui concerne ces derniers, il importe d'avoir des critères qui permettent de distinguer les différentes catégories de voyageurs et qui donnent surtout la possibilité de définir la catégorie dite « touristes internationaux ».

Ces critères et définitions existent et en premier lieu il est nécessaire de voir ce que, en droit international, il faut entendre par trafic international touristique.

I. Définitions internationales du touriste

Les causes des voyages à l'étranger en vue d'y faire un séjour temporaire peuvent être et sont très nombreuses. Le premier groupe comprend les personnes qui se rendent dans un pays autre que le leur pour y occuper un emploi salarié et qui, après un certain temps ou même journellement, retournent chez elles avec l'argent qu'elles ont gagné et économisé. Le deuxième groupe comprend les hommes d'affaires, commerçants, industriels, représentants et agents de différents secteurs d'économie qui vont dans un pays étranger pour les besoins de leur activité professionnelle, en général pour des périodes relativement courtes. Dans le troisième groupe, on peut faire entrer des représentants des États : diplomates et consuls ainsi que des délégués aux différentes manifestations, réunions ou congrès internationaux et des experts ou des fonctionnaires des organisations internationales en mission.

Il y a enfin le quatrième groupe : des gens qui voyagent pour leur plaisir, pour connaître d'autres pays, d'autres cultures, institutions et coutumes, pour visiter des vestiges grandioses du passé, des monuments et des oeuvres d'art, des réalisations merveilleuses du génie humain. Dans ce groupe, on peut inclure ceux qui vont à l'étranger pour y faire une cure ou pour s'y reposer ou, enfin, pour apprendre, étudier, rendre visite à des parents ou amis.

On a commencé, à partir du XVIIIe siècle, à appeler en Angleterre les voyageurs du quatrième groupe « touristes », puisque les jeunes Anglais devaient, pour parfaire leur éducation, aller faire un « tour » en Europe [11]. Le terme est ensuite passé d'abord dans la langue française et ensuite dans presque toutes les autres langues. Ces « touristes » appartenaient en règle générale aux classes très riches de la population et ils étaient, jusqu'au milieu du XIXe siècle peu nombreux, car le voyage d'agrément ou d'éducation était non seulement long et dangereux, mais en plus il coûtait toute une fortune.

Quand le chemin de fer a remplacé la diligence, le voyage est devenu meilleur marché et accessible à un nombre beaucoup plus considérable de personnes. Les « villes d'eau », situées près des lignes de chemins de fer, connurent alors l'ère de grand épanouissement. Mais le tourisme, comme phénomène social et comme activité dans laquelle prennent part les grandes masses humaines, est dû surtout au relèvement du niveau de vie dans les pays industrialisés et au développement de la législation sociale qui assure à tout travailleur des loisirs sous forme surtout d'un congé payé annuel.

L'extraordinaire carrière de l'automobile et le développement de l'aviation ont fait le reste. L'homme, à l'époque actuelle, au moins dans les pays développés, a les moyens, techniques et financiers, de se déplacer, de faire des voyages et de faire des séjours temporaires en dehors de sa résidence, dans son pays ou à l'étranger [12]. Dans le premier cas, il fera du tourisme national, dans le second, international, s'il appartient, comme on le verra, aux deuxième, troisième ou quatrième groupes susmentionnés.

Pour beaucoup de pays qui reçoivent un grand nombre de ces visiteurs temporaires, le tourisme international présente une grande importance économique, car le touriste étranger apporte de l'argent et le laisse dans le pays de son séjour temporaire en y payant les prestations reçues et les produits achetés comme « souvenirs » ou consommés sur place. Sans entrer

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[11] A. J. Norval, *The Tourist Industry, A National and International Survey*, London 1936, p. 27.

[12] S. Bąk, *Międzynarodowa turystyka motorowa* [*Le tourisme international motorisé*], « Ruch Turystyczny — Monografie », 1972, n° 12 ; K. Libera, *op. cit.*, pp. 248 - 261 ; A. J. Norval, *op. cit.*, pp. 157 et s. ; F. W. Ogilvie, *The Tourist Movement*, Londres 1933, pp. 49 - 51, 98 - 101, 161 - 163 ; *Étude ...*, p. 62,

dans le détail et sans essayer de faire une analyse économique, on peut dire que le tourisme international est, à juste titre, considéré comme une « exportation invisible » très avantageuse et qu'il permet, dans beaucoup de cas, d'atténuer ou même de couvrir le déficit de la balance des payements résultant des échanges des biens [13].

Un touriste étranger est donc considéré, du point de vue économique, comme un consommateur, ce qui le distingue nettement de l'immigrant temporaire qui vient dans un pays pour y exercer une activité productrice et y gagner de l'argent au lieu de l'en dépenser [14].

D'un autre côté, et toujours en considérant la question du point de vue économique, la distinction des visiteurs temporaires en ceux qui viennent pour leurs plaisir ou éducation et ceux qui viennent pour tout autre but que l'occupation d'un emploi salarié, tel que santé, sport, affaires, etc., ne se justifie pas. Tous ces visiteurs temporaires se comportent de la même façon. Ils dépensent dans le pays visité l'argent qu'ils ont gagné ailleurs [15].

Ces considérations ont conduit la Commission Économique de la Société des Nations quand elle a fait, en 1937, une première tentative d'élaborer une définition du tourisme international à en accepter une notion très large. En effet la définition du « touriste », finalement adoptée par la Commission et ensuite par le Conseil de la Société des Nations, statuait que ce terme devait, en principe, « être interprété comme signifiant toute personne voyageant pour une durée de 24 heures ou davantage, dans un pays autre que celui de sa résidence habituelle » [16].

Telle qu'elle a été adoptée, cette définition aurait en fait permis d'inclure dans la catégorie « touristes » tous ceux qui venaient dans un pays, sans exception, y compris les travailleurs saisonniers et même les immigrés. Elle aurait donc englobé toute la circulation internationale des personnes, excepté les déplacements d'une durée ne dépassant pas 24 heures, donc le trafic purement local ou transitaire.

Telle n'était pas du tout l'intention de la Commission. Mais, étant donné la difficulté d'élaborer une définition générale assez précise, à la fois large

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[13] Cf. entre autres : *Étude...*; P. Hałaciński, *Ekonomiczne problemy współczesnej turystyki międzynarodowej* [*Les problèmes économiques du tourisme international moderne*], « Ruch Turystyczny — Monografie », 1972, n° 11, ch. VI ; K. Krapf, *Le rôle et l'importance du tourisme international*, Berne 1963 ; A. J. Norval, *op. cit.*; F. W. Ogilvie, *op. cit.*; v. aussi le « Bulletin Technique de l'UIOOT, Tourisme et Économie », Genève.

[14] G. Labeau, *Aspects généraux de la consommation touristique. Cours fait au Centre International d'Études Supérieures de Tourisme de l'UIOOT*, Turin 1967.

[15] A. J. Norval, *op. cit.*, p. 53 ; F. W. Ogilvie, *op. cit.*, pp. 3 - 6.

[16] *Études relatives au tourisme considéré comme facteur de l'économie internationale, Société des Nations, Comité Économique*, Genève 1936, p. 8.

et restrictive, elle a préféré établir une définition générale « du principe » et de la faire suivre d'une énumération des catégories des personnes qui doivent ou qui ne doivent pas être considérées comme « touristes ». En conséquence la définition générale a été complétée par une énumération ainsi conçue :

« Les personnes entrant dans les catégories suivantes sont à considérer comme touristes :

« 1. Les personnes effectuant un voyage d'agrément ou pour des raisons de famille, de santé, etc.,

« 2. Les personnes se rendant à des réunions ou en missions de toutes sortes (scientifiques, administratives, diplomatiques, religieuses, sportives, etc.),

« 3. Les personnes en voyage d'affaires,

« 4. Les visiteurs en croisière maritime, même lorsque la durée de leur séjour est inférieure à vingt-quatre heures. Ces derniers devraient être comptés dans un groupe à part, au besoin sans distinction, suivant leur domicile habituel.

« Ne sont pas à considérer comme touristes notamment :

« 1. Les personnes arrivant, avec ou sans contrat de travail, pour occuper un emploi dans le pays ou y exercer une activité professionnelle,

« 2. Autres personnes venant fixer leur domicile dans le pays,

« 3. Les frontaliers et les personnes domiciliées dans un pays et travaillant dans un autre,

« 4. Les élèves, étudiants et jeunes gens vivant dans des pensions ou internes dans les établissements scolaires,

« 5. Les voyageurs en transit sans arrêt dans le pays, même si leur traversée prend plus de vingt-quatre heures ».

L'énumération faisait donc entrer dans la catégorie « touristes » tous ceux qui, en venant dans un pays, y dépensaient de l'argent gagné à l'étranger et en excluait ceux qui venaient s'y établir ou y gagner de l'argent.

Cependant, l'énumération n'était pas tout à fait conséquente, car elle ne considérait pas comme touristes des élèves ou étudiants vivant dans des pensions ou étant internes dans les établissements scolaires, bien que les frais de leur pension fussent en général supportés par leur famille résidant à l'étranger.

Pour pallier à cette inconséquence, la Commission des Recherches de l'Union Internationale des Organismes Officiels de Tourisme a fait admettre par l'Assemblée Générale de l'Union que cette catégorie de jeunes gens soit désormais comprise dans la définition du touriste [17].

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[17] *Résolution de l'Assemblée Générale de l'UIOOT, adoptée en 1950 à Dublin. Statistiques du tourisme international,* UIOOT, Genève 1965, p. 9.

L'UIOOT ne s'est pas limitée à cette seule modification. D'autres modifications adoptées étaient dues au développement de l'automobile et du tourisme motorisé qui, d'une part, permettait aux possesseurs d'une voiture d'aller passer à l'étranger une partie de leur week-end et, de l'autre, leur donnait la possibilité quand ils traversaient un pays de le visiter. Ceci a fait apparaître une nouvelle catégorie de visiteurs dite « excursionnistes » et a sensiblement changé la notion de voyageur en transit.

D'après la définition de l'excursionniste, élaborée par l'UIOOT, ce terme désigne en principe, « toute personne voyageant pour son plaisir pendant une période inférieure à 24 heures dans un pays autre que celui dans lequel elle réside généralement et ne se livrant à aucune occupation lucrative dans ce pays ». Cette définition s'inspire donc du même critère économique que la définition du tourisme international.

Par ailleurs l'UIOOT a décidé de définir le terme de « voyageur en transit » comme devant, en principe, désigner « toute personne traversant un pays, même si elle y reste plus de 24 heures, sans s'arrêter, ou toute personne traversant un pays et qui y reste moins de 24 heures, à condition que tout arrêt soit de courte durée et pour d'autres motifs que des buts touristiques » [18].

L'UIOOT a donc, d'une part, élargi la définition du touriste international en y faisant entrer les jeunes gens étudiant en dehors de leur pays et, de l'autre, a introduit une nouvelle notion d'« excursionniste » qui n'est en fait que le touriste d'une journée. Elle a, en outre, défini la notion de « voyageur en transit » qui, dans des conditions déterminées, c'est-à-dire s'il s'arrête dans le pays traversé même pour très peu de temps, mais dans des buts touristiques, peut être considéré comme touriste ou comme excursionniste suivant la durée de son séjour.

La Commission de Statistique de l'Organisation des Nations Unies n'a pas cru devoir accepter la définition de la Société des Nations ni les amendements adoptés par l'UIOOT et elle a établi, en 1953, sa propre définition. Celle-ci adopte le terme général de « visiteur » qui désigne les « non-résidents ayant l'intention de séjourner dans le pays pendant un an au maximum, sans y exercer profession rémunérée dans le pays même ». De plus la Commission a recommandé que cette catégorie de visiteurs soit subdivisée, selon le but de séjour, comme suit : 1) transit, 2) vacances, 3) études (professeur, étudiants, autres), 4) affaires et 5) autres visiteurs [19].

Cette définition diffère d'une façon sensible de celle établie par la Société des Nations. D'abord elle substitue au terme de touriste, qui

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[18] *Ibid.*, pp. 7 et 9.

[19] *NU, Statistiques des migrations internationales. Études statistiques*, série M, n° 20, IIe partie, § 17, pp. 4 et 19.

a déjà été presque universellement adopté, le terme de visiteur, peut-être plus adéquat, mais jusque-là non employé. De plus elle présente de sérieuses difficultés d'application à cause des subdivisions qu'elle comporte, parce qu'en fait il est souvent malaisé de classer un visiteur dans tel ou tel autre compartiment. Enfin, en introduisant la durée maximum de séjour, elle exclut certaines catégories de visiteurs, notamment les étudiants dont le séjour dépasse en règle générale le délai imparti, tout en les faisant inclure dans une des subdivisions et créant par cela même une certaine confusion.

Une troisième définition a été incluse dans la Convention sur les facilités douanières en faveur du tourisme, conclue en 1954 à New York. Cette Convention dont actuellement plus de 70 États font partie, définit le touriste comme suit :

« Le terme " touriste " signifie toute personne qui, sans distinction de race, de sexe, de langue ou de religion, pénètre sur le territoire d'un État contractant autre que celui où elle réside habituellement et y séjourne pendant vingt-quatre heures au moins et six mois au plus, au cours d'une même période de douze mois, si son voyage est dû à un motif légitime, autre que l'immigration, tel que : tourisme, agrément, sport, santé, famille, études, pèlerinages religieux ou affaires » [20].

La définition de la Convention de New York qui a été notamment reprise en 1961 avec de légères modifications par l'Organisation de l'Aviation Civile Internationale et incorporée dans l'Annexe 9 de la Convention de Chicago contenant les Normes Internationales et Pratiques Recommandées, plus connue sous le nom de « Facilitation » (en 1964, l'OACI a adopté sa propre définition du « visiteur temporaire » [21]), a sensiblement élargi le nombre des personnes considérées comme touristes par la définition de la Société des Nations, car elle y fait entrer même ceux qui viennent légalement dans un pays pour y occuper un emploi salarié, à moins qu'on interprète le terme « immigration » comme englobant les travilleurs saisonniers appelés parfois « immigrants saisonniers ». D'autre part, elle a introduit, comme la définition de la Commission de Statistique de l'ONU, mais en vue de sauvegarder les intérêts fiscaux des États contractants, un délai limite de séjour, du reste encore plus court.

Il existe donc en ce moment plusieurs définitions du touriste international. Toutes ces définitions ont adopté une notion très large du touriste — ou du visiteur — et y font entrer en principe presque toutes les personnes, à quelques différences près, venant pour un séjour temporaire. Toutes,

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[20] *United Nations Conference on Custom Formalities for the Temporary Importation of Private Road Motor Vehicles and for Tourism,* E/CONF. 16/23, 1955.

[21] *International Standards and Recommended Practices Facilitation, Annex 9 to the Convention on International Civil Aviation,* 5e éd, 1964.

elles ont adopté non pas la notion de nationalité du visiteur, mais de sa résidence. Par conséquent également un ressortissant du pays visité sera considéré comme touriste pourvu qu'il réside habituellement en dehors de son territoire.

L'existence de ces différentes définitions — et il ne faut pas oublier que beaucoup d'États les ont acceptées avec des réserves qui en excluent certains éléments ou qu'ils appliquent parfois leurs propres définitions — entraîne de sérieuses conséquences pratiques. En effet la diversité de critères appliqués est la cause de la non-comparabilité des données statistiques touristiques, établies par les différents États, avec toutes les conséquences fâcheuses que cet état de choses présente pour l'étude du phénomène touristique et pour l'établissement d'une politique touristique rationnelle dans les États intéressés par le développement de leurs relations touristiques internationales.

Pour donner une idée de la confusion qui existe, on peut citer les résultats d'une enquête faite à ce sujet en 1962 par l'UIOOT parmi les États membres. Sur 62 pays qui ont répondu à l'enquête, la définition du touriste recommandée par l'UIOOT était appliquée à des fins statistiques par 35, celle de la Convention de New York — par 16 et celle de la Commission de Statistique de l'ONU — par 7 États. De plus, 4 autres États appliquaient leurs définitions propres.

Afin de remédier aux inconvénients de la situation existante, l'UIOOT a pris l'initiative de soumettre à l'Organisation des Nations Unies le projet de convoquer une Conférence Internationale sur le tourisme qui, entre autres, devait s'occuper de l'élaboration d'une définition uniforme destinée à remplacer les définitions en usage. Le Conseil Économique et Social de l'ONU a donné suite à cette initiative et, après une longue et soigneuse préparation, la Conférence des Nations Unies sur le tourisme et les voyages internationaux fut convoquée en 1963 à Rome. Elle a réuni des représentants de 87 États et de 26 organisations internationales.

Parmi les nombreuses résolutions adoptées par la Conférence figure aussi une qui propose de soumettre à l'examen de la Commission de Statistique de l'ONU et de l'Union Internationale des Organismes Officiels de Tourisme une nouvelle définition. Cette définition qui s'efforce de concilier les principes de la définition de la Société des Nations, modifiée et complétée par l'UIOOT, et de celle de la Commission de Statistique elle-même, adopte le terme général de visiteur pour désigner l'ensemble des personnes en cause, celles-ci constituant deux groupes distincts de « touristes » et d'« excursionnistes ».

La définition proposée est ainsi libellée :

« A des fins statistiques, le terme " visiteur " désigne toute personne qui se rend dans un pays, autre que celui où elle a son lieu de résidence

habituelle, pour toute raison autre que celle d'y exercer une profession rémunérée dans le pays même.

« Cette définition comprend :

« — les touristes, c'est-à-dire les visiteurs séjournant au moins 24 heures dans le pays visité et dont les motifs du voyage peuvent être groupés en :

a) loisirs : agrément, vacances, santé, études, religion et sports ;

b) affaires, famille, mission, réunion ;

« — les excursionnistes, c'est-à-dire les visiteurs temporaires séjournant moins de 24 heures dans le pays visité (y compris les voyageurs en croisières).

« Les statistiques ne doivent pas comprendre les voyageurs qui juridiquement, ne pénètrent pas dans le pays (voyageurs par air, qui ne quittent pas l'aire de transit de l'aérodrome ou autres cas analogues) » [22].

Cette définition fut approuvée par la Commission de Statistique de l'ONU à sa 15e session, tenue en 1968 à New York. La Commission y a cependant apporté une légère modification en précisant que par « touristes » il faut entendre les visiteurs qui restent au moins une nuit ou séjournent au moins 24 heures dans le pays visité, tandis que par « excursionnistes » on entendra les visiteurs qui ne passent même pas une nuit et séjournent moins de 24 heures dans le pays visité.

La définition ainsi amendée fut, à son tour, approuvée par l'Assemblée Générale de l'UIOOT, tenue à Dublin en 1969, mais la question de l'élaboration d'une nouvelle définition est déjà de nouveau posée [23].

Elle a notamment été soulevée par la CNUCED [24] et reprise par la Conférence des Statisticiens Européens, organisée par la Commission de Statistique et la Commission Économique pour l'Europe en coopération avec les secrétariats de la CNUCED et de l'UIOOT.

La Conférence, à sa réunion tenue à Genève en mars 1972, a notamment « estimé que les définitions des termes " visiteur ", " touriste " et " excursionniste " devraient être élaborées, compte tenu des définitions données dans les *Directives* de la CNUCED » [25].

La situation n'est donc pas meilleure qu'en 1962 et l'adoption générale d'une définition uniforme est peut-être encore loin d'être réalisée.

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[22] *Conférence des Nations Unies sur le tourisme et les voyages internationaux, août-septembre 1963. Résolutions et recommandations*, UIOOT, Genève, p. 14.

[23] V. *Guidelines for the Collection and Presentation of Traveel Statistics. Note of the Secretary General, XXIIIrd General Assembly*, UIOOT, Caracas 1 - 10 octobre 1973, Doc. C. 1.1, p. 7.

[24] Doc. TD/B/C. 3/86 ; *Guidelines for Tourism Statistics Prepared by the Secretariat of UNCTAD*, U.N., New York 1971.

[25] *NU, Conseil Économique et Social*, Doc. CONF. Eur. Stats/WG. 39/6, 24 mars 1972, p. 8.

Il a été en outre suggéré que d'ores et déjà, s'inspirant des catégories des « non-résidents », adoptées par le « System of National Accounts » de l'ONU, les groupes suivants de personnes soient notamment considérés comme visiteurs :

membres de l'équipage des navires ou aéronefs étrangers en stationnement ;

employés des organisations internationales qui ne sont pas ressortissants du pays de séjour temporaire et y sont en mission pour une période qui ne dépasse pas un an.

Par contre ne seraient pas considérés comme visiteurs les représentants diplomatiques et consulaires ainsi que les membres des forces armées étrangères stationnant dans le pays [26].

Connaissant maintenant la très large signification donnée au terme « touriste » en droit international, on peut se demander si le tourisme international est un phénomène récent, comme on serait porté de prime abord à le croire, ou s'il est — en se servant bien entendu des critères actuellement adoptés — un phénomène ayant une longue et riche histoire. Il semble opportun d'essayer de répondre brièvement à cette question.

II. Aperçu historique

a) Antiquité. Certains auteurs considèrent que dans l'Antiquité « il n'y avait pas lieu à trafic international des voyageurs » [27]. Cette opinion s'appuie, entre autres, sur une affirmation d'Aristote concernant les étrangers qui sont des ennemis naturels à vaincre, à asservir ou à anéantir.

L'assertion d'Aristote était parfaitement juste et justifiée. L'étranger était en effet partout considéré en principe comme un ennemi qui présentait un danger. Si l'on le rencontrait, on devait donc le mettre avant tout hors d'état de nuire, le désarmer et le faire prisonnier ou tout simplement le tuer. Ceci était surtout vrai lorsque les étrangers venaient en masses armées. Il fallait alors se défendre, les combattre et vaincre ou subir le pillage, l'esclavage ou la mort.

Mais si telle était la règle, elle n'était — comme c'est presque toujours le cas — absolue et elle connaissait des exceptions qui, à force de se généraliser dans certaines régions et à certaines époques, finirent presque par la remplacer.

Une de ces exceptions, pour ne parler que de celles qui concernent les personnes considérées aujourd'hui comme touristes, a pris beaucoup

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[26] *Guidelines for the Collection ...*, p. 8.

[27] E. Reale, *op. cit.*, p. 94.

d'importance entre les pays liés par une certaine communauté de religion, de moeurs, de langue et de culture. Le culte de dieux communs incitait les gens à faire des pèlerinages aux lieux sacrés ou leur a même donné l'idée de les institutionnaliser, tels les Jeux Olympiques qui savaient parfaitement marier la piété avec la performance physique et les rejouissances publiques.

D'autre part, des gens curieux et cultivés, comme Hérodot, entreprenaient des voyages lointains pour connaître des pays étrangers, pour étudier leurs moeurs et leurs institutions. Par ailleurs beaucoup de gens allaient déjà à cette époque lointaine, comme le constate M. Sigaux, chercher le soulagement de leurs maux aux sources bienfaisantes dont la renommée était très répandue [28].

Une autre exception, et peut-être la plus importante, était liée avec le commerce. Depuis les temps les plus reculés, les hommes faisaient du troc sur place. Plus tard, ils allaient échanger ou vendre leurs produits de plus en plus loin pour pouvoir acquérir ce qui leur manquait. Avec le temps est apparu le marchand itinérant, simple intermédiaire, qui achetait les choses produites dans un endroit pour aller les vendre dans un autre en parcourant parfois nombre de pays et des longues distances [29]. L'expédition mythologique des Argonautes n'est peut-être pas autre chose que le récit héroïque des expéditions des marchands qui cherchaient à trouver la route vers l'Extrême-Orient et les produits de luxe, la « Toison d'Or », provenant de Chine.

Tout ce monde-là voyageait et si la notion de frontière était encore parfois assez vague et si les frontières elles-mêmes présentaient plutôt le caractère de zones que celui de délimitations linéaires, il y avait sans aucun doute un trafic international des personnes relativement dense [30].

Mais dans l'Antiquité il n'y avait pas non plus, a-t-on dit, « de règles de droit destinées à réglementer des relations internationales », l'étranger ne pouvait donc jouir d'aucune protection légale [31]. L'existence d'un droit international à cette époque-là, si rudimentaire fût-il, ne paraît cependant pas faire de doute. De toute façon, il y avait déjà, en ce qui concerne la circulation des personnes entre différents pays, certaines institutions qui la rendaient possible et protégée.

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[28] G. SIGAUX, *Histoire du tourisme*, Genève 1965, pp. 9 - 14.

[29] V. O. NOËL, *Histoire du commerce du monde depuis les temps les plus reculés*, Paris 1891 ; G. TÉNÉKIDÈS, *Droit international dans la Grèce des cités*, RCADI, Vol. 90, IIe partie, 1956.

[30] F. L. GANSHOF, *Histoire des relations internationales*, vol. 1, Paris 1958, pp. 50 - 51.

[31] E. REALE, *op. cit.*, p. 94.

Ainsi, les nécessités de la vie et l'intérêt même de différentes communautés ont fait bientôt apparaître une institution qui tendait à protéger tout étranger qui venait dans un but pacifique, surtout pour faire du commerce. Cette institution c'était la loi de l'hospitalité privée. En vertu de cette loi, tout étranger pouvait, individuellement, demander à un homme du pays où il arrivait de lui donner l'hospitalité qui ne pouvait, en principe, être refusée. Tant que l'étranger se trouvait sous son toit ou dans les limites territoriales de ses domaines ou de la cité, l'hôte devait l'héberger et le protéger contre toute atteinte à sa sécurité [32].

L'institution de l'hospitalité privée, connue, semble-t-il, de tous les peuples de l'Antiquité, répondait aux besoins aussi longtemps que les relations étaient rares et espacées et les voyageurs peu nombreux. Elle ne pouvait plus suffire là où ces relations devenaient plus fréquentes et plus étendues, comme ce fut le cas des cités de la Grèce antique. Le nombre même des étrangers qui arrivaient dans des cités particulières rendait le recours à l'hospitalité privée difficile et en même temps gênant. D'autre part, les cités dont les citoyens se rendaient très nombreux à l'étranger, surtout pour y faire du commerce, cherchaient à leur assurer une protection plus sûre, moins aléatoire et plus étendue.

Ces besoins et intérêts convergents ont fait naître une autre institution, appelée l'hospitalité publique, la proxénie. Le proxène, appelé parfois l'hôte ou le bienfaiteur, était nommé par décret du sénat ou du peuple d'un État étranger. Il devait, en cette qualité, donner d'office aide, assistance et protection à tous les citoyens de l'État dont il était proxène et qui arrivaient dans son pays. Il devait notamment leur assurer le gîte et des places aux représentations théâtrales, les assister pour mener à bonne fin leurs affaires, les représenter dans les procès intentés par devant les tribunaux ou les assemblées du peuple [33].

La proxénie, apparue vers le VIIe ou même le VIIIe siècle avant notre ère, était connue dans toute la Grèce. Les proxènes grecs existaient aussi à Rome, à Sydon, en Carthage, en Égypte et jusque dans la mer Noire. Après la chute politique de la Grèce, la proxénie s'est maintenue sous le nom de *hospitium publicum* pour dégénérer finalement en patronat romain [34].

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[32] Cf. L. OPPENHEIM, *International Law*, 8e éd., vol. 1, 1957, pp. 72 - 73 ; G. TÉNÉKIDÈS, *op. cit.*, p. 635 et F. LAURENT, *Études sur l'histoire de l'humanité*, Bruxelles - Paris 1861, pp. 155 - 156. V. aussi HOMER, *Odyssée*, L. VI, vol. 174.

[33] Ch. TISSOT, *Des proxénies grecques et de leur analogie avec les institutions consulaires modernes*, Dijon 1903 ; G. TÉNÉKIDÈS, *op. cit.*, p. 536 ; M. A. CANDIOTI, *Historia de la institución consular en la Antigüedad y en la Edad Media*, Buenos Aires 1925, pp. 44 - 45 et 63.

[34] M. A. CANDIOTI, *op. cit.*, pp. 46 et s. ; A. H. ROTH, *The Minimum Standard of International Law Applied to Aliens*, Leyden 1949, p. 26.

Il faut ajouter que l'État ou la cité antique ne s'opposaient en général pas aux voyages de leurs citoyens — homme libres — bien que parfois l'émigration, même temporaire, fût interdite et punie de mort, comme à une certaine époque à Sparte.

L'hospitalité — privée ou publique — leur faisait d'autre part admettre des étrangers qui ne venaient manifestement pas comme ennemis.

b) Moyen Age. Après la chute de l'Empire romain et dans le chaos qui l'a suivie, les déplacements indviduels des personnes étaient certainement fort rares, car le voyage était difficile, coûteux et extrêmement dangereux. Jusqu'au Xe siècle, il n'y avait d'abord, à part des ambassadeurs, des hérauts et d'autres catégories d'envoyés officiels des États dont la liberté de mouvement et l'inviolabilité étaient régies par ce qu'on peut déjà appeler le droit international coutumier, qu'un seul groupe de voyageurs étrangers en Europe, numériquement très important, les pèlerins. L'Église et, sous son influence, les souverains et les seigneurs particuliers les protégeaient et recommandaient de leur donner l'hospitalité. Les couvents entretenaient des « hospices » ou les pèlerins pouvaient trouver gratuitement gîte et pitance [35].

Jusqu'au XVIe siècle les pèlerinages étaient une des principales causes des déplacements internationaux de personnes. Encore à la fin du XVe siècle, le fameux *Consulat de la Mer* consacrait plusieurs articles aux devoirs et aux droits des pèlerins qui empruntaient la voie des mers [36].

En dehors de l'Europe, des multitudes de pèlerins traversaient les pays islamiques pour se rendre à la Mecque, d'autres, des pays bouddhiques, se rendaient aux lieux voués au culte de Bouddha.

Mais à côté des pèlerins, il y avait des marchands qui n'ont, en fait, jamais disparu de la circulation internationale. Byzance notamment entretenait des relations commerciales très suivies avec le Moyen et l'Extrême-Orient, d'un côté, et certaines contrées de l'Europe de l'autre.

En Europe même, le commerce a commencé à se développer avec l'apparition dans les pays latins, en Flandres et en Europe du Nord, des cités-républiques. Ces cités, devenant souvent vite des puissants États pour lesquels la prospérité était indissolublement liée à l'extension de leur com-

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[35] F. L. GANSHOF, *op. cit.*, p. 63 ; P. HAŁACIŃSKI, *Zarys historii turystyki* [*Précis de l'histoire du tourisme*], Warszawa 1963, pp. 5 et 6 ; O. NOËL, *op. cit.*, vol. 1, p. 126 ; M. TAUBE, *Études sur le développement historique du droit international dans l'Europe orientale*, RCADI, vol. 1, 1926, pp. 369 et s. ; S. VEROSTA, *International Law in Europe and Western Asia between 100 and 650 A. D.*, RCADI, Vol. 113, IIIe partie, 1964 ; E. WORMS, *Histoire commerciale de la Ligue Hanséatique*, Paris 1948, p. 10.

[36] J. M. PARDESSUS, *Collection de lois maritimes antérieures au XVIIIe siècle*, Paris 1831, vol. 2 ; *Consulat de la Mer*, notamment les chapitres XLVI, CXIII, CXVII et CXXIII. V. aussi *Histoire du commerce de Marseille*, éd. Plon, vol. 1, Paris, p. 259.

merce, cherchaient à obtenir des garanties de sécurité pour leurs marchands et navigateurs dans les pays étrangers par voie d'accords ou de privilèges octroyés par les États intéressés. Les marchands d'alors voyageaient eux-mêmes avec leur marchandise. Les voyages, longs et périlleux, demandaient parfois des haltes de plusieurs mois, d'où la nécessité d'assurer à ces marchands la possibilité de séjourner dans les endroits déterminés, près d'importantes places de commerce.

Les principales places commerciales pour le trafic entre l'Europe et l'Orient se trouvaient dans la partie orientale de la Méditerranée. Byzance, ainsi que les Arabes, peuple commerçant, étaient devenus des intermédiaires forcés dans le commerce entre l'Europe et l'Extrême-Orient. Il importait donc de trouver le moyen de trafiquer, surtout avec les marchands musulmans, malgré les défenses de l'Église catholique et malgré l'irréductible hostilité de l'Islam à l'égard des « infidèles ».

Cette possibilité a été donnée grâce, entre autres, au principe de la personnalité des lois, universellement reconnu et appliqué, en vertu duquel chaque homme était toujours et partout soumis à sa loi nationale. Un étranger ne pouvait, d'autre part, réclamer l'application de la loi du lieu de séjour, celle-ci étant considérée comme une faveur réservée aux seuls nationaux du pays et, de plus, correligionnaires, la loi ayant partout le caractère plus ou moins religieux. Surtout dans les pays musulmans la seule loi était celle contenue dans le livre saint, le Coran.

La volonté de tirer du commerce le maximum de profit possible aidant, les parties intéressées arrivèrent vite à trouver une solution acceptable qui donnait aux marchands la possibilité légale de vendre, d'acheter et de vivre dans les pays étrangers. Elle leur était assurée par l'institution des « fondouks » ou des « factoreries commerciales » — sorte d'enclaves dans le territoire étranger, soumises à leur loi nationale et à l'autorité de leur propre chef, le consul d'outre-mer — où les marchands d'une nationalité donnée pouvaient venir habiter temporairement et trafiquer avec une relative sécurité [37].

Ces factoreries, créées en vertu des traités ou des privilèges unilatéraux accordés contre des avantages déterminés, existaient, à partir du XIe siècle, un peu partout, aussi bien à Byzance et dans les États sarrazins de la Méditerranée que dans les États des Croisés et, finalement, dans et entre les villes commerçantes de l'Europe. La ville de Barcelone n'en avait pas moins de 55, disséminées, à un moment donné, dans le

[37] L. B. Hautefeuille, *Histoire des origines, des progrès et des variations du droit maritime international*, Paris 1869, p. 97 ; C. Libera, *Le consul honoraire depuis des origines jusqu'à nos jours*, « Revue Hellénique du Droit International », 1958, n° 3/4, pp. 236 - 239 ; A. Nussbaum, *A Concise History of the Law of Nations*, New York 1947, notamment p. 27.

bassin méditerranéen et dans les plus importants ports du reste de l'Europe. Gênes en avait jusque dans la mer Noire (Kaffa en Crimée), les villes hanséatiques — dans la Mediterranée. En Europe, dans ces centres commerciaux où il n'y avait pas de factoreries proprement dites, les étrangers étaient tous, « marchands ou simples voyageurs », placés sous la protection des autorités locales [38].

Au XIIIe siècle, les marchands étrangers sont partout et pour ne citer qu'un exemple, « on est étonné du grand nombre de négociants et de navigateurs provenant de pays étrangers qui trafiquent à Marseille. Les Italiens y sont en forte majorité [...] On rencontre [...] en fait d'étrangers des Catalans, des Aragonais, des Majorquins et aussi des Levantins [...] ou certains commerçants syriens » [39].

Bien que ces deux groupes : pèlerins et marchands, semblent constituer la majorité des gens qui au Moyen Age font des voyages internationaux, il ne faut pas oublier, ni négliger d'autres catégories, moins nombreuses peut-être, mais à certains points de vue tout aussi importantes, comme par exemple les jeunes gens qui allaient étudier dans les célèbres universités étrangères.

Si les voyages étaient longs, difficiles et pénibles, hérissés de dangers, la circulation des personnes était libre [40]. On admettait et on respectait le droit de l'individu de s'en aller et de venir, d'entreprendre un voyage temporaire dans des pays appartenant à cette « République Universelle » de la Chrétienté dont le Moyen Age a hérité l'idée de l'Antiquité. Entre les pays chrétiens et les autres, la circulation était admise en vertu de la vieille, mais toujours vivante institution de l'hospitalité et elle était souvent favorisée par les traités conclus ou les privilèges unilatéralement accordés.

Cette liberté de l'individu de se déplacer était universellement reconnue et paraissait être tellement normale et naturelle que l'écrivain et juriste du XVIe siècle, Vitoria, la justifiait en disant simplement dans son livre *De Indiis* que « depuis la création du monde chacun pouvait aller et voyager dans tous les pays où il voulait ». Pour Vitoria « les lois des hommes » qui s'opposeraient à la liberté de l'individu de quitter son pays et de se rendre dans n'importe quel autre « seraient contraires à la dignité humaine et à la raison et pour cela elles n'auraient pas de force obligatoire » [41].

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[38] J. M. Pardessus, *op. cit.*, vol. 4, pp. 431 et s. ; O. Noël, *op. cit.*, vol. 1, p. 157 ; G. B. Depping, *Histoire du commerce entre le Levant et l'Europe*, vol. 2, Paris 1910, pp. 49 et s. ; *Histoire du commerce de Marseille*, vol. 1, p. 293.

[39] *Histoire du commerce de Marseille*, vol. 1, pp. 294 - 296.

[40] Cette liberté ne s'appliquait évidemment pas aux esclaves ni aux serfs. Seuls en juissaient les hommes libres.

[41] F. de Vitoria, *De Indiis*, trad. polonaise de J. Modrzejewski, Warszawa 1954, p. 78.

Les différents actes du droit interne concernant la circulation internationale des personnes, comme les fameuses *Tables Amalfitaines* du XIe ou les *Statuts* de Marseille du XIIIe siècles, ainsi que les recueils du droit maritime coutumier, comme le *Consulat de la Mer*, ne s'occupaient point du droit de voyager. Celui-ci paraissait si évident qu'on n'en faisait même aucune mention. On ne se préoccupait que de la façon de se comporter pendant le voyage ou dans les pays étrangers, des droits et des obligations réciproques du voyageur et du « patron » du bateau. De même les traités de ce temps n'avaient pas pour but d'assurer l'admission des individus sur le territoire de parties contractantes, mais de déterminer les conditions de création des factoreries, les exemptions et les facilités accordées ou la garantie de leur sécurité [42].

La situation a entièrement changé quand, à la suite d'une longue évolution qui a commencé au XIIIe siècle et qui a trouvé l'expression dans la formule *rex est imperator in regno suo*, d'une part, et de la Réforme de l'autre, l'idée d'une République Universelle, soumise à une seule autorité suprême, temporelle et spirituelle, a définitivement sombré et fit place à l'idée, formulée par Jean Bodin, de la souveraineté de l'État [43]. Ce dernier s'est efforcé d'étendre son autorité à toutes les personnes, nationaux ou étrangers, qui se trouvaient sur son territoire. Il est finalement arrivé à substituer au principe de la personnalité des lois le principe de la territorialité des lois.

L'État s'efforçait aussi à s'attribuer à partir du XVIIe siècle, au nom de sa souveraineté, le droit absolu de décision en matière de circulation internationale des personnes, tant en ce qui concerne la possibilité d'aller à l'étranger de ses propres sujets que la possibilité des étrangers de venir sur son territoire.

Mais le vieux droit coutumier, reconnaissant la liberté de l'individu en matière de déplacements internationaux, était bien enraciné. Les États eux-mêmes, du reste, changeaient souvent d'attitude, tantôt évoquant leurs droits souverains de libre décision, tantôt revenant sur cette position et proclamant hautement le droit de libre circulation. De même la doctrine était et est toujours loin d'être unanime. Ces hésitations, ces changements d'attitude marquent, depuis trois siècles, aussi bien la théorie du droit international que la pratique des États.

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[42] V. les textes des traités conclus entre les États chrétiens et musulmans et reproduits notamment par J. F. CHAMPOLLION-FIGEAC, *Documents historiques inédits*, Paris 1841 - 1848, notamment vol. 2, pp. 89, 91, 92 et par A. DE MILTITZ, *Manuel des consuls*, vol. 2, Londres - Berlin 1837, pp. 109, 110, 229 - 230, 282 - 283.

[43] J. BODIN, *Six livres de la République*, L. I, Ch. VIII - X.

III. Droit de circulation des personnes en théorie et en pratique

a) La doctrine. Les théoriciens du XVIe et du XVIIe siècle reconnaissaient en général le droit de l'individu de se déplacer librement, tout en admettant parfois le droit de l'État de limiter cette liberté dans la mesure où ses intérêts vitaux pourraient l'exiger.

Pour Vitoria, comme il a été dit, le droit de l'individu à la libre circulation était évident et imprescriptible. Mais aussi pour Jean Bodin qui formule le principe que « le roy de France est souvereign dans son royaume », l'État devait se montrer amical à tous les étrangers dont le séjour ne pouvait pas lui nuire et ne devait refuser l'admission sur son territoire qu'aux bannis et aux banqueroutiers [44].

Grotius soulignait fortement « le droit de chaque nation de voyager et d'avoir accès aux autres nations », ce droit devant, pour lui, justifier la liberté de la mer et la liberté du commerce. Grotius insistait par ailleurs que le droit reconnu de libre passage donnait aussi la possibilité de s'arrêter sur un territoire étranger pour des « raisons de santé ou pour toute autre cause juste », car ce sont les motifs qui ne pouvaient pas porter préjudice à l'État d'admission [45].

Mais l'État pouvait-il limiter le droit d'un marchand au libre accès de son territoire à certaines places seulement ? Cette question fut posée notamment par Gentilis qui répond affirmativement, car « l'État a le droit de protéger certaines choses secrètes devant ceux qui sont ou qui peuvent être des espions » [46].

Par contre, au XVIIIe siècle, pour Pufendorf « seul l'État décide de l'admission d'un étranger », mais même pour lui, si le séjour des étrangers qui méritaient la confiance ne constituait pas de danger pour l'État, celui-ci avait le devoir naturel d'admettre des étrangers qui avaient une juste cause de voyager. Selon Pufendorf, il serait barbare et contraire aux droits d'humanité de se montrer hostile envers ceux qui viennent pour des buts pacifiques [47].

L'État, en vertu de sa souveraineté absolue, aurait donc en principe la pleine liberté de décision en ce qui concerne la circulation des personnes. Mais cette liberté ne peut tout de même pas être illimitée. L'auteur très

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[44] J. Bodin, *Responsio ad paradoxa Malestretti,* cité d'après A. Gardot, *Jean Bodin. Sa place parmi les fondateurs du droit international,* RCADI, Vol. 50, IVe partie, 1934, pp. 607 - 609, 629 et 633.

[45] H. Grotius, *Mare liberum,* New York 1916, ch. I ; *De iure belli ac pacis libri tres,* L. II, ch. II, XV.

[46] A. Gentili, *De iure belli libri tres,* Oxford 1933, pp. 89 - 96.

[47] S. Pufendorf, *De iure naturae et gentium libri otto,* vol. 2, London 1934, pp. 364 - 365.

représentatif de son époque, Éméric Vattel, donne un exemple caractéristique de cette théorie. Pour Vattel, tout État peut, en vertu de ses droits souverains et à sa guise, permettre ou refuser l'admission des étrangers [48]. Mais le droit naturel n'autorise pas un État de refuser, sans raisons graves, l'hospitalité à des étrangers qui la demandent pour des causes justes. Un refus injustifié constituerait un abus de droit de décider librement de l'admission des étrangers et si les autres États sont tenus de respecter une telle attitude, elle n'en serait pas moins une violation par un État de ses propres devoirs [49].

Si tel est le principe, cependant en Europe — constate Vattel et cette constatation est très importante — l'accès est libre pour tous ceux qui ne sont pas des ennemis de l'État [50].

D'autre part, Vattel admet le droit de l'individu de s'expatrier et de voyager, car tout homme naît libre. Et il ajoute que le souverain abuserait de son pouvoir et réduirait ses sujets dans un esclavage insupportable s'il leur refusait la permission de voyager pour leur utilité, lorsqu'il pourrait la leur accorder sans inconvénient et sans danger pour l'État [51]. Certes, la dernière réserve diminue de beaucoup la valeur de la règle posée, mais en ce qui concerne le principe, Vattel est absolument catégorique.

La pratique suivie par et entre les États européens en matière d'admission des étrangers, constatée par Vattel, constitue pour d'autres auteurs une liberté coutumière de la circulation des personnes. Ces auteurs, prenant pour point de départ l'existence d'une règle du droit coutumier en cette matière, n'analysent les droits souverains des États que sous l'angle des limitations que ces derniers peuvent apporter à cette règle [52].

Ainsi, elle ne s'appliquerait, par exemple, qu'à des étrangers isolés, à l'exclusion des groupes armés, et à condition qu'ils ne soient pas suspects ou dangereux pour l'ordre public ou la sécurité de l'État. Le caractère « non suspect » d'un étranger peut être établi par la présentation d'un passeport et son admission ne serait pas alors subordonnée à l'obtention d'une autorisation ou d'un consentement préalable.

Il faut ajouter que la doctrine du XVIIIe siècle commençait déjà à distinguer les différentes catégories d'étrangers suivant les buts de leur arrivée : séjour permanent et établissement ou visites temporaires. On

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[48] E. VATTEL, *Le droit des gens ou principes de la loi naturelle*, Londres 1758, L. I, ch. XIX, § 230 et L. II, ch. VII, § 94.

[49] *Ibid.*, L. II, ch. X, § 135.

[50] *Ibid.*, L. II, ch. VIII, § 100.

[51] *Ibid.*, L. I, ch. XIX, §§ 220 et 222.

[52] Entre autres G. F. MARTENS, *Précis du droit des gens moderne de l'Europe*, vol. 1, Paris 1831, p. 201.

admettait en général que l'État pouvait plus facilement refuser l'admission de ceux qui arrivaient pour s'établir dans le pays, c'est-à-dire des immigrants, que de simples visiteurs temporaires.

Il résulte de ce qui précède que dans la doctrine du XVIIIe siècle deux théories s'affrontent. La première reconnaît le principe de la libre décision de l'État en matière de circulation des personnes, tout en admettant certaines limitations de cette liberté qui s'imposent à l'État. La seconde reconnaît l'existence d'une règle de droit coutumier qui admet la liberté de circulation des personnes, tout en reconnaissant certaines limitations du devoir de l'État de laisser les individus se déplacer librement, notamment en ce qui concerne l'admission de certains étrangers sur son territoire.

Ces deux théories existent côte à côte ; ni l'une ni l'autre n'a jamais entièrement prévalu, comme le démontre l'analyse de la doctrine du XIXe et du XXe siècle.

La première théorie trouve des partisans relativement nombreux. Parmi les auteurs qui, partant de l'idée de la souveraineté de l'État et de ses droits fondamentaux, admettent le principe de libre décision de l'État en ce qui concerne l'admission des étrangers, on peut, entre autres, citer Guggenheim, Klafkowski, Kamarovskij, Oppenheim, Rivier, Strupp, Tschijov, Ulianickij, Wengler et Cavaré.

Pour certains de ces auteurs, cette liberté n'est pas et ne peut pas être absolue, parce qu'elle est tempérée par d'autres principes qu'un État ne peut méconnaître.

Ainsi, par exemple, Rivier commence par dire que l'État est maître chez lui. Il peut refuser aux étrangers l'accès de son territoire, interdire toute immigration ou l'immigration de certains individus ou de certaines catégories d'individus. Rivier constate que « tel est le principe », mais il admet que ce principe est généralement tempéré par le droit du mutuel commerce et le droit de passage inoffensif [53].

Pour Kamarovskij et Ulianickij, un État est libre d'admettre ou de refuser l'admission des étrangers sur son territoire. Mais ce principe théorique est à tel point limité par la pratique et les traités internationaux que le refus général d'admettre des étrangers se révèle inpensable et irréel [54].

Par contre pour Guggenheim, comme il a été dit, la question d'admission des étrangers est réservée au droit national. Ce dernier peut les traiter

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[53] A. Rivier, *Principes du droit des gens*, vol. 1, Paris 1896, pp. 256 et 257, v. aussi pp. 307 et 308.

[54] L. A. Kamarovskij et W. A. Ulianickij, *Meždunarodnoe pravo*, Moskva 1908, pp. 51 et 107.

de différentes manières ; il peut exclure l'admission de certaines catégories d'étrangers ou la soumettre à des conditions déterminées [55].

De même pour Klafkowski, l'admission et l'expulsion d'un étranger « relève de la compétence interne de l'État ». Celui-ci peut édicter l'interdiction temporaire d'admission des étrangers sur son territoire ou de transit par ce territoire « en vertu de sa libre décision » [56].

Également pour Tschijov, le « droit de l'État d'admettre ou de refuser l'admission des étrangers sur son territoire découle du principe du droit international contemporain, universellement admis, du principe de la souveraineté de l'État » [57].

Selon Strupp, il n'y a, pour les États, aucune obligation de recevoir des étrangers « par suite du manque de traités internationaux, reconnaissant aux étrangers un droit d'admission et d'établissement sur le territoire des divers États ». Pour Strupp, donc, seul un traité pourrait établir une obligation juridique de l'État d'admettre des étrangers sur son territoire [58]. Également pour un auteur allemend contemporain, Wengler, « tout État peut [...] à défaut d'obligation dérivant d'un traité [...] refuser aux étrangers l'accès de son territoire [...] » [59]. Oppenheim affirme aussi qu'aucun État ne peut exiger qu'un autre État accorde à ses ressortissants le droit d'accès, « sauf bien entendu une obligation conventionnelle, si un traité en cette matière existe » [60].

Cavaré considère que l'admission des étrangers sur le territoire de l'État en vue de leur établissement peut en principe être librement réglementée par celui-ci. Mais, en ce qui concerne l'admission pour des séjours temporaires, la situation est différente, car dans ce cas l'entrée est en général libre, sauf certaines formalités [61]. Cette réserve et significative.

La théorie du droit souverain de décision de l'État en matière de circulation internationale des personnes a été admise par l'Institut du Droit International lors de sa session de Lausanne de 1888. En effet l'article 1er du projet de la déclaration adopté stipulait que tout État souverain peut régler les questions d'admission et d'expulsion des étrangers de la façon qu'il considérera comme convenable [62].

Mais d'autres théoriciens, probablement non moins nombreux, continuent cependant à considérer que l'homme a le droit de voyager et que

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[55] P. Guggenheim, *op. cit.*, vol. 1, p. 365.

[56] A. Klafkowski, *op. cit.*, pp. 181 - 185.

[57] *Meždunarodnoe pravo*, Moskva 1957, p. 155.

[58] K. Strupp, *Éléments du droit international public universel européen et américain*, vol. 1, Paris 1930, pp. 138 - 139.

[59] W. Wengler, *Völkerrecht*, vol. 2, Berlin 1964, p. 1002.

[60] L. Oppenheim, *International Law, a Tretise*, 8e éd., vol. 1, London 1957, p. 675.

[61] L. Cavaré, *Le droit international public positif*, vol. 1, Paris 1961, p. 275.

[62] « Annuaire de l'Institut de Droit International », Vol. 10, p. 833.

l'État a le devoir d'accepter, en principe tout au moins, des étrangers sur son territoire.

Ainsi, par exemple, l'auteur du premier « code » de droit international, le Suisse Bluntschli est très catégorique : « Aucun État n'a le droit d'interdire d'une façon absolue aux étrangers l'entrée de son territoire et de fermer le pays au commerce général », car la souveraineté n'est pas un droit absolu, elle est limitée par le droit international. L'État a cependant le droit d'interdire son territoire à certains étrangers pour motifs politiques ou juridiques, mais cette exclusion doit être motivée par l'ordre, la sûreté ou le bien public pour ne pas être en contradiction avec le principe de la liberté des relations internationales [63].

La liberté de l'individu de voyager et le devoir de l'État de respecter la liberté de circulation des personnes sont, entre autres, reconnus par l'Italien Fiore, l'Allemand Liszt, l'Autrichien Kelsen, le Belge Nys, les Français Scelle et Sibert. Ce dernier n'admet le droit de l'État de limiter la liberté de circulation que par des exclusions individuelles, car les exclusions générales d'entrée sont interdites [64].

Il est particulièrement intéressant de constater le changement de l'attitude de l'Institut de Droit International, prise en 1888 et citée plus haut. L'Institut a, en effet, continué à s'occuper du problème en question et l'a discuté pendant plusieurs sessions consécutives jusqu'à 1897. A sa session de Hambourg en 1891, il se prononça à une forte majorité en faveur du principe que la question d'admission des étrangers n'est pas laissée à la compétence exclusive de l'État intéressé, mais relève du droit international.

L'article 4 du projet de règlement voté alors prévoyait en effet que l'entrée libre des étrangers dans le territoire d'un État civilisé ne doit être prohibée qu'à raison de l'intérêt public et pour des motifs extrêmement graves dont les exemples ont été énumérés avec soin dans le projet lui-même [65]. Le revirement est frappant.

On peut enfin citer l'opinion de Fauchille qui considère qu'une double règle doit être posée : 1° Tout État a un devoir juridique de recevoir sur son territoire les ressortissants des autres États qui se présentent à ses

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[63] M. Bluntschli, *Le droit international codifié*, Paris 1870, p. 213.

[64] P. Fiore, *Le droit international codifié et sa sanction juridique*, Paris 1911, pp. 344 - 345 ; F. Liszt, *Das Völkerrecht*, 2e éd., Berlin 1920, pp. 65, 100 - 101 ; M. Kelsen, *Théorie générale du droit international public*, RCADI, Vol. 42, IVe partie, 1932, pp. 145 - 146 ; E. Nys, *Les origines du droit international*, Bruxelles - Paris 1894, p. 279 ; G. Scelle, *Précis du droit des gens*, vol. 1, Paris 1932, p. 42 ; *Cours de droit international public*, Paris 1948, pp. 508 et 512 ; M. Sibert, *Traité du droit international public*, Paris 1951, pp. 575 et s.

[65] « Annuaire ... », Vol. 11, p. 283 ; v. aussi en ce qui concerne l'attitude de l'Institut A. Verdross, *Règles internationales concernant le traitement des étrangers*, RCADI, Vol. 37, 1931, p. 341.

frontières ; 2° Il ne peut se soustraire à ce devoir par des prohibitions ou par des restrictions que si son droit de conservation personnelle l'exige. Fauchille reconnaît donc que les étrangers ont en principe un droit à l'accès du territoire et que, en conséquence, le pouvoir de l'État d'édicter des prohibitions ou des restrictions sera nécessairement limité [66].

Quelles seront les conclusions qui pourront être tirées de ce très rapide coup d'oeil sur l'attitude de la doctrine du droit international en matière de circulation internationale des personnes ? [67].

Cette attitude n'a jamais été entièrement uniforme. Comme on l'a déjà dit, deux théories principales se sont affrontées. Ces deux théories n'ont pas du reste, ni l'une ni l'autre, cherché de poser des règles rigides et absolues, mais bien au contraire chacune d'elles admettait des exceptions nombreuses au principe général adopté.

Pour les partisans de la théorie de la souveraineté de l'État en cette matière, il ne saurait pas être question d'un droit absolu d'exclure tous les étrangers et en toutes circonstances.

Comme le dit très justement Ch. G. Fenwick « le droit de l'exclusion totale est plus théorique que réel. En fait aucun État ne peut être soupçonné de vouloir couper lui-même toutes relations avec le monde extérieur » [68].

Suivant J. C. Starke, le droit de l'État d'exclure des étrangers est limité. En règle générale, l'admission est subordonnée à des conditions déterminées et seulement certaines classes d'étrangers, par exemple les touristes ou les étudiants, sont librement acceptées. En plus, il y a une limitation d'ordre pratique à ce droit qu'aucun État ne peut négliger, à savoir : l'exclusion des ressortissants d'un État déterminé serait considérée comme une offense et comme acte inamical avec toutes les conséquences qui en découlent [69].

En conséquence, bien que pour ces auteurs l'État n'ait pas d'obligation juridique d'admettre des étrangers, il a, au moins, une certaine obligation morale qu'il est tenu d'observer pour ne pas, comme l'a dit Oppenheim, violer « l'esprit international » et ne pas s'exposer à la rétorsion.

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[66] P. Fauchille, *Traité de droit international public*, vol. 1, Ière partie, Paris 1922, pp. 889 - 893 et *Le droit d'émigration et le droit d'immigration*, « Revue Internationale du Travail », mars 1924.

[67] V. à ce sujet une vaste étude, très fouillée, publiée par A. Całus, *Prawa i obowiązki państwa w dziedzinie obrotu osobowego* [*Droits et devoirs de l'État en matière de circulation internationale des personnes*], « Ruch Turystyczny-Monografie », 1970, n° 9.

[68] G. J. Fenwick, *International Law*, New York 1924, pp. 175 - 176.

[69] J. C. Starke, *An Introduction to International Law*, 4e éd., London 1958, pp. 257 - 258.

Enfin, pour la plupart de ces auteurs, si l'admission des étrangers n'est qu'un acte de bonne volonté à l'égard des autres États, cet acte doit néanmoins être dicté par la courtoisie, la *comitas gentium,* sans laquelle les relations normales ne seraient pas possibles.

L'État serait donc, pour ces auteurs, libre de fixer des conditions d'admission des étrangers, pourrait exclure certaines personnes ou catégories de personnes, mais ne pourrait pas exercer son droit d'une façon absolue.

Il ne pourrait surtout pas le faire, comme le soulignent de plus en plus souvent les théoriciens contemporains, à l'égard des voyageurs venant pour des « séjours temporaires » dont la situation différerait essentiellement de celle des immigrés venant en vue de s'établir dans le pays. Mais la notion de « tourisme » ou « touriste » n'apparaît encore dans la doctrine du droit international que très, on serait tenté de dire trop, rarement.

Pour ceux des auteurs, par contre, qui reconnaissent le droit des individus de libre circulation, les frontières de l'État dans certains cas pourraient cependant être fermées aux étrangers.

Ceci est possible, entre autres, pour cause d'ordre public, de sécurité ou pour se préserver, par exemple, d'une épidémie.

Certains auteurs énumèrent avec minutie les cas où, selon eux, l'admission peut être refusée. Le projet du Règlement adopté par l'Institut de Droit International à Hambourg en 1891 énumère non moins que 8 points, contenant chacun plusieurs cas spécifiques prévoyant des causes légitimes de refus d'admission.

Comme le remarque très justement Fauchille, on pourra donc, en partant des principes opposés, arriver à un même résultat [70]. Bien que ce résultat ne soit pas dans les deux cas identique, car les États se seront ouverts, dans un cas, parce qu'ils le veulent et, dans l'autre, parce qu'ils le doivent, pratiquement, comme le dit L.P.A. François, il n'y a guère de différence entre les deux doctrines ; l'une et l'autre permettant une discrimination entre les nations, les races [71] et, ajoutons-le, les hommes.

Les partisans du pragmatisme pourraient aller un peu plus loin et dire que, si des thèses différentes mènent aux mêmes conséquences pratiques, il n'y a pas entre ces thèses, en fait, de différence. La différence est purement verbale [72].

b) Attitude des États. Comme dans la doctrine, dans la pratique des États il y a toujours eu et il y a encore de nos jours des hésitations, des chevauchements, des changements d'attitude.

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[70] P. Fauchille, *Traité*..., vol. 1, p. 890.

[71] L. P. A. François, *Règles générales du droit de la paix*, RCADI, Vol. 66, 1938, p. 144. V. aussi A. Całus, *op. cit.*, p. 7.

[72] Conclusion formulée par W. Czapski, *op. cit.*, pp. 91 - 92.

Parfois les États déterminés reconnaissent et respectent la vieille règle du droit coutumier de la liberté de circulation des personnes, parfois les mêmes États réclament et appliquent rigoureusement leur droit souverain de libre décision en cette matière.

Au XVIIe et au XVIIIe siècle, les États cherchent à réduire peu à peu l'ancienne liberté en matière de circulation des personnes et à s'assurer le contrôle de tout déplacement, aussi bien des nationaux que des étrangers. Le meilleur moyen de contrôle s'avère le passeport dont l'usage commence à s'étendre en Europe dès le début du XVIIe siècle.

L'exemple de la France donne une bonne illustration de l'attitude hésitante des États. La première limitation de la liberté du mouvement des étrangers concernait ces voyageurs qui, une fois entrés en France, voulaient s'écarter « des grands chemins des Postes ». Une ordonnance de 1623 les astreignait de se munir d'un passeport [73]. Ils n'en avaient pas besoin, s'ils suivaient les grandes routes susmentionnées qu'empruntaient les Postes. Une cinquantaine d'années plus tard, en 1669, l'obligation de posséder un passeport fut étendue à tout voyageur, Français ou étranger, qui voulait entrer en France ou en sortir [74]. Ainsi l'État s'assurait le contrôle de toute la circulation à travers la frontière. Au bout d'une quinzaine d'années, cette obligation fut cependant abolie par l'édit du 28 juin 1686, pour être rétablie d'une façon durable en 1745 [75].

La Révolution française a commencé par rétablir la liberté de circulation en supprimant l'usage des passeports, « ce produit du despotisme des princes, contraire à tous les principes de justice et de raison ». La Déclaration des Droits de l'Homme et du Citoyen et, ensuite, la Constitution de 1791 reconnaissaient solennellement, comme un droit, « la liberté de tout homme d'aller, de rester, de partir, sans pouvoir être arrêté ni détenu que selon les formes déterminées par la Constitution » [76].

Ce régime de liberté n'a pas duré longtemps. Les dangers que l'émigration politique, d'une part, et l'infiltration de toutes sortes de brigands de l'autre, faisaient courir à la Révolution, amenèrent l'Assemblée nationale à adopter en mars 1792 une loi qui rétablissait le régime du passeport obligatoire pour tous ceux qui voulaient passer la frontière. Cette loi qui devait constituer une mesure temporaire, à révoquer « aussitôt que les circonstances qui l'ont provoquée auront cessé » [77], est restée en vigueur dans la suite et le régime qu'elle a réintroduit a été maintenu aussi bien

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[73] Édit du 13 décembre 1623, cité par E. Reale, *op. cit.*, p. 98.

[74] *Ibid.*, Ordonnances du 12 juin 1669 et du 2 novembre 1677.

[75] *Ibid.*, Ordonnance du 28 juin 1745.

[76] *Constitution Françoise, Décret de l'Assemblée Nationale du 3 septembre 1791*, Paris MDCCXCI, Imprimerie Royale, p. 7.

[77] E. Reale, *op. cit.*, pp. 103 - 104.

par l'Empire que par la Restauration. Une loi de 1849 a établi en outre le droit de l'État d'ordonner l'expulsion immédiate d'un étranger devenu, pour quelque cause que ce fût, indésirable. L'obligation de posséder un passeport a été même étendue aux voyages des Français à l'intérieur de la France [78].

L'exemple de la France a été suivi par presque tous les pays d'Europe. Ceux-ci, à l'exception de l'Angleterre, de la Suède, de la Norvège et, jusqu'au partage de 1795, de la Pologne [79], qui n'ont pas cessé de reconnaître et de respecter la liberté de circulation des individus, ont rendu la possession du passeport obligatoire pour la sortie et pour l'entrée de leur territoire. La délivrance du passeport a été presque partout soumise à des mesures restrictives et souvent vexatoires [80].

Vers le milieu du XIXe siècle, l'attitude des États européens en ce qui concerne le droit de l'individu à l'expatriation et l'admission des étrangers commence cependant à changer.

Souvent, du reste, les États ne prennent pas une position nette d'où une grande difficulté de déterminer leur attitude. Parfois, ils adoptent aussi des positions qui changent, parfois qui se contredisent. En plus l'attitude des États extra-européens est souvent différente sinon opposée à celle des États européens.

Procédant comme auparavant, il faudra successivement analyser les actes qui témoignent de l'attitude favorable des États à la conception de leurs droits souverains et absolus en matière de circulation des personnes et, ensuite, ceux qui sont en faveur de la reconnaissance de l'existence d'une règle de droit international concernant la liberté de cette circulation.

Première théorie. Chaque État est libre de statuer souverainement sur l'expatriation de ses propres ressortissants, ainsi que sur l'admission, aussi bien temporaire que définitive, des étrangers et sur leur expulsion. A part la position prise par la France, examinée plus haut, l'exemple le plus frappant est celui de la position prise, vers la fin du XIXe siècle, par les États-Unis. Le Secrétaire d'État américain, Foster, soutenait en 1893 l'opinion officielle du gouvernement des États-Unis qu' « il y a un principe

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[78] V. A. Weiss, *Traité théorique et pratique de droit international privé*, 2e éd., vol. 2, Paris 1908, pp. 90 - 92. Comparez aussi E. Bès de Bere, *De l'expulsion des étrangers*, Montpellier - Paris 1888, p. 53.

[79] Cf. H. Stroynowski, *Nauka prawa przyrodzonego, politycznego, ekonomiki politycznej i prawa narodów* [*Traité du droit naturel politique, de l'économie politique et du droit des gens*], 3e éd., Wilno 1805, IVe partie, pp. 252 et s. Voir aussi notamment l'art. IX du traité entre la Pologne et l'Autriche de 1775, chez A. de Miltitz, *op. cit.*, vol. 2, IIe partie, p. 1407.

[80] V. notamment l'*Ordonnance autrichienne du 25 mars 1801* ; G. F. Martens, *Nouveau recueil général des traités, supplément*, vol. 2, pp. 332 - 334.

reconnu de droit international que toute nation souveraine possède le pouvoir inhérent de sa souveraineté et indispensable à son existence, d'interdire aux étrangers l'accès de son territoire ou de ne les admettre que dans tels cas et sous telles conditions qu'elle-même seule considérera nécessaire d'établir » [81].

L'attitude des États américains après la Première Guerre mondiale, en ce qui concerne l'admission des étrangers, ressort le mieux de la convention interaméricaine sur le statut des étrangers, signée en 1928 à La Havane. L'article 1er de cette convention statue que « les États ont le droit de déterminer par voie législative les conditions d'admission et de résidence des étrangers sur leur territoire » [82].

En Grande-Bretagne, le Comité Juridique du Conseil Privé a émis en 1891, dans l'affaire Musgrove contre Chun Teeong Toy, l'opinion qu' « il n'existe aucun fondement juridique qui justifierait l'affirmation qu'un étranger a le droit illimité d'accès sur le territoire britannique » [83].

La conception que l'admission des étrangers relève de la compétence exclusive de l'État a été également parfois admise par la jurisprudence.

Ainsi la Cour Suprême des États-Unis a jugé en 1892 qu' « il existe un principe incontesté de droit international que toute nation souveraine jouit du droit, comme souveraine et comme ayant le droit de conservation, de limiter l'entrée des étrangers sur son territoire ou de ne les admettre que dans des cas et dans des conditions qu'elle détermine elle-même » [84].

Dans l'affaire d'un certain Soltanov contre le ministre des Affaires étrangères de la Pologne en 1927, au sujet de refus de visa d'entrée, le Tribunal Suprême de Pologne a déclaré qu' « au moment où la décision était prise, il n'y avait pas de règle qui donnerait à tout étranger le droit de venir en Pologne » [85].

Pareillement, le Tribunal Suprême Fédéral Argentin affirmait qu'il existe « un droit incontesté de la nation d'édicter l'interdiction d'entrée à un étranger ou d'établir les conditions d'admission des étrangers dans des formes et de la manière jugées convenables » [86].

On ne peut pas enfin passer sous silence l'attitude prise par la Commission A de la Conférence internationale sur le traitement des étrangers,

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[81] J. B. A. Moore, *Digest of International Law*, vol. 4, Washington 1906, pp. 156 - 157.

[82] Texte de la Convention dans H. W. Briggs, *The Law of Nations, Cases, Documents and Notes*, 2e éd., New York 1952, p. 530.

[83] M. O. Hudson, *Cases and Other Materials on International Law*, 3e éd., St. Paul 1951, pp. 531 - 532.

[84] J. B. A. Moore, *op. cit.*, vol. 4, p. 67.

[85] « Annual Digest and Repports of Public International Law Cases, 1927 - 1928 », Case n° 221.

[86] *Ibid.*, 1935 - 1937, Case n° 145.

convoquée par la Société des Nations en 1929 à Paris. La Commission a également adopté dans son projet de convention l'idée que tout État est libre de régler l'admission des étrangers sur son territoire et qu'il peut soumettre cette admission aux conditions limitant le temps de séjour ainsi que la liberté de circuler, de s'établir et de choisir sa résidence ou de la changer [87].

Il faut maintenant passer aux manifestations d'opinion et aux attitudes prises au XIXe et au XXe siècle par les États démontrant que ces derniers reconnaissaient l'existence d'une règle de droit qui donne à l'individu la liberté de circuler. Les déclarations officielles en cette matière concernaient, du reste, en général le droit d'émigrer seulement, mais que l'on peut évidemment considérer comme comprenant le droit de faire un voyage temporaire. Ainsi, par exemple, la déclaration solennelle de l'Assemblée générale de Francfort-sur-le-Main en 1848 proclamait que le droit d'émigrer, sans paiement d'aucune taxe, devait être considéré comme un des droits fondamentaux du peuple allemand [88].

Un autre exemple est donné par une résolution commune du Sénat et de la Chambre des Représentants du Congrès des États-Unis, votée en 1868, qui proclamait que « le droit d'expatriation est un droit naturel et inhérent de tout homme, nécessaire pour jouir du droit de vie, de liberté et de bonheur » [89].

Le droit de la liberté de circulation a été aussi parfois reconnu par les États dans les traités, comme en témoigne l'article V du traité entre les États-Unis et la Chine du 28 juin 1868 dans lequel les parties contractantes « reconnaissent le droit, inhérent et inaliénable, de l'homme de changer sa patrie et sa sujétion, ainsi que l'avantage mutuel de la libre migration et émigration de leurs citoyens et sujets respectifs d'un pays à l'autre pour des buts de curiosité, de commerce ou d'établissement permanent » [90]. Il est vrai que, à peine 15 ans plus tard, le principe ainsi solennellement reconnu, aussi bien que le traité lui-même allaient dans les relations américano-chinoises devenir caducs, mais le fait de la reconnaissance aussi explicite du droit de libre circulation par le droit conventionnel méritait d'être mentionné.

De nombreux traités de commerce de la deuxième moitié du XIXe siècle contenaient, presque comme une clause de style, une stipulation reconnaissant le droit des ressortissants des parties contractantes d'aller et de venir

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[87] Société des Nations, Doc. C. 97, M. 1930, II, p. 509.

[88] E. Reale, *op. cit.*, p. 67.

[89] G. H. Hackworth, *Digest of International Law*, vol. 3, Washington 1942, p. 162.

[90] J. B. A. Moore, *op. cit.*, vol. 4, pp. 187 - 188. Il faut souligner que ce traité prévoit « la libre migration pour des buts de curiosité », donc des buts éminemment touristiques. Une telle stipulation était à l'époque encore bien rare.

librement et sans aucune entrave, de voyager et de faire librement du commerce sur leurs territoires respectifs [91]. Cette stipulation était parfois accompagnée par une autre qui réservait le droit des parties d'exiger la présentation d'un passeport ou d'un autre document officiel « attestant la nationalité » de son possesseur [92]. Le droit d'accès au territoire était donc ainsi formellement reconnu à l'égard, entre autres, des marchands qui, si l'on se sert de la terminologie de la définition de Rome, ne sont que des touristes venant pour affaires.

La reconnaissance du droit de l'individu à la liberté de mouvement résultait parfois implicitement de l'abolition par l'État de l'obligation de posséder un passeport pour pouvoir passer la frontière. Dans certains États, cette abolition a été faite par mesure législative, comme par exemple en Espagne par le décret du 17 décembre 1862 [93] ou dans la Confédération Germanique par la loi du 12 octobre 1867, étendue ensuite à tout l'Empire, en vertu de laquelle aucun papier de voyage ne pouvait être réclamé ni des Allemands, ni des étrangers soit à l'entrée, soit à la sortie du territoire [94]. Dans quelques pays de l'Amérique Latine, les constitutions reconnaissaient formellement et consacraient la liberté de circulation [95]. Dans quelques pays enfin, comme par exemple en France, la législation en question, n'ayant jamais été formellement abolie, était en fait tombée en désuètude. Il en était de même en Italie où, après l'unification, la législation des anciens États, très restrictive, ne fut plus appliquée [96].

Comme conséquence de cette tendance, la liberté de circulation était au début du XXe siècle presque partout rétablie [97].

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[91] V. entre autres les traités conclus par la France avec la Bolivie (1839), le Chili (1846), l'Équateur (1848), le Mexique (1886) et l'Éthiopie (1908) — A. Weiss, *op. cit.*, vol. 6, p. 292 et vol. 7, pp. 109, 113, 138, 209 et 228, ainsi que le traité entre le Danemark et l'Italie (1886) et celui entre l'Italie et la Colombie (1908) — *La réglementation des migrations*, B. I. T., Études et Documents, série 0, n° 3, vol. 3, Genève 1928, pp. 30 et s.

[92] Traité d'amitié, d'établissement et de commerce du 18 août 1875 entre les Pays-Bas et la Suisse avec le Protocole Additionnel du 24 avril 1877, G. F. Martens, *Nouveau recueil*..., 2e série, vol. 2, pp. 293 - 296.

[93] A. Weiss, *op. cit.*, vol. 2, p. 639.

[94] E. Reale, *op. cit.*, pp. 107 - 108.

[95] *La réglementation*..., vol. 1, pp. 24 - 34.

[96] V. A. Weiss, *op. cit.*, vol. 2, p. 639 et E. Reale, *op. cit.*, p. 107.

[97] Całus constate que le XIXe siècle a été, malgré tout, loin d'abandonner entièrement l'obligation de passeport et que certains États maintenaient des limitations étendues de la liberté de circulation des personnes, *op. cit.*, p. 200. Ces États étaient cependant si peu nombreux qu'André Siegfried pouvait, avant 1914, faire son voyage autour du monde en ayant, comme seule pièce l'identité, sa carte de visite, v. P. Grandjeat, *Les migrations de travailleurs en Europe*, « Cahiers de l'Institut International d'Études Sociales », 1966, n° 1, p. 15.

La Première Guerre mondiale amène un changement complet de la situation. La liberté de circulation des personnes qui pouvait être considérée comme une grande reconquête du XIXe siècle, a subitement et entièrement disparu. Le rétablissement dans tous les pays, ou l'établissement dans ceux qui, comme la Suède, ne l'ont jamais connue auparavant, de l'obligation de posséder un passeport, l'introduction — pour les étrangers — de l'obligation d'obtenir un visa d'entrée, de transit ou même de sortie, les prescriptions sévères en matière de douanes, d'allocation de devises et de taxes diverses ont considérablement gêné et réduit toutes les catégories du trafic international des personnes.

Pour remédier à cet état de choses, beaucoup d'États ont conclu, dans la période d'entre-deux-guerres, de traités bilatéraux qui établissaient pour les ressortissants des États contractants le droit d'accès au territoire de l'autre État. Ainsi par exemple le traité de commerce et de navigation, conclu entre les États-Unis et l'Allemagne le 8 décembre 1923 prévoyait dans son article 1er que « les nationaux de chacune des Hautes Parties Contractantes seront autorisés à entrer, à voyager et à résider sur le territoire de l'autre [...] », mais en même temps l'autorisation du Sénat américain de ratifier le traité précisait bien qu'aucune de ses stipulations ne pouvait affecter la législation concernant l'admission des étrangers, ni le droit d'édicter une telle législation [98].

Même si, comme dans l'échange des notes en 1928 entre le Danemark et la Perse, relatives à l'arrangement pour régler provisoirement les relations entre les deux pays, il y avait une stipulation que les ressortissants des parties « seront admis et traités conformément aux règles et pratiques du droit international commun » [99], cette stipulation ne visait probablement pas dans l'esprit de ses auteurs la règle relative à la liberté de circulation, ressuscitée au XIXe siècle, mais les « pratiques » restrictives appliquées partout pendant et après la Première Guerre mondiale.

Il faut enfin noter que plusieurs accords bilatéraux conclus par des États européens entre 1930 et 1938 et concernant les facilités concédées par les parties sur la base de réciprocité en matière de « trafic temporaire » des personnes ou, dans quelques cas, simplement de « trafic touristique », ne contenaient aucune stipulation sur le principe de liberté de circulation, mais abolissaient simplement certaines formalités de frontière, la plupart du temps l'obligation du visa [100].

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[98] G. H. HACKWORTH, *op. cit.*, vol. 3, p. 549.

[99] G. F. MARTENS, *op. cit.*, 3e série, vol. 20, p. 18. V. aussi vol. 30, p. 692.

[100] Ces accords n'ont pas été, la plupart du temps, publiés. Une liste des pays qui n'exigeaient pas de visa d'entrée des ressortissants de certains autres pays, en règle générale sur la base de réciprocité, contient la publication déjà citée du Comité Économique de la Société des Nations, *Études relatives au tourisme*..., pp. 26 - 36.

Tout de suite après la Deuxième Guerre mondiale, la situation était sensiblement la même, mais depuis 1948, une tendance vers la libéralisation des règles concernant le mouvement des personnes, et surtout les séjours temporaires, se fait nettement sentir.

La Déclaration Universelle des Droits de l'Homme, votée par l'Assemblée Générale de l'ONU en 1948, contient même une reconnaissance du droit de l'individu à la liberté de circulation. Elle proclame en effet dans son article 13 que « Toute personne a le droit de circuler librement et de choisir sa résidence à l'intérieur d'un État. Toute personne a le droit de quitter tout pays, y compris le sien, et de revenir dans son pays » [101]. La Déclaration n'a pas de force obligatoire, mais elle a posé d'une façon solennelle le principe de la liberté de l'individu en matière de circulation internationale et elle l'a revêti de l'autorité des Nations Unies. On pouvait penser que le premier pas vers la réadmission par les États de ce vieux principe et vers sa reconnaissance comme règle juridique a été ainsi fait.

Ce droit n'a pas été cependant reconnu par la Convention Européenne des Droits de l'Homme, signée à Rome en 1950. Le Protocole Additionnel n° 4 prévoit seulement la liberté de l'individu de circuler librement sur le territoire de l'État où il a été admis « légalement », c'est-à-dire en conformité avec le droit de l'État en question [102].

Le Pacte des Droits Civils et Politiques de l'Homme, adopté par l'Assemblée Générale de l'ONU, le 16 décembre 1966, ne l'a pas non plus reconnu. Son article 12 stipule en effet seulement que quiconque se trouve légalement sur le territoire d'un État a le droit de circuler librement dans les limites de cet État. Toute personne aura aussi le droit de quitter librement chaque pays, y compris le sien. Ces droits ne connaîtront aucune limite, sauf celles qui sont prévues par la loi et qui sont indispensables pour cause, entre autres, de sécurité nationale, de santé publique ou de moralité [103].

En fait ce sera donc l'État, comme dans la Convention Européenne, qui aura seul le droit de déterminer qui peut *légalement* se trouver sur son territoire et quelles limitations légales pourront être apportées à la circulation internationale des personnes pour cause de sécurité ou de moralité publiques [104].

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[101] V. A. N. Holcombe, *Human Rights in the Modern World*, New York 1948, pp. 18 - 22 et C. Berezowski, *Zagadnienia zwierzchnictwa terytorialnego* [*Problèmes de la souveraineté territoriale*], Warszawa 1957, pp. 34 - 35.

[102] V. G. Guyomar, *Nations Unies et Organisations régionales dans la protection des droits de l'homme*, RGDIP, 1964, n° 3, p. 694.

[103] V. « American Journal of International Law », 1967, n° 3.

[104] Pour la pratique et le droit interne de différents États en matière d'admission des « quasi-migrants » v. R. Plender, *op. cit.*, ch. VI, pp. 161 - 190.

Il faut cependant constater que depuis le vote de la Déclaration, de grands progrès ont été réalisés et que, surtout en ce qui concerne les voyages temporaires, la situation a sensiblement évolué.

Un nombre considérable d'accords bilatéraux et même multilatéraux ont eu pour but de régler, entre États contractants, les problèmes de la circulation des personnes. En laissant de côté les traités d'établissement ou de migrations saisonnières de la main-d'oeuvre, ainsi que les conventions sur le trafic frontalier, on constate l'existence de très nombreux accords qui concernent les « déplacements temporaires » dont la durée ne dépasse pas, en règle générale, trois mois.

Ces accords ne contiennent en général aucune énonciation sur le principe de la liberté de circulation ou des droits souverains de l'État, mais se contentent de supprimer l'obligation de posséder par les intéressés le passeport ou d'obtenir le visa d'entrée. Si les États contractants renoncent ainsi, dans leurs relations réciproques, à exercer leur droit d'autoriser dans chaque cas individual l'entrée et la sortie de leur territoire à l'égard de leurs propres nationaux et des ressortissants de l'État co-contractant, ils gardent néanmoins intact leur droit de contrôle et de décision dans des cas particuliers. Ceci résulte du fait que les parties : 1° se réservent le droit de refuser l'accès ou le séjour sur leur territoire aux ressortissants de l'autre ou des autres États contractants, considérés comme indésirables ; 2° déterminent les documents dont leurs nationaux devront être munis pour pouvoir quitter leur propre territoire.

Les dispositions de quelques dizaines de ces accords, conclus après la querre, se ressemblent beaucoup et adoptent, au fond, les mêmes solutions. Les différences sont surtout verbales. Pour s'en rendre compte, il suffira de comparer un des premiers accords bilatéraux de ce genre, l'accord entre la Belgique et la France de 1949 [105], et un des derniers en date, l'accord entre la Pologne et la République Démocratique Allemande de 1971 [106], avec l'accord multilatéral sur la circulation des personnes entre les pays membres du Conseil de l'Europe du 13 décembre 1957 [107].

Ainsi, si les accords de 1949 et 1957 parlent, à la différence de la convention de 1971 qui concerne les « voyages des ressortissants de deux

[105] Échange des notes constituant un accord entre la Belgique et la France dans le but de faciliter la circulation des personnes entre les territoires métropolitains belge et français, Paris 8 et 12 avril 1949, « Nations Unies, Recueil des Traités », Vol. 198, 1954, n° 2655, pp. 37 et s.

[106] Convention entre les Gouvernements de la République Populaire de Pologne et la République Démocratique Allemande concernant les voyages mutuels des ressortissants de deux États, signée à Varsovie, le 25 novembre 1971. Dziennik Ustaw Polskiej Rzeczypospolitej Ludowej [Journal des Lois de la République Populaire de Pologne], 1971, n° 35, texte 306.

[107] « Nations Unies, Recueil des Traités », Vol. 315, 1958, n° 4565, pp. 139 et s.

États », de la « circulation des personnes » entre les territoires des parties contractantes, l'un et l'autre ne s'appliquent qu'aux seuls ressortissants des parties contractantes, à l'exclusion des ressortissants des pays tiers, même s'ils ont leur résidence permanente dans un des États contractants. La « circulation des personnes » signifia donc « circulation des ressortissants des États contractants ».

Tous les trois accords ne s'appliquent qu'à des séjours temporaires « inférieurs ou égaux à trois mois » (deux mois en Belgique selon le § 6 de l'accord de 1949). Ils pourront être prolongés, selon l'article 7 de l'accord de 1971, jusqu'à six mois au maximum.

Les dispositions essentielles concernent l'abolition de la nécessité d'obtenir l'autorisation expresse de deux États intéressés avant de faire le voyage, sous forme du passeport, d'une part, et du visa, de l'autre.

Les accords de 1949 et 1957 prévoient que les ressortissants des parties contractantes peuvent circuler entre leurs territoires respectifs « sous le couvert de l'un des documents énumérés » et qui sont soit le passeport, même périmé depuis moins de cinq ans, soit une carte d'identité officielle délivrée par les autorités compétentes et, en ce qui concerne l'accord de 1957, certaines autres pièces d'identité particulières (pièces d'identité pour enfants par exemple) spécifiées pour chacun des pays contractants dans une annexe de l'Accord.

Dans les accords de 1949 et 1957, il n'y a aucune mention au sujet du visa, mais la suppression de l'obligation de l'obtenir ressort implicitement, mais clairement du libellé de leurs articles 1er (4) et 1er respectivement qui stipulent que les ressortissants des parties contractantes « peuvent circuler entre les deux pays » ou « peuvent entrer sur le territoire des autres Parties et en sortir » simplement « sous le couvert d'un des documents » énumérés. Ces documents seuls suffisent donc sans qu'il soit besoin de les munir d'une autorisation de l'État de séjour temporaire sous forme de son visa [108].

La convention de 1971 supprime, dans son article 1er, l'obligation de posséder le passeport et le visa pour les voyages inférieurs à trois mois. Dans l'Annexe sont énumérés les documents qui autorisent leurs titulaires à traverser la frontière et à séjourner sur le territoire de l'autre État. Ce sont, entre autres, pour les ressortissants polonais la carte d'identité, le

[108] Il y a du reste un nombre très considérable d'accords qui ne portent que sur l'abolissement de l'obligation du visa. Un des derniers exemples de cette catégorie d'accords est la convention polono-autrichienne du 18 juillet 1972. La suppression de l'obligation du visa se fait aussi par voie de déclaration unilatérale et sans réciprocité par l'État qui veut favoriser ainsi l'arrivée des touristes étrangers. De tels actes unilatéraux ont été édictés notamment par les États de l'Europe occidentale à l'égard des ressortissants des États-Unis. V. à ce sujet K. Libera, *Międzynarodowy ruch*..., pp. 296 et s.

certificat provisoire d'identité et le passeport collectif ; pour les ressortissants de la R.D.A. — la carte d'identité, la carte marine, licence pour le personnel navigant et le livret militaire.

Le passeport n'est obligatoire dans tous les cas et d'après tous les accords analysés que pour les séjours qui dépassent trois mois [109].

Le passage de la frontière peut se faire par tous les postes-frontières autorisés (art. 6 de la convention de 1971) ou « seulement par les postes autorisés », si l'une ou plusieurs des Parties contractantes le jugent nécessaire (art. 2, de l'Accord de 1957). L'accord franco-belge est muet sur ce point.

Aucun des accords en question ne précise à quelles catégories de personnes il s'applique. Le seul critère qu'ils adoptent est le critère du temps de séjour. Les facilités reconnues profitent donc à toutes les catégories de déplacement temporaires : touristes, excursionnistes, travailleurs saisonniers.

En ce qui concerne ces derniers, les accords stipulent bien que leurs dispositions ne portent pas atteinte aux prescriptions légales ou réglementaires relatives au séjour des étrangers y compris évidemment les prescriptions concernant la protection du marché national de travail. La législation nationale peut donc même formellement exclure la venue des travailleurs saisonniers en interdisant tout emploi des étrangers non autorisé d'avance.

L'Accord de 1957 laisse du reste aux États contractants la possibilité légale de priver les travailleurs saisonniers du bénéfice de l'Accord, car son article 1er (3) stipule que « le passeport en cours de validité et le visa peuvent être exigés pour [. . .] toute entrée sur le territoire d'une autre Partie en vue d'y exercer une activité lucrative ».

L'analyse de l'attitude et de la pratique des États conduit ainsi à la constatation d'un fait incontestable. Quelle que soit la position prise, quel

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[109] Les États scandinaves ont adopté, dans leurs relations mutuelles, le régime le plus libéral, en supprimant l'obligation de posséder et de présenter à la frontière un document d'identité quel qu'il soit. Ces États ont donc, en fait et en droit, reconnu le droit de leurs ressortissants à la libre circulation pour les déplacements temporaires entre leurs territoires respectifs. Le « Protocole entre la Suède, le Danemark, la Finlande et la Norvège, relatif à la suppression des passeports pour les voyages entre ces pays, signé à Stockholm, le 14 juillet 1952 » prévoit en effet que leurs ressortissants « ne seront plus tenus d'être munis d'un passeport ou d'un autre document de voyage lorsqu' ils se rendront d'un pays dans l'autre ou quand ils séjourneront dans un autre pays nordique pendant une période pour laquelle un permis de séjour n'est pas requis », « Nations Unies, Recueil des Traités », Vol. 198, 1954, n° 2655, p. 37. V. P. Hałaciński, *Integracja turystyczna Skandynawii* [*Intégration touristique des pays scandinaves*], « Ruch Turystyczny », 1968, n° 2 et, en ce qui concerne le Bénélux son article *Integracja turystyczna Beneluksu* [*Intégration touristique des pays du Bénélux*], « Ruch Turystyczny », 1969, n° 1. Pour la situation qui existe dans les différentes régions du monde v. D. C. Turack, *op. cit.*, pp. 89 - 100.

que soit le principe proclamé, l'État, à l'époque actuelle, se réserve toujours le droit de réglementer l'admission et le séjour des étrangers, même s'ils ne sont que de simples touristes, ainsi que l'expatriation, même temporaire dans les buts touristiques, de ses propres ressortissants.

La constatation faite par la Conférence de Rome qu'« un passeport valable reste le titre de voyage international le plus approprié » [110] caractérise bien l'attitude des États modernes à l'égard de la liberté de circulation internationale des personnes. Si l'État renonce à l'exercice de son droit de réglementer cette circulation, il ne le fait que par voie conventionnelle, strictement dans les cas et conditions prévus par l'accord. Les exceptions, comme celle des pays scandinaves qui dans leurs relations mutuelles ont renoncé à tout contrôle des déplacements temporaires, ne font que confirmer la règle généralement adoptée et suivie.

On peut cependant conclure en disant que le droit conventionnel démontre une tendance nette vers la libéralisation des déplacements temporaires et surtout des déplacements touristiques. Si les États évitent cependant de se servir du terme « tourisme » dans les accords qu'ils concluent ou de se référer à une définition du touriste, ceci semble être dû au fait qu'il n'y a pas jusqu'à présent de définition du touriste juridiquement acceptable et généralement acceptée par les États. Celles qui existent sont élaborées « à des fins statistiques » et appliquées par les Offices Nationaux de Tourisme ou par les Offices de Statistique, mais ne le sont pas par les organes gouvernementaux chargés des relations interétatiques.

Il semble que l'élaboration d'une définition juridique devra être une des premières tâches à entreprendre par l'Organisation Mondiale du Tourisme, organisation intergouvernementale qui va remplacer l'actuelle Union Internationale des Organismes Officiels du Tourisme [111].

L'adoption d'une telle définition pourra faciliter et accélérer le processus de libération des « déplacements temporaires sans but lucratif » et favoriser ainsi, encore davantage, le développement du tourisme international, ce « passeport pour la paix », comme on l'a appelé en 1967, déclarée « Année Internationale du Tourisme » par l'Assemblée Générale de l'ONU.

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[110] *Conférence des Nations Unies sur le tourisme et les voyages internationaux, Rome août-septembre 1963. Résolutions et recommandations*, UIOOT, Genève 1963, p. 15. La recommandation en question ajoute du reste qu'« il n'est donc pas possible, à l'heure actuelle, de recommander la suppression de passeport à l'échelle mondiale ».

[111] Pour que l'accord sur la transformation de l'UIOOT en OMT entre en vigueur, il faut 51 ratifications des statuts de cette dernière. A la fin de 1973, 49 documents de ratifications étaient déposés. Et la 50e ratification semble acquise, le Sénat américain ayant en décembre autorisé, à l'unanimité, le Président à ratifier ces Statuts. Il est donc presque certain que l'Organisation Mondiale du Tourisme commencera à fonctionner en 1974.

"One State—One Vote" Rule in International Universal Organizations

by JAN KOLASA

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The right to participate in the adoption of resolutions constitutes one of the fundamental prerogatives of the members of international organizations. But not all members of each international organization have equal rights in this respect. Suffice to mention here only the well-known weighted voting system conferring upon each individual member of an international organization a different number of votes according to criteria established beforehand. Yet the principle of equality of votes of all member-States, irrespective of political, economic, military and other differences between them, is legally binding within the majority of the present-day international organizations. This equality of votes is usually expressed by the formula "one State—one vote."

In this article an attempt has been made to examine and present (a) how the right to vote and "one State—one vote" rule were expressed in the constituent instruments of universal international organizations, and (b) how this right and rule were extended or transformed by the rules of procedure of the main organs of individual organizations. Moreover, not confining itself solely to the formal aspects of this subject-matter as reflected in constituent instruments and rules of procedure, the article also attempts to examine whether and to what extent the right to vote and the rule of "one State—one vote" have been consistently and fully implemented, especially in view of the statutory provisions of those organizations which, apart from a plenary organ, envisage at least one main organ of a limited membership, as well as with regard to the statutory provisions of certain organizations associating different kinds of members.

The scope of the research work has been limited to universal international organizations wherein the rule of equality of votes constitutes one of the fundamental constitutional provisions. These are the widely known organizations of the United Nations system, namely, the United Nations itself and its specialized agencies, with the exception of the financial organizations based on weighted voting system.[1]

I. Statutory Formulation of the "One State—One Vote" Rule

Although the right to vote and the "one State—one vote" rule have found their expression in the statutes of international organizations, some ambiguities still remain. Indeed, various statutory provisions raise some doubts as to the very meaning of the equality of votes rule.

Roughly, there are three different statutory formulas of the "one State—one vote" rule.

Some statutes contain a clear formulation of this rule, repeated separately for each principal organ authorized to adopt resolutions. In the first place such a formulation appears in the United Nations Charter wherein the subsections "voting" concerning the General Assembly, as well as the three Councils, begin with the provision that each member of the organ in question shall have one vote.[2] This rule has been identically formulated in the FAO Constitution, IAEA Statute and WMO Convention with respect to the main organs of these organizations.[3]

The IMCO and ITU Conventions, however, contain only one common formulation of the "one State—one vote" rule for all the main organs authorized to adopt resolutions. But at the same time it has been clearly pointed out that outside the plenary organ a member has the right to vote only in those other main organs in which he participates.[4]

In such organizations as ICAO and UNESCO this rule is explicitly formulated only in relation to one organ, that is, the plenary one.[5] The same feature also appears in the WHO Constitution and in GATT.[6] But

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[1] The most recently established UN specialized agencies, as UNCTAD and UNIDO, have not been discussed in this article.

[2] See, Art. 18, para. 1 ; Art. 27, para. 1 ; Art. 67, para. 1 ; Art. 89, para. 1.

[3] FAO, Constitution, Art. III, para. 4 and Art. V, para. 1 ; IAEA, Statute, Art. V, para. C and Art. VI, para. E ; WMO, Convention, Art. 11, para. (a) and Art. 16, para. (a).

[4] IMCO, Convention, Art. 43, para. (a) ; ITU, Convention, Art. 2, paras 1, 2 and Art. 9, para. 3.

[5] UNESCO, Constitution, Art. IV, para. 8a ; ICAO, Convention, Art. 48, para. (b), and Art. 52.

[6] WHO, Constitution, Art. 59 and Art. 60 ; GATT, General Agreement, Art. XXV, para. 3.

the UPU Constitution does not mention the rule of " one State—one vote " at all.

The above-mentioned divergencies may to some extent stem from neglect or a rather far-reaching drafting freedom. But this is neither the only, nor a sufficient explanation. It seems that the divergencies in statutory formulations of the " one State—one vote " rule resulted mainly from different understanding of this rule by those who had drafted the statutes. Wherever it had been understood as an abstract notion, its formulation became more general and abstract, but only with regard to the plenary organ. For it is only the plenary organ where each member of an organization has always a real voting power.[7] On the other hand, whenever a practical, casuistic point of view had prevailed, the said rule was separately formulated for each organ or a reservation was made that in organs of a limited membership only those States have a right to participte in voting that are members of these organs.

Unified formulation of the rule of " one State—one vote " principle is also lacking in rules of procedure of the main organs of the above-mentioned universal organizations. But here the discrepancies are fewer than in the statutes. Some rules of procedure only repeat the relevant statutory formulas,[8] others supplement them with new provisions, especially with respect to organs of the council or committee type.[9] They also extend the " one State—one vote " rule over subsidiary bodies created by the main organs.[10]

If by the " one State—one vote " rule we understand that each member-State has always the right to one vote in the process of adopting resolutions, then it seems obvious that such a notion can only refer to voting in a plenary organ where each member of an organization has a representative. In other organs, however, this rule can refer to all members of an organization only potentially, that is, they may make use of their one-vote right when they are elected to an organ of a limited membership and only during their term of office.

The " one State—one vote " rule can be however interpreted in a

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[7] If, of course, he has not been temporarily deprived of this right.

[8] Cf., for instance, United Nations, Rules of Procedure of the General Assembly, Rule 84 ; Rules of Procedure of the Economic and Social Council, Rule 59 ; Rules of Procedure of the Trusteeship Council, Rule 36. There is no such provision in the Provisional Rules of Procedure of the Security Council, because they do not establish any voting principles at all and refer in this matter directly to the UN Charter.

[9] Cf., for instance, UPU, Rules of Procedure of the Executive and Liaison Committee, Art. 15, para. 1.

[10] Cf., for instance, United Nations, Rules of Procedure of the General Assembly, Rule 125 ; Rules of Procedure of the Economic and Social Council, Rule 26 ; Rules of Procedure of the Trusteeship Council, Rule 67.

narrower sense, namely, that each member-State has only one vote during the adoption of resolutions. But this need not mean at all that it has at its disposal this voting power always and in all organs ; it need not even mean that every cast vote has always and everywhere the same legal value.

According to the opinion of many authors, the equality of votes as expressed in the " one State—one vote " rule results from or is a derivative of the principle of sovereign equality of all States. Undoubtedly, the origin of this rule can be derived from the history of international conferences and from the practice of the first international organizations. It can be also directly connected with the principle of sovereign equality of States which lies at the constitutional foundations of the United Nations as well as of the specialized agencies of universal character. But it would be impossible to overlook some modifications it underwent, and the specific character it assumed, in the present-day international organizations of a differentiated internal structure. This is apparent most of all against the background of differentiated membership and organs of a limited membership.

II. Associate Membership and Dependent Territories with Voting Right and the " One State—One Vote " Rule

The very definition of a universal international organization contains the assumption that it is based on universal membership. But this assumption is understood and carried out differently. For the membership of every international organization is of essential importance. It is on the membership that the political outlook of an international organization depends considerably.[11] As a matter of fact there are presently no international organizations the access to which would depend only on the will of the State concerned. But it must be said that, irrespective of a great differentiation of the criteria and procedure of admitting new members to international organizations, the legal status of new members becomes identical with that of original members as soon as the full membership has been acquired.

1. Associate Membership

Admission to an international organization is not always tantamount to acquisition of a full membership and also of voting power. Here the

[11] Cf. W. Morawiecki, *Funkcje organizacji międzynarodowych* [*Functions of International Organizations*], Warszawa 1971, p. 54 ff, and H. Okularczyk, *Członkostwo organizacji wyspecjalizowanych* [*Membership in the United Nations Specialized Agencies*], Warszawa 1970, *passim.*

institution of associate membership provided for by the statutes of FAO, UNESCO, IMCO, WHO, ITU, and by GATT, may serve as an example.

Basically, the scope of such a membership is limited to non-self-governing territories. Thus, for example, the FAO Constitution stipulates :

> " The Conference may [...] decide to admit as an Associate Member of the organization any territory or group of territories which is not responsible for the conduct of its international relations [...] " (Art. II, para. 3).

Almost identical provisions are to be found in the UNESCO, IMCO, WHO, and ITU statutes.[12]

However, not in all international organizations the associate membership is limited to non-self governing territories remaining under the supervision of metropolitan States which are responsible for the conduct of their international relations. In ITU, for example, the associate membership can be granted apart from non-self-governing territories, to all trusteeship territories, and even to those sovereign States that have not applied for full membership.[13] So far no sovereign country has made use of this form of membership in ITU. Thus it could be said that associate membership in these organizations actually applies to non-self-governing territories only. In this respect, however, GATT constitutes an exception. This organization has introduced into its practice the associate membership status for sovereign States. It has been already granted to two socialist States, Yugoslavia and Poland, as well as to Cambodia.[14]

From the point of view of the right to vote and " one State—one vote " rule, the division of general membership into full and associate membership is of fundamental importance. For the associate members are deprived of any voting power whatever, with the exception of WHO where they possess it in a very limited scope, only with regard to certain issues and only in subsidiary organs of the Health Assembly.[15]

Regarding the rule of " one State—one vote " in the light of its realization, different stands can be taken on the institution of associate membership. It could be said that with reference to non-self-governing territories no infringement of this rule occurs, as they are not States

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[12] See, UNESCO, Constitution, Art. II, para. 3 ; IMCO, Convention, Art. 9 ; WHO, Constitution, Art. 8 ; ITU, Convention, Art. I, para. 3(b).

[13] ITU, Convention, Art. I, para. 3(a) and 3(c).

[14] G. Curzon, *Multilateral Commerical Diplomacy*, London 1956, p. 34 ff, and W. Morawiecki, *Międzynarodowe organizacje gospodarcze [International Economic Organizations]*, Warszawa 1970, p. 204 ; cf. also K. Równy, *Układ ogólny w sprawie ceł i handlu (GATT)—sprawy członkostwa [GATT—Questions of Membership]*, " Sprawy Międzynarodowe," 1964, No. 2.

[15] Resolution adopted 21 July, 1948. See WHO, *Basic Documents*, 21st ed., Geneva 1970, pp. 19—22.

and thus cannot claim equal rights. But, as a matter of fact, here the difference between a non-self-governing territory and a sovereign State is of no importance. For the lack of voting power results from the very nature of associate membership, irrespectively of the legal status of the specific member of international community. In their capacity as associate members, non-self-governing territories as well as sovereign States have the same general rights and obligation, but without any right to vote.

2. Non-Self-Governing Territories with Voting Power

The institution of associate membership does not constitute the only base for co-operation between dependent territories and international organizations. There are certain non-self-governing territories which have, within the scope of several universal international organizations, a right to vote as the member-States.

As far back as the 19th century, colonial powers allowed their colonies, protectorates, and other dependencies to attain full rights in international organizations to secure in this way for themselves support and advantage in voting. Actually they had at the disposal not only their own vote, but also the votes of their sometimes very numerous dependent territories. Such practice was widely cultivated i.a. in UPU and ITU.

The " one State—one vote " rule was accepted as the basis of the UPU activities as far back as in 1874 in Bern. At the same time, however, major powers had tried by various means to ensure for themselves greater influence upon the activities of this organization. One of the means to achieve that purpose was the enlargement of the number of votes in the UPU Congress by introducing separate representations of their colonies with a right to vote.[16] Remnants of this practice exist till today. Finally, the so-called colonial article had been left ouf of the text of the UPU Convention adopted in 1964, but as recently as in 1969 seven territories dependent on the USA, Spain, France, Great Britain, Holland, and Portugal had still voting rights in this organization.[17] Thus practically they represented additional votes for these States.

Similarly, the principle of equality of votes was also adopted in 1932 at the preparatory conference of ITU in Madrid and—also circumvent.[18] In contradistinction, however, to the Postal Convention, the Madrid Telecommunication Convention of 1932 contained no equivalent to the so-called colonial article which would enable the dependent territories to make

[16] See more C. A. Riches, *Majority Rule in International Organization*, Baltimore 1940, pp. 272—280.

[17] See *Yearbook of the United Nations*, 1969, p. 927.

[18] C. A. Riches, *op. cit.*, pp. 281—290.

use of membership rights in international organization. ITU, which was established in result of fusion of the International Telegraph Union and International Radiotelegraph Union, had to include at its very birth as members those dependent territories that had had full membership rights in the two previous organizations. And their traditions in this respect had been quite ample and deeply rooted as the Radiotelegraph Convention of 1906 stipulated the admission of colonies to full membership with a rather characteristic reservation, namely, that " the number of votes at the disposal of one government, including its colonies, possessions or protectorates, shall in no case exceed six."[19] No less interesting solution of this issue can be found in 1932 when full membership rights, including voting rights, was granted to additional six territories and territorial groups. These territories were under the patronage of Great Britain, Holland, Belgium, France, Italy, Japan, Portugal, and the United States. At the same time the Soviet Union and Germany were granted a compensation " the right to a supplementary vote."[20] This " supplementary vote " shows rather conclusively how the votes of dependent territories were dealt with and at the same time, how the constitutional principle of " one State—one vote " were put into practice.

Eventually, the practice of admitting dependent territories to full membership in UPU was abandoned in 1957. At present they are admitted as associate members, i.e. without the right to vote. Nevertheless, due to the old practice, even in 1969 there were five dependent territorial groups with full membership rights inside this organization, that is, with the right to vote on equal terms with sovereign States.[21] As a result even in 1969 such countries as the United States, Spain, France, Portugal, Great Britain, and Holland had in UPU two votes each, Portugal—three, and the rest, that is over hundred countries—one vote each. Similar situation prevailed in ITU where in the same year two votes were at the disposal of Portugal, Great Britain, France, the United States, and Spain respectively.[22] Such a practice is obviously contradicting the principle of equality of votes.

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[19] Art. 12, quoted after C. A. Riches, *op. cit.*, p. 182.

[20] Art. 21 of the Internal Regulations of the Madrid Telecommunication Conference, *Madrid Radiotelegraph Documents*, vol. 2, 1932, p. 53. See also C. A. Riches, *op. cit.*, p. 285 and H. Okularczyk, *op. cit.*, p. 123.

[21] See *Yearbook of the United Nations*, 1969, p. 927.

[22] *Ibid.*, p. 932. See also H. Okularczyk, *op. cit.*, p. 125 and B. Broms, *The Doctrine of Equality of States as Applied in International Organizations*, Vammala 1959, pp. 273—277. Of course, today these practices represent relics of the past only. For instance, it is worth to recall that in the International Institute of Agriculture, established in Rome in 1905, Great Britain had at the end of the thirties at her disposal 22 votes, the United States—21, France—19, Italy—13, Germany—5. C. A. Riches, *op. cit.*, pp. 260, 264—265.

Among the present-day specialized agencies of the United Nations there exists another variant of membership, so to say intermediate, between full membership on the one hand and associate membership on the other, which is accessible to dependent territories. This solution is to be found in WMO. According to the WMO Convention any non-self-governing territory or a group of such territories, and any United Nations trust territory or a group of such territories maintaining its own meteorological service may, apart from sovereign States, become a member of this organization. Incidentally, the WMO Convention denominates both the sovereign States and the dependent territories simply as " members of the organization " and accords to each of them one vote in the Congress.[23] At the same time, however, it introduces with regard to voting a distinction between " members " and " members which are States " and restricts the voting power of dependent territories by excluding them from voting on important issues such as changes of the Convention, admission of new members, and so on.[24] So a clear inequality of voting rights occurs here and rather of essential character. The number of members with limited voting rigths had been quite considerable in this organization. 15 non-self-governing territories were still thus limited in 1964 and 10—in 1969.[25]

The problem of membership in the GATT must also be taken here into consideration. The point is that the General Agreement mentions not only States but also non-self-governing territories which have full autonomy in international trade relations.[26] Thus the non-self-governing territories may be, in specific conditions, recognized within GATT as " contracting parties." Such cases have occurred in the practice of this organization.

Without embarking upon considerations how the keeping up of sovereign equality of the States belonging to international organizations is affected by admitting dependent territories, it is necessary to enquire into the problem of how—in the context of the rule of " one State—one vote "—their voting rights are exercised within these organizations. In connection with this, the following points are worthy of notice :

In organizations where non-voting associated members are limited

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[23] Art. 3, paras (d—f) and Art. 11, para. (a).

[24] Art. 11, para. (a) 1—4. To quorum for a discussion on these matters the presence of the majority of member-States is also required (Art. 12).

[25] See S. HUBERT (ed.), *Zbiór statutów i regulaminów organizacji międzynarodowych* [*Collection of Statutes and Rules of Procedure of International Organizations*], vol. 1—2, Warszawa 1961—1967, vol. 1, part 2, pp. 1073—1075 and *Yearbook of the United Nations, 1969*, p. 933.

[26] GATT, General Agreement, Arts XXXIII and XXVI, para. 5(c). See also W. MORAWIECKI, *Narody Zjednoczone—Zamierzenia i rzeczywistość* [*United Nations—Aims and Reality*], 2nd ed., Warszawa 1970, pp. 353—354 and C. H. ALEXANDROWICZ, *World Economic Agencies, Law and Practice*, London 1962, p. 251.

only to non-self-governing territories, the inequality in the respect of voting rights seems to be easier to explain. After all, not being sovereign States, these territories need not to have equal rights. But as a consequence the equality of all members within a given organization becomes doubtful.

As is well known, certain international organizations include as associate members not only dependent territories, but also sovereign States. In this case all associate members, be they dependent territories or sovereign States, have the same legal status within these organizations. All of them are deprived of voting power. This produces inequality of States with regard to their membership rights and, in a way, also impairs the full implementation of the rule of " one State—one vote."

The fact that dependent territories have achieved in some international organizations the status of ordinary members with full voting power should also be taken into account. Such members exist to the present day in UPU and ITU as relics of the past and the GATT Statute still makes such a practice possible. This might be regarded as fulfilment of equal rights of all members. Such a point of view, however, would be only of a strictly formal value for the votes of non-self-governing territories are in fact all at the disposal of administering States. Thus, in this case again, though in a different way, the implementation of the " one State—one vote " rule suffers a setback. This is, however, not exactly a legal setback, but rather a factual one.

A peculiar implementation of the rule of " one State—one vote " in WMO should be also mentioned here. In this organization non-self-governing territories and groups of such territories have voting power only in the plenary organ and only with regard to certain issues. The most important questions can be solved only by the votes of member-States. Here we have an example of inequality of rights with respect to voting of two different groups of members.

III. Organs of a Limited Membership and the " One State—One Vote " Rule

In international organizations the right to vote is inseparably connected with the membership status. No organization, however, can function or vote otherwise than through competent organs. And the composition of these organs need not to agree with the general membership of an organization.

The present-day international organizations consist as a rule of one intergovernmental plenary organ and at least of one intergovernmental organ of a limited membership. The membership of intergovernmental organs comprises States which are represented by their delegates acting in accordance with governmental instructions.

A plenary organ, that is, the general assembly, conference or congress, includes representatives of all members of an organization, regardless of whether they are sovereign States or dependent territories. But in respect to organs of a limited membership, usually called councils or committees, the situation is different. Members of these organs are not delegated by individual members of an organization, but are elected—fully or partially, in a number set in advance—by a plenary organ; they may be even designated by an organ of a limited membership or simply enjoy the status of permanent members.

Given such a structure of universal international organizations, the division of competences between the plenary organ and organs of a limited memebership arises as an important problem. The discussion of this complex question, based on source materials or on investigation of the practice of individual organizations, is beyond the scope of this study. It seems sufficient to refer only to fairly unanimous views of the doctrine that although basically the organs of a council or committee type perform seemingly subsidiary and executive functions, these functions are often of a very great or even decisive importance. These organs play an important role, especially in the process of undertaking decisions and in reaching agreements between all the member-States, that is, in carrying out basic functions of modern international organizations. And what is even more important, the practice shows that the up to date evolution of universal international organizations tends towards fuller and fuller recognition of this key role of intergovernmental organs of a limited membership.[27]

Thus the need arises to examine how, against this background, members of international organizations exercise their voting power.

1. Limitation of the Number of Members

Basically, each universal international organization has one organ of a limited membership. The exceptions are: the Council and the Maritime Safety Committee of IMCO and, of course, the Security Council, the Economic and Social Council, and the Trusteeship Council of the United Nations.

The membership of such organs as a council or committee is rather small in relation to the general membership of these organizations. The United Nations and universal specialized agencies have presently a very wide membership. In many cases they comprise almost all States, and sometimes different dependent territories too. However their organs of

[27] Cf., e.g., W. Morawiecki, *Narody Zjednoczone* [*United Nations*], pp. 374—385; K. Kocot, *Organizacje międzynarodowe* [*International Organizations*], Wrocław 1971, p. 94; D. W. Bowett, *International Institutions*, London 1963, pp. 109—119; W. Friedmann, *The Changing Structure of International Law*, London 1964, p. 32.

a limited membership consist of a small number of representatives of States. Thus the UN Security Council comprises 15 members only, the UN Economic and Social Council—27, the UN Trusteeship Council—6. In the UN specialized agencies: the ILO Governing Body is composed of 48 members (of whom only 24 are representatives of States), the UNESCO Executive Board—34, the FAO Council—31, the WHO Executive Board—24, the IMCO Council—27, the IMCO Maritime Safety Committee—16, the ICAO Council—27, the UPU Executive Council—31, the ITU Administrative Council—29, the WMO Executive Committee—24, the IAEA Board of Governors—25. In this respect the GATT Council of Representatives, which consists of the representatives of all contracting parties prepared to assume duties resulting from their membership, constitutes an exception.[28]

The afore-cited numbers show that the differences in the size of organs of a limited membership are rather considerable and that their size has no direct proportional relation to general membership of a given organization. In the course of the last dozen years all organizations have augmented at least once membership of their councils or committees. Although these changes may sometimes appear as considerable, they are disproportionate to growing membership of these organizations. The following general list shows this quite clearly:

	General Membership*		Council or Committee Membership		
	Originally**	in 1969		Originally	in 1969
UN	51	138	ECOSOC	18	27
			Security Council	11	15
ILO	52	121		24	48
FAO	48	119		15	31
WHO	63	128		18	24
UNESCO	31	125		18	34
ICAO	42	117		21	27
UPU	91	142		19	31
ITU	56	137		18	29
WMO	57	122		15	24
IMCO	34	68	Council Committee	16	27
				14	16
IAEA	80	94		23	25

* without associate members
** as an UN specialized agency

[28] As is well known, originally the General Agreement did not envisage any formal organizational structure. It was the Conference that brought into beeing the permanent organs. The Council of Representatives was established at the XVI Session of GATT in 1960. *GATT, Basic Instruments and Selected Documents*, 9th Supplement (GATT, 1961—1), Geneva 1961, p. 8.

Thus, according to the list, general membership of many above-mentioned organizations has increased twice or more, whereas the composition of their organs of a limited membership have not (except ILO and FAO) increased twofold anywhere. As a result, assuming even the existence of an ideal rotation system, the average chance for each member to be elected to a council or committee of any of these organizations has diminished considerably. Also the size of organs of a limited membership in relation to general membership represented in plenary organs has changed in comparison with the initial situation. Thus a proportionally lessening membership of a council or committee adopts resolutions and acts in the name of all members and of the organization as a whole.

Since the possibilities of taking part in the activities of these organs diminish statistically for an average member, the chance of exercising voting rights also grows smaller even within the most efficient rotation system.

2. Election Criteria for Organs of a Limited Membership

Obviously, no full rotation is observed in elections to the organs of a limited membership either in the United Nations or in any of the specialized agencies. In such elections certain more or less precise criteria are obligatory, of which two come to the foreground: the criterion of interest in the activities of a given organization on the part of a State and its contribution to these activities, as well as the criterion of equitable geographical representation. Both these criteria are applied evenly, but in certain organizations one of them prevails.

(a) **Organs of the United Nations.** In virtue of the first of the above-mentioned criteria (contribution to the maintenance of international peace and a special interest in this issue), the United Nations Charter secured permanent seats in the Security Council for the following five powers: China, France, Great Britain, the Soviet Union, the United States (Art. 23, para. 1). The remaining non-permanent members of this organ are elected by the General Assembly on the recommendation of the Security Council, with due regard in the first instance to the contribution of individual members to the maintenance of international peace and security and to the other purposes of the Organization, and also to equitable geographical distribution (Art. 23, para. 1). At the same time the Charter explicitly blocks the so-called quasi-permanent seats by the provision that " a retiring member shall not be eligible for immediate re-election " (Art. 23, para. 2).

The compromise embodied in Article 23, para. 1, of the Charter has never been rigidly interpreted in relation to the election criteria of non-permanent members of the Security Council. It has been treated rather

as an indication for the General Assembly to be followed in carrying out these elections. In practice, of the two above-mentioned criteria, the criterion of equitable geographical distribution of non-permanent seats has always prevailed decisively.[29] Already in 1946 a gentelman's agreement was concluded in London which provided for an exact number of seats for particular geographical regions.[30]

In fact, the London Agreement had been kept only during the three subsequent years, that is, to 1949. Afterwards serious and sharp disputes, and protracted elections of the East-European candidates took place. Owing to political considerations exclusively, various attempts were made to deprive the East-European region of its only non-permanent seat, electing to it Greece, Turkey, and even Philipines.[31]

When in 1965 Article 23 of the Charter was amended and the Security Council membership rose to 10 elected members, the geographical distribution was also set anew. Africa and Asia obtained 5 seats, Latin America—2, Western Europe and other countries—2, and Eastern Europe—1.[32] Considerable increase of the number of seats, from 2 to 5, obtained by the African and Asian countries reflects, at least in general outline, the increase of the UN general membership from these geographical regions.[33]

It must be admitted that, in accordance with Article 23, paragraph 2 of the Charter, no UN member has been ever re-elected for immediate term

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[29] See L. M. Goodrich, E. Hambro, A. P. Simons, *Charter of the United Nations. Commentary and Documents*, 3rd ed., New York 1969, pp. 197, 199.

[30] Latin America 2, British Commonwealth—2, Asian and Far East countries—1, Western Europe countries—1, Eastern Europe countries—1.

[31] For more details see Repertory of Practice of United Nations Organs, vol. 2, pp. 5—15; W. Morawiecki, *Organizacje międzynarodowe* [*International Organizations*], 2nd ed., Warszawa 1965, pp. 138—140 and R. Sonnenfeld, *Zasada "sprawiedliwego podziału geograficznego" przy wyborze niestałych członków Rady Bezpieczeństwa* [*The Principle of "Equitable Geographical Distribution" in the Election of Non-permanent Members of the Security Council*], "Sprawy Międzynarodowe," 1960, No. 3 *passim*.

[32] Resolution of the United Nations General Assembly 1991 (XVIII), adopted 17 Dec., 1963. See Z. Galicki, *Zmiany składu Rady Bezpieczeństwa i Rady Gospodarczo-społecznej ONZ* [*Changes in the Composition of the UN Security Council and the UN Economic and Social Council*], "Państwo i Prawo," 1966, No. 7—8, pp. 62—69.

[33] Cf. D. Kay *The New Nations in the United Nations 1960—1967*, New York 1970, pp. 26—38. The composition of the United Nations membership according to geographical regions is as follows: Africa—42, Asia and Far East—18, Middle East—13, Western Europe—17, Eastern Europe—10, Latin America—20, Northern America and the Carribbean region—6. See H. Okularczyk, *Organizacja Narodów Zjednoczonych—członkostwo i organy główne* [*The United Nations—Membership and Principal Organs*], "Sprawy Międzynarodowe," 1970, No. 8, p. 156 ff and J. Machowski, *Grupy "regionalne" w ONZ* [*Regional Groups in the United Nations*], "Sprawy Międzynarodowe," 1963, No. 1.

of office in the Security Council, but it must be also stated that in practice a wider rotation of States in filling non-permanent seats on the Council has not been observed. Even a glance at the results of elections of non-permanent members from the Latin-American region shows quite clearly that till 1969 certain States were markedly favoured. Brazil was elected for as many as five terms of office (1947, 1952, 1955, 1964 and 1967); Columbia—for four (1948, 1954, 1957, and 1969); Argentina—for three (1957, 1960, and 1966); for two terms of office—Cuba (1950 and 1959) and Chile (1953 and 1962); for one term of office—Mexico (1946), Equador (1951), Peru (1956), Panama (1959), Venezuela (1963), Bolivia (1965), Uruguay (1966), and Paraguay (1969).[34] Of all the 20 States of this region, some of them had never till 1969 obtained a seat as a non-permanent member of the Security Council, whereas other States had been re-elected two, three, and even four times. In other regions the situation in this respect does not look much better.[35]

Thus the member-States of the United Nations do not have equal chances of obtaining seats among the Security Council members. This inequality results first and foremost from the fact that the Great Powers have secured for themselves permanent seats on the Security Council; secondly, in electing non-permanent members the rotation system is not observed to the full, as some States have a privileged position—mainly the bigger ones, and also those pushed by the Great Powers armed with the right of veto.

In contradistinction to specific provisions concerning the Security Council, the UN Charter establishes criteria for electing members to the Economic and Social Council, albeit in this respect some rather concrete proposals were put forward at the San Francisco Conference.[36] They manifested the conviction that the Economic and Social Council would not be able to function efficiently without permanent participation of the economically strongest States. These proposals, however, were not included in the UN Charter. Their indirect influence can be found only in Article 61 of the Charter permitting immediate re-election of the retiring members of the Economic and Social Council. Besides, the term of office in this organ is longer than that in the Security Council as its duration is three years (Art. 61, para. 2). The election is carried out in the General Assembly by a qualified majority of votes (Art. 18, para. 2).

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[34] See *Yearbook of the United Nations, 1944—1969.*

[35] Cf. L. M. Goodrich, E. Hambro, A. P. Simons, *op. cit.*, p. 197, and B. Broms, *op. cit.*, pp. 245—253.

[36] *United Nations Conference on International Organizations*, vol. 8, p. 501; see also B. Broms, *op. cit.*, p. 260.

In practice, as is well known, the five Great Powers have been always elected to the Economic and Social Council. Hence, being permanently re-elected, they are in fact permanent members of this organ. The remaining members have been elected in accordance with the principle of equitable representation of all geographical regions, though from the very beginning greater and economically more advanced States have been taken into consideration in the first place, and some of them re-elected a number of times. As the practice of a dozen initial years has already shown, of the 36 States represented in this organ the five Great Powers have been permanently represented on the Council, 3 States were represented during three terms of office, 12—during two terms of office, and 16—during one term of office.[37]

It must be admitted, however, that—despite a lack of formal stipulations in the Charter—the principle of equitable geographical distribution of the seats in the Economic and Social Council has been fairly carefully observed according to the following scheme : the Great Powers—4 seats,[38] Africa and Asia—5 seats, Latin America—4 seats, Eastern Europe—2 seats, Western Europe and other countries—3 seats.[39] Following the enlargement of the Council up to 27 members, the distribution scheme had also changed—Africa and Asia were granted as much as 12 seats.[40]

Broadly speaking, the General Assembly has shown a visible tendency to observe equitable geographical distribution in electing members to the Economic and Social Council, and has also taken into account the changes that occurred in membership of the United Nations by increasing quite considerably the number of seats for the African and Asian regions. On the other hand, however, owing to permanent re-elections of the Great Powers and to several re-elections of the States of a medium economic potential, as well as to longer terms of office, no full rotation is carried out in the Economic and Social Council too, and consequently there is no equal chance for each member of the United Nations to exercise his voting rights within this organ.

For the Trusteeship Council the UN Charter has established three categories of members : (1) all States administering trust territories ; (2) permanent members of the Security Council which are not administering

[37] See *Repertory of Practice of the United Nations Organs*, vol. 3, p. 184 ; see also S. D. Bailey, *The General Assembly of the United Nations*, London 1960, p. 177.

[38] Since its XV Session (1960) the General Assembly stopped to elect Chiang Kai-shek's delegates to this organ.

[39] Cf. W. Morawiecki, *Narody Zjednoczone* [*United Nations*], p. 109 ; initially this distribution wasn't very certain. See L. M. Goodrich, *The United Nations*, London 1960, p. 116.

[40] See more Z. Galicki, *op. cit.*, pp. 62—69 ; W. Morawiecki, *op. cit.*, p. 109 ; L. M. Goodrich, E. Hambro, A. P. Simons, *op. cit.*, p. 410.

trust territories, and (3) members elected by a qualified majority of votes by the General Assembly for three-year terms. Article 86 of the UN Charter does not specify the number of members of the Trusteeship Council. It only assumes that a quantitative balance should be kept between the number of those States which administer trust territories and those which do not. Given such an assumption, the composition of the Trusteeship Council must of course change as the trusteeship territories gain independence. At present it is an organ of no great importance and even further completion of its membership according to the provisions of Article 86 of the Charter has become impossible.[41]

Considering the relevant provisions of the United Nations Charter and the existing hitherto electoral practice of the General Assembly with regard to the Trusteeship Council, it must be again stated that members of the United Nations have had no equal opportunities to be represented in this organ and to exercise there their voting rights. For, irrespective of different categories of membership of the Trusteeship Council envisaged by the Charter, the General Assembly has not respected adequately the rotation system in electing new members.[42]

Generally, it should be stressed that members of the United Nations have no equal opportunities to be represented in its organs of a limited membership. Thus they have also no equal chances to make use of their voting rights in these organs. Despite of the fact that the size of these three organs is very small in comparison with general membership of the United Nations, in two of them permanent seats have been explicitly reserved for the five Great Powers. The same Great Powers have not only on the strenght of the Charter the right to permanent seats in the Security Council and in the Trusteeship Council, but are also making use of the same privilege in the Economic and Social Council by being constantly re-elected for consecutive terms of office. The remaining States must content themselves with only such seats that have not been filled by the Great Powers. But even within this scope, owing to the lack of a wider rotation, their opportunities are still unequal. While some of them have been elected several times, others have not yet had any possibility to be represented in these organs and to enjoy there their voting rights.

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[41] After all, the parity principle established in the Charter with regard to the Trusteeship Council composition has produced, almost from the very beginning, serious difficulties in practice. See Repertory of Practice of United Nations Organs, vol. 4, pp. 305—324, and L. M. Goodrich, E. Hambro, A. P. Simons, *op. cit.*, pp. 519—523.

[42] See the list of members elected to this organ in Repertory of Practice of United Nations Organs, vol. 4, p. 324 and in successive volumes of the *Yearbook of the United Nations*, 1949—1969.

(b) **Organs of Specialized Agencies.** In specialized agencies the problem of composition of intergovernmental organs, known as councils or committees, does not present itself uniformly. In some of them the electoral criteria are established in such a manner that practically any election must always and in the first instance give seats to a small group of States representing the greatest potential in the domain of basic activity of a given organization. Sometimes these seats are of permanent or semi-permanent character. This is the situation in such specialized agencies as IAEA, IMCO, ICAO, and ILO.

The IAEA Board of Governors consists of 25 members divided into three separate categories. To the first category belong five members which are most advanced in the technology of atomic energy, including the production of source materials, and also the members most advanced in this field, chosen from each of the eight regions mentioned in the IAEA Statute (Art. VI, para. 1) on condition that a given region is not represented by any of the above-mentioned five members. The five main atomic powers are : the United States, the Soviet Union, Great Britain, France, and Canada. In the remaining regions Australia, Brazil, the Republic of South Africa, India, and Japan have been recognized by the Agency as the most advanced in this respect. It must be stressed here that the States in this category are neither elected by voting for a definite period, nor even designated according to regional principle *sensu stricto*. Each of them should be simply a State, one from a given region, which conforms to the criteria mentioned in the Statute of the Agency. All in all, 10 States belonging to this category are considered to be virtually permanent members of the Board of Governors.[43]

To the second category belong two Agency-members from among the following other producers of source materials : Belgium, Czechoslovakia, Poland, and Portugal, as well as a third Agency member as a supplier of technical assistance. Members of this group are designated for a period of one year by the outgoing Board of Governors on the understanding that no member of this group will be eligible for redesignation in the same category for the following year (Art. VI, para. 2). Thus in practice the four States mentioned by name in the Statute alternate according to the rotation system each year in pairs : Poland and Czechoslovakia, Belgium and Portugal. These seats on the IAEA Board of Governors are undoubtedly

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[43] Cf. W. MORAWIECKI, *Międzynarodowe organizacje gospodarcze* [*International Economic Organizations*], p. 198 and of the SAME AUTHOR, *Skład organów i procedura głosowania w Międzynarodowej Agencji Energii Atomowej* [*Structure and Voting Procedure in IAEA*], in : *Księga pamiątkowa z okazji 50-lecia pracy naukowej J. Makowskiego* [*Festschrift published on the Occasion of the 50th Anniversary of Professor J. Makowski's Scientific Activity*], Warszawa 1957, pp. 195—213.

semi-permanent. The third State included most often in this category is Denmark or Sweden.[44]

The third category of membership of the IAEA Board of Governors consists of a group of 12 members of the Agency elected with due regard to equitable representation on the Board as a whole from among States situated in the eight geographical regions listed in the Statute. Elections are to be held in such a manner so that the Board shall at all times include in this category three representatives of the area of Latin America, three representatives of Africa and the Near East, and a representative of each of the remaining areas except North America. It has been also stipulated that members in this category will not be eligible for re-election in the same category for the following term of office (Art. VI, para. 3).

Thus the explicit provisions of the IAEA Statute impose different conditions of membership of the Board of Governors. Of the 25 members of this organ, as much as 13 are designated in virtue of their specific capacity in the field of the basic IAEA activity, and only 12 are elected with regard to equitable geographical representation. The latter are elected by a plenary organ by a simple majority of the members present and voting.[45]

So the first category comprising 10 members holds virtually permanent seats, the second category comprising three members—semi-permanent seats, and only the third category is elected for two-year term of office on condition that re-election for the following two-year period is inadmissible. It should be also added that no wider rotation is observed with regard to those 12 members of the Board of Governors which obtain their seats by way of election. Some States have been already elected for the second time,[46] while other have not yet had the opportunity to be elected even once.[47]

In IMCO, differently than in other specialized agencies, there are two intergovernmental organs of a limited composition: the Council and the Maritime Safety Committee.

Presently the IMCO Council consists of 18 members elected by a plenary organ. In electing the members of the Council, the Assembly shall proceed in such a manner so as to include in the Council: (a) six States with the largest interest in providing international shipping services, (b) six

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[44] See successive volumes of *Yearbooks of the United Nations* and W. MORAWIECKI, *Narody Zjednoczone* [*United Nations*], pp. 324—326.

[45] IAEA, General Agreement, Art. V, para. E, 1 and Rules of Procedure of the General Conference, Rule 83.

[46] For instance, Indonesia, Columbia, Mexico, Pakistan, Peru, Thailand or Italy.

[47] Up to 1969 only 62 members, out of the total of 102 members, had held seats on the Board of Governors.

States with the largest interest in international seaborne trade, and (c) six States not elected according to criteria stated above (point (a) and (b)), but having special interest in maritime transport or navigation and whose election to the Council will ensure the representation of all major geographical areas of the world.[48]

Thus in contrast with the IAEA Board of Governors, all members of the IMCO Council are elected by its plenary organ.[49] Against all appearances, however, the differences in completing membership of the IAEA Board and the IMCO Council are not very considerable. For the sphere of freedom of the IMCO Assembly in electing members to the Council is fairly limited. Members of the first category (Art. 18, para. a) are elected according to the registered tonnage of their merchant fleet and six further members (Art. 18, para. b) are elected on the basis of their actual participation in seaborne trade. The Assembly enjoys more freedom only in electing six members of the third group. As a result, like in IAEA, the two first categories of members of the IMCO Council have practically permanent or almost permanent seats. They are the greatest maritime powers. But even in electing States to the Council from the third group (c), the Assembly has also to take into account whether they have a special interest in maritime transport or navigation ; besides all members are eligible for re-election.[50] Thus also in this instance it is difficult to say that all members of IMCO have equal opportunities in exercising their voting power in the Council. As the practice has shown, representatives of the 13 following States keep permanent seats in this organ since the very beginning of IMCO : Australia, France, Greece, Holland, India, Japan, Canada, Federal Germany, Norway, Great Britain, Italy, the United States and the Soviet Union. In 1969 IMCO comprised already 68 members, but only 21 States were elected to its Council.[51]

In this respect the situation is somehow different in the second IMCO's organ of a limited membership, namely, in the Maritime Safety Committee. This committee consists of 16 members elected by the Assembly from among the States having an important interest in maritime safety. Here we have again three groups of members : the first group comprises eight members elected from among the 10 largest shipowning

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[48] IMCO, Convention, Art. 18. Before this article was changed in 1965, membership of the Council and the criteria of its election were different. See D. W. Bowett, *op. cit.*, pp. 111—113 and C. H. Alexandrowicz, *op. cit.*, pp. 158—159.

[49] To be elected, a simple majority of members present and voting is required. The term of office is 2 years and may be followed by immediate re-election. See IMCO, Convention, Art. 16, para. (d), 19 and 43.

[50] Cf. D. W. Bowett, *op. cit.*, p. 112.

[51] See *Yearbook of the United Nations, 1959—1969.*

nations; the second comprises four members elected in such a manner as to ensure adequate representation to each of the four regions established for this purpose; the remaining four members are elected from among States not otherwise represented on the Committee (Art. 28, paras a—c).

Undoubtedly, in electing members to the Maritime Safety Committee the IMCO Assembly has more freedom than in electing members to the Council. It applies to electing the second and third group.[52] Yet the possibilities of a wider rotation are in this instance considerably diminished by a provision of the Convention that the members of the Committee shall hold office for as much as four years and that, furthermore, the same States are elegible for re-election without any restrictions (Art. 28). As a result, the eight States of the first group have virtually permanent seats on the Committee. These are again: Great Britain, the United States, Japan, Norway, Italy, the Soviet Union, France, and Greece. In the remaining two groups the rotation is not observed. From the establishment of this organization till 1969 only 17 States had been elected to the Committee. And as much as 13 of them had held their seats without interruption since it had been set up.[53]

In ICAO it is a Council that constitutes the representative organ of a limited membership. It consists of 27 members elected by a plenary organ for the period of three years with the possibility of immediate re-election.[54] However, in holding elections the Assembly is to take into account the necessity to ensure an adequate representation within the Council to: (a) the States of chief importance in air transport, (b) the States which make the largest contribution to the provision of facilities for international civil air navigation, and (c) the States not otherwise included and whose designation will ensure that all the major geographical areas of the world are represented on the Council (Art. 50).

Thus, similarly as in IAEA and IMCO, the freedom of action of the ICAO Assembly in electing members to the Council is considerably limited by the relevant statutory provisions. The Assembly has to ensure adequate representation on the Council for the States belonging to air powers. Yet the provisions of the ICAO Convention are in this respect a little more

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[52] As far as the first group is concerned, the Assembly has practically no freedom of choice. The International Court of Justice in his advisory opinion of 8 June, 1960 rejected the view that the term "elected" used in the Convention gives the Assembly the freedom of conducting elections. The tonnage registered under the flag of a given country constitutes a decisive factor, no matter whether the ships are owned by its nationals or foreigners (Liberia's and Panama's case). ICJ, *Reports 151 (1960)*; see also C. H. ALEXANDROWICZ, *op. cit.*, pp. 161—163.

[53] See *Yearbook of the United Nations, 1959—1969.*

[54] ICAO, Convention, Art. 50 paras (a—c) and Rules of Procedure of the Assembly, Rules 55—61.

flexible than the respective provisions contained in the constituent instruments of IAEA or IMCO. For they do not stipulate the quantity of members which according to criteria established beforehand are to be elected from each of the three groups of members. Nevertheless, the States of a weaker air capacity may, at the best, expect to be elected only according to one of the three criteria established in Article 50, paragraph (b). But even within this limited scope they are faced with certain additional difficulties. Thus, for instance, though the elections to the Council are held separately for each of the three categories with the candidates being placed on separate lists, the non-elected States from a higher category automatically enter the list of candidates of the following category. Such a procedure hampers the maintenance of an adequate geographical representation within the Council, as well as the admission of smaller States.[55]

A survey of successive elections to the ICAO Council shows very clearly that also in this instance the first and second group of members holds virtually permanent and semi-permanent seats in this organ, and that with regard to the third group an adequate representation of the regions important to air communication and a wider rotation have been not too strictly observed. In this respect the following data are of considerable interest : till 1969 only 68 States had been elected to the Council as against the total of 117 members of ICAO itself.[56] Thus, if the full rotation system had been observed only with regard to the third group comprising only six or seven States, approximately 50 States would have become members of the Council between 1947 and 1967, i.e. during the seven three-year terms of office. In view of the existing practice, till 1969 as much as 49 member-States had been prevented from gaining seats on the Council, and thus from making use of their voting power.

As far as ILO is concerned, its characteristic feature is that each State is represented in this organization by four delegates entitled to vote individually (Art. 4, para. 1). From among these four delegates two are government delegates and the other two represent respectively the workers and employers of each member-country (Art. 3, para. 1). Hence, similarly as in the ILO General Conference, three groups of representatives hold seats on the ILO Governing Body. Of the total of 48 members of the Governing Body, one half represents the governments and the other half represents the employers and workers, respectively (Art. 7, para. 1).

Non-governmental delegates are elected to the Governing Body respectively in two groups of 12 by the employers' delegates and the workers' delegates to the General Conference of ILO (Art. 7, para. 4). The situation

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[55] Cf. C. H. ALEXANDROWICZ, *op. cit.*, pp. 145—146.

[56] *Yearbook of the United Nations, 1946—1969.*

of the delegates representing governments on the Governing Body is different. Of the 24 of such delegates, 10 are appointed by the ILO member-States of chief industrial importance (Art. 7, para. 2). The decision which States are to be considered as having chief industrial importance is not a matter of the General Conference but rests with the Governing Body alone (Art. 7, para. 3). The remaining 14 government delegates are appointed by the members selected for that purpose by the government delegates to the General Conference (Art. 7, para. 2).[57] The term of office of the members elected in this way, that is, by the majority of the electoral college, is three years.[58]

As a result of these constitutional provisions, the following States have 10 seats reserved in the ILO Governing Body : China, France, India, Japan, Canada, Federal Germany, the United States, Great Britain, Italy, and the Soviet Union. As States of the highest industrial capacity, they hold actually permanent seats on the ILO Governing Body. The remaining seats on the Governing Body had been held only by 55 States till 1969, as compared with the total of 121 members of ILO. That was so because some States had been repeatedly re-elected (for instance, Chile, Mexico, Holland, Argentina, Belgium, Brazil, Australia).[59] There is even no ban on immediate re-election. Thus, the members of ILO too, have no equal opportunities to be elected to the ILO Governing Body and, consequently, to make there use of their voting power.

An insight into the composition of the organs of a limited membership of the four specialized agencies—those of IAEA, IMCO, ICAO, and ILO—leads to the following conclusions :

The organs discussed here have a relatively small membership and their composition lacks uniformity. In the IAEA Board of Governors and in the IMCO and ICAO Councils there are three, and in the ILO Governing Body two categories of government delegates. Certain categories of members are designated by the IAEA and ILO organs of a limited membership themselves : in IAEA 13 as against the total of 25 and in ILO 10 as against the total of 24 government delegates. Although all members to the IMCO and ICAO organs are elected by their plenary organs, the scope of the election is considerably limited by statutory criteria. And these require that the States of chief importance in air transport or in seaborne trade

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[57] That is, except the representatives of the 10 States recognized as main industrial powers.

[58] ILO, Standing Orders of the International Labour Conference, Arts 48, 49, and 52.

[59] *Yearbook of the United Nations, 1946—1969.*

shall obtain adequate representation. This is the so-called principle of qualified representation.[60]

As a consequence of either explicit and detailed, or only general statutory provisions, each organ of these four organizations embraces a rather wide group of permanent and semi-permanent members ; moreover, many of other members were repeatedly re-elected. Roughly, it is the same States that occupied the seats in all these organs. And a considerable part of the members of IAEA, IMCO, ICAO, and ILO has not yet had the opportunity of a direct participation in the work of the organs of these agencies. Thus these members have no equal chances to make use of their voting power. Smaller and weaker States are simply left out in elections.

Such a structural scheme of the representative organs of a limited membership is by no means accidental. The four above-mentioned agencies have very extensive powers and their activities are of great importance to the member-States. Hence the States most interested in these activities ensured for themselves the largest possible influence on the structure and development of these agencies by securing for themselves privileged positions in their organs and, consequently, the possibility of efficient control and policy making. Holding permanent seats, they have *ipso facto* permanent voting rights with regard to all matters that are settled in these organs.[61]

The remaining group of universal specialized agencies comprises FAO, WHO, UNESCO, UPU, ITU, and WMO. Of course, such a division into two groups is perhaps too arbitrary. Yet it reflects to a certain degree their specific as well as common general features within the scope of the discussed subject.

The original text of the FAO Constitution envisages that its Council shall consist of members appointed as individuals according to their personal qualifications. So they had acted in the capacity of independent international officials. But already in 1947 this provision of the Constitution was substituted by another one providing that instead of persons it is the States that were to be elected to the Council. At the same time the burden of responsibility for the activities of FAO was considerably shifted to the Council.[62]

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[60] Cf. W. Koo, *Voting Procedures in International Political Organizations*, New York 1947, p. 53.

[61] Many authors consider that the organs (of council or committee type) of these four organizations play a crucial role in directing their activities. See, for instance, W. Morawiecki, *Narody Zjednoczone* [*United Nations*], pp. 310, 324, 274—275, 321—322 ; D. W. Bowett, *op. cit.*, pp. 109—114 ; W. Friedmann, *op. cit.*, p. 32.

[62] See W. Morawiecki, *Międzynarodowe organizacje gospodarcze* [*International Economic Organizations*], p. 137. Of rather different opinion is D. W. Bowett, *op. cit.*, p. 114.

At present the FAO Council consists of 31 member-States elected by a plenary organ which also establishes the term of office of its members and other details connected with its composition (Art. V). Thus the criteria for selecting members of the Council are not, as in other agencies, formulated in the statute, but established by the plenary organ and included in its internal regulations. These regulations stipulate that in selecting members to the Council for a three-year period by a simple majority of votes,[63] the plenary organ shall have due regard to the need of: (a) ensuring to the Council a balanced geographical representation of nations interested in the production, distribution and consumption of food and agricultural products, (b) ensuring the participation in the Council's work of those member-States which contribute in a large measure to the realization of the aims of FAO, and (c) creating the possibility of participation in the Council, by rotation, of the greatest possible number of member-States.[64] So the scope of these elections is fairly wide, but the possibility of immediate re-election and the clause of largest interest in food production and consumption give again a privileged position to greater and economically stronger States. Elections to the FAO Council between 1946 and 1960 demonstrated quite clearly that in this period the seats on the Council were held permanently by the representatives of such States as Canada, France, the United States, India, Egypt, Italy, and Indonesia. A few other States as Brazil, Great Britain, Chile or Pakistan also kept permanent seats, with short intervals only. In the course of these five terms of office only 46 States were elected to the FAO Council. It was not much in relation to the total membership of FAO.[65]

The UNESCO Executive Board had consisted originally of 18 members elected individually, as in FAO, by a plenary organ from among the delegates of various member-countries.[66] Amendments introduced into the Constitution in 1954 have augmented the number of members of this organ and have changed their character. No more are they persons elected individually, but representatives of the member-States. At present the UNESCO Executive Board comprises 34 members, all elected for a four-year term of office by the plenary organ by a simple majority of the members present and voting, without the right to immediate re-election for the following term of office.[67]

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[63] FAO, General Regulations, Rule XXII, para. 1(a) and Rule XII, para. 3(a).

[64] *Ibid.*, Rule XII, para. 3.

[65] *Yearbook of the United Nations, 1946—1960.*

[66] For more details see J. Kolasa, *International Intellectual Co-operation—The League Experience and the Beginning of UNESCO*, Wrocław 1962, p. 143.

[67] UNESCO, Constitution, Art. V, paras 1 and 3 and Rules of Procedure of the General Conference, Rules 96 and 97.

In electing members to the Executive Board, the plenary organ shall endeavour to include persons competent in the arts, the humanities, the sciences and education, and possessing adequate qualifications to fulfil the administrative duties of the Board. At the same time it shall also have regard to the diversity of cultures and balanced geographical distribution (Art. V, para. A, 2). These criteria, being of a general character and identical for all the members of UNESCO, should rather exclude the possibility of holding permanent seats.

But even in UNESCO where—owing to the almost exclusively co-ordinative character of its activities—the attempt to establish objective general criteria for elections to the Executive Board has been so successful, the practice has taken a different course. Despite the explicit stipulation in the Constitution that no member of the Executive Board shall be immediately eligible for the following term of office (Art. V, para. A, 3), the list of members for the years 1946—1969 shows that certain States, such as France, the United States, Egypt, India, Great Britain, Italy, Pakistan, Japan, Federal Germany, and the Soviet Union, held practically permanent or semi-permanent seats in this organ. No wonder then that till 1969 only 70 States had become members of the UNESCO Executive Board, though in the same year UNESCO as a whole comrised already 125 members.[68] The greater States, more important on the international arena, had also in the UNESCO's organ of a limited membership secured for themselves virtually permanent seats and permanent voting rights.

Similar to the UNESCO Executive Board is the WHO Executive Board, which originally consisted of 18, and since 1959—of 24 members, all elected by the Health Assembly. These members are elected for a three-year term of office with a possibility of immediate re-election (Art. 25). The WHO Constitution provides that in electing States to serve on the Board, the Health Assembly is to take into account—like in UNESCO—an equitable geographical distribution ; at the same time the representatives appointed by these States should be technically qualified in the field of health (Art. 24). Interestingly enough, it is precisely WHO where—as the practice between 1949 and 1969 showed—there are no fully permanent seats on its executive organ, though the Constitution poses no formal obstacles in this respect. Certain States, however, held seats on the Board almost uninterruptedly during the whole of this period, mainly France, the Soviet Union, Great Britain, and the United States.[69]

With regard to their type and composition, the ITU Administrative Council and the UPU Executive Council are similar to one another. They

[68] *Yearbook of the United Nations, 1946—1969.*

[69] *Ibid.* The Soviet Union suspended its activities in this organization between 1949 and 1955.

also resemble in many respects the UNESCO Executive Board and the WHO Council.

The ITU Administrative Council consists at present of 29 members, all elected by the Plenipotentiary Conference with due regard to the need for equitable representation of all parts of the world. The ITU Convention does not stipulate the exact duration of the term of office of the Council members, and does not prohibit an immediate re-election of the same States for the following term of office. It is stressed, however, like in the UNESCO and WHO Constitutions, that persons representing the States on the Council shall be qualified in the field of telecommunication services (Art. 9, paras 1, 1 and 2). The electoral practice of the ITU Administrative Council leads to the following conclusions: (1) till 1969 a rather small number of States, that is, only 43 had been elected to the Council as compared with the total of the 137 ITU members, (2) during all this period the following States had held permanent seats on the Council: Argentina, Brazil, China, France, Yugoslavia, Canada, Switzerland, Turkey, the United States, Italy, Great Britain, and the Soviet Union. And these 12 permanent seats constitute almost a half of this organ's composition.[70]

The UPU Executive Council comprises 31 members elected by the Congress for a five-year term of office. Like in ITU, in electing these members the stress should be laid on equitable representation of all regions of the world and on qualifications of the representatives in the field of postal administration.[71] In the course of twenty years (1949—1969) no member-State of the Postal Union occupied permanently a seat on Committee. But few member-States were elected to it, only 36, albeit in 1969 general membership of this agency surpassed 140.[72]

Unlike other hitherto discussed organs, the WMO Executive Committee has no definite numerical composition. Article 13 of the WMO Convention provides that the chairman and vice-chairman of the Organization, as well as the chairmen of six regional meteorological associations become *ex officio* members of the Executive Committee. The remaining members are elected by the WMO Congress from among directors of meteorological services of the WMO members (14). The Congress should take into account the need for equitable geographical representation.[73]

Thus in this group of specialized agencies (FAO, UNESCO, WHO, ITU, UPU, and WMO) where political and economic interests of the greater and more important States are not so strongly at stake as in IAEA, IMCO,

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[70] *Yearbook of the United Nations, 1948—1969.*

[71] UPU, Rules of Procedure of the Executive Council, Art. 2.

[72] *Yearbook of the United Nations, 1949—1969.*

[73] Regions are delimited with great accuracy according to geographical coordinates; see *WMO, General Regulations*, Geneva 1967, Annex I.

ICAO, and ILO, the composition of the organs of a limited membership is based on more general and less complex principles. They comprise in fact a single general category of members, i.e. such members that are elected by a plenary organ with due regard to equitable geographical distribution and to the experience of the delegates in the activities of their organizations. Nevertheless, irrespectively of statutory reservations concerning immediate re-election of the same States and the need for an adequate geographical representation, the States of a greater economic potential and greater political importance hold virtually permanent seats in the huge majority of councils and committees of these organizations. In each of them dozens of smaller member-States were not elected even once to the organs of a limited membership. Thus they were not able to cast their votes in these organs at all.

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The equality of voting power, rather ostentatiously proclaimed in the statutes of universal international organizations, does not fully correspond with the practice. In any case, the " one State—one vote " rule provides no basis for an assumption that each member-State has always and in all organs of a given international organization equal voting rights with all other members of this organization. In point of fact these rights are limited with regard to the huge majority of members by specific statutory provisions and internal regulations, as well as by the respective practice.

To begin with, the very right to vote is not implemented uniformly in many international organizations. Associated members, be they dependent territories or sovereign States, are deprived of it. Even if the right to vote has been, by way of a rare exception, granted to associated members, it is of a very limited scope and thus not equal to the right of other members. And in organizations in which non-self-governing territories have gained full membership rights, including the right to vote, their voting power remains in fact at the disposal of the States exercising control over these territories. Such States may dispose of not only one, but of several votes in the organs of a given organization.

Among members possessing full voting rights different inequalities occur resulting from a specific implementation of these rights in the organs of a limited membership.

First of all, the composition of these organs, except GATT, is very small in comparison with general membership of international organizations. Despite constant expansion of these organs, the disproportion between general membership of international organizations and the number of members represented in their organs of limited membership is not diminishing but growing. As a result, the average member of an organization

has increasingly less and less opportunities to be admitted to these organs and to pronounce himself by his vote.

In many international organizations the members of the organs of a limited membership are elected by plenary organs. So at least in this way the members of international organizations can exert influence on the composition of these organs. However, as is well known, in such organizations as IAEA, ICAO, IMCO, and ILO important part of the composition of their organs is designated by the organs themselves or with merely formal participation of their plenary organs. Members designated in such a manner are, as a matter of fact, permanent members, occupying seats on a council or committee in virtue of the great power as well as important interests they are representing in the field of the activity of these organizations. Here the fact that the same States form the core of almost all these organs speaks for itself.

The permanent members of the UN Security Council are outright mentioned by their names and, in addition, their votes have a different legal value than those of the elected members. As is well known, they have the right of veto. Besides, also in other organizations the votes of certain members have sometimes a specific significance not only political, but also strictly legal—for instance, to get an amendment to the IMCO Convention passed, a two-thirds majority of the votes of the Assembly is required, including an affirmative vote of at least a half of the members of the Council (Art. 52).

The statutes of some international organizations contain a reservation that the same States shall not be elected for an immediate term of office in organs of a limited membership. Then, in the best case, the States of a greater potential and interests in a given domain of international co-operation content themselves with semi-permanent seats. In practice, however, irrespective of statutory reservations, such states are permanently represented in these organs which constitutes a clear discrimination against the smaller or less important States.

Thus the rule of " one State—one vote " does not guarantee to all the members of an organization that they will have an equal opportunity to pronounce themselves by their vote in its organs of a limited membership. Serious restrictions exist here which stem either from explicit statutory provisions or from practice.

Of course, the differentiated situation of the members of international organizations as regards their voting power in organs of a council or committee type, has its respective justification and practical consequences. For such organs play, as a rule, a crucial role in the process of shaping and arriving at the decisions in international organizations, and the main task of directing all their activities seems to be shifting from plenary organs

to organs of a narrower composition. Thus, given the assumption of equality of all members and with the " one State—one vote " rule, particular interests of the greater and more powerful States can be properly secured in universal international organizations exactly through their privileged position in organs of a limited membership where they exert constant influence upon the decisions and activities of the whole organization. Apparently, this privileged position is universally accepted by all members, even without distinct constitutional stipulations in this matter. Otherwise, these organizations would have either ceased to occupy themselves with issues important to international relations, or would have adopted the weighted voting system. Neither the first, nor the second solution would be desirable, albeit apparently the implementation of the " one State—one vote " rule is not so contrary to the weighted voting system as the very denomination could suggest and as it is often stressed by the doctrine. On the other hand, it is the CMEA Statute where the rule of " one State—one vote " is fully and consequently implemented. According to the provisions of this Statute, each member-State is fully entitled to participate in the activities of each CMEA organ and has the right to vote on each subject, which is of its concern. And the resolutions are passed according to the principle of unanimity of all members concerned.

Reservations and Objections in the Treaty Practice of Poland

by RENATA SZAFARZ

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The aim of this article is to: (a) analyze reservations[1] formulated by Poland after 1945; (b) show the attitude of other parties to Polish reservations (taking into consideration the implications of State succession); (c) present Poland's reaction to reservations submitted by other States. This will allow us to analyze to what degree reservations have influenced the treaty relations between Poland and other countries. All data and facts presented in this paper reflect the existing status—in the light of available source materials[2] as to 31 December, 1972.

The Characteristics of Reservations Formulated by Poland

Among the various types of statements submitted by Poland when signing multilateral treaties or when depositing the documents of ratifica-

[1] On the definition of a reservation—see R. SZAFARZ, *Reservations to multilateral treaties*, "Polish Yearbook of International Law," 1970, vol. 3, pp. 294—298.

[2] I.e., *United Nations Treaty Series*, "Dziennik Ustaw Polskiej Rzeczypospolitej Ludowej" ["Journal of Laws of the Polish People's Republic" further referred to as Dz.U.] and UN Doc.; Multilateral Treaties in respect of which the Secretary-General Performs Depositary Functions, List of Signatures, Ratifications, Accessions, etc, as at 31 Dec., 1971,—ST/LEG/SER.D/5 and ST/LEG/SER.D/1, Annex.

Since the majority of reservations and objections connected with Poland concern "treaties in respect of which the Secretary-General performs depositary functions," it seems purposeful to resign from quoting these documents each time and instead to formulate a general remark: whenever a fact is stated or a quotation is cited, etc., and the source is not given, the fact is mentioned in, or quotation comes from Doc. ST/LEG/SER.D/5 (reservations, objections) or from Doc. ST/LEG/SER.D/1, Annex (reservation clauses contained in the treaties).

tion, acceptance or approval, reservations constitute a separate category. After 1945, Poland submitted reservations to 34 treaties.[3] Of this number, Poland is already bound by 28 treaties while 6 treaties signed with reservation await ratification.

The first group comprises the following treaties :

1. Convention on the Privileges and Immunities of the Specialized Agencies of 21 November, 1947 ; reservations concerned sections 24 and 32.

2. Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 ; reservations were submitted to Articles IX and XII.

3. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949 ; the reservation concerned Article 10.[4]

4. Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August, 1949 ; the reservation concerned Article 10.[5]

5. Geneva Convention relative to the Treatment of Prisoners of War of 12 August, 1949 ; reservations submitted to Articles 10, 12 and 85.[6]

6. Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August, 1949 ; reservations were formulated in respect to Articles 11 and 45.[7]

7. Convention on the Political Rights of Women of 31 March, 1953 ; reservations concerned Article VII and IX.

8. Convention concerning Customs Facilities for Touring of 4 June 1954 ; reservations concern Articles 4 and 21.

9. Additional Protocol to the Convention concerning Customs Facilities for Touring, relating to the Importation of Tourist Publicity Documents and Material of 4 June, 1954 ; reservation submitted to Article 15.

10. Customs Convention on the Temporary Importation of Private Road Vehicles of 4 June, 1954 ; reservation concerned Article 40.

11. Customs Convention on Containers of 18 May, 1956 ; reservation concerned Article 17.

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[3] I do not take into consideration the International Telecommunication Convention of 12 Nov., 1965, because in my opinion the Polish declaration submitted in respect to this Convention is not in its essence a reservation (see Dz.U., 1969, No. 15, item 108). Furthermore I have omitted the non-binding Sugar Agreement of 1953 and 1958 as well as the Protocols for their prolongation.

[4] Dz.U., 1956, No. 3, item 171.

[5] *Ibid.*

[6] *Ibid.*

[7] *Ibid.*

12. Customs Convention on the Temporary Importation of Commercial Road Vehicles of 18 May, 1956 ; reservation formulated in respect to Article 38.

13. Convention on the Taxation of Road Vehicles for Private Use in International Traffic of 18 May, 1956 ; reservations concerned Article 10, paragraphs 2 and 3.

14. Convention on the Contract for the International Carriage of Goods by Road (CMR) of 19 May, 1956 ; reservation concerned Article 47.

15. Convention on the Taxation of Road Vehicles Engaged in International Goods Transport of 14 December, 1956 ; reservation concerned Article 9, paragraphs 2 and 3.

16. Convention on the Taxation of Road Vehicles Engaged in International Passenger Transport of 14 December, 1956 ; reservation submitted to Article 9, paragraphs 2 and 3.

17. Convention on the High Seas of 29 April, 1958 ; reservation formulated in respect to Article 9.

18. Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June, 1958 ; reservation concerned the entire Convention in accordance with Article 1, paragraph 3.

19. Customs Convention on the International Transport of Goods under Cover of TIR Carnets (TIR Convention) of 15 January, 1959 ; reservation concerned Article 44, paragraphs 2 and 3.

20. Agreement on the Privileges and Immunities of the IAEA of July 1959 ; reservations concerned, paragraphs 26 and 34.[8]

21. Convention relating to the Unification of Certain Rules concerning Collisions in Inland Navigation of 15 March, 1960 ; reservations concerned Article 14 and the entire convention (in conformity with clauses contained in Arts 9, 15 and 16).[9]

22. European Convention on Customs Treatment of Pallets used in International Transport of 9 December, 1960 ; reservation concerns Article 11, paragraphs 2 and 3.

23. Single Convention on Narcotic Drugs of 30 March, 1961 ; reservations submitted to Articles 12, paragraphs 2 and 3, Article 13, paragraph 2, Article 14, paragraphs 1 and 2 and Article 31, paragraph 1 (b).

24. Convention on the Conflict of Laws relating to the Form of Testamentary Dispositions of 5 October, 1961 ; reservation relates to the entire convention (in accordance with Art. 12).[10]

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[8] Dz.U., 1970, No. 28, item 222.

[9] Dz.U., 1972, No. 25, item 183.

[10] Dz.U., 1969, No. 34, item 284.

25. Amendments to the International Convention for the Prevention of Pollution of the Sea by Oil of 11 April, 1962 ; reservation concerned the amendment to Article XIV.[11]

26. Convention on Offences and Certain Other Acts Committed on Board Aircraft of 14 September, 1963 ; reservation submitted to Article 24, paragraph 1.[12]

27. International Convention on the Elimination of All Forms of Racial Discrimination of 7 March, 1966 ; reservation formulated in respect to Article 22.

28. Convention for the Suppression of Unlawful Seizure of Aircraft of 16 December, 1970 ; reservation concerned Article 12, paragraph 1.[13]

The following are treaties that have been signed only by Poland with reservations :

1. Agreement on Special Equipment for the Transport of Perishable Foodstuffs and on the Use of such Equipment for the International Transport of some of those Foodstuffs of 15 January, 1962 ; reservation concerns Article 12, paragraphs 2 and 3.

2. European Agreement concerning the Work of Crews of Vehicles Engaged in International Road Transport (AETR) of 19 January, 1962 ; reservation concerns Article 22, paragraphs 2 and 3.

3. Convention on Road Traffic of 8 November, 1968 ; reservation in respect to Article 52.

4. Convention on Road Signs and Signals of 8 November, 1968 ; reservation concerns Article 44.

5. European Agreement concerning the Work of Crews of Vehicles Engaged in International Road Transport (AETR) of 1 July, 1970, reservation concerns Article 20, paragraphs 2 and 3.

6. Convention on Psychotropic Substances of 21 February, 1971 ; reservations were made in respect to Article 19, paragraphs 1 and 2, and Article 31, paragraph 2.

Only eight of the above mentioned treaties do not contain reservation clauses. They are : Convention on Privileges and Immunities of the Specialized Agencies, Genocide Convention, four Geneva Convention on the Protection of War Victims, Convention on the High Seas and Amendments to the Anti-Pollution Convention.

All the remaining treaties contain a clause which permits certain reservations. When submitting a reservation Poland always abided by the requirements formulated in the clauses. But one must add that in one case the reservation concerned the reservation clause itself (the reservation

[11] Dz.U., 1969, No. 27, item 212.

[12] Dz.U., 1971, No. 15, item 147.

[13] Dz.U., 1972, No. 25, item 181.

in respect to Article VII of the Convention on the Political Rights of Women).

On analysis of Polish reservations, it may be stated that the most numerous reservations are those that exclude the judicial and arbitration clauses from the scope of obligations accepted by Poland. Such reservations were submitted to 25 of the above specified treaties.

Beside these, reservations have also been sporadically submitted to the other final clauses. Poland formulated one reservation to the colonial clause (Genocide Convention) and one to the participation clause which discriminated certain States (Amendment to Anti-Pollution Convention).[14]

These three reservations, due to the character of the provisions to which they pertain,[15] do not result in the normal legal and practical consequences and have rather the meaning of political protest.

The remaining Polish reservations concern the merits of the treaties. Among these, two categories may be distinguished. Reservations concerning single, clearly indicated treaty provisions belong to the first category. Accordingly, to all four Geneva Conventions on the Protection of War Victims, Poland submitted the following reservations: the Detaining Power's request that a Neutral State or appropriate organization undertake protectory functions could be recognized as legal after obtaining the consent of the State whose citizens are to be subjected to this protection (reservation to Article 10, 10, 10, and 11 respectively). Furthermore to the third and fourth of these conventions Poland submitted reservations recognizing the responsibility of States transferring, respectively, prisoners of war and civilian persons—to other State—for their implementation also in the period when the prisoners of war or civilian persons are in the custody of the Power accepting them (reservations to Arts. 12 and 45 respectively). Poland submitted one more reservation to the third of the mentioned conventions. She refused those prisoners of war who were convicted of war crimes and crimes against humanity, benefits embodied in the convention (reservation to Art. 85). Besides, Poland submitted a reservation extending the rule expressed in Article 9 of the Convention on the High Seas (this article establishes immunity from jurisdiction for all state-owned nonmerchant ships) to all ships owned or operated by a State.

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[14] In this matter Poland more frequently submitted declarations which were not formally reservations—see Doc. ST/LEG/SER.D/5.

[15] Compare Art. 24, para. 4 of the Vienna Convention on the Law of Treaties of 23 May, 1969 which reads as follows: "The provisions of a treaty regulating the authentification of its text, the establishment of the consent of States to be bound by the treaty, the manner or date of its entry into force, reservations, the functions of the depositary and other matters arising necessarily before the entry into force of the treaty apply from the time of the adoption of its text."

In the case of the Convention concerning Customs Facilities for Touring a reservation was submitted in respect to the provision stipulating that souvennirs of a definite value may be imported without fulfilling normal formalities (reservation to Art. 4).

In turn, in the case of the Single Convention on Narcotic Drugs and the Convention on Psychotropic Substances, all Polish reservations concern the provisions which impose certain obligations upon third States, which have been deprived of the right to become contracting parties to these treaties due to the discriminatory participation clauses.

The second category of Polish reservations concerning the merits of the treaties are addressed to the entire treaties, but also, as a matter of fact (which may be established after conducting an interpretation) purporting "to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State."[16]

These are reservations which refer to the scope of application of the treaties. All of them were submitted on the basis of explicit authorization formulated in the reservation clauses. This refers to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Convention relating to the Unification of Certain Rules concerning Collisions in Inland Navigation and the Convention on the Conflict of Laws relating to the Form of Testamentary Dispositions.

Analysing the legal meaning of the Polish reservations, it ought to be stressed that the greater majority aim at excluding the legal effects of treaty provisions in respect to Poland. A few are aimed at limiting the legal effects of the individual provisions. Only three reservations aim at extending the legal effects and they are as follows : reservation to Article 9 of the Convention on the High Seas[17] and the identically worded reservations to the third and fourth Geneva Conventions on the Protection of War Victims (reservations to Arts 12 and 45 respectively). These two reservations extend responsibility for the executing of the Convention—already after transferring the protected persons—also upon the transferring State. In other words, Poland ensured herself the right to recognize the responsibility of both the receiving as well as the transferring State.

In Poland's practice to date there have been no reservations that have aimed at changing *sensu stricto* the legal effects of given treaty provisions.[18]

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[16] See description of a reservation contained in the Vienna Convention on the Law of Treaties ; Doc. A/CONF.39/27, Art. 2, para. 1(d).

[17] For further information see R. SZAFARZ, *op. cit.*, pp. 295—296.

[18] Reference is made here to reservations which aim at substituting obligations, when—at the same time—the scope of both obligations (i.e., that arising out of a treaty and that arising out of a reservation) are not identical in any of their parts.

All Polish reservations have been formulated clearly and in a way that leaves no doubt as to their scope and content. It is specially worth noting that there is not one reservation in Polish practice which, as is often the case of other countries, would generally subject the implementation of a treaty to its conformity with internal law (which is, as is well known, subject to optional changes).

All this is, among others, a manifestation of Poland's respect for the principle of good faith in international relations.

Coming to the formal and procedural matters connected with the submission of Polish reservations, one must underline that they were submitted upon various occasions—when signing, ratifying, accepting and acceding. If Poland's signature was accompanied by a reservation to a treaty which required ratification these reservations were, as a rule, confirmed or repeated when depositing the documents of ratification. This was abandoned only in one single case and that was in the case of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The problem arises whether from the point of view of international law the Polish statement made at signing " With reservation as mentioned in Article I, paragraph 3 " is (may be) further legally effective. In this connection the problem ought to be solved whether in the given period i.e., at the end of the 1950's and beginning of the 1960's, there existed a legal requirement to confirm, at ratification, a reservation made at signing.

To begin with it is necessary to state that at that time there was no general treaty norm regulating this matter. Furthermore not one single reservation clause inserted in the treaties dealt with this matter.[19]

The practice of States in this respect has undergone a certain evolution. While in the initial period (second half of the 19th and beginning of the 20th century) reservations were not confirmed, the inter-war period was marked by a growing number of confirmations and this became a rule after the Second World War.[20] This evolution has been connected with more extensive changes occuring in the procedure of concluding treaties. Ratification, which was recognized as a confirmation of the signature (in other words a confirmation of the treaty to such an extent as embraced by the

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Compare for example the well known reservations substituting different signs for Red Cross (i.e., Red Crescent, Red Lion and Sun, Red Shield of David) formulated to the different Red Cross Conventions.

[19] This problem was regulated for the first time, introducing the requirement of confirmation, in the Convention on Road Traffic (Art. 54, para. 5) and in the Convention on Road Signs and Signals (Art. 46, para. 4)—both of November 8, 1968.

[20] See statistical data compiled by the UN Secretary General concerning this last period—UN Doc. A/5687, p. 88, para. 7.

signature) began to be recognized as a confirmation of the treaty as such. In addition to this, aside from the procedure of simultaneous signing of the treaty, the practice of *signature differeé* was introduced.

It remains to be established whether and when eventually did this practice lead to the creation of a customary norm establishing an obligation to confirm reservations. In order to do this one must analyze the *opinio juris* of States, also in those cases when they acted in a different manner.

Among the cases of non-confirmation of reservations, the majority comprise those that are difficult to interpret univocally (as in the case of the Polish reservation mentioned above). The intentions of States, different as a matter of fact, manifested themselves only in three cases. Venezuela recognized that her reservations made when signing the Vienna Convention on Consular Relations of 24 April, 1963 and not confirmed upon ratification, are to be considered as withdrawn. On the other hand Italy (The Convention relating to the Status of Stateless Persons of 28 September, 1954) and France (in respect to the Convention on the Political Rights of Women) considered that their reservations were still legally effective in spite of the fact that they were not confirmed when depositing the documents of ratification. This is substantiated by the fact that they withdrew certain reservations a few years after the treaties became binding upon these States. In other words, till the time they withdrew these reservations these States considered them to be valid.

These cases occured at the end of the 1950's and beginning of the 1960's which seems to substantiate the view that the requirement of confirmation was not yet firmly established.

Generally speaking, the views of States as a whole, on this matter manifested themselves clearly only during work on the codification of the Law of Treaties : in the Governmental commentaries to the drafts of the International Law Commission (further referred to as ILC) as well as at the Vienna Conference ; that is only in the middle and towards the end of the 1960's. Not one State questioned the necessity of confirming reservations and so the appropriate provision of the ILC draft was included without protests in the Vienna Convention on the Law of Treaties (Art. 23, para. 2).

Among the treaty depositaries an opinion prevails that reservations must be confirmed, but even here one meets with exceptions and lack of decision.[21]

Up to the present the official publication of the UN Secretariat—ST/LEG/SER.D/5 (see footnote 2) quotes confirmed as well as nonconfirmed reservations and both categories are treated equally. Among others, the Polish reservation presented here is also mentioned there.

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[21] See UN Doc. A/5687, pp. 56—58.

The stand of the Secretary General of the UN is not of course authorative either in this or other such cases due to the UN General Assembly Resolution 598 (VI) and 1452 (XIV) which oblige him to refrain from a legal evaluation of the submitted reservations, objections, etc. On the other hand, this proves that the necessity of confirming reservations has not been established to such an extent that the Secretary General could consider nonconfirmed reservations to be withdrawn—without risking the challenge that he has overstepped the limits of his authority. If a clearly formulated norm existed in this respect the stand of the Secretary General in respect to nonconfirmed reservations would not comprise a " prejudgement " mentioned in the Resolution.

In connection with the practice of the Secretary General it is particularly interesting to observe the complete indifference of States in respect of the continuous publication—in documents reflecting the status of treaties—of nonconfirmed reservations (on equal footing with the ones that have been confirmed).

Various opinions have been voiced in literature concerning the necessity of confirming reservations.[22]

After an initial period of indecision[23] the requirement of confirmation absolutely prevailed in the ILC. It was formulated already in 1951 in a report presented at the UN General Assembly by the ILC.[24] Justifying the necessity of confirming reservations H. Waldock stated in his report that : " clearly, different opinions may be held as to what exactly is the existing rule on the point, if indeed any rule exists at all. But [he] suggests that a rule requiring some form of confirmation of the reservation in the instrument of ratification is desirable in the interest of certainty, and is more in harmony with the modern concept of the ratification process as a confirmation not of the signature but of the treaty that the rule proposed in the Harvard Research Draft [. . .]."[25]

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[22] The following favour confirmation : *Kurs meždunarodnogo prava*, vol. 4, Moskva, 1968, p. 159 ; H. Bokorne-Szegö, " A nemzetközi szerzödesekhez füzottfentartasok ", Budapest, 1961, p. 286 ; indirectly also M. Lachs, *Umowy wielostronne* [*Multilateral Treaties*], Warszawa, 1958, p. 162. Those against : D. Kappeler, *Les reserves dans les traites*, Basel, 1958, p. 19 ; M. Khadjenouri, *Reserves dans les traites internationaux*, Geneve, 1953, pp. 48—49 ; I. Detter, *Essays on the Law of Treaties*, London, 1967, p. 61 ; D. S. Lichshein, *Las reservas en los tratados multilaterales*, " Revista de Ciencias Juridicas y Sociales," 1959, No. 100, p. 154. See also D. Kappeler's compilation of opinions, *ibid.*, p. 19.

[23] See report presented by J. L. Brierly—YILC, vol. 2, 1950, p. 242 ; see also M. O. Hudson's opinion—YILC, vol. 1, 1950, p. 91.

[24] See YILC, vol. I, 1951, p. 382 and vol. 2, p. 131.

[25] YILC, vol. 2, 1962, p. 66.

During the discussion at the ILC this necessity was only once undermined[26] and was only once expressly supported.[27] The requirement of confirming reservations was included both in the provisional as well as the final draft of the ILC.[28] But it is necessary to underline that there is nothing in the materials of the ILC which would prove the thesis that in the opinion of the Commission this comprises a simple reflection of an already existing customary rule. Furthermore the above-mentioned opinion of H. Waldock proves exactly the opposite.

The entire, above-mentioned analysis leads to the conclusion that in spite of a clear tendency to strengthen the requirement of confirmation, one cannot say that at the end of the 1950's and beginning of the 1960's this requirement was legally binding in the form of customary norm.

It appears that this status was granted to it only at the Vienna Conference devoted to the codification of the Law of Treaties (1968—1969). The Conference and its final result in the form of a convention played in this case the role of a factor " consolidating " and " crystallizing " the emergent customary law, in the sense described in the oral statement of Denmark and Netherlands as well as in the sentence of the International Court of Justice in the North Sea Continental Shelf cases.[29]

Refering this to the Polish reservation in question, it is possible to state that there are no legal obstacles in recognizing its effectiveness. In this case the intent which accompanied the non-confirmation of the reservation is decisive.

Even if we were to accept the fact that in the case of Italy and France non-conformity with the requirement of confirming is connected with the reservation clauses contained in the respective treaties (they envisage, as one of the alternatives, the possibility of submitting a reservation at signing) one must add that the case is identical in respect of the Polish reservation. Article 1, paragraph 3 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards also stipulates that reservations may be submitted " When signing, ratifying or acceding to this Convention [. . .]."[30]

This strengthens the above presented thesis. It seems that it is not weakened even by the wording of the customary ratification formula which states that the Convention is ratified " as a whole and each provision

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[26] See K. M. YASSEEN, YILC, vol. 1, 1965, p. 168.

[27] See opinion of G. I. TUNKIN, YILC, vol. 1, 1965, p. 167.

[28] See Art. 18, para. 2(b) of the provisional draft (YILC, vol. 2, 1962, p. 176) and Art. 18, para. 2 of the final draft (Supplement No. 9/A/6309/Rev. I, p. 40).

[29] ICJ, North Sea Continental Shelf Cases, 1969, Judgement of 20 Feb., 1969, pp. 38—41.

[30] UNTS, vol. 330, p. 38.

contained in it."[31] It seems that in international relations and even in internal ones[32] such a formula is not considered to refer to reservations. In the case of reservations separate and clear statements are required.

The following two side conclusions result from the question discussed above.

Firstly, since the necessity of confirmation is *lex lata,* in all probability since the Vienna Conference devoted to the codification of the Law of Treaties, in the publications of the UN Secretary General reflecting the status of Treaties ST/LEG/SER.D (6, 7, 8, . . . , etc) it should clearly be stated in each case whether the reservations submitted at signing were confirmed at ratification, acceptance or approval. At the same time, treaties containing a clause providing, as one of the possibilities, the submission of reservation at signing (when the treaty requires a two-stage procedure in consenting to be bound by it) should be treated on equal footing. For in practice, also in these cases reservations are usually confirmed, while neither in the framework of the ILC, nor at the Vienna Conference has this category of cases been regulated differently.

Secondly, the depositary, and especially the UN Secretary General, should seek the opinion of the States which in the period preceding the Vienna Conference did not confirm the reservations submitted at signing, in respect to the intended legal effect of this non-confirmation.

The deliberations in this part of the article should be supplemented with the fact that, to date, not one Polish reservation has been withdrawn.

The Attitude of Other Parties to Polish Reservations

In the vast majority of cases, Polish reservations were accepted by other parties to the treaties. According to the prevailing practice this was tacit consent. In accordance with the long-standing customary rule of international law[33] in relations between Poland and these countries the appropriate treaties are binding in the form modified by reservations (on the basis of the reciprocity principle). Accordingly, depending upon the type of reservation, the given provision of the treaty will not be binding (in the case of excluding reservations), will be binding only to a limited

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[31] Dz.U., 1962, No. 9, item 41.

[32] For example the statement of our Council of State concerning the accession to the European Convention on Customs Treatment of Pallets used in International Transport contains an identical formulation (Dz.U., 1969, No. 33, item 280). In turn the governmental declaration concerning this convention states that Poland acceded with reservations (*ibid.*, item 281).

[33] Confirmed in Art. 21, para. 1 of the Vienna Convention on the Law of Treaties.

extent (in the case of limiting reservations) or will be binding in a broader sense (in the case of extending reservations).

In the case of 11 treaties Polish reservations were met 44 times with the objections of certain States. This concerns 4 treaties containing a reservation clause (regulating among others the effects of objections) and 7 treaties that did not contain such clauses.

The following treaties belong to the first group :

1. Convention on the Political Rights of Women ; objections were submitted by Canada, Taiwan, Denmark, Ethiopia, Norway, Pakistan, Sweden and Israel.

2. Convention concerning Customs Facilities for Touring ; objections expressed by Italy and Switzerland.

3. Additional Protocol to the abovementioned Convention, relating to the Importation of Tourist Publicity Materials—objected to by Switzerland.

4. Customs Convention on the Temporary Importation of Private Road Vehicles—objected to by Switzerland.

Since the reservation clause contained in the Convention on the Political Rights of Women (Art. VII) provides maximum effect on each individual objection (i.e., the complete lack of treaty relations between the reserving and objecting States) this convention is not binding between Poland and all the above-mentioned objecting States.

A less univocal situation exists in respect to the remaining three treaties. Identical, extensive (containing 7 points) reservation clauses contained in these treaties do not regulate the effects of single objections. It is stated on the other hand that :

" Reservations [...] shall not be admitted if objection is expressed by one-third of the signatory States or of the Contracting States as hereinafter provided." (Art. 20, para. 2, Art. 14, para. 2, Art. 39, para. 2 respectively).

Of course, due to the insignificant number of objections, the consequence provided for here is not taken into account. But the problem still remains whether the mentioned objections cause no legal effects or do but bear minimum effect (because only this eventuality could be taken into account, in accordance with the prevailing presumption, see below).

In order to answer this question it is necessary to check whether the lack of distinct provisions regulating clearly the effects of single objections comprises a gap which is " filled " by general rules of international law concerning objections or whether this lack is immaterial in view of the fact that the interpretation of the clauses—in their generality—show the intention of the parties not to attach any legal effects with objections that are less numerous than provided for in the quoted paragraph 2.

The key to resolving the whole problem lies in the final result of the interpretation of the appropriate reservation clauses. Only then when nothing else results from them, even indirectly, we shall be dealing with the above-mentioned general norms and more specifically—the minimum effect.

An analysis of the clauses leads us to conclude that the authors of the respective treaties were first of all interested in defining the conditions under which the reserving States could participate in them. On the other hand, it is clear that their aim was also to achieve such a solution in respect to reservations which would quarantee a uniform position of all interested States in relation to the reserving States. If such is the case, one must concede that from the mentioned reservation clauses one may interpret that it was the concerned parties' intention not to attach any specific legal effects to objections expressed by less than one-third of the signatory States.

This leads us to the simple conclusion that all 4 objections in respect of Poland's reservations to the above presented treaties are without any legal effect. The treaty relations between Poland on the one hand, and Italy and Switzerland on the other are such as if these States accepted our reservations, i.e., they are based on the reciprocity principle (para. 7 of the mentioned clauses).

But is must be added that due to the type of reservations (excluding reservations) the practical result would be the same (the non-binding of the provision affected by the reservation in relations between the reserving and objecting States to the extent of a reservation) also then if we accepted the fact that the objections have a minimum effect. Nevertheless the point in the presented reasoning lies, in my opinion, in the fact that it defines the legal positions occupied by Poland, Italy and Switzerland in respect to the mentioned treaties.

The following treaties belong to the second group :

1. Convention on the Privileges and Immunities of the Specialized Agencies ; an objection was expressed by the United Kingdom of Great Britain and Northern Ireland.

2. Convention on the Prevention and Punishment of the Crime of Genocide ; objections were expressed by : Australia, Belgium, Brazil, Taiwan, Cuba, Ecuador, Greece, the Netherlands and the United Kingdom of Great Britain and Northern Ireland.

3. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field ; an objection was expressed by the USA.[34]

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[34] UNTS, vol. 213, p. 378.

4. Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea ; an objection expressed by the USA.[35]

5. Geneva Convention relative to the Treatment of Prisoners of War ; objections were expressed by : USA,[36] United Kingdom of Great Britain and Northern Ireland,[37] Australia,[38] New Zealand,[39] and Barbados.[40]

6. Geneva Convention relative to the Protection of Civilian Persons in Time of War ; objections were expressed by USA,[41] United Kingdom of Great Britain and Northern Ireland,[42] Australia,[43] New Zealand[44] and Barbados.[45]

7. Convention on the High Seas ; objections were expressed by Australia, Denmark, Fiji, Japan, Madagascar, Netherlands, Thailand, Tonga, United Kingdom of Great Britain and Northern Ireland and USA. It is not clear whether Israel's objection refers to Poland's reservation since it was formulated extremely vaguely.[46]

In some cases the objecting States motivated their objections. For example the United Kingdom of Great Britain and Northern Ireland stated that " in its view " Poland's reservations to the Convention on the Privileges and Immunities of the Specialized Agencies " are not of the kind which intending parties to the Convention have the right to make." Brazil, Taiwan and the Netherlands motivated their objections to Poland's reservations made to the Genocide Convention as well as Madagascar her objection to Poland's reservation to the Convention on the High Seas on the grounds of " the incompatibility of Polish reservations with the object and purpose of the treaty."

Comparing these evaluations with the contents of the Polish reservations one gets the impression that they are groundless. The most striking is the description of the Polish reservation to the colonial clause permiting the limitation of the territorial scope of the Genocide Convention as " incompatible " (objections of Brazil and Taiwan).

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[35] *Ibid.*, p. 382.

[36] *Ibid.*, p. 383.

[37] UNTS, vol. 278, p. 267 (concerning reservations to Arts 12 and 85).

[38] UNTS, vol. 314, p. 334 (concerning reservations to Arts 12 and 85).

[39] UNTS, vol. 330, p. 357 (concerning reservations to Arts 12 and 85).

[40] UNTS, vol. 653, p. 454 (concerning reservations to Arts 12 and 85).

[41] UNTS, vol. 213, p. 384.

[42] UNTS, vol. 278, p. 267 (concerning a reservation to Art. 45).

[43] UNTS, vol. 314, p. 334 (concerning a reservation to Art. 45).

[44] UNTS, vol. 330, p. 357 (concerning a reservation to Art. 45).

[45] UNTS, vol. 653, p. 454 (concerning a reservation to Art. 45).

[46] The objection of Israel states that it concerns all reservations " incompatible with the purpose and objects of this Convention ", using as an example the reservation of Tunisia. In the proceeding deliberations this objection is excluded.

Certain acts of objection define their effects.

The minimum effect (the treaty is binding in relations between the reserving and objecting States with the exception of the provision affected by the reservation to the extent of this reservation) was expressly foreseen in all acts of objection submitted in respect to Polish reservations concerning the Geneva Convention on the Protection of War Victims, as well as in the objection of Denmark, pertaining to the Convention on the High Seas. The same effect was provided for in a special explanatory note presented by the USA—some time after expressing her objection—in connection with the Geneva Conventions on the Law of the Sea od 1958. This note embraced also the Polish reservation made in respect of the Convention on the High Seas.

The maximum effect (the complete non-existence of treaty relations between the reserving and objecting States) was clearly or implicitly (by pointing out the " incompatibility " as the grounds for objection) foreseen in the following acts of objection : Brazil's, Taiwan's and the Netherland's, concerning Polish reservations to the Genocide Convention and in the act of Madagascar in connection with the reservation to the Convention on the High Seas.

It must be accepted that all remaining objections according to the generally binding presumption, exert minimum effects.[47]

In the case of objections of a maximum effect the type of reservation to which it refers to has no bearing upon the form of relations between the reserving and objecting States ; irrespective of the kind of reservation, always the treaty in its entirety is not binding between the States in question.

It is a different matter in the case of objections of the minimum effect. The general principle that the treaty is binding between the reserving and objecting States with the exception of the provision affected by the reservation, to the extent of this reservation, leads us to different legal consequences depending on whether we have to do with a reservation excluding, limiting or extending the legal effects of the provisions of the treaty. In the case of an excluding reservation the whole provision embraced by the reservation is not binding between the reserving and objecting States. Such is the case in the relations between Poland and the United Kingdom of Great Britain and Northern Ireland in respect to the Convention on the Privileges and Immunities of the Specialized Agencies ; as well as between Poland and Australia, Belgium, Cuba, Ecuador, Greece

[47] For a general outline concerning the effects of an objection and presumption binding in this question see R. SZAFARZ, *op. cit.*, pp. 305—312.

and the United Kingdom of Great Britain and Northern Ireland in respect to the Genocide Convention.

In the case of reservations which limit the legal effects of the treaty's provision only part of the provision not embraced by the reservation is binding between the reserving and objecting States. Such is the situation between Poland and the USA, Australia, the United Kingdom of Great Britain and Northern Ireland, New Zealand and Barbados in respect to the Geneva Convention relative to the Treatment of the Prisoners of War (in connection with the Polish reservation to Art. 85).

It is not difficult to notice that due to the type of the mentioned reservations the practical effect of an objection of a minimum effect is the same as the effect of acceptance.

A specific situation exists in respect to the identical Polish reservations to the four Geneva Conventions on the Protection of War Victims submitted to Articles: 10, 10, 10, 11 respectively. Poland subjects the application of these provisions to additional circumstances (i.e., the previous consent of the State whose citizens are to be protected). In formulating this condition Poland in a way limited the scope of applicability of these provisions in respect to herself.[48] In this sense these are limiting reservations. Nevertheless, an objection of a minimum effect results in the non-binding of all provisions affected by the reservation and not only their parts since the USA objected to the Polish *sine qua non* condition of the application of the respective provisions. Of course, in this situation the practical result of the objection of a minimum effect is not equal to the acceptance of the reservation.

In the case of reservations that extend the legal effects of the provision of the treaty, the provision affected by the reservation is fully binding in relations between reserving and objecting States. The situation is such as if the reservation had never occured. Such is the case in respect to relations between:

— Poland and the USA, United Kingdom of Great Britain and Northern

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[48] Accordingly it seems that G. PILLAUD is mistaken when he sugests that declarations of this type are not reservations in the understanding of the draft article on the Law of Treaties prepared by the ILC (see C. PILLAUD, *Les reserves aux Conventions de Geneve*, "Revue Internationale de la Croix Rouge," Juillet, 1965, No. 559, pp. 315—324). In my opinion Art. 2, para. 1(d) of this draft stating among others that a reservation means a statement purporting "to exclude or to vary the legal effect of certain provisions of the treaty [...]" embraces in its scope also this category of declarations. The same concerns the description of a reservation contained in the Vienna Convention on the Law of Treaties (Art. 2, para. 1(d)), which does not differ substantially from the draft of the ILC.

Ireland, Australia, New Zealand and Barbados in respect to Article 12 of the Geneva Convention relative to the Treatment of Prisoners of War ;

— Poland and the abovementioned States—in respect to Article 45 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War ;

— Poland and Australia, Denmark, Fiji, Japan, the Netherlands, Thailand, Tonga, the United Kingdom of Great Britain and Northern Ireland and the USA in respect to the Convention on the High Seas.

In the case when the extending reservation is the only reservation submitted by a State in respect to a given treaty, the treaty itself is binding between the reserving and objecting States as such. Such was the case in connection with the Polish reservation to the Convention on the High Seas.

Endeavouring to present the full state of treaty relations between Poland and other States which expressed their objections to her reservations it is necessary to study the problem of State succession in respect to the objections. If we were to say that together with succession in respect to treaties one automatically inherited the objections, the circle of States objecting to Polish reservations would grow at least by a dozen or so additional States.

In the contemporary international law there is neither treaty norm, nor customary rule which would regulate this matter in a general manner. Also in the practice of States, as of recent, the question of inheriting objections or submitting objections at the moment of succession was passed over in silence. This problem emerged for the first time in connection with the succession of Barbados in respect to the Geneva Convention on the Protection of War Victims in 1968. A declaration was attached to the notification of succession in which Barbados submitted an identical objection to that submitted earlier by the United Kingdom of Great Britain and Northern Ireland.[49]

Two other cases concern the Geneva Convention on the High Seas. When Fiji notified of her succession, she withdrew the objection of the United Kingdom of Great Britain and Northern Ireland (of course to such an extent as it concerned Fiji) to the reservation of Indonesia, replacing it with her own statement and adding that it

"maintained all other objections communicated to the Secretary General by the United Kingdom Government to the reservations made by certain States with respect to this Government."

In turn Tonga, presenting a similar declaration in respect of Indonesia's reservation stated that it

[49] UNTS, vol. 653, p. 454.

"affirms that in the absence of any other statement expressing a contrary intention, it wishes to maintain all objections communicated to the Secretary General by the United Kingdom to the reservations or declarations made by States with respect to any convention of which the Secretary General is the depositary."

In all remaining cases the situation is unclear. After all what kind of presumption should one connect with the complete lack of any allusion to objections in a notification of succession ?

This problem has merely been presented in literature, without any attempt at solving it.[50]

In a report for the International Law Association presented in 1968 in Buenos Aires, D. P. O'Connell proposed that a solution should be accepted under which the successor State should automatically—*ex lege*—inherit all the objections of his predecessor.[51]

The Conference of the ILA did not take up this matter pending the consideration of the whole problem of reservations by the UN Conference on the Law of Treaties.

H. Waldock in his report for the ILC, which is occupied at present with the problem of State succession, proposed a *de lege ferenda* solution in accordance with which a presumption would speak on behalf of inheriting objections unless notifications of succession contained some other objections.[52] In his commentary to this proposal H. Waldock pointed out that there are several reasons for such a formulation of a presumption in this question :

(1) the objection could be communicated by the colonial Power in the interest of the territory of the newly independent State ;

(2) such a presumption better safequards the interests of the new State ;

(3) if its intentions are different, it can always explicitly withdraw the objection when notifying succession or later ;

(4) as a rule objections are of a minimum effect—therefore such a formulation of the presumption in the question of succession would not limit the treaty relations between States to much.[53]

It seems that these arguments may be confronted with the following counter arguments :

(1) As H. Waldock himself admits the non-inclusion in the notification on succession of any allusion to objections is a sign on behalf of new States

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[50] See D. P. O'Connell, *Recent Problems of State Succession in Relation to New States*, "Recueil des Cours," vol. 2, 1970, p. 186 ; H. Bokor-Szegő, *New States and International Law*, Budapest 1970, p. 111.

[51] Quotation in YILC, vol. 2, 1969, p. 49, para. 13.

[52] YILC, vol. 2, 1970, pp. 46—47, Art. 9.

[53] *Ibid.*, pp. 51—52.

that they are not interested in the objections expressed by the colonial Powers.[54]

(2) Practice shows that the colonial Powers communicated objections in the first place in their own interest.

(3) In the solution itself proposed by H. Waldock there exists a certain contradiction since a quite opposite presumption is connected with the lack of allusion to the objections of the colonial Power depending on whether the notification on succession contains new objections or not.

(4) Since the concept of succession emerging from the practice of States and approved by the ILC is closer to accession (only *ex tunc* and not *ex nunc*) than succession in the understanding of internal law,[55] it would be advisable to adopt a solution harmonizing with the provisions of the Vienna Convention on the Law of Treaties. This would anticipate, among other things, the necessity of communicating clear declarations in respect to all objections (i.e., both inherited as well as new).

It is hard to say which solution in this matter will gain the status of legal norm. The interests of States will decide. Although the presently prepared convention regulating the law of succession in respect to treaties will, as such, refer only to those cases of succession which occur after the ratification of the convention it is, on the other hand highly probable that its separate provisions will play a role in the interpretation of the present facts in the field of succession.

None of the objections communicated in respect to Poland's reservations have as yet been withdrawn.

Polish Reaction to Reservations of Other States

In the vast majority of cases Poland accepted the reservations of other States, maintaining a passive attitude throughout the period appropriate for expressing objections. Only in two cases did the Polish stand towards reservations of other States take the form of objections.[56]

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[54] *Ibid.*

[55] The following elements bear witness to this : the complete voluntary character of succession, the lack of any presumption in this respect, the possibility of submitting new reservations (an often practice !), the possibility of expressing new objections, etc. Compare the discussion in the ILC (YILC, vol. 1, 1970, pp. 133—168), and specially S. Rosenne's remark (*ibid.*, p. 156, para. 71). See also Art. 9 of H. Waldock's draft together with commentary (YILC, vol. 2, 1970, pp. 46—52).

[56] I have omitted here the numerous Polish objections relating to declarations of the Federal Republic of Germany which are aimed at extending the legal force of treaties upon West Berlin, since it seems that this problem requires separate broad presentation.

One of them, communicated in 1969 concerned the first of two Tunisian reservations formulated when acceding to the Convention on the Recovery Abroad of Maintenance of 20 June, 1956, worded as follows:

"(1) Persons living abroad may only claim the advantages provided for in the Convention when considered non-residents under the exchange regulations in force in Tunisia."

In accordance with the reservation clause contained in this treaty (Art. 17) an obligation results in maximum effects i.e. the mentioned convention is not binding at all in relations between Poland and Tunisia.

The second Polish objection is mentioned in H. Waldock's report on State succession in respect to treaties. In this report he has included information about Poland's objection to Malta's reservation submitted in its notification on succession and concerning Article 3 of the Additional Protocol to the Convention concerning Customs Facilities for Touring, relating to the Importation of Tourist Publicity Documents and Materials.[57]

Malta's reservation was as follows:

"Notwithstanding Article 3 of the Additional Protocol the duty-free temporary importation into Malta of display material (e.g. showcases, stands and similar articles), sound recordings and flags, shall be subject to the making of a deposit with the Controller of Customs equivalent to the amount of duty payable on the goods allowed to be temporarily imported or to the giving of a security for such duty."

If this information published by H. Waldock is correct, it is surprising that this objection is not mentioned either in the UNTS or the Doc. ST/LEG/SER.D/1—5. Although this objection did not bring about any legal effect due to the wording of the reservation clause contained in this Protocol[58] such is after all the case of Switzerland's objection to Poland's reservation submitted to the same Protocol and this objection was mentioned both in the UNTS (vol. 367, p. 335) and in the ST/LEG/SER.D/5, (p. 232, footnote 8). In connection with this case one may conclude that the official publications of the UN Secretariat should practice uniform principles in publishing information on the status of treaties.

None of the quoted objections have been withdrawn by Poland, and it is very probable they will not remain the only ones in Polish practice. Analysing reservations formulated to treaties to which Poland may accede in the future, one must state that, bearing this in mind, special attention should be payed to one of the reservations submitted when acceding to the Vienna Convention on the Law of Treaties.

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[57] YILC, vol. 2, 1970, p. 49, para. 8.

[58] Compare argumentation on this problem in part II of this work.

It reads as follows :

" C—The Government of the Syrian Arab Republic does not in any case accept the non-applicability of the principle of a fundamental change of circumstances with regard to treaties establishing boundaries, referred to in Article 62, paragraph 2(a), inasmuch as it regards this as a flagrant violation of an obligatory norm which forms part of general international law and which requires the right of people to self-determination."

This reservation is open to objection on many grounds : logical, legal and political.

(a) The grounds for reservation (reference to the principle of self-determination of nations) has nothing to do with the disposition of the reservation. The question of a fundamental change of circumstances (and exceptions in the implementation of this norm) belongs to the problem connected with the denunciation, termination and suspension of valid treaties, while the problem of treaties inconsistent with the principle of self-determination of nations (in other words imposed by force, fraud, corruption of a representative, etc.) belongs exclusively to the question of invalidity of treaties. These are, after all, two completely different institutions of treaty law.[59] In other words if we have to do with, for example, a treaty establishing boundaries and concluded as a result of exerting force upon a given State, the State concerned may free itself from the effects of this treaty by establishing its invalidity and invoking the specific ground for this.

(b) Referring to the fundamental change of circumstances in such a situation it is not only legally wrong, but could also indirectly show that the victimized party considered the treaty to be valid and binding up to a certain moment and only in light of a changed situation wished to free itself from it in the future. This would not be in the interest of the State concerned. Another factor which would not be to the advantage of the interested State would be the taking of additional limitations since the freeing from an unlawfull obligation is made dependent upon the change of circumstances while there exist a possibility to impeach the validity of a treaty any time.

(c) From the above the conclusion may be drawn that the opinion

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[59] In respect to this question see statement of H. WALDOCK, Expert Consultant at the Vienna Conference on the Law of Treaties, *United Nations Conference on the Law of Treaties, First Session, Official Records*, p. 381, para. 31 and UN Doc. A/CONF.39/L.40/. Compare also statement of Afghanistan and Morocco submitted at the signing of the Vienna Convention on the Law of Treaties as well as the statement of the head of the Polish delegation to the Vienna Conference, Mr. E. WYZNER, (*United Nations Conference on the Law of Treaties, Second Session, Official Records, Twenty-Second Plenary Meeting*).

according to which the exclusion of treaties establishing boundaries from the scope of the principle of fundamental change of circumstances comprises " a flagrant violation of an obligatory norm which forms part of general international law [. . .] " is unjustified. Another argument that supports this thesis results from the confrontation of the definition " of an obligatory norm of general international law " and the fact that the disscused provision of the Vienna Convention was approved by the international community of States as a whole during the Vienna Conference. It is simply difficult to assume that over a hundred States represented at the Conference permited the inclusion in the Vienna Convention of a provision which would be incompatible with a such presently binding norm. At the plenary session of the conference, 93 States voted in favour of Article 62 (Art. 59 of ILC draft), 3 against and 9 abstained.

All this leads to the conclusion that the discussed reservation is groundless.

Final Remarks

Aside from detailed conclusions formed in the analytic section of this paper several thoughts of a general nature come to mind.

1. The fact that only in 8 cases Poland's reservations relate to treaties that do not contain any reservation clause proves that Poland is far from overusing the institution of reservations.

2. Polish reservations do not infringe upon the object and purpose of the respective treaties.

3. It is necessary, at the latest upon the Vienna Convention on the Law of Treaties entering into force, to revise the information on treaties and the way of publishing them in the Doc. ST/LEG/SER.D (6, 7, 8 . . . , etc) with the aim of adjusting them to the requirements of the Convention.

4. The non-existence of treaty relations between Poland and other States as a result of objections of a maximum effect does not in any way interfere with the further binding of appropriate norms of customary law in relations between Poland and those States.

5. The question of reservations and objections in the context of state succession requires further study.

6. It is to be expected that in the future Poland will have to make use of the possibility of submitting objections more often than has been the case till now. This is connected with the structural changes in the international community. As a result of these changes treaties more and more often possess progressive contents. It is reservations to such treaties that could cause Polish objections.

The Law on Special Missions

by MIECZYSŁAW PASZKOWSKI

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There are probably few equally mysterious terms in international law than that of " special missions." At first one is instinctively inclined to associate it rather with the activities of services other than the foreign service. And yet the International Law Commission of the United Nations adopted this very term as the most suitable for defining that particular form of representation which is used *ad hoc* by States in their mutual relations. It is true that in practice the term " delegation " is more frequently used. To define diplomatic representation—also used is the term " *ad hoc* diplomacy." It is necessary, however, to bear in mind that the term " delegation " is very wide. It covers all kinds of delegations, including those sent by States to the sessions of the organs of international organizations or to international conferences, whereas the term " special missions " in the meaning given to it by the International Law Commission refers only to official delegations sent by one State to another for the purpose of dealing with it on specific questions and performing in relation to it a specific task. Accordingly, a special mission is as a rule an institution set up within the scope of bilateral interstate relations. Given a great variety of special missions and the tasks performed by them, it would not always be correct or, anyhow, necessary to define them as " diplomatic," since the very concept of special mission involves representing one State in relation to another. Special missions deal with matters which fall within the competence of States as subjects of international law. Since the definition of " special missions " is one of the basic and at the same time one of the most controversial questions, we shall revert to this problem later. Here and now we have to pay some attention to the reasons which today prompt States so often to use special missions in their mutual relations.

As a rule, States maintain mutual relations through permanent diplomatic missions. The head of a permanent diplomatic mission is empowered fully to represent his State in relations with the State to which he is accredited. Diplomatic missions function as the normal channel for negotiations, especially those of a political character between the two States concerned. Concurrently, certain questions are dealt with through consular missions. Diplomatic and consular contacts are long established forms of international relations, but they are not the only ones. But since the main purpose of this paper is the presentation of certain basic issues concerning the problem of special missions, we must by-pass discussion on other forms of relations between States, such as, for instance, relations resulting from participation in an international conference or in international organizations.

States have various reasons for using special missions to settle specific questions. In fact, they are in practice the only possible form of immediate relations between two States having neither diplomatic nor consular relations. But even when diplomatic and consular relations exist, States resort to the use of special missions. Sometimes this is required by the character of the matter in question. Special high level missions often take part in important State ceremonies. On other occasions, to settle a specific question, it may be desirable to send an individual enjoying general respect and authority. But in most cases properly qualified persons are entrusted with the task of settling specific problems. In view of the steady increase in international transactions, permanent diplomatic missions are often not able to carry out all the tasks which arise from their relations with the State to which they are accredited. Further, it is necessary to stress that the development of modern means of transport and communication facilitates and notably encourages the use of this flexible form of representation known as special mission. Summing up, we can state that the essential and objective reasons are decisive as to the appearance today in international relations of, apart from permanent diplomatic missions, also all kinds of *ad hoc* special missions, delegations, itinerant ambassadors or special envoys.

In spite of the growing number and importance of special missions, especially since the Second World War, their legal status has not been yet settled. Rules concerning such missions were shaped by fragmentary regulations of the municipal law of some States, by precedent, custom and practice.[1]

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[1] This problem was discussed more widely by M. Bartos in his lecture delivered at the Hague on *The Status of Special Missions* (Academy of International Law, "Recueil des Cours," vol. 108) and by M. R. Donnarumma in his monograph entitled *La Diplomazia "Ad Hoc,"* (Naples 1968).

The need for codification of the rules on special missions was recognized by the International Law Commission during its work on the codification of rules covering diplomatic relations. The work of the Commission served as a basis for the adoption of the Vienna Convention on Diplomatic Relations in 1961. However, it became evident at the Vienna Conference that the work of the International Law Commission on the codification of rules on special missions was not sufficiently advanced. Further, there was a lack of unanimity as to the form in which such a codification should be carried into effect. In this connection, the Conference, in a separate resolution, recommended that the General Assembly of the United Nations should refer the topic back to the International Law Commission for further study in the light of the Vienna Convention on Diplomatic Relations.[2] This recommendation was accepted by the General Assembly which on 18 December, 1961, requested the International Law Commission further to study the subject of special missions and to report to the General Assembly.[3]

The International Law Commission presented the results of its work on the subject of special missions to the General Assembly at its XXII session in 1967.[4] The General Assembly then found that the draft articles on special missions elaborated by the Commission might serve as a basis for an international convention on the subject. The task of preparing such a convention was entrusted directly to the Sixth Committee (Legal Questions) of the General Assembly. The Sixth Committee devoted time to the matter during two consecutive sessions of the General Assembly (sessions XXIII and XXIV). The Convention was adopted by the General Assembly and opened for signature on 16 December, 1969.[5]

The object and purpose of the Convention is the codification of all basic matters connected with the exchange of special missions.

The Preamble to the Convention specifies the motives and circumstances which led to the codification of the law on special missions. It may be noted that the Preamble refers to the basic aims and principles of the United Nations Charter such as the sovereign equality of States, the maintenance of international peace and security, and the development of

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[2] Doc. A/CONF. 20/10/Add. 1.

[3] Resolution 1687/XVI/, Question of Special Missions.

[4] GA Official Records : *Twenty-Second Session, Supplement No. 9 /A/6709/Rev. 1/ : Report of the International Law Commission on the Work of its Nineteenth Session, 8 May—14 July, 1967.* The special rapporteur of this subject at the International Law Commission was Professor Milan Bartos (Yugoslavia). Later, during the examination of the Commission's draft by the General Assembly, Professor Bartos acted as an expert-consultant.

[5] The text of the Convention is to be found in the Annex to the Resolution 2530(XXIV).

friendly relations and cooperation between States. Referring to two previous conventions which gave effect to the codification of diplomatic and consular law—that is, to the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations—the Preamble expresses the conviction that the Convention on Special Missions will constitute the completion to those two conventions and will also contribute to the development of friendly relations between States whatever their constitutional and social systems.

Several terms were defined by Article 1 of the Convention. Apart from the definition of a "special mission," various categories of persons joining the staff of special missions were determined. Since the definitions included in Article 1 have been adopted "for the purpose of the Convention," they have no general significance and are without prejudice to the use of those terms or to meanings which may be given to them in the internal law of any State or in other instruments of international law.

Although the Convention is not divided into parts, the entire substance of it is logically arranged according to specific groups of questions.

Questions concerning the sending of a special mission and its composition, the commencement, exercise and conclusion of its functions are regulated by Articles 2 to 20. It is of interest that the Convention does not specify, even by way of example, the functions of special missions. However, the question of functions had been resolved differently by the Vienna Convention on Diplomatic Relations, where the typical functions of a permanent diplomatic mission were enumerated in succession. Those functions, according to Article 3 of the Convention, consist *inter alia* in: (a) representing the sending State in the receiving State; (b) protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law; (c) negotiating with the Government of the receiving State; (d) ascertaining by all lawful means the conditions and developments in the receiving State, and reporting thereon to the Government of the sending State; (e) promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations. Also enumerated in the Vienna Convention on Consular Relations are various functions of a consular mission (Art. 5). It is obvious that the functions of special missions cannot differ essentially from those of a diplomatic mission as specified in the Vienna Convention on Diplomatic Relations. They cannot differ substantially as regards their content. They do differ, however, with respect to the work, forms and other details resulting from the circumstances of each particular case. Therefore to undertake such an enumeration of the functions of special missions proved to be extremely difficult.

Although it can be stated that, generally speaking, the purpose of a special mission is to undertake talks on specific matters or to fulfill specific tasks in relations between the sending State and the receiving State, such a statement involves too great a variety of functions and tasks. These functions and tasks cannot be defined in general terms. In every case, they depend on a particular agreement between the two States concerned. Therefore, the enumeration of the functions of special missions, even of those most typical and common, would not be very useful. That is probably the reason why the scope of the functions of each special mission was left by the Convention to be determined by the interested States—that is, the sending State and the receiving State (Art. 3).

The next part of the Convention (Arts. 21—49) contains provisions defining the legal status of the members of a special mission and the legal status of a mission as a whole. Thus this part includes provisions for facilities, privileges and immunities of all kinds. Already in the Preamble to the Convention, attention was drawn to the fact that the purpose of privileges and immunities relating to special missions is not to benefit individuals but to ensure the efficient performance of the functions of special missions as missions representing a State. Article 47 comprises provisions indicating the duty of all persons enjoying privileges and immunities under the Convention to respect the laws and regulations of the receiving State. These persons are also obliged not to interfere in the internal affairs of the receiving State. The premises of special missions must not be used in any manner incompatible with the functions of the special mission as envisaged in the Convention, in other rules of international law, or in any special agreements in force between the sending and the receiving States. Article 48 states that the representatives of the sending State in the special mission and the members of its diplomatic staff should not involve themselves for personal profit in any professional or commercial activity in the receiving State. Article 49 includes a general exclusion of discrimination by stating that in the application of the provisions of the Convention no discrimination shall be made as between States. This article includes at the same time an enumeration of all possible variations which in the light of the Convention are not considered to constitute a discrimination (limitations introduced on the basis of the principle of reciprocity, modifications introduced without detriment to the subject and purpose of the Convention and to the interests of third States).

The concluding part (Arts 50—55) contains final clauses related to the signing, ratification, accession to and entry into force of the Convention. Authorized texts of the Convention are, as is usual with treaties concluded under the auspices of the United Nations, in Chinese, English,

French, Russian and Spanish. The functions of the depositary are performed by the Secretary-General of the United Nations.

Each of the aforesaid groups of articles, and even each article separately might be a subject for a special analysis. A comparison of the articles of the Convention on Special Missions with the respective articles of the Vienna Convention on Diplomatic Relations would be particularly interesting. Such a comparative study would show the differences and similarities in the two Conventions as regards settling analogical questions. Furthermore, we may ask whether the Convention on Special Missions gives adequate consideration to the peculiar nature of those missions as compared with permanent diplomatic missions. Such an approach would constitute one of the possible ways of answering the very essential question as to whether the Convention on Special Missions brings anything new, and what practical needs it meets.[6] However, a comparative analysis of the two Conventions, article by article, is not the essential purpose of this work. Moreover, there is another possibility of presenting the basic problems of the Convention on Special Missions—problems which shape and probably will continue to shape the attitude of the States to the Convention. It is easy to prove that the concentration of attention on basic problems is at present much more appropriate and timely. The Convention on Special Missions is still far from being effectively in force. According to Article 53, the Convention will come into force after 22 instruments of ratification or accession have been submitted. But on 18 October, 1972, it had been ratified by four States only (Argentina, Cyprus, Fiji and Tunisia). It is, of course, impossible to state with absolute certainty whether this situation has resulted from decisions previously taken, or is caused by uncertainty as to the need of the Convention, or by ambiguities and misunderstandings, or simply by neglect.

It is true that the importance of special missions was recognized at the United Nations Conference on Diplomatic Intercourse and Immunities and in a special resolution adopted by the Conference on 10 April, 1961. Even so, there never existed any unanimity as to the need of codification of rules on special missions or the form of such a codification. Specifically, two solutions were advanced : in the form of an additional protocol to the Vienna Convention on Diplomatic Relations, or in the form of a separate

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[6] Cf. on the same subject—M. R. DONNARUMMA, *La Convention sur les missions speciales (8 decembre, 1969)*, "Revue Belge de Droit International," 1972, No. 1 ; Basic questions of the Convention of Special Missions are also discussed by Professor A. KLAFKOWSKI in the fourth edition of his *Podręcznik prawa międzynarodowego* [*Manual of International Law*], Warszawa 1971, pp. 264. Considerable attention to this question is also paid by Professor I. P. BLIŠČENKO in his, *Diplomatičeskoe pravo*, Moskva 1972.

international convention. The second solution offered several further possibilities. A separate convention would have either settled the whole problem or confined itself to settling those questions that are specific to special missions, referring the remaining questions to other, already existing sources of international law, in particular the Vienna Convention on Diplomatic Relations. The difference of opinions on those basic questions lasted throughout the whole period of the preparatory work. Clashes of contradictory opinions can be traced in the reports on the discussions within the International Law Commission, as well as in the observations submitted by States during the different stages of the preparatory work. Those differences did not disappear even at the time when the International Law Commission, after many years of work, submitted in 1967 to the General Assembly of the United Nations Organization the final text of the draft articles on special missions, with a recommendation that this draft be embodied in a separate, universal, international convention.

The opinion of individual States as regards the text of the Convention on Special Missions may best be ascertained from the official records of UN General Assembly. The final text of the draft articles, worked out by the International Law Commission, was first submitted to a general debate at the Sixth Committee of the General Assembly during its XXII session. At the following two sessions it was exhaustively discussed, article by article. After an exchange of opinions, and examination of the amendments submitted, the separate parts of the project were directed to the Drafting Committee.[7]

The task of this Committee consisted in unifying the terminology and giving final shape to individual provisions and the Convention as a whole. The discussion in the Drafting Committee often transcended purely technical and drafting matters. The arguments in the Committee were not, however, recorded. Its chairman, Professor Mustafa Kamil Yasseen, of Iraq, orally reported the results of the Drafting Committee's work at the plenary sessions of the Sixth Committee. Even so, the official United Nations records are the fullest and practically the only accessible source of information on the attitude of individual States both to the Convention as a whole and to specific problems discussed.[8]

[7] The Drafting Committee consisted of the representatives of the following States: the Democratic Republic of the Congo, Denmark, France, Ghana, Iraq, Italy, Japan, Mexico, Pakistan, Peru, Poland, the Union of Soviet Socialist Republics, the United Arab Republic, the United Kingdom of Great Britain and Northern Ireland, the United States of America.

[8] The consecutive reports of the Sixth Committee from the discussion on this subject submitted to the plenary meeting of the General Assembly at its XXII, XXIII and XXIV sessions may be a useful guide to the documentation of UN concerning special missions. There are, respectively, Doc. A/6898, A/7375 and A/7799.

Without pretending to offer a full account of the opinions or to present all the nuances and subtleties which were revealed during the discussions in the General Assembly, it is worth while to present a general characteristics of attitudes adopted in accordance with different State groupings. Such a general characteristic may serve as a suitable background for further, more detailed consideration of certain questions.

It became obvious rather early that the countries of Latin America were showing great interest in the elaboration and adoption of uniform rules on special missions. It seems that for this attitude there were two reasons. First, because in the Latin-American countries special missions have an established tradition and because they constitute an important instrument of cooperation. Secondly, because the International Law Commission, in preparing the draft articles on special missions, took as a basis, to a considerable extent, the experience of these States and took into account their practice.

Also other States belonging to the group of, according to the terminology used in the United Nations, developing countries, were deeply interested in the adoption of the Convention. For various reasons, these countries have not yet established a sufficiently wide network of permanent diplomatic missions. They settle many of their affairs by means of special missions. The status of such missions is not very precisely defined. Thus the representatives of the developing countries were, having in mind mainly their practical needs, in favour of a proper regulation of the status of special missions.

Perhaps the most uniform and consistent attitude as regards the necessity of the codification of rules on special missions by an international convention was adopted by the socialist States. Their representatives frequently argued that special missions represent today a very important instrument of international cooperation. As the scope of international cooperation increases steadily, the importance of functions performed by special missions increases concurrently. They provide facilities for speedy and direct contacts through persons having adequate powers and qualifications to settle the matters in which two or more States may be interested. Common practice shows how many problems are solved by special missions, without detriment to the role and status of permanent diplomatic missions in international relations.[9]

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[9] In his Fourth Report on Special Missions (Doc. A/CN.4/194) Professor Milan BARTOS has expressed the following view: " In looking closely at the development of international relations, the Special Rapporteur cannot help noting that diplomatic missions are being progressively reduced to the level of bureaucratic machines and that embassies are being becoming a kind of headquarters for the performance of the special tasks for which they are responsible. For this reason, regular diplomatic

Moreover, the socialist States have contributed considerably to the enrichment of the practice as regards the exchange of special missions. The exchange of delegations on the highest party and government level has become common practice in relations between the socialist States. These delegations are, as a rule, headed by the leaders of communist parties—that is, parties playing the leading political role in States of socialist type. The position and importance of party leaders, as acknowledged leaders of nations, have also been accepted in relations between socialist and capitalist States. The outward manifestation of such recognition of this particular importance of party leaders is the protocol associated with their visits. We may quote here, by way of illustration, the visit of the First Secretary of the Central Committee of the Polish United Workers' Party, Edward Gierek, to France in October 1972. It had the character of a state visit. On behalf of the French Government, Edward Gierek was received by the President George Pompidou, the head of State.

Special missions more and more often consist of high level persons other than the head of State, Prime Minister or Minister of Foreign Affairs. In accordance with the traditional rules of international law, such persons are not entitled to act on behalf of their State. These new situations require consideration and settlement. During the discussion on the draft Convention, the representatives of the socialist States stressed the point that every special mission, regardless its level and the character of the functions performed, was in every case a mission representing the State. Hence the necessity of conferring on every such mission appropriate facilities, privileges and immunities to secure its independent functioning.

The attitude of the group of western States was the least uniform. They have a long established and widely developed network of permanent diplomatic missions throughout the world. Thus permanent missions constitute their main means of communication and cooperation with other States. Such countries as France, Great Britain, Japan or Italy more often receive than send special missions. Consequently, there is a growing tendency in those States to regulate the status of special mission through *ad hoc* or permanent agreements based on the already existing rules of international and internal law. A more elastic attitude was adopted by the representatives of the United States. That country makes frequent use of special

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missions are increasingly being relieved of high political functions and also of purely technical duties." It seems that this opinion is exaggerated. The fact that many questions are dealt with by special missions does not signify that the tasks of permanent diplomatic missions are being diminished. Each of those two forms of State representation has its own place and its own tasks in present-day international relations. It should be also noted that in the subsequent parts of his Fourth Report Professor Bartos considerably toned down the above-quoted opinion.

missions. It seems, however, that it prefers special agreements relating to every individual mission to a general regulation in the form of international convention. Further, the United States has also lately introduced a number of internal regulations concerning *inter alia* the status of certain special missions (high level missions), a fact which diminishes the interest of this State in a general convention.[10]

It is not surprising that it is the group of western countries that is opposed to any uniform regulation of the legal status of special missions in the form of a general international convention, and—perhaps above all—to conferring on those missions far-reaching privileges and immunities. This opposition found its expression in statements and amendments submitted by the representatives of France and Great Britain.[11]

The biggest differences of views and attitudes were revealed with respect to the most important matter—namely, to the scope of the Convention. In other words, it is necessary to find an answer to the question as to which missions the resolutions of the Convention should apply.

An opinion on the general concept of special mission can be formed from the articles of the Convention as a whole. From this point of view, particularly important are Articles: 1 (Use of terms), 2 (Sending of a special mission), and 49 (Non-discrimination). Article 1(a) contains the definition of a special mission and there above all must be sought the criteria which will make it possible to establish which missions are special missions within the terms of the Convention. It is obvious, however, that this article must be examined in the light of the Convention as a whole.

According to the Convention, a special mission is a mission which represents a State in its relations with another State. A special mission is of a temporary character and this distinguishes it from a permanent diplomatic representation. A special mission may be sent by a State to another State but only with the consent of such other State. The aim of a special mission is to transact business with the receiving State or to perform in relation to the receiving State a specific task. Irrespective of whether the tasks it performs are more or less important, the special mission always represents the sending State and acts on its behalf.

The definition of a special mission formulated in the final text of the Convention does not substantially differ from the definition proposed by the International Law Commission. The sole difference was that the original draft articles contained the term " representative character " in the

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[10] See L. J. HARRIS, *Diplomatic Privileges and Immunities. A New Regime is Soon to be Adopted by the United States*, " American Journal of International Law," 1968, No. 1.

[11] See, i.a., GA Official Records, *Twenty-Third Session, Sixth Committee, 1040th meeting, 16 October 1968,* and *1055th meeting, 30 October 1968.*

following context : " A special mission is a mission of a representative and temporary character." In the final text of the Convention, this expression was replaced by the words : " representing the State."

The International Law Commission made great efforts to explain the meaning of the expression " representative character." In its commentary to Article 1(a), the Commission explained that a special mission must represent the sending State. In the Commission's view this was an essential distinguishing characteristics of special missions by which such a mission, in the sense used in the draft articles, might be distinguished from other official missions or visits. Again in its commentary to Article 1(e), the Commission emphasized that among the conditions laid down in sub-paragraph (a) of Article 1, which a mission must fulfil in order to be regarded as a special mission, is the necessity of representing the sending State. To Article 1(e) special attention was paid by Sir Humphrey Waldock when he spoke in his capacity as the chairman of the Sixth Committee of the General Assembly during its XXII session.[12] Sir Humphrey Waldock said, *inter alia*, that those who wanted to know what was the exact meaning of the expression " representative character " could find some useful indications in Article 1(e). Despite these explanations, the problems of establishing the exact criteria of a special mission produced numerous controversies at the Sixth Committee of the General Assembly. Precisely the expression " representative character " provoked particular controversies. It emerged quite unexpectedly that this discussion was connected with fundamental political questions. The representatives of certain western States were hinting quite clearly that their opposition to the definition of a special mission as proposed by the International Law Commission, and even to the draft articles as a whole, resulted from a fear that the socialist States would try to introduce under the future convention too great a number of missions, including those sent by a variety of institutions or enterprises. It is difficult to detect whether those fears resulted simply from unawareness of the rules of legal and socio-economic system of the socialist States. Perhaps the representatives of some western States wanted thus to provoke an authoritative answer which could disperse their doubts and reservations.

In any case, the representatives of the socialist States had to explain at length and patiently that also in their view a special mission was only a mission representing the sending State as such. It does not represent either private persons or any corporations ; it does not represent either private or State enterprises. It represents the State, only the State and

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[12] *Sixth Committee, Summary Records of Meetings, 957 meeting, 26 September, 1967.*

nothing but the State. A special mission in the sense used by the Convention is an institution of interstate relations. It is an institution of international public law. Functions and aims of special missions originate from the State authority and no other.

Finally, after prolonged and extremely detailed discussions, a definition was agreed as accorded general approval. To sum up all the foregoing points, it is worthwhile to recall verbatim the text of this definition as it appeared in the Convention:

> "A 'special mission' is a temporary mission, representing the State, which is sent by one State to another State with the consent of the latter for the purpose of dealing with it on specific questions or of performing in relation to it a specific task."

In close connection with the controversies on the scope of the Convention were those on the scope of privileges and immunities conferred upon special missions. The latter reflected the differences of opinions between particular States with reference to the question of privileges and immunities in general.

The number of persons enjoying a privileged position in international relations is steadily growing. Apart from the diplomatic staff of the permanent diplomatic missions, the officials of international organizations, and the delegates of States to the sessions of the organs of international organizations or the international conferences also enjoy specific privileges and immunities. Different States react differently to this phenomenon. Countries in which meetings, sessions or conferences of all kinds are frequently held, are in general against increasing the circle of persons enjoying a wide scope of privileges and immunities. Other countries, however, maintain that the necessity of granting to all representatives of States special legal protection ensues from the principle of sovereign equality and promotes the development of international relations.

States which were opposed to extending the privileges and immunities to new categories of persons had tried earlier still, during the work of the International Law Commission on the draft articles concerning special missions, to solve this problem by limiting the application of the future Convention only to special missions of high level cited explicitly in the Convention itself—for example, to missions led by the Head of State, Prime Minister, Mister of Foreign Affairs, or other members of the government. That was the tenor of proposals submitted by, among others, the United States and Australia.[18] The International Law Commission rejected such proposals considering them too restrictive. The Commission never considered that the rank of the person leading a mission

[18] Annex I to the Report of the International Law Commission on the Works of its Nineteenth Session (Doc. A/6709).

might of itself determine the division of special missions into different categories. The Commission stated, however, that high level persons who by virtue of international law are entitled to a special status do not lose such status when becoming a member of a special mission.[14] The Commission also came to the conclusion that the nature of the affairs dealt with by special missions could not form a basis for classification of missions into different categories. To divide the affairs into political, economic, technical, scientific, cultural, etc., is no easy task. Supposing, however, that such a division were possible, it would not enable an *a priori* assumption that, for example, political affairs are always more important than economic, economic more important than technical, and so on. There are countries in the world for which the production and sale of cocoa or coffee is one of the most important matters. On the other hand, there are countries where the production and sale of wine becomes a paramount State problem. In the records of the International Law Commission, we can find many examples which show the immense difficulties with which the Commission would have to deal, if it set out to classify special missions according to specific matters.[15]

The International Law Commission came, therefore, to the conclusion that new general pattern rules should be worked out concerning facilities, privileges and immunities to be enjoyed by special missions. But it soon emerged that the choice of standard or level of such rules is also no simple question. For it was obvious that the States which were opposed to granting to special missions a wide range of privileges and immunities would be in favour of lowering such level. It might also be anticipated that the argumentation of those States would tend to prove that the granting of this

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[14] Para. 1 of Art. 21 proposed by the International Law Commission read as follows: "The Head of the sending State, when he leads a special mission, shall enjoy in the receiving State or in a third State, in addition to what is granted by these articles, the facilities, privileges and immunities accorded by international law to heads of State on an official visit." As a result of amendments submitted to the Sixth Committee, this paragraph in the final text of the Convention was formulated as follows: "The Head of the sending State, when he leads a special mission, shall enjoy in the receiving State or in a third State the facilities, privileges and immunities accorded by international law to Heads of State on an official visit." The latter formulation does not constitute any improvement. The advantage of the text proposed by the Commission was in pointing out that the rules defining the status of the head of he State should be sought, above all, in the text of the Convention itself. Those rules do not exclude the possibility of securing to the head of State still other facilities and honours, if they result from other rules of international law, or customs and traditions observed by the given receiving State.

[15] The fullest picture of the work of the International Law Commission on this question is given by Doc. A/CN.4/194—*Fourth Report on Special Missions by Mr Milan Bartos, Special Rapporteur.*

or that privilege or immunity is not indispensable to a special mission in order that it may perform its function. It was also well-known that other States would argue that there is a need to grant to special missions—in view of their functions or representative character—the widest possible legal protection. After considering various possibilities, the International Law Commission finally decided to accept as a basis for working out the articles on privileges and immunities of special missions the provisions of the Vienna Convention on Diplomatic Relations.

Of course, there are differences between the wording of the Vienna Convention on privileges and immunities and the wording of the relevant articles of the Convention on Special Missions. Those differences derive from the necessity of adjusting the Vienna Convention to the specific character of special missions. In one case, however, the International Law Commission openly departed from the solution adopted by the Vienna Convention. Establishing the general principle of inviolability of the premises of special missions, the Convention on Special Missions allows the entry of agents of the receiving State into premises of the special mission, even without the consent of its head, in case of fire or other disaster seriously endangering public safety, whereas the Vienna Convention stressed the absolute necessity in any circumstances of the consent of the head of the mission for entering its premises by the agents of the receiving State. The solution proposed by the International Law Commission in the Convention on Special Missions (Art. 25) encountered criticism in the General Assembly, especially by the Ukraine and other socialist States which demanded that even in this case a solution should be accepted analogous to that adopted by the Vienna Convention on Diplomatic Relations. It turned out, however, that the majority of members of the General Assembly was not ready to adopt absolute inviolability of premises in the case of special missions.

While the General Assembly was studying the draft articles submitted by the International Law Commission, one more attempt was made to divide special missions into various categories and to differentiate privileges and immunities accordingly. This attempt found its expression in the series of amendments submitted by France and Great Britain.[16] These amendments were opposed by a decisive majority of members of the General Assembly. Some of them were rejected during the voting, others withdrawn by their sponors. The draft articles, worked out by the International Law Commission, including the part concerning the privileges

[16] The texts of all amendments submitted to the Commission's draft of articles, together with information on decisions taken with regard to these amendments, are contained in two reports of the Sixth Committee—Doc. A/7375 and A/7799.

and immunities of special missions, were adopted by the General Assembly with a few changes only.

For the solution proposed by the International Law Commission—that is for granting to special missions privileges and immunities similar to those formulated in the Vienna Convention on Diplomatic Relations—there was a considerable majority of the developing countries of Asia, Africa and Latin-America, together with the socialist countries.

We should not, however, draw from all this the conclusion that Poland and other socialist States will in every situation support the widening of the scope of privileges and immunities. It is true, however, that in this particular case, in view of the subject and aim of the Convention on Special Missions, as well as its universal character, the socialist States together with the majority of other States took the view that the legal status of special missions should be settled on the firm ground of the provisions of the Vienna Convention on Diplomatic Relations, as suggested by the International Law Commission.

To demonstrate the propriety of the solution proposed by the International Law Commission, numerous arguments of a theoretical as well as practical character might be offered. After all, it is well known that a special mission represents the State. It has its seat on the territory of the receiving State with its consent. The functions and tasks of a special mission are agreed with the receiving State. It is natural, then, that the receiving State should ensure to the members of a special mission personal inviolability, as well as inviolability of the premises and documents belonging to such a mission. It should also exempt the members of a special mission from all onerous personal services, dues and taxes, customs duties and examination. In brief, the receiving State should secure all the conditions which are necessary for the functioning of a special mission as a mission representing the State. In the present situation, owing to the variety of the existing social and economic systems, and the variety of legal traditions and views, the best way to secure such conditions is the granting to special missions of satisfactory privileges and immunities. It seems that the acceptance of the principle that special missions should enjoy a considerably wide scope of privileges and immunities, does not exclude the possibility of their appropriate modification in relation to particular special missions, if the States directly interested find that desirable. Such was the attitude adopted by the Polish delegation during the discussion on this question on the forum of the General Assembly.[17]

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[17] See GA Official Records, *Twenty-Second Session, Sixth Committee, 960th meeting, 3rd October 1967,* and *Twenty-Third Session, Sixth Committee, 1057 meeting, 31st October, 1968.*

Finally, it should be emphasized that the receiving State is by no means helpless in the face of possible attempts to abuse privileges and immunities for purposes not connected with the official status and functions of a special mission. The receiving State may decline to accept a special mission if considers its size to be unreasonable, having regard to circumstances and conditions in the receiving State and to the needs of a particular special mission. The receiving State may also, without giving reasons, decline to accept any person as a member of the special mission. Any member of the special mission may be declared *persona non grata,* or not acceptable. The Ministry of Foreign Affairs of the receiving State, or other agreed organ must be notified of the composition, arrival and departure, localization of the premises and considerable other data concerning a special mission. Members of a special mission shall respect the regulations of the receiving State. In a separate resolution adopted together with the Convention, the General Assembly recommended that the sending State should waive the immunity of members of its special mission in respect of civil claims of persons in the receiving State when it can do so without hampering the performance of the functions of the special mission ; and that, when immunity is not waived, the sending State should use its best endeavours to bring about a just settlement of the claims.[18]

Obviously, it cannot be assumed that the receiving State will never have any difficulties with any special mission. But on the other hand it cannot be stated that there is in the Convention any lack of balance as between the legitimate interests of the receiving State and the requirements of special missions. Basic to a special mission, as an institution, is the principle of mutual consent of the States concerned—the sending and the receiving State. This principle has found its expression in the actual definition of special mission, and in many other resolutions of the Convention.

Thus Article 2 of the Convention envisages that a State may send a special mission to another State only with the consent of the latter. The consent must be obtained in advance—that is, before a mission is sent. The requirement of previous consent is particularly important in the case of the newly independent countries. The discussion at the General Assembly showed that the newly independent States are apprehensive of and try to avoid situations in which special missions of other States could be sent to them without their previous consent. This apprehension is not without foundation. It is easy to envisage the complications and difficulties which may result from an unannounced arrival of a special mission of an influential State—a mission which starting to perform its functions

[18] Resolution 2531(XXIV) of 8th Dec., 1969.

and tasks would at the same time require the grant of a highly privileged status. Article 2 of the Convention excludes the possibility of such situations arising. The same Article stresses also that the consent of the receiving State must be obtained through diplomatic channels or other channels mutually agreed or accepted. The existence of diplomatic or consular relations is not indispensable for sending or receiving special missions. In the event of a lack of such relations, the sending State and the receiving State may come to terms through other channels in matters connected with the planned sending of a special mission. They may do it through the good offices of another State, international organization or in any other way, on condition that such action is agreed upon or accepted by both sides. An essential or even the most important element of mutual consent as regards sending and receiving a special mission is agreement as to the functions of any such mission.

Although the text of the Convention does not express it explicitly, it may be assumed that any change of functions, and especially the widening of their scope, may take place only as a result of the mutual consent of the sending State and the receiving State.

A special mission, within the meaning of the Convention, is essentially an institution belonging to the sphere of bilateral relations between States. In the case of a State intending to send the same mission to several States in turn, it must so inform each of the State interested ; for each of those States is a receiving State. Giving consent to receiving a special mission the receiving State must have full knowledge of all circumstances associated with its sending. Information as to which countries the given mission is to visit, and in what sequence, may sometimes be of essential value for the receiving State.

Even when several special missions belonging to different States arrive to the receiving State at the same time to deal with the same matter, they still may be treated as separate special missions. According to Article 6 of the Convention, several States may simultaneously send their special missions to another State, after obtaining its consent, to discuss in common, with the consent of all those States, the questions which are of their common interest. In such case the meeting of special missions with the representatives of the receiving State becomes similar to a multilateral international conference. The similarity is, however, only partial. In fact, we have to do here with a situation in which on the one hand there is the receiving State as the most interested party, and on the other hand all the sending States. The fact that in such case special missions deal with one and the same matter is the only basis for their common meeting. Sometimes, such a meeting takes place as a matter of convenience and economy. An example will better illustrate such a situation : as a result of an

elemental disaster (for instance, the flood at Florence), cultural treasures of universal value may be in danger of destruction. The governments of several States decide to give assistance to the State suffering the elemental disaster. To discuss the forms of assistance with the competent authorities of the receiving State each of the assisting States intends to send a special mission. The receiving State, though it gives its acceptance to the arrival of each mission separately, fixes the meeting of those missions for the same time. Precisely, in this very case we have to do with the sending of special missions by several States to deal with a matter of common interest to the receiving State and the special missions of those several States. On the other hand, several States may send a joint special mission to one State. They have, of course, to inform the receiving State concerning it not later than when seeking the consent of that State. The consent, of course, must be obtained beforehand—that is, before the sending of the mission.

The consent of the directly concerned States being such paramount element in determining highly important matters—that is, on sending and receiving a special mission and on its functions—then a question may arise as to whether the States directly concerned may also decide by way of mutual agreement on other matters connected with the sending and receiving of the special mission. That question is important especially in connection with the scope of privileges and immunities which should be granted to every special mission.

There is in the Convention no clear answer to this question. It is certain, however, that not all the rules codified in the Convention are peremptory rules. Article 49 of the Convention indicates that, indirectly but with sufficient clarity. It provides the States directly concerned with a possibility of introducing certain modifications in dealing with special missions in specific situations, on condition that the requirements stipulated are complied with.[19]

However, it is necessary to emphasize, that the principle requiring that the Convention should be applied as a whole remains unchanged. The Convention aims at the unification of the practice of States with reference to special missions. In spite of possible changes in relations between two States directly concerned, only those resolutions of the Convention which

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[19] Art. 49 envisages, *inter alia,* that discrimination shall not be regarded as having taken place where States modify among themselves, by custom or agreement, the extent of facilities, privileges and immunities, for their special missions, although such a modification has not been agreed with other States, provided that is not incompatible with the object and purpose of the present Convention and does not affect the enjoyment of the rights or the performance of the obligations of third States.

have a general significance and are not limited to bilateral relations will be fully applied. Article 42 concerning transit of a special mission through the territory of a third State may serve as an example of such a provision.

The aim of our remarks so far has been the presentation of basic problems of the Convention on Special Missions. Special attention has been paid to those questions which have produced the greatest number of controversies and differences of opinion. Those differences concerned the content of the Convention. Another no less difficult matter of discussion was the problem of participation in the Convention on Special Missions.

In the Vienna Convention on Diplomatic Relations of 1961, frequently cited here, a formula was applied providing that all States, Members of the United Nations or of any of the specialized agencies or parties to the Statute of the International Court of Justice, and any other State invited by the General Assembly of the United Nations may become party to the Convention. This formula acquired the name of the Vienna formula. From then on, the western States persistently sought to apply this formula to other multilateral international agreements, not excluding conventions, the subject and task of which was the codification of the rules of general international law. A motion to introduce the Vienna formula in the Convention on Special Missions was submitted by France, the United Kingdom and the United States.[20]

The socialist States, supported by many other States opposed to this motion. The Vienna formula would prevent States which were not members of the United Nations and did not belong to any other category of States mentioned in the formula (as was the case of German Democratic Republic, Korean People's Democratic Republic and Democratic Republic of Vietnam) from accession to the Convention on Special Missions. It cannot be denied that the universal application of treaties codifying the rules of international law is in the interest of all nations and the international community as a whole. Thus pursuant to the principle of sovereign equality, all States without any restrictions should be given the possibility of participation in such treaties.

Again, the motion to apply the Vienna formula was passed by a majority of votes. However, in the resolution corroborating the Convention on Special Missions, the General Assembly expressed its conviction that multilateral treaties which deal with the codification and progressive development of international law, or the object and purpose of which are of interest to the international community as a whole, should be open to universal participation. Pointing out that the General Assembly has been enabled to invite also other States not belonging to the categories

[20] See, Doc. A/C.6/L.773.

mentioned in the final clauses to participate in the Convention on Special Missions, the resolution envisaged that the General Assembly would, at its next session, consider the question of issuing such invitations in order to ensure the widest possible participation in the Convention.

The absence of the signatures of the socialist States under the Convention on Special Missions was mainly due to the fact that the question of participation was not satisfactorily solved in the Convention itself.

In the meantime the German Democratic Republic and the Korean People's Republic owing to their admission to to several organizations of the UN system acquaired also the possibility to accession to the Convention on Special Missions and other general multilateral treaties. But the problem of participation of other States in such treaties remains still unresolved. Further, it is still an open question whether participation in general multilateral treaties, especially in treaties codifying universal international law, could be dependent on previous participation in other international treaties.

In connection with the question of participation in general multilateral treaties, it is worthwhile to tackle one more problem. Decision concerning accession or non-accession to a specific international treaty falls, in fact, within the competence of the State itself. It is, however, not entirely a matter of indifference from the point of view of the interests of other States and the international community as a whole.

In the case of the Convention on Special Missions, we have to do with a Convention the subject and aim of which is the codification and progressive development of the rules of international law. Situations in which the Convention may prove its usefulness are quite numerous. It may prove useful in relations between States which maintain normal diplomatic relations as well as in situations particularly difficult or non-typical. We may here recall the visit of W. Brandt, Chancellor of the Federal Republic of Germany, to Poland in 1970 in connection with the signing of the Treaty between the Polish People's Republic and the Federal Republic of Germany covering the normalization of their mutual relations. At that time, Poland and the Federal Republic of Germany had not yet established diplomatic relations. All the legal aspects, as also ceremonial questions, of this visit could be regulated only in accordance with the concept of special mission.

It is obvious that high level persons—a Head of State, a Prime Minister, a Mister of Foreign Affairs—enjoy during an official visit in another State the privileges and immunities to which they are entitled according to international law. But who is able to state authoritatively and univocally what is the content of those privilegs and immunities in relation to persons of lower level? The existence of the Convention on Special Missions facilitates an answer to this question.

The Convention on Special Missions may be useful in non-typical situations in which the States desire to use particular discretion. The Convention facilitates agreement as to status, and all other matters connected with the exchange of special missions wihout the need for long preliminary negotiations.

Finally, the Convention on Special Missions may prove useful—and this is of the greatest importance—in many other less spectacular situations, including those in which the exchange of special missions, bringing about an exchange of views, adjustment of attitudes, and conclusion of an agreement may contribute to the settlement of many problems in international relations.

Of course, it might be maintained that the States involved may always reach agreement as to the functions, status, and all other matters connected with the sending of each special mission, but it will not always be an easy matter. In the event of a difference of opinions, it will be much easier to reach agreement by reference to the text of the Convention.

States may take advantage of the Convention without acceding to it, and even before it comes into force. It seems that, if only he knows of its existence, a lawyer will consult the text of the Convention, and here we touch upon a subject of a slightly more general character.

It is certain that there are many treaties which are quickly forgotten after coming into force. And the Convention on Special Missions may fall into oblivion, even before its coming into force. This would not be an isolated case. From time to time, the International Law Commission submits to the General Assembly of the United Nations the results of its work in the form of draft articles worked out in order to achieve codification and progressive development of different branches of international law. The General Assembly also receives from many other subsidiary organs draft articles for examination and final decision. Many of those draft articles have become international treaties, having been adopted by the General Assembly or by the conference of the diplomatic plenipotentiaries of States.

The extent of achievement in the sphere of codification can be measured, however, neither by the number of draft articles elaborated nor even by the number of conventions adopted. A much more effective criterion is the number of conventions which have come into force and the number of States who are contracting parties to those conventions. We might go one step further and state that the real measure of achievements in the sphere of codifications can be expressed only by an increasing respect for the rules of international law.

A state of affairs in which international treaties are forgotten is certainly not normal. The fact that in this case we have to do with treaties the aim of which is the codification and progressive development of the

norms of universal international law must be a matter of great concern.[21] If such a state of affairs is to continue, the international community will have to realize sooner or later the existence of a serious dilemma : either the codification work does not adequately meet the requirements of the present stage of the development of international relations, or no proper attention is being paid to the means which should be systematically applied in order to secure a wider appreciation of international law.

Codification for the sake of codification is too expensive an undertaking. Here, the costs express themselves not only in measurable sums of money. Much more dangerous in its effects may be the fact of the devaluation of the rules of international law. And yet the aim of codification is simply to contribute to the development of friendly relations between nations, irrespective of their constitutional and social systems.[22]

In 1974 the International Law Commission established by the UN General Assembly to promote codification and progressive development of international law as envisaged in Article 13 of the United Nations Charter, celebrated its 25th anniversary.

On this occasion many well-deserved plaudits were expressed and compliments paid to the International Law Commission. However, it would perhaps not be out of place to use this solemn occasion for putting the question : what next with the codification ?

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[21] Cf. on the same subject Doc. A/CN.?/205/Rev. 1 : Final Stage of the Codification of International Law—Memorandum by Mr R. Ago, dated 29 July, 1968.

[22] Preamble to the Convention on Special Missions.

The UNESCO System of Protection of the Right to Education (As an Example of the Most Rational Model of the Protection of Human Rights by an International Organization)

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"International protection of human rights is a political action, a function of time and place and the interplay of international and domestic forces, and the deficiencies in available remedies reflect contemporary political realities, including divergent national-international perspectives."[1] Respective legal instruments are in their essence only a superstructure of the dialectic process of international protection of human rights; the base of this process is the current general relationship of forces on the international arena, and its content—the constant confrontation of opposed political interests. Depending precisely on the scale of these divergencies, the system of the international protection of human rights operates either less or more efficiently.

Since the separate elements of the catalogue of the fundamental human rights arouse controversies of a varying degree, while the intensity of the political struggle with regard to their observance undergoes various fluctuations depending on the general alignment of forces in the world, the models of the protection of these rights differ in their essence. They express in each case a certain common denominator of attitudes adopted by the individual States with regard to concrete problems. As a result, while the protection of some human rights is limited to a general proclaiming of fundamental principles which often do not meet with a strong approval of a considerable number of governments, other rights are protected by a whole net of precise instruments guaranteeing their enforcement.

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[1] L. HENKIN, *National and International Perspectives in Racial Discrimination,* "Revue des Droits de l'Homme—Human Rights Journal" (cited hereinafter as RDH), vol. 4, 1971, No. 2/3, p. 268.

Thanks to the efforts of UNESCO, the codification of the right to education began early enought, and it is today one of the most precise and effective regulations in the domain of human rights. And although the first impulse in this respect came from outside UNESCO, the Organization, skillfully inspired by the United Nations itself, assumed comparatively early responsibility for the protection of the right to education ; this is after all quite natural when one takes into account the immensity of the tasks in the field of education tackled precisely by UNESCO.

In 1952, on instructions from the Economic and Social Council, a United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities took up a study of discrimination in education.[2] Ambassador Charles D. Ammoun, appointed a Special Rapporteur, formulated in his report as a result of his complex study of the problem, certain general principles of the elimination and prevention of discrimination in education, and postulated the concluding of a convention which would guarantee their observance.[3] The Sub-Commission decided, therefore, to ask UNESCO to weigh the possibility of preparing and adopting, on the basis of the achievements of the Sub-Commission and the general UNESCO experience, of a suitable international instrument or instruments against discrimination in education.

The UNESCO Executive Board decided, therefore, to place this question on the agenda of the X Session of the General Conference in 1958.[4] In view of its approval for the proposed undertaking,[5] a draft convention was soon submitted to the XI Session of the Conference.[6] Due, however, to the fact that some member States said in the course of discussion at the X Session that because of their federal system they would be unable to ratify a convention regulating problems reserved in their constitutions for the jurisdiction of provincial authorities, the Conference decided to work out at the same time and submit to the debates of the next session in 1960 the draft of a Recommendation against Discrimination in Education,[7] not envisaged originally in the proposals of the Sub-Commission and its Special Rapporteur.

However, another phenomenon was also taken into account here. Namely, it happens sometimes that States delay the ratification of an

[2] ECOSOC Res. 443.XIV (1952).

[3] *Study of Discrimination in Education, by Charles Ammoun, Special Rapporteur,* UN Doc. E/CN.4/Sub.2/Rev.1 (1957).

[4] UNESCO Doc. 50 EX/Decisions 6.1.

[5] UNESCO Doc. 10C/1.34.

[6] UNESCO Doc. 11C/15 : Cf. UNESCO Doc. 11C/PRG/36.

[7] H. SABA, *La convention et la recommandation de l'UNESCO concernant la lutte contre la discrimination dans le domaine de l'enseignement,* " Annuaire français de Droit International," vol. 6, 1960, p. 651.

agreement until the introduction of amendments in their legislation. This means that the coming into force of an instrument is considerably delayed. Thus the number of States ratifying a convention is at first comparatively small, it often increases slowly, and the convention does not meet for a long time the requirement of universalism ; sometimes, it even never meets it.

On the other hand international organizations frequently try to ensure the applicability of the provisions of multilateral agreements concluded under their auspices also to such member States which delay their ratification or which do not ratify them at all. Formally non-binding recommendations are in such cases the only instrument of pressure which might force States to accept certain legislative solutions or to pursue a certain policy. The directives formulated in these recommendations are addressed to all members (including also those who did not express their approval of them in voting) ; they are backed by the prestige of the organization and the moral and political influence of these governments which see in their enforcement an important advantage for their interests ; frequently also an organization has at its disposal more or less effective means of control of their implementation by the members.[8]

The fact that the XI Session of the UNESCO General Conference of 14 December, 1960 adopted together with the Convention against Discrimination in Education an accompanying Recommendation must be regarded as effective as it was feasible. It means that the codification of the fundamental principles of educational policy stepped outside the circle of the States parties to the Convention. Almost verbatim (with slight changes of a purely editorial nature, dictated by the difference in the legal importance of the two instruments, and with the omission of the concluding clauses), the Recommendation repeats the formulations of the Convention, recommending member States the application of its principles and calling on them for the submission of periodical reports as concerns its observance.

The Convention says first of all that

" the term ' discrimination ' includes any distinction, exclusion, limitation or preference[9] which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullyfying or impairing equality of treatment in education [. . .] "

[8] This means that the Constitution of UNESCO envisages the obligation of member States to submit periodical reports to the General Conference, pertaining, among other things, to how they carry out its conventions and recommendations (Art. VIII).

[9] But it was expressly stated in the course of the preparatory work " that there is no unjustified ' preference ' when the State takes measures to meet the special requirements of persons in particular circumstances, such as backward children, the blind, populations to whose illiteracy it is desired to put an end by suitable teaching methods, immigrants, etc." (UNESCO, Doc. 11C/PRG/36, para. 13).

This means that the notion of discrimination in education covers in particular such practices as the deprivation of any person or group of persons of access to any type or level of education, the limiting of education to its lower level for any individual or groups of persons ; creation or maintenance of separate educational systems or establishments for individuals or groups of persons otherwise than on conditions defined in the Convention itself, and finally—the placing of any person or group of persons in a situation incompatible with the dignity of man.

The value of this definition consists in a skillful combination of the listing of pretexts of discrimination (drawn, though not verbatim, from Article 2 of the Universal Declaration of Human Rights) with the listing of the basic methods of discriminatory practices included already in the ILO Convention No. 111 concerning Discrimination in Respect of Employment and Occupation (1958), additionally enriched here by the term " limitation ".

Attempts at a precise definition of discrimination, both in general and in its various forms (racial discrimination, discrimination of women), as well as in its various manifestations (discrimination in employment, discrimination in education) were made in numerous instruments of international law, that is both in declarations and conventions passed by the United Nations or its specialized agencies, or by regional organizations operating outside its system. The definitions formulated in them repeat after the Universal Declaration a more or less modified catalogue of pretexts of discrimination, but usually do not describe the methods of the discriminatory practices. Taking both these elements into consideration, it must be conceded that the UNESCO Convention contains in its provisions the broadest notion of discrimination in the currently binding international law.

In spite of its name, the purpose of the Convention is not only to prevent discrimination in certain its universal manifestations, but to codify and develop the right to education and to determine the means of its enforcement. Thus using the definition of discrimination, the Convention formulated in its material part a whole system of legal obligations imposed both on its parties and on UNESCO itself, which has additionally important functions connected with its implementation.

The operative provisions of the Convention may be grouped by way of classification in several sections subordinated logically to certain general principles expressing the main directions of the UNESCO policy in the field of education in a wide sense of the term. Hence the principle of non-discrimination is just one of the aspects of a much wider problem : it is closely connected with the principle of equality of opportunity and of treatment in the matter of education, supplemented moreover by prin-

ciples of democtratic content of education, respect of religious convictions in the field of education protection of the rights of minorities, and finally—respect of the diversity of national educational systems. It is only in their entirety that they determine the significance of the right to education recognized already in the Universal Declaration as one of the fundamental human rights.[10]

The principle of non-discrimination in education stems from the general anti-discriminatory norm of international law,[11] developed and enriched here by some new elements. States parties to the Convention undertake the adoption of certain strictly defined steps aimed at preventing all discriminatory practices and their effective elimination from national systems of education. The purpose of the principle is on the one hand to ban discrimination, imposing on State authorities the duty of abrogating all legislative provisions and official instructions, and of stoping administrative practices giving birth to discrimination in education ; on the other hand—it imposes on these authorities the positive duty of making the system of access to teaching establishments and the treatment in the field of education function without discrimination.

The material canvas of the Convention is the principle of equality of opportunity and of treatment in the matter of education. It is not a mechanical reversal of the principle of non-discrimination, because it consists in binding the member States for a systematic development of the system of education for the purpose of guaranteeing for all persons enjoying the right to education not only a theoretical freedom of access to teaching

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[10] Earliest attempts at the inclusion of the universal right to education in the catalogue of fundamental human rights included drafts of the International Bill of Human Rights prepared by an international committee appointed by the American Law Institute (Art. 11 ; " The Annals of the American Academy of Political and Social Sciences," January 1946, p. 22 ; Cf. *ibid.* C. W. JENKS, *The Five Economic and Social Rights,* p. 40 ff) and the Commission to Study the Organization of Peace (Art. 16 ; " International Conciliation," 1946, No. 426, pp. 562—564). It is characteristic that these attempts encountered opposition in the West at that time.

[11] The United Nations Charter is in the system of contemporary international law the source of the principle of the protection of human rights and of anti-discrimination norm which is one of its aspects. It is worth noting, however, that referring in the preamble to the principle of non-discrimination and the universal right to education, the Convention quotes exclusively the Universal Declaration of Human Rights. This is nothing out of the ordinary. The Declaration, to the omission of the Charter itself, is quoted, for example, by regional conventions on human rights, by some conventions of the International Labour Organization and even by acts of the United Nations itself. It is, therefore, difficult to escape the impression that the all-round authority of the Declaration, even though it is not of a binding character, is at least equal to the position held by the United Nations Charter in the process of the progressive development and the codification of human rights.

establishments,[12] but also the fullest possible fulfilment of their deepest educational aspirations.

The principle of equality of opportunity and treatment in the field of education entails a number of elements : a free of charge elementary education and obligatory school attendance at this level ; a generally accessible and achievable to everybody secondary education in its different forms, a higher education accessible to everybody to an equal extent on the basis of one's individual capabilities,[13] a State-guaranteed observance of compulsory school attendance as laid down in domestic law ; guarantee of an equal standard and identical conditions of the quality of teaching in all public educational establishments of the same level ; supporting and developing, by the employment of proper methods, of the teaching of persons who are either illiterate or who entered a grammar school but did not complete it, or the continuation of their education according to their individual capabilities, and finally—the securing of training of teaching personnel without any discrimination.

In comparison with the provisions of the Universal Declaration of Human Rights, which are too vague in this respect, the Convention makes a major step forward : it not only develops more fully the substance of the principle involved, but it builds also a mechanism of its implementation by commiting the member States to the formulation, development and application of a national policy which " by methods appropriate to the circumstances and to national usage " will be aimed at supporting the equal opportunity and treatment in the field of education.

If, therefore, the formal ban on certain discriminatory practices itself may be imposed immediately, and the principle of non-discrimination operates above all in the sphere of legislative measures, the principle of equality of opportunity and treatment in the field of education calls in fact for a planned national policy orientated for a gradual achievement

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[12] According to the stipulations of the Convention, foreign residents have access to education on the same principles as the citizens of States which are parties to it. This means that the quoted Art. 3(e) goes farther than the identically worded provisions of Art. 22 of the Convention relating to the Status of Refugees (1951) and Art. 22 of the Convention relating to the Status of Stateless Persons (1954) in which the parties commit themselves to accord refugees and stateless persons the same treatment as their own citizens, but solely with regard to " elementary education." At higher levels of education, refugees and stateless persons are to receive treatment " as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances."

[13] The system of preferred treatment of youth of peasant and worker origin applied in Poland when it comes to the admission to higher schools does not stand in contradiction to the UNESCO Convention, for it does not mean in practice any discrimination of candidates from other environments. Its sole aim is to equalize the educational opportunities stipulated in the Convention.

of the goals set by the Convention. In spite of some seeming similarities, such is the sense of the difference between these two principles.

With regard to the next three principles, the States parties to the Convention undertake in general to adopt all indispensable measures to ensure their observance, with the reservation that the Convention does not define either the character or form of these measures ; the last principle, on the other hand, is addressed to UNESCO itself and defines the limits of freedom of the parties to the Convention in the field of the organization of the national educational systems.

The principle of the democratic contents of teaching is based on the assumption repeated after the Universal Declaration[14] that

> " education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms ; it shall promote understanding tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace."[15]

The principle of respecting religious convictions in the field of education is aimed first of all at granting parents or guardians the freedom of choice of teaching establishments for their children (including also other than State establishments, meeting the requirements of appropriate teaching standard or approved by the respective educational author-

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[14] It is characteristic that the Convention does not follow the UNESCO Constitution operating in this context with the terms " justice " and " rule of law," but repeats verbatim the formula of Art. 26, para. 2 of the Universal Declaration on Human Rights. This is another proof of the influence of the Declaration on the UNESCO Convention.

[15] The formulation of Art. 5, para. 1(a) of the Convention supplies grounds for Poland's attitude on the question of the revision of school textbooks in the German Federal Republic. The assertion of the West German side that in view of the autonomy of the Lands in the field of education the federal authorities have no effective means at their disposal in this respect finds no support in the Convention, since it does not contain a federal clause (Cf. W. Markiewicz, *Polsko-zachodnio-niemieckie dyskusje nad podręcznikami szkolnymi* [*Polish-West German Discussions on School Textbooks*], " Biuletyn Polskiego Komitetu do Spraw UNESCO," 1973, No. 3, pp. 21—22). Although the federal government is not formally bound by " the agreement between the UNESCO Committees of Poland and the GFR on the subject of the revision of the contents of school textbooks, signed in Braunschweig in October 1972 (text in " Biuletyn Polskiego Komitetu do spraw UNESCO," 1973, No. 1, pp. 18—20), it appears from the UNESCO Convention itself that it is bound to adopt appropriate measures to guarantee that textbooks contradictory to the spirit of understanding, tolerance and friendship between all nations be not used in the teaching process (Poland is a party to the Convention since 1964, and the GFR since 1968). The Polish educational authorities on their part began to carry out the recommendations of a mixed commission of experts without waiting for reciprocal steps of the appropriate West German authorities.

ities) ; second—it is aimed at ensuring—by way of solutions accepted by the domestic legislation—a moral and religious upbringing of children in the spirit of their own religious views ; nor can anybody be compelled to accept religious instruction incompatible with his own views.

The principle of protection of the rights of minorities is aimed on the other hand at recognizing their right to conduct their own activity in the field of education, including the maintenance of schools and—in accordance with the principles of the educational policy of a given State—the teaching of their own language or its use in teaching ; such schools should meet the requirements of proper teaching standard laid down or approved by the appropriate educational authorities, their attendance shall be voluntary, and the rights of the minorities shall be observed without detriment to State sovereignty in a manner which shall not hamper the members of a given minority in understanding the culture and language of the society as a whole or in participating in its activities.

Limits for the discretion of UNESCO with regard to the educational policy of the States parties to the Convention are set by their sovereignty. They are expressed in the principle of respecting the national specificities of the educational systems. By preventing their standardization, the authors of the Convention saw in those specificities an important premise of the development of national educational systems in the light of the concrete conditions and traditions of the individual countries. Exemption is given, therefore, from the general notion of discrimination, to the establishment or maintenance of separate systems or teaching institutions for students of both sexes, or for religious or linguistic reasons, as well as the establishment and maintenance of private teaching institutions. The Convention lays down conditions whose fulfilment sanctions such a solution.[16]

The principle of equality of opportunity and treatment in education, strictly integrated with the principle of democratic contents of teaching which is given a supreme human priority, is of fundamental importance in the legal system of the Convention. The remaining principles of the Convention play a subsidiary role in regard to the principle of equal op-

[16] This does not mean *per se* that the problem of the organization of national systems of education was listed by UNESCO among "matters which are essentially within domestic jurisdiction" which are mentioned, after the UN Charter, by its Constitution in Art. 1, para. 3. The premise of the accepted principle is, on the other hand, a striving for the preservation, according to the formulation of the provision quoted here, of the "independence, integrity and fruitful diversity of the cultures and educational systems of the Member States." As a consequence, the UNESCO Convention, while establishing certain priorities in the domestic policy of the member States, leaves to their discretion the choice of the means for their implementation in accordance with the circumstances and the practice of the individual countries.

portunity and treatment. The principle of non-discrimination is aimed at protecting the conditions of the observance of the above supreme principle, while the observance of the principles pertaining to the respecting of religious convictions, protection of the rights of minorities, or even the principle of respecting the specificities of the national educational systems is permissible solely under conditions guaranteeing full observance of the principle of equal opportunity and treatment.

In its executive part, the Convention provides for a system of periodical reports submitted by the parties to it to the General Conference on dates and in forms set out in it, as concerns the adoption of legislative measures and administrative steps, as well as actions undertaken by them in the process of the implementation of the Convention, including the implementation of obligations concerning the conduct of the national policy aimed at supporting the equality of opportunity and treatment.

The Convention does not admit reservations[17] and excludes the colonial clause. Its solutions are based in the first case on the presumption that the principles laid down by it supplement one another and must be treated as a whole ; in both cases, it tends to give its provisions the widest application possible.[18]

The Convention against Discrimination in Education reveals many similarities with the ILO Convention (No. 111) concerning Discrimination in Respect of Employment and Occupation (1958). Both conventions develop creatively the contemporary norm of international law concerning non-discrimination, describing with precision its application in two important spheres of social life : education and employment. Both of them postulate also that their parties should eliminate and prevent discrimination in some of its manifestations as a priority task of the national policy. Both of them impose also on parties to them the duty of a systematic undertaking of steps in this direction, leaving to the discretion of the parties the choice of means applicable in the light of the conditions and usage of a given country.

Both Conventions provide also for periodical reports to be submitted by the parties in regard to the implementation of the resultant obligations,

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[17] Taking into consideration both the character and the purpose of the Convention it is hard to agree with its critics of Art. 9 concerning reservations : a different view is expressed by K. P. Rubanik, *Meždunarodnye soglašenija, konvencii i rekomendacii JUNESKO,* " Soviet Yearbook of International Law," 1961, p. 302.

[18] A departure from this positive tendency is Art. 13 prohibiting States which are not members of UNESCO from accession to the Convention otherwise than on an express " invitation " of the Executive Board ; the adoption of this article was motivated by the intention to discriminate certain socialist States. In the discussions and voting on the text of the separate articles of the draft Convention, the Soviet Union and the socialist States voted against Art. 9 and 13.

including also the anti-discriminatory policy envisaged in the two instruments and the results achieved by it. Both of them are also supplemented by separate recommendations. As a consequence, even such member States of the two organizations which are not parties to the Conventions administered by them are even so in duty bound to report to the General Conferences on the state of their legislation and practice in the fields covered by the provisions, as well as on actions undertaken in the process of their systematic implementation.[19]

One must not forget, however, that it was precisely ILO Convention No. 111 that was the model used in a considerable extent for the drafting of the UNESCO Convention. The International Labour Organization had an incomparably richer experience as regards legislative regulation of burning social and economic problems in accordance with international law, which had produced the so-called International Labour Code,[20] as well as a reliable system of implementation of agreements supervised by it ;[21] its achievements included also a whole series of problem-oriented conventions on human rights, one of them being a treaty instrument against discrimination, first ever in the UN system.[22] The Convention against Discrimination in Education was only the seventh of its kind to be adopted under UNESCO auspices, UNESCO having no previous achievements when it comes to agreements on human rights.

Both the ILO and UNESCO Conventions were adopted at a time when all attempts at concretizing the catalogue of fundamental human rights in the United Nations Covenants on Human Rights had been deadlocked in a deep impasse over a dozen years long. Both of them, however, soon came into force :[23] they were, therefore, instrumental in moving forward

[19] The duties of the ILO member States concerning the submission of reports on the implementation of the provisions of even those conventions which they did not ratify are discussed by C. W. JENKS, *Human Right, Social Justice and Peace,* in : *International Protection of Human Rights. Proceedings of the Seventh Nobel Symposium,* Uppsala 1968, pp. 238—239.

[20] C. W. JENKS, *Social Justice and the Law of Nations. The ILO Impact after Fifty Years,* Oxford 1970, pp. 8—9.

[21] A monograph of this problem is presented by E. A. LANDY, *The Effectiveness of International Supervision. Thirty Years of ILO Experience,* London 1966. The first international instrument on human rights adopted by the United Nations, which provided for measures of implementation was the Anti-Racialist Convention (1965) ; Cf. KAMLESHWAR DAS, *Measures of Implementation of the International Convention on the Elimination of All Forms of Racial Discrimination with Special Reference to the Provisions Concerning Reports from States Parties to the Convention,* RDH, vol. 4, 1971, No. 2/3, pp. 213 ff.

[22] ILO Convention (No. 100) concerning Equal Remuneration for Men and Women Workers for the Work of Equal Value (1951).

[23] The ILO Convention came into force on 15 June, 1960, while the UNESCO Convention came into force on 22 May, 1962.

the development of the normative regulation of human rights.[24] Both of them played the role of a pacemaker in the process of codification of the general principles of the international protection of human rights, especially the anti-racialist norm,[25] which was soon given the highest priority in the United Nations work.

Thus we can find reflections of the various formulations of the Convention against Discrimination in Education in United Nations instruments which develop or strengthen the principle of non-discrimination,[26] while the guiding idea of the Convention became the seed of two programme resolutions of the General Assembly setting out general standards of conduct of United Nations members: Declaration on the Promotion among Youth of the Ideals of Peace, Mutual Respect and Understanding between Peoples[27] and Declaration on Social Progress and Development.[28]

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[24] It was quite rightly recommended at that time to employ the strategy of partial solutions: "We believe that the most fruitful approach to the task of developing legally binding standards of human rights would be to attack the problem piecemeal. A series of conventions dealing with single or small groups of issues pertaining to human rights should be negotiated"—postulated a Commission to Study the Organization of Peace in its Tenth Report, *Strengthening the United Nations*, New York 1957, p. 7. Quite right was also a Polish author who wrote less than ten years afterwards in his reflections on the UN Anti-Racialist Convention: "It appears that the codification of human rights at international legal level *sensu stricto* progresses faster in the various fields than the twenty-year-old efforts on the draft covenants on human rights. The development of anti-discriminational law, particularly the ILO Convention, the UNESCO Convention and the present multilateral agreement, is a proof of the correctness of the immediate adoption of partial solutions, limited at first to a single field, as, for example, to the struggle against racialism in the present case. It will certainly be both easier and quicker afterwards to regulate the whole of the problem of the international protection of human rights"—H. ANDRZEJCZAK, *Prawnomaterialny zakres Konwencji ONZ w sprawie likwidacji wszelkich form dyskryminacji rasowej* [*Legal Material Scope of the UN Convention on the Elimination of All Forms of Racial Discrimination*], "Sprawy Międzynarodowe," 1966, No. 12, p. 101.

[25] J. BALICKI, *Dyskryminacja rasowa w świetle międzynarodowego prawa* [*Racial Discrimination in the Light of International Law*], Wrocław 1972, p. 155.

[26] United Nations Declaration on the Elimination of All Forms of Racial Discrimination—GA Res. 1904(XVIII) of 20 Nov., 1963, Art. 8; International Convention on the Elimination of All Forms of Racial Discrimination—GA Res. 2106 A(XX) of 21 Dec., 1965, Art. 5e(v), and Art. 7; Declaration on the Elimination of Discrimination against Women—GA Res. 2263(XXII) of 7 Nov., 1967, Art. 9.

[27] GA Res. 2037 (XX) of 7 Dec., 1966.

[28] GA Res. 2542 (XXIV) of 11 Dec., 1969, Art. 10(e), 11(d) and 21. The provisions of the Declaration with regard to the right to education and their implementation in Poland were described by J. ZIÓŁKOWSKI, *Deklaracja ONZ o Postępie Społecznym i Rozwoju* [*UN Declaration on Social Progress and Development*], "Kultura i Społeczeństwo," 1971, No. 4, pp. 128—129.

The achievements of the UNESCO Convention were also reflected partly in the text of the International Convenant on Human Rights, adopted a few years later.[29] Article 13 of the Covenant on Economic, Social and Cultural Rights concerning the right to education repeats or modifies some of the provisions formulated earlier in the Convention; it does not, however, tackle the problem of the ban on discrimination in education, general access to it and equal treatment in such a complex and integral manner as the Convention itself.[30]

A novelty, however, are provisions postulating gradual introduction of free-of-charge education at the secondary and higher level, and listing the development of the educational system of all levels, establishment of an appropriate scholarship system and systematic improvement of the material conditions of the teaching personnel among premises of a full implementation of the universal right to education. The Covenant on Civil and Political Rights, tackles the problems covered by the Convention in a purely marginal manner in Article 18 treating on the freedom of thought, conscience and religion.

But while in the UN Covenants the problems of the right to education are only a component part of the entire regulation of human rights, and their synthetic treatment was dictated by the requirements of codification technique, the UNESCO Convention devotes much more space and attention to the right to education and could treat it much more broadly.

As a result, the construction of the protection of the universal right to education in the provisions of the UNESCO Convention which takes a much greater account of its specificity, goes further and faster and is more effective than its treatment in the Covenants.

Further—because formulating general principles of national educational policy, treated less penetratingly in the Covenants, the Convention correlates the right to education with the appropriate tasks in the State; it strives at the same time for a real equalization of the educational opportunities and treatment in this field for everybody without any discrimination; last but not least—it wides access to education for outside the strict circle of the citizens of the States which are parties to it.

Faster—because the Convention came into force without much trouble notoriously characteristic for work on the Covenants on Human Rights. As a result, the UNESCO Convention is binding today on several score

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[29] GA Res. 2200 A(XXI) of 16 Dec., 1966.

[30] The Covenants do not use at all the term "equality of opportunity and of treatment in the matter of education" which is fundamental in the legal system of the UNESCO Convention.

States,[31] including also ones from which one cannot expect an early formal acceptance of the Covenants. For in spite of the accumulation of more than a dozen ratifications (by the Soviet Union as the first power), the Covenants are still not of binding force.[32]

It is more effective because UNESCO operates with a more effective system of the implementation of the Convention against Discrimination in Education than the United Nations with regard to the Covenant on Economic, Social and Cultural Rights. Although both instruments envisage the submission of reports by their parties in regard to their implementation,[33] UNESCO broadens this requirement—in its Recommendation—to all the member States; and last but not least, the 1962 Protocol lays down a special procedure for the settlement of disputes arising in the process of the implementation of the UNESCO Convention.

A system of the executive measures of the Convention against Discrimination in Education was put in motion soon after its coming into force. Acting on the authority of the General Conference, the Executive Board decided in May 1965 that reports shall cover all the operative provisions of the Convention and the Recommendation. They shall be submitted by States at regular intervals and in a uniformized form.[34] The

[31] As of 18 April, 1973, there were 60 States parties to the UNESCO Convention "Conventions and Recommendations adopted under Auspices of UNESCO"—CL/2290 of 4 July, 1973.

[32] It is worth noting, however, that the number of ratifications required for the UNESCO Convention to enter into force amounts to 3 (in the ILO Conventions on Human Rights—2), and in the Covenants on Human Rights—35. The distinction is in its essence purely of a political character, because the entry of an agreement into force (even if the number of parties to it is at first comparatively small) often means the crossing of a *sui generis* turning point. It exerts a mobilizing influence on other States for which it is more difficult to ignore its provisions, strengthened now by virtue of its legal binding force, as well as by the authority of the States parties to that agreement and of the organization under whose auspices it is being implemented; as a result, this might bring about a chain reaction in the form of a systematic increase in the number of State ratifying it. If, however, problem-oriented conventions have already broken through the barrier of distrust and are on the whole ratified in time by several dozen States, the International Covenants on Human Rights were adopted in an atmosphere of a far-going caution. It was recognized at the same time, quite rightly no doubt, that they will not fulfil their tasks until they assume a really multilateral character; the setting of such a high threshold of their ratification was aimed at preventing the unilateral introduction of the Covenants by a comparatively small number of States belonging to a certain camp or groupings, and their subsequent exploitation in the ideological struggle against States from another camp.

[33] E. Schwelb, *Some Aspects of the Measures of Implementation of the International Covenant on Economic, Social and Cultural Rights,* RDH, vol. 1, 1968, No. 3, p. 363 ff, on the subject of UNESCO, *ibid.* pp. 370—371.

[34] UNESCO Doc. 70EX/Decisions 5.2.1.

questionnaire on whose basis the States were to draft their reports was worked out by the UNESCO Secretariat and circulated in June 1965 among the 30 States, members of the Convention. Its version covering the provisions of the Recommendation was supplied to all member States. The first parcel of reports came to hand up to May 1966 ;[35] the XIV General Conference recommended the continuation of the reporting system,[36] while in July 1968 the Committee on Conventions and Recommendations in Education submitted a report based on the 61 reports of member States.[37]

The second round of reports took less time, two years only. The XIV General Conference approved a new questionnaire ;[38] after receiving all replies to it, the Committee drafted a new report.[39] Since not all governments answered the questionnaire, the XVII General Conference of 1972 passed a resolution asking all member States for a regular submission of complete reports in accordance with the provisions of the UNESCO Constitution and the two relevant instruments ; the Director General was instructed to investigate the purposefulness of an early adoption of recommendations supplementing the provisions of the two instruments,[40] provided for in Article 6 of the Convention and the Recommendation, defining measures to be adopted at a later date against various forms of discrimination in education and for the purpose of protecting the equality of opportunity and treatment in this field. In view of the fact that new conditions indispensable for new solutions have ripened since their adoption nearly thirteen years ago, the adoption of one or several supplementary recommendations seems probable in a comparatively near future ; in such a case there is no doubt that the effectiveness of the UNESCO instruments concerning the right to education would be considerably strengthened.

The system of the implementation of the UNESCO Convention, based according to the original principles on obligatory reports of its parties,

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[35] Preliminary report of the Committee, based on reports of 31 States, published in UNESCO Doc. 14C/29 and Add.

[36] UNESCO Res. 14C/39.

[37] UNESCO Doc. 15C/11. After a study of the report, the Conference adopted on this problem resolutions 15C/29.1 and 15C/1.161 ; a penetrating analysis of a large number of the reports is presented by P. MERTENS, *L'application de la Convention et de la Recommandation de l'UNESCO concernant la lutte contre la discrimination dans le domaine de l'enseignement. Un bilan provisoire*, RDH, vol. 1, 1968, No. 1, p. 91 ff.

[38] UNESCO Res. 16C/38 and Add. ; draft questionnaires together with recommendations of the Executive Board concerning the procedure of the examination of the periodical reports of the member States—UNESCO Doc. 16C/14.

[39] UNESCO Doc. 17C/15. The report contains a summary of 41 reports of member States ; Res. 16C/38 says that for reasons of economy they shall not be published in UNESCO documentation. Commentary of the Executive Board—UNESCO Doc. 17C/15 Add.

[40] UNESCO Res. 17C/31.

was extended soon after its coming into force by an additional facultative Protocol. On 10 December, 1962, the XII General Conference adopted a Protocol instituting a Conciliation and Good Offices Commission to be responsible for seeking the settlement of any disputes which may arise between States parties to the Convention against Discrimination in Education.

For the Convention envisages in Article 8 that disputes arising between parties to it in regard to its interpretation or application shall be submitted for settlement, if not settled by way of negotiations and if other means of their settlement fail, to the jurisdiction of the International Court of Justice. This means that this provision gives States parties to the Convention an express pointer asking them to try first to settle their disputes by negotiations. Should these fail, parties to a dispute may seek other means. Since the latter are not defined in detail, the parties enjoy the freedom of creative quests and choice of a suitable procedure ; only if these, too, fail, the parties may submit their case to the International Court of Justice. The authors of the Convention started here no doubt from the assumption that even a " bad settlement is better than a good judgement." The submission of a dispute to the International Court of Justice is possible only provided that all the participants in it express their consent.

The adoption of the Protocol was motivated by the intention of making it easier for States parties to the UNESCO Convention to settle in a friendly manner disputes which might arise in the process of its implementation by putting at their disposal an institutionalized but unformalized facultative procedure.[41]

This was the purpose of the appointment of the Conciliation and Good Offices Commission operating under the auspices of UNESCO, whose functions consist in investigating the facts of a given case which is the object of the dispute submitted to it, and in rendering its good offices to the States participating in such disputes for the purpose of their friendly settlement on the basis of the respect for the provisions of the UNESCO Convention.[42] The procedure of amicable settlement of disputes arising between parties to the facultative Protocol with regard to the implementa-

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[41] S. BASTID, *Une nouvelle commission de conciliation* in : *Problèmes de droit des gens. Mélanges offerts à Henri Rolin,* Paris 1964, p. 1 ff ; S. HOARE says correctly : " International community has preferred a form of implementation which is not mandatory but optional " in : *René Cassin Amicorum Discipulorumque Liber,* " Jura homini ac civis," vol. 1, Paris 1969, p. 103.

[42] John CAREY calls the Commission " the first potentially global agency for human rights negotiation "—*UN Protection of Civil and Political Rights,* Syracuse 1970, p. 77.

tion of the provisions of the Convention consists in principle of two phases. In phase one the dispute may be settled by the very States participating in it, either by way of bilateral negotiations or by way of other means open to parties in such disputes. Phase two consists in proceedings before the Commission which finds first whether all accessible domestic remedies had been exhausted in accordance with the general principle of international law, investigates the facts of the controversial case, and then subsequently performs its proper conciliatory function offering the parties in such a dispute its good offices for a friendly settlement of the dispute on the basis of the observance of the norms of the Convention. Finally, the Commission publishes its report.

If a friendly agreement is reached in regard to the dispute, the report of the Commission contains solely a description of the facts and the manner in which the dispute is settled. If, on the other hand, no solution is found and accepted, the report contains a description of the facts and recommendations addressed by the Commissions to the participants in the dispute in question.

After the passage of six years from the Protocol's coming into force[43] the Commission may also perform its functions in disputes whose participants, although parties to the UNESCO Convention, are not parties to the Protocol itself, provided they express in each case their consent to the submission of such a dispute.

It is certainly too early for a full evaluation of the system of the functioning of the UNESCO Convention ; moreover, its provisions may be soon considerably expanded by supplementary recommendations. To-date experience suggests, however, that striving for the protection of the universal right to education UNESCO is employing proper methods.

It may be noted that gradual introduction of instruments—at any rate conditioned by the maturing of real needs for the formulation of ever new principles of the international protection of human rights and the growing readiness of governments for cooperation in their implementation—regulating only fragments of the catalogue of basic human rights (in this case the right to education), but doing it with a greater precision than could be done by a complex regulation of the problem, such as is

[43] The Protocol came into force on 24 Oct., 1968, that is three months after the obtaining of 15 ratifications (The Convention itself required 3 ratifications only !). As of 18 April, 1973 the Protocol is binding on 21 States : CL/2290. None of the socialist countries ratified the Protocol. Their reluctance in regard to facultative procedures of implementation is additionally justified in this case by the possibility of the abuse of the right to complaint by the capitalist States in view of the lay character of the socialist educational systems (which, *nota bene*, do not infringe the provisions of the UNESCO Convention).

attempted in the Covenants,[44] is the most pragmatic strategy for the progressive development and codification of human rights.

The political premises of such problem-oriented conventions consist in that they skillfully differentiate the degree of protection of the various human rights in proportion to the strength of their being approved by the international community (understood here in the abstract as a specific incidental variable of frequently antagonistic interests of various countries), and that they lay down special procedures for their implementation.[45]

Like other problem-oriented conventions, the UNESCO Convention is also inspired largely by both the letter and the spirit of the Universal Declaration on Human Rights ; nevertheless, while models of the Declaration expressed only a minimum regulation of the right to education, the UNESCO Convention contains an optimum programme ; part codifications are simply less controversial, and this is why they achieve more.

It is, therefore, not without reason that C. W. Jenks asserts " that the specialized agencies [. . .] are the executive agencies of the Covenant with a major share of responsibility for its effective implementation. The inevitably general character of the economic, social and cultural rights recognized by the Covenant implies that, to give them a more definable content, more detailed conventions and recommendations providing the common core of uniform or at least comparable legislation and administrative action are necessary ; these will normally be adopted and administered by the specialized agencies concerned in their respective fields. The entry into force of the Covenant on Economic, Social and Cultural Rights will therefore put to the test a wholly new series of arrangements for cooperation between the United Nations and the specialized agencies in the implementation of its provisions."[46]

But the importance of the Convention must not be seen solely from the angle of its connections with other instruments pertaining to the in-

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[44] The strategy of " step by step solutions " is extolled also by W. Morawiecki, *Funkcje organizacji międzynarodowej* [*Functions of an International Organization*], Warszawa 1971, p. 96 ; " It is I think not devoid of correctness to say that partial solutions, more modest in their scope and really accessible in a given situation, might pave they way for ever wider and more ambitious solutions of problems of international cooperation." He points out, however, at the same time that " it would be an error to ascribe to such limited and partial solutions the character of germs of an automatic process of further development. Further progress of a process of cooperation is possible only at the result of struggle against forces impeding it."

[45] A. S. Nartowski, *Human Rights in the United Nations System* (*Development Trends*), " Polish Yearbook of International Law," vol. 5, 1970.

[46] C. W. Jenks, *A New World of Law ? A Study of the Creative Imagination in International Law,* London 1969, p. 54.

ternational protection of human rights. On the other hand, it is the nucleus of the International Code of Education regulating key problems of international cooperation in this field and general standards of the organization of the educational systems in the individual countries.[47]

The regulating and controlling functions in the field of protection of the right to education, that is the process of the formulation of the standards of the policy of the member States (either equipped with formal binding force or being only in the nature of general recommendations) and the control of their observance, are supplemented in the UNESCO practice with functions of a operative nature to a greater extent than in the practice of the United Nations. There is no doubt from this point of view that the opinion of C. W. Jenks who says that specialized agencies are executive agencies of the Covenant is correct. It is after all much easier for international organizations to develop operative functions in the course of the implementation of their tasks of a social character than in a purely political field. And, again, it is easier for the specialized agencies to perform these functions than for the United Nations itself.

On the other hand, effective protection of the universal right to education cannot be based exclusively on certain legal institutions. With the use of means actually at its disposal, UNESCO works for a systematic development of education in contemporary world mainly through: the liquidation of illiteracy and promotion of functional literacy, through the training of teaching personnel, supporting of women's eduction of all levels,

[47] The terms "International Code of Education" and "International Code of Culture" (based on analogy to the "International Labour Code") may embrace many instruments pertaining respectively to these problems. The International Code of Education includes thus, i.a., Declaration of the Rights of the Child (1959), Declaration on the Promotion among Youth of the Ideals of Peace, Mutual Respect and Understanding between Peoples (1965), as well as the UNESCO instruments: Beirut Agreement (1948), Florence Agreement (1950), Recommendation concerning the International Standardization of Education Statistics (1958), Recommendation concerning Technical and Vocational Education (1962), Declaration of Guiding Principles on the Use of Satellite Broadcasting for the Free Flow of Information, the Spread of Education and Greater Cultural Exchange (1972).

The Convention and Recommendation against Discrimination in Education, the Protocol to the Convention and the Recommendation concerning the Status of Teachers (1966) form, of course, the core of this "International Code of Education." The system of the implementation of the Recommendation concerning the Status of Teachers, put in motion in 1966 (UNESCO Res. 14C/1.131), consists also in the mandatory reports of member States. The first series of these reports, worked out in cooperation with the ILO, was submitted to the UNESCO General Conference in 1970 (UNESCO Doc. 16C/15 and Add), which decided that the next round of inspections of the implementation of the provisions of the Recommendation will take place in the years 1974—1976, and that the reports of member States will be based on a joint ILO and UNESCO questionnaire (UNESCO Res. 16C/39).

planning of educational policy, promotion of lifelong education and adult education, development of teaching in rural regions, development and modernization of teaching methods and schools aids, utilization of film, radio, television and satellite communication for the purpose of education. These means at the disposal of UNESCO are very modest. They are made up of economics and cuts in the budgets of international organizations, which affect first of all operational programmes, taking the wind out of the sails of more ambitious undertakings in this very field. Ever more funds are being swallowed by the maintenance costs of the ever more opulent secretariats and their offices (see the construction of the sixth building of the UNESCO in Paris !). For all that, however, education continues to hold the first priority in the UNESCO activities. Apart from its general efforts, UNESCO has been tackling specialized programmes of the development of education in the developing countries. They included training of teaching personnel, development of elementary school system in Latin America, the Experimental World Literacy Programme, teaching and development of education among the Palestine refugees.[48]

Only when one compares the real tasks of international cooperation in the field of education in contemporary world with these after all imperfect and insufficient programmes, does one realize to what a tremendous degree does the success of the process of the implementation and protection of human rights in the economic and social field depends on the practical solution of burning problems by the States concerned themselves, and to what a comparatively slight extent does it depend on even the best solutions according to the principles of international law. This means that the States concerned should mobilize their own resources in this field.

A legal norm is not an absolute. It functions in concrete circumstances only. The international standards of human rights are not and cannot be a panaceum for all problems. True, the right to education itself has been universally recognized, but the number of illiterates in some countries reaches 90 per cent. Two-fifths of adults in the world can neither read nor write, while one-half of children of school age cannot benefit from their right to education because of the inadequacy of conditions. Only universal liquidation of illiteracy and really radical progress in the process of an all-round development of education of all levels in all countries will make the practical protection of the right to education really feasible. In turn, full implementation of economic and social rights will bring nearer for mankind the possibility of a universal implementation of civil and political rights. It goes to UNESCO's credit in the field of the protection of human rights that it endeavours to solve this problem by attacking it

[48] UN Doc. A/CONF. 32/41, Res. XII : " Illiteracy " (1968).

from the right side, that is expanding first of all the operational functions of the system. The system of the protection of human rights worked out by UNESCO may serve precisely as an example of the most reasonable model of the implementation of human rights by international organizations.

Efforts aimed at bringing up young people in a spirit of understanding between nations, propagating the respect of human rights and fundamental freedoms, of supporting the United Nations activities for the strengthening of peace, in short—at the implementation of the principle of democratic contents of education,[49] hold a particular place in the UNESCO activity programme.

It may be surmised that the creation of a United Nations International University, expected to take place in a not too distant future, will intensify these efforts, particularly in the field of the development of the theoretical principles of the teaching of human rights.[50]

In UNESCO's conception, the science on human rights is an independent scientific discipline. As such, it should occupy its own, separate place in university curricula.[51] The idea is confirmed by the result of a poll held under the auspices of UNESCO : the teaching of human rights at universities.[52] UNESCO acts also as patron of editorial work on the preparation of the first textbooks on the international dimensions of human rights.[53]

UNESCO was the first of international organizations whose activity deals with problems of the international protection of human rights to appreciate the importance of the theoretical front. By organizing numerous seminars, symposia and congresses, by acting as patron of research schemes,

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[49] H. SABA, *Le rôle de l'UNESCO dans l'éducation de la jeunesse dans le respect des Droits de l'Homme et des libertés fondamentales,* " Jura homini ac civis," vol. 1, p. 275 ff, G. WARBURG, *Education for Human Rights, ibid.*, p. 438 ff. ; G. KAMIŃSKI, *La jeunesse, facteur de la promotion et de la réalisation du respect universel des Droits de l'Homme,* RDH, vol. 4, 1971, p. 153 ff.

[50] Cf. " Proposal for the Creation of a Teaching and Research Section of the United Nations International University in the Field of Human Rights " (International Institute of Human Rights, March 1973). The teaching of human rights within the framework of the UN International University is dealt with recently by the following Resolutions : 2951 (XXVII) of the General Assembly of 11 Dec., 1972 and 17 (XXIX) of the Commission of Human Rights of 3 April, 1973 (" Teaching of Human Rights in Universities and Development of an Independent Scientific Discipline of Human Rights ").

[51] Cf. materials of the "Working Group on the Preparation of a University Textbook on Human Rights, UNESCO, Paris, 28—30 June, 1972."

[52] *Enseignement des Droits de l'Homme dans les universités. Rapport préparé avec l'assistance financière de l'UNESCO par l'Institut International des Droits de l'Homme et International Law Association,* RDH, vol. 6, 1973, No. 1.

[53] Cf. materials : " Textbook on the International Dimensions of Human Rights : Tentative Outline."

by publishing numerous works and propaganda materials, the Organization aims at creating in human minds such an intellectual climate that would be conducive to an all-round development and progress of human rights in the contemporary world.

And last but not least, UNESCO boldly tackles key political problems of our epoch. The many years of efforts by the socialist States aimed at liquidating the myth of the alleged "political neutrality" of UNESCO[54] are bearing fruit. The general programme of activity in the field of human rights carried out at present by UNESCO is married more strongly than ever before to its efforts for the maintenance of peace and development of international cooperation, limiting of armaments race, liquidation of colonialism and racialism. It is deeply rooted in the philosophy of peaceful coexistence.[55] In fact, only in a world whose picture is emerging slowly from the programme resolutions of UNESCO can human rights be truly implemented.

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[54] Cf. K. P. RUBANIK, *Meždunarodnye pravovye voprosy na sessijah rukovodjaščih organov JUNESKO (1960—1965)*, "Soviet Yearbook of International Law," 1964—1965, p. 204 ff.; M. MEGHIN, *Organizacija obedinënnyh nacij po voprosam prosveščenija, nauki i kultury*, Moskva 1959, *passim*; *JUNESKO i sovremennost'*, Moskva 1966, *passim*.

[55] Cf. resolutions and recommendations of the UNESCO General Conference adopted at successive sessions: Res.: 11C/8.1—*Peaceful and Neighbourly Relations*, (1960); 13C/6.2—*UNESCO's Task in Contributing to Peace, Peaceful Cooperation and Living Peacefully Together, among States with Different Economic and Social Systems*, (1964); 15C/9—*UNESCO's Contribution to Peace and UNESCO's Tasks with Respect to the Elimination of Colonialism and Racialism*, (1968); 16C/8—*UNESCO's Contribution to Peace and Its Tasks with Respect to the Elimination of Colonialism, and Utilization of UNESCO's Programme as a Means of Strengthening Cooperation between European States in the Interests of Peace and Security in Europe*, (1970); 17C/7.1—*Human Rights and Peace*, (1972); 17C/10.1—*UNESCO's Contribution to Peace and Its Tasks with Respect to the Elimination of Colonialism and Racialism*, (1972); compare also UNESCO Doc. 17C/11—*UNESCO's Contribution to Peace, Respect of Human Rights and the Elimination of Colonialism and Racism: Report by Director-General*, (1972).

Bohdan Winiarski

Le 4 décembre 1969 s'est éteint, à l'âge de quatre-vingt-cinq ans, après une brève maladie, l'éminent juriste, professeur et juge international, Bohdan Stefan Winiarski.

Né le 27 avril 1884 à Bohdanowo près de Łomża en Pologne, région alors appartenant à l'Empire de Russie, il obtient son certificat d'études secondaires au lycée d'État à Łomża, en 1903. A cette époque, il participe déjà aux associations clandestines ayant pour but la renaissance de l'indépendance polonaise. Les souvenirs de sa jeunesse deviendront, après des années, le sujet d'un de ses livres, écrit avec beaucoup de tempérament littéraire, *Aux bords de la Pisa, de la Wissa et de la Narew. Un voyage sentimental* (Kraków 1965, en polonais).

Il a fait son droit aux Facultés de Varsovie et de Cracovie. Docteur de l'Université Jagellonne de Cracovie en 1910, il poursuit des études suplémentaires aux Universités de Paris et de Heidelberg. Membre des organisations clandestines estudiantines, il fait partie, en 1908 et 1909, du Comité de direction de l'Association de la Jeunesse Polonaise « Zet ». A la suite de trois procès politiques, il est condamné à sept mois d'emprisonnement.

Son intérêt pour l'activité politique et patriotique allait toujours de pair avec sa vocation pour le travail académique dans le domaine du droit public. Ses premières publications, toutes en polonais, traitent des questions constitutionnelles et administratives : *Le conflit constitutionnel russe-finlandais* (Warszawa 1911), *Représentation proportionnelle et la réforme électorale en France* (Warszawa 1913), *Le régime juridico-politique de la Galicie* (Warszawa 1915). Mais il écrit aussi sur les problèmes de la théorie du droit, à savoir sur la doctrine de Duguit, et sur le droit international, en s'intéressant en particulier au droit de l'air. Nommé, pour les années 1911 - 1914, assistant et puis chargé de cours à l'École des sciences politiques à Cracovie, il enseigne le droit public français et russe.

En 1914, il devient chef de la section juridico-politique du Comité national polonais à Varsovie, puis à St-Pétersbourg ; c'était un organisme

chargé de la défense des intérêts polonais pendant la Première Guerre mondiale. Winiarski rédige une publication sur le *Royaume de Pologne. Recueil de documents concernant les rapports juridiques entre le Royaume de Pologne et l'Empire de Russie* (Warszawa 1915, en polonais) et il s'occupe des implications de la situation créée par la guerre, en écrivant un essai intitulé *Le caractère international de la question polonaise* (Pétrograd 1917, en polonais). En 1917, Winiarski part pour Paris où il est désigné secrétaire de la section juridique du Comité national polonais. Membre de la délégation polonaise à la Conférence de la Paix (1919), il remplit les fonctions du jurisconsulte de la délégation, participe aux travaux de deux sous-commissions de la Conférence et s'occupe, dans le cadre de la délégation, des affaires de la Société des Nations et des problèmes du transit, des voies d'eau et des ports. Il sera aussi le délégué de son pays aux trois premières Assemblées de la S.D.N. et à la conférence de Barcelone (1921).

En 1920, l'Université de Poznań le nomme professeur agrégé de droit des gens et, en 1922, titulaire de la chaire de droit international à la Faculté de Droit et des Sciences économiques, dont il devient plus tard le doyen (1936 - 1939).

Dans ses recherches, il poursuit encore les travaux en droit constitutionnel commencés avant 1914 (*Régime politique et administratif dans la Pologne autrichienne*, Lausanne 1921 ; *Les institutions politiques en Pologne au XIX*ème *siècle*, Paris 1921, édition polonaise du même ouvrage à Poznań 1923). Mais son intérêt principal se concentre maintenant sur les problèmes du droit des gens : *Les fleuves de Pologne en droit international* (Poznań 1922, en polonais), *Principes généraux du droit fluvial international* (*Recueil de cour*, vol. 45), *Sécurité, arbitrage, désarmement* (Poznań 1928, en polonais) et *Recueil de sources pour servir à l'enseignement de droit international* (Warszawa 1938, en polonais).

Délégué de la Pologne à la Commission des communications et du transit de la S.D.N. (1921 - 1927) et président du Comité pour l'unification du droit fluvial à partir de 1925, il est aussi délégué de la Pologne à la Commission internationale de l'Oder (1923 - 1931) et agent du Gouvernement polonais dans l'affaire relative à la *Juridiction territoriale de la Commission internationale de l'Oder* devant la Cour de la Haye (1929).

Sa connaissance des affaires publiques lui valut la désignation en tant que commissaire du gouvernement polonais pour la liquidation des biens allemands en Pologne occidentale (1924 - 1927) ainsi que l'élection à la Diète (1928 - 1935, député du Parti national). Il écrit aussi sur les problèmes de la réforme constitutionnelle en Pologne (1935).

Au début de la guerre et de l'occupation, Winiarski a été arrêté par les Allemands et emprisonné à Poznań, à l'hôtel de ville, comme otage (septembre - novembre 1939). Remis dans un camp de transition, il fut expulsé,

avec sa famille, de Poznań. Au mois de janvier 1940, il réussit à franchir la frontière hongroise et gagne Paris où il met ses services à la disposition du Gouvernement du Général Sikorski. Il prend part aux travaux entrepris en vue de la future conférence de la paix et il préside la Commission gouvernementale d'enquête pour la campagne de 1939. Nommé président de la Banque de Pologne (siège provisoire à Londres) en 1941, il remplit cette fonction jusqu'à 1946. En janvier 1946, il est délégué à la Ière session de l'Assemblée générale des Nations Unies.

Élu membre de la Cour internationale de Justice, il était juge à La Haye pendant 21 ans (1946 - 1967). Il fut aussi le président de la Cour (1961 - 1964). Sa contribution à la jurisprudence de la Cour était considérable. Un autre juge de La Haye, le célèbre juriste belge Charles De Visscher, a écrit que Winiarski « fut dans toute l'acception du terme, un grand juge pleinement conscient des devoirs de la mission judiciaire de la Cour. [...] Son intégrité morale, sa bienveillante et souriante courtoisie étaient à la hauteur de la rectitude de son jugement comme de l'étendue de son savoir ». Dans ses moments libres, Winiarski prépare une traduction polonaise du *Droit des Gens* d'Emer de Vattel (parue à Varsovie en 1958).

A partir de 1946, Winiarski se consacre entièrement à son devoir de juge et, par conséquent, il cesse de publier des ouvrages juridiques pour éviter, comme il le soulignait lui-même, le conflit éventuel entre la passion du chercheur et les exigences de sa haute fonction internationale. Néanmoins il participe activement aux travaux des sociétés savantes, dont l'Académie Polonaise des Sciences à Cracovie, la Société des Lettres de Poznań et, tout particulièrement, l'Institut de Droit international. Associé de l'Institut depuis 1929 et membre depuis 1947, il préside cette académie internationale entre 1963 et 1965. En 1965, l'Université de Wrocław, en reconnaissance des services qu'il avait rendus au droit international, lui a conféré le degré de docteur *honoris causa*.

Jusqu'à la fin de ses jours, il s'intéressait aux besoins et au développement de sa région natale de Łomża. L'homme courageux, sage et simple, il nous laisse le beau souvenir d'une vie consacrée à sa patrie, à la justice et aux principes immuables de droit.

Krzysztof Skubiszewski

Leon Babiński

On 11 January, 1973, Professor Leon Babiński, LL. D., died in Szczecin. He was born in Warsaw on 13 January, 1891. After finishing a Warsaw high school he read law in Paris (1912) and Moscow (1913). At 22 he began training as a barrister's assistant. When Poland regained her independence, he was for a time chief secretary of the Supreme Court. For the next 20 years (1919—1939), he served as a lawyer at the Ministry of Foreign Affairs where he held various posts.

The professional lawyer's work was only a part of Professor Babiński's life: Immediately upon graduating he took up juridical research. As soon as the system of higher education began to function in Poland he devoted himself to teaching and remained loyal to it to the end of his life.

Professor Babiński had a great variety of scientific interests. He has left over 200 publications which cover four fields of legal sciences: the history of Polish law, private international law, public international law and transport law.

The earliest work of the late professor dealt with the history of Polish law (on methods of probate of testatory divisions according to the perpetual records of the Poznań region in the 14th and 15th centuries, published in 1917). Professor Babiński liked history and his erudition in this field was quite notable. He frequently referred to history in scholarly discussions, demonstrating the connections between the constructions of contemporary and old institutions. The historical enthusiasm of Professor Babiński was not confined to the history of Polish law. He delved deeply into the history of private international law which became the main field of his scholarly interests. He presented a penetrating historical outline of this branch of legal sciences in a manual of private international law (1935) and a manual on the development of private international law beginning with mid-19th century (1960).

Worth noting apart from the work on the history of Polish law mentioned above are: a treatise of the fall of currency in Poland in mid-17th century against the background of the then financial crisis (1919), a work

about the Radom Treasury Tribunal (1923) and a work on the Pomeranian legal memorandum addressed to the Polish king in the years 1469—1470 (1961). The publication dates indicate that the passion for historical research accompanied Professor Babiński all his life.

As has been said already, the late Professor devoted his greatest interest to private international law. His publications on this field cover all aspects of the subject. Thus there are works on collision law, on international civil procedure and on law of aliens. The greatest importance is attached to his works of a general nature, such as first of all a work published in 1927 in " Revue de droit international prive " entitled *Le droit international prive en Pologne*. This is an outline covering the whole of the problems of the Polish doctrine of private international law. This work rendered a particularly great service to the doctrine of private international law in Poland, because it was the first work to present the Polish doctrine of this branch of legal sciences based on the law of 2 August, 1926. Another work of a general character is an outline of lectures on private international law, published in 1935 and covering general doctrines and personal law.

After many years Professor Babiński returned once again to the general problems of the subject which constituted the corner-stone of his interests. After World War II, in 1957, he published a work under the title *Problems of Contemporary Polish Private International Law*. His intention was that legal relations after the war should differ from the earlier ones. He felt a need of a new interpretation of the definitions of conflict of laws. A further reminiscence of new thoughts is represented by the treatise *L'etendue du droit international privé dans le système juridique international* (1961).

His works on international civil procedure include a treatise on the contribution to the problem of national jurisdiction over a foreign State (1928), a work on trial rulings in the law on private international law (1936) and an article on the provisions of the civil code devoted to international law.

Professor Babiński's research on public international law was concentrated above all on legal problems of the consular service (*Consular Protection of Inheritance*, 1919, *Legal Problems of the Work of Consuls*, 1935, *Organization and Technique of the Consular Service*, 1948). Also worth mentioning is his work on the freedom of the seas and oceans (1947), and Part One of a mimeographed student textbook on public international law, containing the law of peaceful relations (1948).

The fourth direction of the late professor's research concerned transport law, above all the air law. In 1930, that is a few months after the conclusion of the 1929 Warsaw convention on air transport, he published a work on the ways and directions of the contemporary air law. He wrote also on the

legal status of the captain of an aircraft (*La protection juridique du commandant de l'aeronef*, 1933) and of the influence of marine law on the codification of the air law (1937).

After more than twenty years Professor Babiński returned to transport law. Together with J. Siedlecki, he published in 1963 a treatise on direct bill of lading. Together with W. Górski, he published a two-volume mimeographed student textbook on transport law (1959—1960). In the last publication of his life the late professor joined his interest in transport law to private international law. He did this in his work *Le contract de commission de transport en droit international privé* (1970).

Professor Babiński took a lively interest in current legal problems. He expressed this many times in writing. As has been mentioned, he reacted at once, to the adoption of an international convention on air law, concluded in Warsaw in 1929. When Poland was considering the accession to the Hague conventions of 1902 and 1905 he published two treatises on their subject. After World War II, when the question of the legal status of Germany was new and doubtful, he wrote on the organization of the control of Germany and the problem of the German statehood (1949). The same may be said of the period of World War I. Even before the armistice was signed Professor Babiński wrote of the registration and indemnization of war losses after the great wars of the 19th and 20th centuries.

The didactic activity of the Professor was as wide as his scientific research. He taught the history of the old Polish court law, public and private international law, air law, transport law and general science on law. In the inter-war period he lectured regularly, from 1919 to 1939, on private international law to students at the Central School of Economics. He lectured also before the last war at the School of Political Sciences, at the Free University and the Higher School of Journalism. After World War II he lectured for five years on private and public international law at the University of Poznań. For one year he taught public international law. In 1951, he moved to Szczecin to the School of Economics. For four years he was its rector. When the School was merged with the Szczecin Polytechnical Institute as its economics department, he lectured there until his retirement on the general science of law and on transport law.

Professor Babiński took an active part in the work of learned societies. He was an active member of L'Institut de Droit International, the International Law Association and the Academy of International Law and Jurisprudence named after Fra da Vitoria in Madrid. As regards Polish learned societies, most of his care was devoted to the Szczecin Scientific Society of which he was co-founder and the first president.

Such an intense professional, scientific and didactic activity was possible only thanks to the ardent zeal that could be seen in all the

activities of Professor Babiński. He did everything with enthusiasm. He was a zealous teacher, a passionate researcher and a fervent debater. His whole life was marked by disinterestedness and complete dedication to his cause. He never enclosed himself in the circle of his own affairs. He was a benevolent and cheerful man. And so he will remain in the memory of those that knew him.

Professor Babiński performed conscientiously his life task and left his mark on the Polish science of law. The services rendered by Professor Babiński were recognized by the Szczecin Polytechnical Institute when it awarded him its honorary doctor's degree.

Witalis Ludwiczak

Remigiusz BIERZANEK, *Współczesne stosunki międzynarodowe* [*Contemporary International Relations*], Warszawa 1972, PIW, 376 pp.

The book under review is in a double sense a complete novelty in Polish literature. It is the first systematic study of a new subject that international relations have became in the syllabus of the Institutes of Political Science : Professor Remigiusz Bierzanek lectured at the Institute of Political Science of the University of Warsaw ever since its foundation. This means that we have to do here with the first attempt ever made in Poland, and probably also in other socialist countries, in this domain.

Second—the book is of an unconventional nature : it is difficult to classify it in any category of publications. Since it is written on a subject in which its author lectures at the University, it should really be a manual of international relations. It is not an accident, however, that it has been published by a literary publishing house which says that it is an essay. And rightly so, for it is written in an easy and fine literary vein—it sketches the various problems without trying to exhaust them, while its contents, unburdened by references to learned sources and documents, have rather the form of a conversation with the reader. The book has, therefore, a broader range of influence than a traditional manual. Its function is also different : it not so much appeases as stimulates the hunger of knowledge about contemporary international relations.

But this is precisely why, in my opinion, the book may be called a manual of a new type : a modern manual whose basic trait is its open character. It is open in a subjective sense of the word : for various recipients interested in international relations from various positions and for various purposes. It is also open with regard to the subject matter leaving the possibility of different answers to the questions asked, and the freedom of choice from a variety of alternate solutions.

From the point of view of academic didactics, such a modern manual serves as an aid for the study of a given subject and not for learning it. From the point of view of its scientific exploratory value it may contribute more to the development of theory than the formulation of abstract assertions, especially in the situation in which the science on international relations finds itself today, when it is more correct to define theory as a skillful set of questions than answers.

Such is the general original model of the book of Professor Bierzanek, which deserves great recognition, and by publishing which the author has done us a great service.

The contents of the book represent, of course, only a certain approach to such a model, and the degree of this approach varies in the various chapters.

It may be said in general that legal and organizational problems of international relations have been treated in a more traditional manner and, in proportion to other aspects of those relations, the author has devoted much more attention to them, describing even highly detailed and

technical problems concerning, e.g., the diplomatic and consular service, or data pertaining to the structure of the United Nations. This is not to be wondered at, for the author is after all an experienced lecturer and a consummate specialist in international law. Remembering this, one should rather emphasize with appreciation that his book on international relations goes so far outside traditional legal problems and juridical method.

It is really amazing with what expertise and freedom does the author move particularly in the area of old and contemporary political doctrines and the science of international relations. In this area exactly come to the full light the above mentioned values of the model of the book as a modern manual of an open character. I think that Chapter VI, dealing with international security and disarmament, approaches most closely to this model.

Tackling this subject, the author describes first the principle of balance of forces, which has played such a great role as the rule of political behaviour of States. It is characteristic of the style of the book that while making a number of reservations with regard to this principle the author does not reject it categorically as a factor stabilizing also contemporary international relations. A temporate criticism and caution in the formulation of ultimate evaluations impart a reflexive character to the arguments of the author, and incline the reader to his own reasoning and a serious quest after solutions.

The same applies to the presentation of answers which various philosophical and ideological schools tried to give to the question: what are the causes of wars? The author presents the views of philosophers and theologists who treated war as a product of the frail human nature; of writers who say that the causes of wars lie in the structure of the international system and the existence of sovereign States; of those who regarded war as the result of the struggle for the survival of the fittest. Finally, he gives a comprehensive picture of the Marxist attitude and its evolution. It is only from the manner of the presentation, from the distribution of accents and critical remarks, that it becomes apparent that the author prefers the solutions proposed by Marxism or expressed in the attitude of the governments of the socialist countries.

The author passes on finally to an analytical presentation of political events in the field of international security and disarmament, as well as the present situation in this domain.

Chapter I ("Introductory Notes") has a similar structure. It describes such questions as the object and independent character of the science on international relations. The same may be said of Chapter II devoted to factors shaping international relations, and Chapter V ("Types of International Relations"), devoted chiefly to the problem of peaceful coexistence. Chapter III, concerned with States and groups of States, and Chapter IV, discussing the legal and organizational forms of international relations, are devoted more, as has been mentioned already, to the supply of a large store of information about existing institutions. But here, too, the author gives an interesting analysis of such research methods and theories as functionalism, the games theory, simulation, etc., always emphasizing, of course, the views and attitudes representative of the socialist countries.

The style and character of the book have resulted in certain disproportions in the treatment of various problems: broader development of some of them, and just a mention or even omission of others. I think that it was also in some measure the result of haste justified by the necessity of meeting the urgent demand for this kind of introduction to the science on international relations.

The author develops, for example, his arguments concerning small and dwarf States, while the role of big powers in in-

ternational relations is described modestly rather in the context of the voting procedure in the Security Council.

In Chapter III, the author makes first a division of States into three main groupings: socialist States, capitalist States and the "third world." This division has become too obsolescent already and does not reflect the complexity and multidimensional character of the contemporary international system. The author overestimates also the present and future role of the "third world." A further division of States was made on the basis of existing regional organizations. Some simplified evaluations appeared here, particularly with regard to the European Economic Community, when economic successes of its members are ascribed to the organization itself. One may note also some inconsistencies in the evaluation of certain factors of international relations. In some cases, for example, the author ascribes to public opinion small influence on the policy of governments, in other cases, however, he seems to exaggerate it.

Some questions have been treated too superficially. The author criticizes, for example, the possibility of the application of the games theory in the science of international relations, since its mathematical calculations apply to a limited number of variable factors, while the real number of variables in the practice of international relations is unlimited. The value of the games theory for the science of international relations consists mainly, however, in that it acts as an apparatus which permits to take a better and more consistent account of such factors as calculated risk, admissible value of stake, probability of winning, etc.

Worth emphasizing is the high evaluation of the role of international organizations and the recognition of the science of those organization as an independent scientific discipline. Out of the many valuable observations of the author in the field of legal problems, worth emphasizing is his highly pertinent approach to the question of effectiveness of international law. The author says, *inter alia,* that "the principle of reciprocity is very often a factor behind the observance of international law [...]" (p. 84). It is a pity, however, that the statement was not developed further and that the author did not show the political consequences of the principle of reciprocity.

These few examples of disproportions and weaker points do not affect the general high value of the book of Professor Bierzanek. Also, they concern questions which might be subject to discussion. It may be even considered to be a merit of the author that he stimulates such discussions when he expresses his views, often without concealing his own hesitation and doubts with a modesty worthy of a great scholar.

The task the author set himself was difficult not only because of the pioneering nature of the work. The difficulty arose also from the extremely dynamic character of international relations of the present moment. Changes in the system of these relations often take one by surprise and are the reason why not only quantitative data but also certain qualitative traits become obsolescent in the period which passes between the writing of a book and its publication. For example, the author still treats threats to natural environment in the narrow aspect of the effect of nuclear test explosions or the possible use of atomic weapons. In the meantime, the problem of the protection of natural environment "exploded" in the international forum, attaining the rank of one of the most urgent and important functions of the United Nations.

I think I may safely say, therefore, that mainly thanks to its general methodological orientation, its original approach and its reflexive strength, Professor Bierzanek's book on contemporary interna-

tional relations is a successful first attempt at the achievement of a difficult goal. It is to be expected that its next editions for which there will be growing demand will give the author an opportunity of an even better coping with this task.

Wojciech Morawiecki

Jerzy JAKUBOWSKI, *Prawo jednolite w międzynarodowym obrocie gospodarczym* [*Uniform Law in International Economic Relations*], Warszawa 1972, PWN, 243 pp.

Jerzy Jakubowski's treatise on uniform law in international economic relations is the fruit of many years of research conducted by the author, concentrated on legal problems of the international exchange of goods and services. After numerous studies of a smaller calibre he published in 1966 a work on the contract of sale in international trade, where he came to the conclusion that so far no supra-state, uniform world law governing international sales exists (*lex mercatoria*). But a process of its systematic uniformization is under way. This is indicated by the uniformization of trade practices and sales law both on a universal and regional scale. J. Jakubowski has proved an ardent supporter of the unification of law on a world scale not only in the field of international sales, but also in the entire domain of international economic relations. He called for the "liquidation of contradictions between the international nature of relations in foreign trade and their national regulations."[1]

The above ideas were born from the observation of changes appearing in the latter part of the 20th century in the field of the civil-law regulation of economic relations on an international scale. The constant and close contact of the author with the legal reality equipped him with an acute vision which does not lose sight of noteworthy events, while his profound theoretical knowledge permits him a bird's eye view of the law and its application, permits him to carry out a synthesis of the many complex problems, enables him to attempt a look into the future as well. Thanks to these qualities, the book may be called a dogmatic systematization of the uniform international law of economic relations and a full analysis of the principles of the interpretation of that law.

J. Jakubowski's research concentrates on the field of international commercial law. The term embraces the entire object of an international regulation of economic relations. The term covers also problems of industrial ownership, transport law, bill of exchange and cheque law and, as the latest phenomenon, problems of law regulating the exchange of goods and services, as well as principles of the settlement of accounts arising from this exchange. In accordance with tradition, the author accepts a very broad definition of international commercial law. This involves all kinds of relations pertaining to economic problems as they appear in the light of civil law.

On the basis of his data J. Jakubowski offers the following definition of the international commercial law: "It is a system of norms produced by way of a joint law-making activity of States, and regulating economic relations between the subjects of civil law of various States. The system is closely united and coupled with a set of rules produced outside the activity of States in the practice of international economic relations" (p. 37).

The above definition is connected with problems of the application of the norms of international economic law, where the forefront issue is the sequence of the application of conventional norms in relation to a law made autonomically. The

[1] J. JAKUBOWSKI, *Umowa sprzedaży w handlu międzynarodowym* [*Contract of Sale in International Trade*], Warszawa 1966.

author draws attention to three different attitudes towards this matter:

(1) recognition of international commercial law as an integral part of national legal systems;

(2) recognition of international commercial law as belonging to some third legal system, which is neither a part of national laws nor a part of international law;

(3) recognition of international commercial law as a part of international law.

J. Jakubowski declares himself in favour of the latter conception. He explains that this may be done only if one accepts a definition of international law based on the criterion of its source, i.e. that a norm of international law is a norm made on an international plane. J. Jakubowski's research is focused on the question of the application of so-conceived international commercial law. The author emphasizes in this connection that by the term "application" he means the basic function of organs settling controversial issues.

The central problem of the work of J. Jakubowski is the question of the interpretation of uniform law, which—as the law itself—should be of a uniform character. If the court of a State interprets uniform law in accordance with principles accepted in the given country, such an interpretation leads to differences of opinion and by the same token destroys the purpose of uniform law. It is therefore indispensable to try to establish some common criteria of interpretation, which would be respected by courts of all States belonging to a given act of uniform law.

The author cites a number of examples of divergences in the interpretation of provisions of international agreements introducing uniform law. He mentions among other things problems of the interpretation of Articles 2 and 4 of the Paris Convention on the protection of industrial property of 1883, divergences which arose from the provisions of Article 10 of the Brussels Convention on bills of lading, some rules pertaining to international air transport of 1929 with regard to the definition of a carrier, and carrier's liability for luggage and goods. J. Jakubowski points out that the question of differences in interpretation led in many cases to introduce supplements or changes in international agreements. To prove that the problem of uniformity of interpretation of uniform law is a vital one he mentions the fact that at three consecutive meetings of an organization dealing with the unification of law, namely the Rome Institute, the participants tackled divergences in the interpretation of uniform law (1956, 1959, 1963).

According to J. Jakubowski, three ways lead to the achievement of uniformity of interpretation. It may be achieved by: (1) measures conducive to uniformity of interpretation by the courts of individual States; (2) legislative measures serving the uniformity of interpretation; (3) measures consisting in the internationalization of the application of uniform law.

The first include: a proper preparation of judges by a study of comparative law, a method of including in international agreements provisions on the necessity of uniform interpretation, circulation among member States of sentences issued in other countries, against the background of a given uniform legal act, working out and popularization of suitable interpretation guidelines in the judicatures of member States.

Legislative measures serving the uniformity of the interpretation of norms of international commercial law include above all the care of certain international organizations on an act of uniform law and periodical amendments of uniform law. An important role in the striving for a uniform interpretation is played by the method of defining the terms contained in the acts of international uniform law. Another method of preventing differences in the interpretation of uniform law is the choice of a suitable form of international legislation.

The last method leading to the achievement of harmony in the interpretation of uniform law is, according to the author, the communication of sentences concerning problems of international trade to courts or arbitration of an international character. Although J. Jakubowski is of the opinion that the setting up of such courts for international trade is not feasible at present, he thinks nevertheless that it is possible to make a beginning by appointing international advisory interpretation panels for problems connected with the interpretation of uniform law.

The filling of gaps in uniform law is a problem of particular importance. The author draws attention to many methods which may be used in case of a gap. These are : the method of filling the gaps by a maximum exploitation of the possibilities inherent in the legal act of uniform law itself, the method of looking for solutions with the help of other acts of uniform law, the method of the application of universally recognized legal principles and trade usage, the method of the application of national law and finally the method of supplementing uniform law by way of the law-making activity of the courts.

J. Jakubowski ascribes significance to three out of the above methods only. He attaches no weight either to the method of filling a gap with the help of other legal acts of uniform law or to the method of the law-making activity of courts. The resorting to other legal acts fails not only because of the difference in the matter of the legal act to be supplemented, but first and foremost because of the difference in the cirle of participants in a given legal act. One may resort to this method only when a case involves legal acts of a similar group of States or a similar object of regulation. J. Jakubowski rejects completely the method of the law-making activity of the courts. He is of the opinion that only a future international court may be vested with law-making powers.

The filling of gaps in uniform law by the three remaining methods may be done, according to the author, first of all by a search for solutions in the uniform law itself. If this method fails, it is necessary to resort to universally recognized legal principles. And *ultimo loco* one should apply the law of the country indicated by the collision norm of a uniform act.

Part Two of the book deals with problems of the application of the common economic law of the member countries of the Council of Mutual Economic Assistance. In this, let me call it, detailed part of the work the main emphasis is placed on divergences in the interpretation of the joint law and the investigation of ways leading to the achievement of uniformity. An analysis of measures serving the uniformity of interpretation of the joint law indicates first of all the need of the fullest possible information about practice. The author supports the idea of the publication of a joint legal journal of the CMEA member countries.

But even the best information cannot fully protect uniformity of interpretation. Much help could be given here by interpretation guidelines. The author suggests also the method of achieving uniformity of interpretation by setting up a uniform international court for the settlement of civil law disputes between subjects belonging to the CMEA member countries. J. Jakubowski is not in favour of setting up such a court as an organ of appeal from sentences issued by the arbitration commissions of the individual member countries, as this would destroy the character of arbitration institutions as courts of conciliation. The author thinks it is possible to organize such a court as an international institution whose sole task is to issue guidelines to the interpretation of the joint law and to take over cases passed on to it by national arbitration bodies. He accepts also the possibility of the functioning of an international arbitration court as a single instance court

for cases where the value of the subject of dispute exceeds a certain sum.

Writing on the interpretation of the joint law, the author makes numerous remarks about the semantic, systematic and functional interpretation, and above all about the prevention of divergences by proper legislative methods. An important role is played in this respect by revisions of the acts of the joint law and methods used in the field of legislative technique. Legal acts should be formulated in as descriptive a language as possible, taken from practice of international trade, definitions should be worded by pragmatic methods, texts of a uniform act should be accompanied by explanatory articles.

The author thinks that gaps in the joint law of economic relations of the CMEA member countries can be filled by methods very similar to those described in part one of the book. He ascribes considerable importance to the method of the exploitation of possibilities inherent in a given act of the joint law, particularly in the application of *analogiae legis*. He notes that the filling of a gap by resorting to another act of the common law is easier and simpler in legal relations developing between the CMEA member countries, since it leads to correct solutions thanks to the homogeneity of the system of the member countries, which has produced certain legal principles of a supreme nature, accepted and recognized by all of them. It is, therefore, correct to observe the principle of the ancillary role of the legal system of a given member country.

The main content of J. Jakubowski's book and the main purpose of his research is, as has been said already, the problem of the uniformity of interpretation of the unified law of international trade. The filling of gaps belongs to the question of the interpretation of the law. For purposes of the construction of his work the author treats separately problems of interpretation and problems of the filling of gaps. In the closing remarks of my review, when I speak of interpretation of the law I shall mean at the same time the filling of gaps.

Problems of the interpretation of uniform law are very controversial. This must be so and cannot be otherwise on the present stage of the development of uniform law (not only commercial). Authors writing about uniform law include representatives of the conservative trend defending classic conception at any price. At the other pole are supporters of innovations. The latter consider that no principles recognized by the legal doctrine should be observed in the interpretation of uniform law. They hold that clinging even partly to classic principles of interpretation means stagnation. There are also some authors who while modulating views in accordance with the new trend try to preserve from past achievements what could be useful in the new system. It would not be right to say that the attitude of J. Jakubowski is a compromise one. Moving with great ease in the current of novelties, J. Jakubowski combats anachronisms with a strong polemic passion very characteristic of him. At the same time he respects classic conceptions when he sees usefulness in their preservation. As an expert on the theory of law he can breathe a new spirit into the old conceptions and subordinate novelties to formulae recognized by science.

Referring to what I have said at the beginning of the review, I might say that J. Jakubowski has written a book containing a creative synthesis of the genesis and structure of uniform international commercial law and its interpretation; he has imbued it with new ideas and suggestions for future solutions. It is impossible to discuss in a review the very numerous intellectual constructions concerning the nature of the proposals for the future. It is also difficult to fasten upon the many proposals concerning interpretation of the law without exposing oneself to the charge of fragmentary questioning of problems taken out of their

context. The wide horizons of the author are built on a synthesis of phenomena which are undergoing constant change. This is why the generalizations made by him cannot be based always on generally accepted grounds. And they cannot be otherwise, since new institutions and definitions have still a long way to go to the precision of detailed formulations. Because of this the J. Jakubowski's treatise has an additional value since it offers inspiration for monographic studies of various problems of uniform economic law. It may be clearly seen from the text of the book that the author realizes that he is moving amidst problems that are still in *statu nascendi*. Frequently he propounds very cautious theses, pointing out that they require a thorough treatment. It is hard to foresee today which of J. Jakubowski's conceptions will be confirmed after an analytical investigation. One may risk, however, the statement that the main skeleton of the constructions contained in the book will survive.

Witalis Ludwiczak

Manfred LACHS, *The Law of Outer Space. An Experience in Contemporary Law-Making*, Leiden 1972, VIII+196 pp.

The latest book of Professor Manfred Lachs, President of the International Court of Justice, differs from many other treatises on space law first of all because it is at the same time a thorough study of the contemporary process of the making of international law. This is emphasized in the sub-title of the book: *An Experience in Contemporary Law-Making*. The choice of the law of outer space as the subject of this work which is of extreme importance for the theory of international law and international practice has been caused, I think, not only by the high qualifications of the author in this field. As regards the subject, the author combined his theoretical interests, expressed in numerous publications[1] with his practical activities as the first Chairman of the Legal Sub-Committee of the Committee of the UN General Assembly for Peaceful Uses of Outer Space (until 1967).

Space law which is a new and constantly expanding branch of international law, both in view of its rapid rate of development and its new special law-making mechanisms, fully deserves a pentrating study. All the more so since numerous difficulties both of a political (conflicting interests of various States) and legal nature (necessity of working out new legal solutions adapted to the requirements of the new "dimension" of international law relations) had to be overcome on the way of its development.

The book consists of twelve chapters. In the first three the author shows the law of outer space as a new "horizon" and a new chapter of international law, and describes the early stages of international cooperation in this field. Further chapters are devoted to the presentation of the fundamental principles and institutions of the international law of outer space: the legal regime of outer space and celestial bodies (Chapter IV), frontiers of outer space (V), legal situation of astronauts and objects launched into outer space (VI), assistance for and return of astronauts and space objects (VII), space telecommunications (VIII), peaceful uses of outer space (IX), rights and obligations of States (X) and their international liability (XI). The final chapter preceding the conclusions of the book is in the nature of a synthesis of the international law-making process in the realm of the law of outer space.

[1] One should mention above all *The International Law of Outer Space* published in "Recueil des Cours," vol. 113, 1964, No. 3, The Hague Academy of International Law.

The starting thesis of the book is the assertion that there never was a State of "legal vacuum" as regards outer space, since the problem was regulated by rules of international law. The extension of the binding force of international law to outer space did not mean, of course, a simple application of the existing principles and rules of international law to this new field of human activity. Many of them required proper adjustment. Some of them proved, however, unsuitable for the new situations. This necessitated the creation of new ones. The tremendous development of human activity in the outer space created increasingly greater needs in this respect. Hence there arose the necessity of working out a "written law" in this domain. The task was entrusted to the United Nations which created new institutionalized mechanisms (The Legal Sub-Committee) which were to help in the execution of this task.

The rapid—though certainly not as spectacular as the process of the conquest of the cosmos—process of the development of the international law of outer space has been divided by the author into two basic stages. The first of them is connected with the adoption by the United Nations of a number of resolutions (end of the 1950's and early 1960's) containing guidelines as regards the directions and means of the development of international cooperation in this field, and defining certain basic principles and rules which were to "pave the way" for the working out of final solutions in the form of binding international agreements. The culminating point of this stage came in 1963 when the XVIII Session of the UN General Assembly passed a Declaration of Legal Principles governing the Activity of States in the Exploration and Use of Outer Space. The next stage began in 1967 with a Treaty on the Principles governing the Activity of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies which formulated the fundamental principles of *corpus iuris spatialis*. This was followed in turn by agreements on the Rescue of Astronauts and the Return of Objects Launched into Outer Space (1968) and International Liability for Damage caused by Space Objects (1971).

The author appraises very highly the to-date achievements of international legislation in the field of the law of outer space, although it is difficult to say in his opinion that the legislation has fully achieved its goals. Some of the rules demand further elaboration while others have not been formulated with sufficient precision and call for improvement (p. 142).

The rules guarantee sufficient protection of the interests of the international community. Writing of the rights and duties of States (Chapter X), the author strongly emphasizes this fact when he says that the provisions of the law of outer space protect both the interests of States which are active in the cosmos and of those which are inactive there. This is why the freedom of activity in outer space is not absolute, but is limited by the rights and interests of other States. The above statement leads the author to the formulation of a more general thesis according to which the expansion of the activeness of States, which covers ever new fields of activity, leads to a widening of the scope of their mutual obligations. These seemingly contradictory phenomena constitute in fact supplementing elements of development characteristic for contemporary international law which should create in due time proper guarantees protecting the rights and interests of the entire international human community.

Emphasizing the great impact of science and technology on the social and economic development of the contemporary world, the author points in the conclusion of his arguments to the tasks of law which should contribute to the exploitation of science in the interest and for the

good of mankind (p. 149). He points out rightly in this connection that in many fields law lags behind the development of events. Certain sections of international law require further development and certain changes, while some other sections are only beginning to shape. The existing loopholes should be filled by a further development of international law, but not a "past-oriented, myopic or parochial" one. Full success in this domain may be achieved only through the concerted efforts of many States, similarly as has been partly achieved already in the field of science and technology.

The work of Manfred Lachs, imbued with the fine ideas of humanism, based on a thorough analysis of the rules of the law of outer space, taking into account elements of the real alignment of forces in the international arena, constitutes an outstanding contribution of a Polish jurist to the world science of international law.

Jerzy Rajski

Jacek MACHOWSKI, *Prawa Człowieka. Zagadnienia współpracy międzynarodowej* [*Human Rights. Problems of International Cooperation*], Warszawa 1968, Książka i Wiedza, 294 pp.

Dr Jacek Machowski's book occupies a special position in Polish writings on international law, for it is the first ambitious attempt at an encyclopaedic interpretation of the issue of international protection of human rights. The 20th anniversary of the adoption of the Universal Declaration of Human Rights by the UN General Assembly provided the inspiration for writing the book. Yet it's not just a work written for a special occasion. The working approach to the subject, its factual analysis decidedly dominate over the anniversary meditations and contemplative interpolations. These, kept in proportions, often under the form of a pleasant historical reflection, constitute in my opinion a useful and extremely effective accent in this dissertation. Consequently, the author has presented in an interesting way a considerable amount of knowledge about the basic problems of international cooperation for the respect of individual standards of human rights and basic freedoms. As rightly stated by the representative of the Polish United Nations Association, which sponsored this publication: this cooperation "is a necessity of our times, is an organizational form of our atomic age" (p. 5).

The book is full of original elements and fresh creative ideas, although the author has strictly observed the rigours of a popular-science work. The text is clear, easy to understand, which is important, because in spite of the fact that the book has appeared during the International Year of Human Rights, it is addressed not only to specialists. On the other hand, it is undoubtedly a paradox that it has been necessary to wait for an anniversary and official celebrations organized under the auspices of the United Nations to present a set of such topical and important problems to wide circles of readers, to popularize in Poland the achievements of Polish diplomacy and Polish political and legal thinking in spreading the ideas and principles of human rights in contemporary international law. It seems however, that although this presentation is ample in scope, yet it is not clear and legible enough. It would probably have been much better to isolate this problem from the rest in the form of at least one

chapter dedicated solely to a comprehensive treatment of Polish initiatives.[1]

The study begins with historical origin of human rights, a question rarely dealt with in Polish literature of the subject. J. Machowski is of the opinion that "the first signs of an international concern for the respect of basic human rights could be traced in the stipulations of religious freedom contained in various treaties concluded after the Reformation and resulting from the order accepted as a consequence of religious wars" (p. 15). Consequently, the contemporary normative provisions in the sphere of the international protection of human rights are genetically deduced by the author from the protection of minorities and humanitarian evolutional trends in international law of the 19th century (ban on trade in Negroes, first conventions on the law of war). These trends have been strengthened in the twenty years between the two world wars by the achievements of the International Labour Organization and by some at least achievements of the League of Nations.

World War II was a turning point in the process of shaping and development of the idea of international protection of human rights. The immense, unprecedented in history intensity of the Nazi crimes perpetrated not only against individuals but also against entire nations, sharply revealed the need of close cooperation in the international arena in order to protect human rights and basic freedoms. Consequently, it led to the formulating of many new and progressive principles by the States of the anti-Nazi coalition. Nevertheless, we owe the specification of particular standards of international protection of human rights to the Charter and the practice of the United Nations. It is the Charter of the United Nations that lists the need "to reaffirm the faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small [...]" as one of the fundamental aims of the Organization and pays considerable attention to the protection of human rights.

Jacek Machowski rightly points to the fact that even at the Conference in San Francisco differences have emerged among the great powers as to the manner in which to define the duties of the United Nations concerning the international protection of human rights. "The Soviet delegation wanted to specify the generally formulated provisions of the draft Charter in the matter of human rights, requesting to itemize some of them, for example the right to work or to education [...]. The American amendments in the matter of human rights were marked by a generality of formulations and tendency to avoid the specification of particular matters which would be subject to international protection [...]. Thus, the binding provisions of the Charter of the United Nations in the matter of human rights are the result of a compromise between the far-going and progressive demands of the Soviet delegation and the limited possibilities of the delegations of Western States." But in spite of the fact that the respective provisions of the Charter of the United Nations are not perfect "they constitute an

[1] Such a solution, and rightly so, in my opinion, was adopted recently by Wojciech MORAWIECKI in the second edition of his work *Narody Zjednoczone. Zamierzenia i rzeczywistość* [*The United Nations. Intentions and Reality*], Warszawa 1970, where "role and rank of People's Poland in the system of the United Nations" is dealt with separately. On the other hand, it must be admitted, that the foreign language summaries in Machowski's book (the English text is printed on pp. 283—284) place the accent on the Polish initiative in the cause of the international protection of human rights, but in a general and compressed way which leaves much to explain. The author, however, has published a separate article on this subject: *Wkład Polski w dziedzinę współpracy międzynarodowej w zakresie praw człowieka* [*The Contribution of Poland into International Cooperation within the Scope of Human Rights*], "Nowe Prawo," 1969, No. 3, pp. 351—360.

undoubted progress and considerable step forward on the way to creating a proper and effective system of international protection of human rights," concludes Jacek Machowski (p. 25).

And so thanks to the provisions of the Charter the progressive development and codification of human rights are going on within the framework of the organization of the United Nations. The formulation of the principles of the protection of human rights as standards of behaviour recommended by the UN to its member States as well as their implementation reflect the fierce political fight among the opposing groups within the United Nations. The book pays considerable attention to this problem and presents the controversies and disputes which had accompanied first the adoption of the Universal Declaration of Human Rights and then the work on the Covenants. The author rightly underlines the statement that the right of peoples and nations to self-determination is an integral element of the contemporary conception of human rights, just as is the absolute ban on discrimination in all its manifestations. The same applies to the principles of non-applicability of statutory limitations to war crimes and crimes against humanity which was confirmed in 1968 in contemporary international law by the Convention concluded under the auspices of the United Nations on the motion of Poland.

Machowski devotes much attention to human rights in the economic, social and cultural fields. He underlines that it is their implementation that conditions the effectiveness of respective political rights and fundamental freedoms. On the margin of Machowski's work it may be observed that the development of human rights in the economic, social and cultural fields has been inspired in the United Nations by the constitutional norms of the European socialist States.[2]

[2] Cf. A. Ross, *United Nations: Peace and Progress*, Totowa—New Jersey, 1966, pp. 351—352.

However, the author is wrong in criticizing the division made by the United Nations of the substance of human rights into two different Covenants : one dealing with the economic, social and cultural rights, the other with political and civil rights. It is true that the acceptance of such a solution opens the "possibility of access to the Covenant on Civil and Political Rights without simultaneously adopting the separate Covenant on Economic, Social and Cultural Rights, that is the obligations which condition the reality of the first ones" (p. 52). But the matter is not all that simple. The contemporary international law prefers step by step solutions. The two Covenants on Human Rights and the Optional Protocol to the Covenant on Civil and Political Rights, worked out by the UN, are a case in point in spite of the fact that there was an objective possibility of including all the provisions into one convention.

Yet, a division was made for pragmatic reasons (a similar technical solution was adopted in Geneva in 1958, when four separate convention on the law of the sea were presented for signing). The point is to enable the States ill-disposed towards a group of provisions, to adopt at least some other regulations. Such a solution does not weaken but considerably consolidates the universal scope and character of international legal relations. The socialist States will probably not ratify the Optional Protocol to the Covenant on Civil and Political Rights, but thanks to its isolation an obstacle has been removed blocking the way to the ratification by them of the Covenants on Human Rights themselves. Another argument in favour of the division of Covenants into two separate problem conventions is the essential differentiation in the level of social and economic development of the United Nations member States.

In conclusion, it should be said that it is a valuable publication and very useful, imbued with the spirit of deep understanding of and support for the noble

ideas of human rights and international cooperation for their full implementation. The annex contains a large compendium of the most important international documents concerning various questions of the protection of human rights, and contributes considerably to the popularization of the problem.

Andrzej S. Nartowski

Wojciech MORAWIECKI, *Międzynarodowe organizacje gospodarcze* [*International Economic Organizations*], Warszawa 1970, Central School of Planning and Statistics, 338 pp.

Professor Wojciech Morawiecki's popular manual of contemporary international organizations has had two editions, yet the present work is not just a reedition or even a revised version of the chapters on the most important economic institutions.[1] What we have here is an academic textbook discussing this subject in a new, interesting light. The author has introduced in his treatment of the subject elements of a general theory of international organization and it is against this background that he presents those institutions.

The basic value of this work is methodology. Professor Morawiecki has undertaken an analysis of the principles of the functioning of international organizations, and an attempt at a vivid presentation of the dialectic essence of the phenomenon. The aim of this monograph is to give a comprehensive discussions of selected economic institutions, to present the main direction of their statutory tasks and to outline their activity. The starting point is then the determination of the kind and scope of the real needs for cooperation among States, which stimulate the establishment of a given organization and are its *raison d'être*. International organizations are presented in the book against the background which determines their essence and character.

The work consists of two main parts approximating to the basic stages of the teaching process. Part One formulates the theoretical bases and is a comprehensive introduction to the study of international economic institutions. A detailed documentation of the hypotheses of the whole argument makes Part Two, in which factographical material is the main element. The factor integrating the two parts is the research method. The general part contains a crosssection, based on problem criterions, of different structural aspects and principles of functioning of international economic organizations. The detailed part contains a systematic survey of particular institutions. The correlation between those two inter-penetrating planes of treatment makes possible an exact verification of the statements that have been advanced and enlarges the approach to the subject.

In the general part the author discusses the classification of international organizations, their origin, concept, membership, statute, bodies and mechanism of decision-making, and the functions performed by an international organization in the process of cooperation of member states.

International organizations can be classified *ad infinitum*. The web of classification forms a criss-cross pattern and practice constantly adds new forms to the reality. Professor Morawiecki divides organizations into governmental and non-

[1] W. MORAWIECKI, *Organizacje międzynarodowe* [*International Organizations*], 2nd ed. enlarged, Warszawa 1965, PWN.

governmental, universal and regional,[2] supranational and coordinative. True, classification introduces an order which is superficial and limited in fact to "the creation... of abstract models while the live thing is always richer and more complex," but it has at the same time a certain secondary cognitive function: "The placing of some international organization in a certain category should carry information about the kind of constitutional and correct solutions to be applied to it" (p. 11).

The range of competence has been made the criterion of distinguishing an economic institution from other international organizations. Nevertheless the author makes the reservation that this division is relative and imprecise, since every international organization has some economic aspect. For the sake of the argument, the notion of economic institution has been limited to those "which deal with relations in the sphere of production of material goods and services directly connected with them" (p. 19). Their characteristic feature is the high degree of measurability of the interests of member States, which in turn makes possible a considerably more precise definition of their effectiveness.

The author has made a concise description of the origin of international economic organizations. The formation of the world market and the consistently progressing processes of the inter-dependence of States in economic relations have laid their material foundations. But that is not all: "For an international institution to be established certain political conditions must always mature and be fulfilled: a degree of unanimity of will of States must be achieved, indispensable to conclude a proper multilateral international agreement, on which rests the existence and activity of an organization. The fulfilment of the functions of an organization depends on these conditions. The lack of favourable political conditions may become the main barrier on the way to the establishment of an international organization and later to its activity, even where the proper material conditions have matured, and its foundation and functioning have become an objective necessity" (p. 21).

The definition of an international organization is clear and elastic. The author has described it as "a process of collaboration between sovereign States, developing in a particular form whose fundamental trait is the existence of permanent bodies working for the fulfilment of common tasks of the participating States" (p. 31). This working formula implies two parallel approaches to the nature of the problem. The structural approach enables an analysis of the institutional solutions in their model shape, which is useful but limited to the surface of the phenomenon. Of utmost importance here is not the form but the content of the policy of member States, dialectically woven from trends to collaborate and compete, aimed at meeting many common needs by means of an instrument, that is an international organization, equipped with proper competences. The functional approach, preferred by the author, is based on the assumption that the essence of an international organization lies in the process of some concrete activity developed by this organization, in which the centre of gravity consists in decision-making.

The political character of an international organization is determined first of all by its membership, but the type of general institutional solutions chosen for a

[2] It is an interesting suggestion that an institution may be placed in the group of universal international organizations when it sufficiently safeguards the real equality of rights of the socialist and capitalist systems (p. 13). Consequently, the author denies the attributes of universalism to financial organizations operating under the United Nations (p. 176). In another work, he even questions their international character: W. Morawiecki, *Narody Zjednoczone. Zamierzenia i rzeczywistość* [*The United Nations, Intentions and Reality*], 2nd ed. revised and enlarged, Warszawa 1970, Wiedza Powszechna, p. 414.

particular case plays a role too.[3] The composition of the membership is a factor determining the political alignment of the general balance of forces, the main directions of the organization's activity and defines the practical ceiling of effectiveness of the actions it undertakes. Besides, the content of decisions made by particular bodies is determined by the mechanism of decision-making. The author concentrates his attention on the main parameters of this process: the composition of the bodies, the validity and importance of resolutions, and the voting procedure.

Professor W. Morawiecki advocates a typically functional model of activity of an international organization. The material tenor of its structure is formed by notion of basic function to which performance of the "particular functions" and the whole body of structural and procedural solutions should be subordinated. According to this definition the basic function of a modern international organization is "the political process leading to the revealing and expansion of the community of interests of the States concerned, and, on this basis, reaching a general agreement as to common tasks and means of their realization" (p. 75). The practical fulfilment of this basis function determines the effective activity of a given organization.

The most often practiced form of activity of a modern international organization is the consultative process, which accompanies the performance of particular functions. It comprises three main stages of achieving an agreement by member States. They are: the initial stage of confrontation of views and attitudes, the main stage of negotiations and the final stage of adopting recommendations. The basis of classification of the "particular functions" is formed by the type of political process, that is by the kind of methods of action adopted by the organization in the process of implementation of its objectives. The author distinguishes the following functions: regulative, controlling and operative, with the reservation that in the external activity of an international organization these functions manifest themselves in a different way than in *foro interno*.[4]

In the detailed part of the book the author discusses the tasks of the United Nations in the field of international economic cooperation, particularly the activity of the Economic and Social Council and auxiliary agencies (UNICEF, World Food Programme and UNDP). Next, he deals with UN specialized agencies (ILO, FAO, IMF, IBRD, IFC, IDA, ICAO, IMCO, IAEA, GATT, UNCTAD, and UNIDO), and gives a characteristic of the international institutions dealing with raw materials, of the West European organizations (OECED, CEE, EFTA) and the organizations of economic cooperation of the socialist countries, first of all, the Council for Mutual Economic Assistance.

The composition of the detailed part and the method of handling the subject correspond closely to the composition of the part dealing with general considerations. An analysis has been made of the origins, membership composition and functions of a given organization, the mechanism of decision-making and the appraisal of its activity. Thus the author has presented a rational and legible conception of international organizations and

[3] Cf. W. MORAWIECKI, *Institutional and Political Conditions of Participation of Socialist States in International Organizations: A Polish View*, "International Organization," vol. 22, 1968, No. 2, pp. 498: "In fact, the author believes that the character of an international organization can be more accurately deduced from a political analysis of its membership than from a juridical analysis of its statute."

[4] More on this subject: W. MORAWIECKI, *Funkcjonalne podejście do organizacji międzynarodowej [Functional Approach to an International Organization]*, "Sprawy Międzynarodowe," 1970, No. 10/11, and: *Funkcje organizacji międzynarodowej [The Functions of an International Organization]*, Warszawa 1971, Książka i Wiedza.

a pragmatic evaluation of their activity. The book makes it possible better to understand what an international organization really is, especially when it is involved by the member States in their struggle and rivalries, and is at the same time their instrument of successful cooperation ; also what are the reasons of existence of international economic institutions, and their practical possibilities.

Andrzej S. Nartowski

Jerzy PIEŃKOS, *Wpływ wojny na obowiązywanie umów międzynarodowych* [*The Effect of War on the Binding Force of Treaties*], Warszawa 1973, 324 pp.

The well-known writer on the law of treaties, McNair, said that the problem of the effect of war upon treaties arouses interest not only because of its own weight. The topic constitutes also a " good example of the development of law from a single and over-simple rule covering a genus into a group of rules [...]," and is a useful reagent " for detecting the essential characteristics of the different kinds of treaties."[1]

In spite of the importance of the subject, however, it has been tackled by few authors and as far as Poland is concerned, the book by Jerzy Pieńkos is the first monographic work on the subject. This is not surprising when one takes into account the extensive and unstabilized practice. The difficulties encountered by theoretical generalizations are proved best by the omission of this problem in the Vienna Convention on the law of treaties, which contains solely a negative provision (Art. 73), that is a provision excluding this question from the scope of the Convention.

The more appreciation is due to the author who has collected materials covering both treaty and diplomatic practice, judgments of international tribunals and doctrinal views over three centuries. The author presents his material historically (except Part I devoted to doctrine), paying attention, however, mainly to the most recent times : to the treaties of peace and the practice of States since World War II.

As the author quite rightly points out, the problem of the effect of war on the binding force of treaties is closely connected with views on the nature and character of war in a given historical period. This is why for two centuries, during which war was legal instrument of international relations, both practice and doctrine considered that war drew in its wake the annulment of treaties concluded previously between the belligerents. " This happens "—wrote de Vattel— " either because nations silently assumed a state of peace between them, or because each party, being in a position to deprive the enemy of his property, takes away from him the rights it has granted him in these treaties." (p. 16).

However, even during the period between the peace treaty of Westphalia (1648) and the Vienna Congress (1815) there were exceptions from this rule. For it was considered that certain treaties retained their validity in spite of the hostilities conducted by their parties. These treaties included certain trade agreements (p. 62) and treaties " which establish lasting legal situations outside the frontiers of a country, e.g. treaties pertaining to territorial cessions, as well as treaties which establish lasting legal situations inside a State, e.g. treaties regulating international servitudes " (p. 66).

On the other hand, representatives of the doctrine of that period, such as Grotius, Mably, de Vattel or Klüber, were generally in favour of the thesis that " war invalidated all treaties concluded between

[1] MCNAIR, *The Law of Treaties*, Oxford 1961, 695 pp.

the belligerents, with the exception of treaties concluded in case of war."

The century since the Vienna Congress until the outbreak of World War I brought little change. The survey of the treaties concluded and of the diplomatic practice made by the author proves that according to the predominating opinion the validity of treaties concluded before the outbreak of a war depended solely on express provisions restoring the binding force of such treaties (e.g. pp. 88—89, 92, 94—95). Very few are still cases in which certain treaties are considered to be still binding (e.g. establishment agreements—p. 101). It was only the end of the 19th century, which was marked in international relations by the conclusion of multilateral administrative-technical conventions, that brought certain changes. During the negotiations between the United States and Spain, the view was accepted that "in accordance with international law all multilateral conventions [...] to which Spain and the United States were parties, e.g. the International Postal Union, the convention on undersea cables, conventions on industrial property and the Geneva Red Cross Conventions, are only temporarily suspended between States and have been revived *proprio vigore* together with the conclusion of the peace treaty" (p. 104).

The same view was reflected also in judgments of international tribunals and doctrine. The Permanent Court of Arbitration in 1910 (the book gives the erroneous date of 1920) in the North Atlantic Coast Fisheries case, declared: "International Law in its modern development recognizes that a great number of treaties obligations are not annulled by war, but at most suspended by it" (p. 112).

A number of writers also supported the thesis on the suspension of treaties for the duration of a war (e.g. E. Nys. Bluntschli, Fiore, Bonfils). The same view is reflected in the resolution of the Institute of International Law of 1912, drawing also attention to the differences in the effect of war upon bilateral and multilateral treaties (p. 116).

World War I was terminated by a number of peace treaties which confirmed the existing trend. True, the authors of the individual peace treaties based their provisions on the traditional assumption of the expiration of treaties as a result of war. Nevertheless, the principle was applied in full with regard to bilateral treaties only. The latter still required an express notification for the revival of their binding force, an act reserved *nota bene* for the victorious States. With regard to multilateral agreements the provisions of the individual peace treaties reflected already the view that these agreements, particularly on an economic or technical nature, were still binding after the war, their validity being suspended for the duration of the hostilities (p. 309).

The third and main part of the book deals with peace treaties and diplomatic practice after World War II. All the peace treaties concluded between the Allied Powers and Germany's allies regulate the fate of bilateral agreements (except the peace treaty with Austria which was not treated as an enemy State). Although the provisions of those peace treaties are modelled in a certain sense on the provisions of the peace treaties concluded after World War I, there are some essential differences between them. It is worth attention, that for example, in the peace treaty with Italy there is a provision that each of the Allied Powers shall notify for Italy's information a list of agreements it wants "to keep in force or to revive." The author draws attention to the fact that the formulation, typical of the Paris treaties, does not indicate "whether the authors were in favour of the conception of the annulment of treaties or of the maintenance of their force, or finally of their differentiation." "They confined themselves to stating the fact that some bilateral treaties retained their legal force after the outbreak of a war [...],

while other treaties were annuled by it." (p. 174).

On the other hand, the peace treaties concluded after World War II did not regulate the fate of multilateral conventions. The decision of the Allied Powers was explained by the Soviet delegate, professor V. N. Durdenevsky stating that in accordance with *opinio communis* multilateral treaties were only suspended by war: "*Il n'est donc pas nécessaire de viser, dans le Traité de Paix, rétablissement de ces Traités*" (p. 199).

Interesting within the framework of these provisions is the practice of the Allied Powers concerning Germany with which no peace treaty has been concluded as yet. The author ascribes only a limited cognitive value to this practice (p. 186). However, in the reviewer's opinion it is precisely because of the absence of treaty provisions that practice reflects the usage and *opinio iuris* prevailing on this issue.

In one of the very first of its legal acts the Control Council for Germany tackled the problems of treaties to which Germany had been a party. Proclamation No. 2 issued by the Control Council authorized the representatives of the Allied Powers, to make decisions "concerning the abrogation, bringing into force, revival or application of any treaty [...] to which Germany is or has been a party." The interpretation of the above provision is controversial in literature. The author seems to favour the thesis that by Proclamation No. 2 the treaties of the German Reich (or some of them) were annuled (cf. pp. 188—189, 191). In the reviewer's opinion Proclamation No. 2 only authorized the representatives of the Allied Powers to adopt appropriate legal acts, but the Control Council never made use of this right. However, it appears from the proclamation that its authors considered that at least some of the treaties of the Reich retained their binding force.

Further steps on this issue were made only after the establishment of two separate States in the German territory—the Federal Republic of Germany and the German Democratic Republic. The Allied High Commission set up in the area of the three western zones (and not the Control Council, as the author says, which had suspended its activity in result of the separatist policy of the western Powers) issued a directive on the basis of a decision of the three western governments laying down the procedure for the renewal of the application of pre-war treaties with regard to the FRG. States maitaining diplomatic relations with the FRG at that time were asked to notify the Federal Republic of Germany which agreements are to be applied again. In distinction from the procedure laid down in the Paris treaties, the directive authorized also the Federal Republic to notify the individual States through the AHC the treaties she desired to keep in force.

It is interesting to note that the directive used the wording "give effect to all or a part of a treaty," and that it did not use such terms as "revival" or "reactivation" which—as the authors says—"would express explicite the termination of the treaties as a result of the outbreak of a war" (p. 194). According to the author, the reason for it is to be found in the fact that the Federal Republic of Germany "as a subject of a new alignment of relations after World War II had never been an addressee of the pre-war treaty provisions." This thesis, however, is controversial in the light of the official attitude of the FRG which identifies herself with the former Reich, an attitude which was even shared by the three western Powers.

It is inconceivable why the presentation of the GDR practice with regard to the treaties of the former Reich has been limited by the author to a remark in a footnote (p. 231). When the Soviet Union transferred to the GDR the competence for an autonomic handling of her international relations, it did not lay down any procedure for the revival of the applica-

tion of pre-war treaties. As a result, the GDR adopted in two legal acts provisions concerning the renewal of the application ("*Wiederanwedung*") of 40 multilateral conventions. She took no steps, on the other hand, with regard to bilateral agreements.

It is impossible in a brief review to deal with the immense material collected by the author. His presentation of the State practice and doctrine permitted him to formulate the conclusion that so far there is no norm regulating the problem of the effect of war on the binding force of treaties. Certain trends have appeared, however. State practice is particularly in favour of preserving the binding force of multilateral treaties, especially when they are not of a political character. The application of such treaties is suspended between the belligerents, and only to the extent which is necessary in practice. This does not apply, of course, to treaties concluded in case of war. On the other hand, bilateral agreements—with few exceptions—lose their validity and require express provisions contained in a peace treaty for their further application (it is to be thought that in the absence of such a provision, the parties may also decide to renew the application of a treaty. The author says in conclusion (probably *de lege ferenda* ?) that in result of the banning of war in the contemporary international law neither an unjustified denunciation of a treaty, nor the presumption of its automatic abrogation by war is permitted (p. 313).

J. Pienkos' book has filled a serious gap in the Polish literature on international law. Its merit is not diminished by the errors I have indicated, nor by certain faults in its construction, such as for example, the repetition of the views of doctrine presented in Part I, in separate Chapters of Parts II and III ; the scattering of the analysis of certain general problems throughout Parts II and III, what also causes repetitions. Moreover, the reader would like a clearer selection and classification of the vast of documentary materials.

Renata Sonnenfeld

Renata SONNENFELD, *Ograniczenia kompetencji państw EWG [Limitation on Sovereign Powers of EEC Mmeber States]*, Warszawa 1973, Polish Institute of International Affairs, 172 pp.

The emergence of the European Economic Community resounded strongly in the science of international law. The broad activity of this organization and the complex legal problems connected with it are watched also in Poland with vigilant attention by economists, politicians and lawyers, particularly by lawyers specializing in international affairs. Legal literature, however, does not keep step with the general interest taken in the institutional development and activities of the Economic Community. Apart from articles in legal journals, there appear publications of a rather textbook character. There is, on the other hand, a shortage of monographic studies on even the most fundamental legal problems of the Ecnomic Community.

It deserves, therefore, an especial appreciation that Miss Renata Sonnenfeld has tackled such a crucial and in a certain sense ticklish subject as the problem of the limitation of sovereign powers of the EEC member States. The subject is no doubt very interesting and topical, and at the same time very difficult and complicated, since it is a crossing point of the most fundamental problems of law and international organizations, and a pyramid of various legal planes.

The title of the book itself is perhaps too lapidary, but it describes well the problems dealt with in it. On the one

hand the author undertook the investigation and presentation of the law-making powers and legal character of the EEC, and on the other hand, she tried to show in this context the powers of the member States of the Community. Miss Sonnenfeld tried to answer the question whether and how does the membership of the Community limit the powers of its individual members in the field of their internal and international law-making activity. So treated, the main problem of the book involves the most fundamental problems of international law as affecting the EEC, both from the theoretical and practical point of view.

The construction of the book is legible, while the problems tackled by it constitute a certain closed whole. Chapter I entitled *The Development of Powers of International Organizations* takes the reader into general problems connected with the subject of the work. This background is then used for a better presentation of the more important powers of the EEC organs (Chapter II). Chapter III entitled *Law of the Community* gives a penetrating insight into the law made by this organization, while Chapter IV (*The Material Limitations of the Domestic Jurisdiction of States*) deals with selected fields of concrete limitations (normative acts and practice) of the powers of the member States in favour of the Community. Thus the reader passes from general to detailed problems and obtains a full and legible picture of the problem the publication is devoted to.

As regards the general content of the work it must be conceded that the author carries it in a consistent and clear manner. The analysis of both the legal questions and the practice is penetrating, while the synthesis is always supported by suitable normative material, examples from practice and views from literature. Very striking is the conciseness of the arguments and clarity of the guiding idea. Even a reader who is not highly initiated in the complex problems of the European Community can follow the author's arguments without difficulty, and orientate himself in the presentation of the subject.

It is not always possible, of course, to avoid certain simplifications, controversial statements or even certain mistakes in a study of this kind.

In Chapter I, the author gives quite a clear and sound picture of the development of powers of international organizations, and quite correctly stops for a moment over the problem of their subjectiveness in the plane of international law. Having correctly established the various elements making up this definition, she quite unexpectedly narrowed down her final conclusion by saying : " International organizations are subjects of paricular international law ; this remains unchanged by the case of the United Nations which embraces practically the entire international community " (p. 11). The author probably forgot here the more than a dozen specialized agencies of the United Nations system, whose status as subjects in international law is almost universally recognized, and whose membership is as universal as the membership of the United Nations itself.

In Chapter II the author describes generally the legal character of the European Economic Community, giving the reader a well-documented picture of it as an international and not supranational organization. She argued convincingly that the European Community belongs to organizations which are still subject to principles of international law. At the same time, however, she draws attention to the fact that the foundation and activity of the European Economic Community creates completely new theoretical and practical problems unknown to the old law of international organizations, or even more so to the law of nations. With a quite well formulated and quite convincingly argumented general thesis, at times the author, with the intention of an even stronger description of her standpoint, resorted to too formal and even too

superficial generalizations. One may quote here as an example the conclusions drawn from a too formal juxtaposition of Article 9 of the ECSC statute and Article 100 of the United Nations Charter (p. 31).

Comparing the contents of these two articles the author says that if one omits the term "supranational" used in Article 9 of the ECSC statute its tenor will prove almost identical with the tenor of Article 100 of the UN Charter. Firstly, all comparisons are pointless here if one omits precisely this element which is the most important and the most controversial, and at the same time the most fundamental for the problem under discussion and for the subject of the whole book. Secondly, even if one accepts after the author that the contents of these two articles are almost identical, it is essential in this case that the UN Charter refers solely to the Secretary General, while Article 9 of the ECSC statute refers to a collective body with important and wide law-making powers, whose decisions are binding on the member States. Finally, the author's argument that the statute grants a supranational character "solely to the activity of one of the organs of the ECSC and not of the entire organization" detracts nothing from the essence of the problem. One could very well risk here a quite reverse assertion—the grant of such a character to a single organ is more concrete and significant than if it were granted generally to the entire organization.

Writing of the powers of the EEC, the author confined herself to the Council and the Commission, because she considered that the role of the other organs, that is the Assembly and the Community Court is insignificant for the context of her arguments (p. 40). Although such a limitation of arguments could be regarded as justified, one cannot say, I think, that the role of the Community Court is insignificant in this context. After all one finds frequently views in the doctrine that it is precisely the Community Court that is the most "supranational" of all organs of the Community; even if only in the sense that it may be approached not only by the governments of the member States, which is consistent with the general practice of international courts, but also by institutions and physical persons. What is more, it is hard to overestimate the powers of the Community Court and the significance of its rulings on such questions as, for example, the relationship between the law of the Community and the internal law of the individual member States.

Completely convincing, on the other hand, are the author's arguments that the Commission, that is an organ bearing supranational features, plays the most essential role not as regards its own decision-making powers, but precisely within the framework of cooperation with the Council in working out proposals which form a basis for the law-making decisions of the Council (p. 53). Miss Sonnenfeld is also right in formulating the conclusion that major decisions, which is essential for the main problem of the book, remain so far in the hands of the member States and their representative organ, that is the Council (p. 58).

Interesting and penetrating, though by the very nature of things rather generalized, are arguments on the subject of the relationship between the law of the Community and the internal law of the member States (pp. 78—91). On the basis of views from literature, analysis of court rulings and examples from practice the author draws the conclusion that "the law of the Community—that is both provisions contained in the Treaty and those made by the EEC organs—constitutes for member States an obligation in international law and has no priority in relation to the internal law of the member States" (p. 90). She understands the lack of this priority in the sense that "in practice—a Common Market norm does not automatically abrogate a contradictory internal law of a member State." The author

has also serious doubts as regards the direct applicability (Art. 189) of these norms in the territory of the member States. But I think she did not fully succeed in undermining the views of other authors (in Poland—K. Skubiszewski and others), that the legislative acts of the Community are binding in the internal legal order of the member States and do not require internal executive rules.

The author frequently builts up her arguments by court judgements. In this respect justified objections are raised by the way in which she uses the attitude of the courts in the well-known case connected with the nationalization of the Italian Electricity Companies. In support of her thesis the author quotes the ruling of the Italian Constitutional Court which held that Community and national law had equal status in Italy, so that the former could suffer derogation by a subsequent national enactment. Miss Sonnenfeld says also that the Italian doctrine, citing the above ruling, gives Common Market norms a status equal only to national laws (p. 87). She did not use, on the other hand, a ruling issued in the same case by the Community Court. And it is precisely on the basis of the latter that an entirely reverse view has been formulated in the doctrine. Namely, many authors consider, that since the ruling of the Community Court in the case of the nationalization of the Italian Electricity Companies, a view on the absolute priority of Community law over national law of the member States has been stabilized (cf. e.g. S. Holt, *The Common Market*, London 1967, p. 133). The Court held that States cannot derogate from Community law by a law promulgated later and unilaterally.

The author devoted most attention to the presentation of material limitations of the powers of States arising from their membership of the Community. This is a sort of case-study which is intended to give a final reply to the problem posed in the title of the book. These limitations are significant both in the sphere of internal and foreign affairs, and they surpass considerably material limitations known in any other international economic organization. In some fields EEC member States simply lost the power of independent decisions. The author is right, nonetheless, when arguing further her general thesis that in spite of such serious limitations the EEC member States still continue to be sovereign States, co-deciding on all steps made within the Community.

One feels that bibliography is somewhat too scanty. It must be admitted that the author used a great variety of rich source materials. She learned the views of the doctrine well, which might be seen in the whole of her arguments. But the literature in the footnotes and at the end of the book is incomplete. It lacks even treatises and articles by Polish authors directly concerned with her problems, e.g., articles by K. Skubiszewski ("Przegląd Zachodni," 1962, No. 3) or A. Całus ("Państwo i Prawo," 1962, No. 17). As regards foreign literature, there is a distinct predominance of German works.

However, the indication of certain doubts or even shortcomings must not obscure the overall value of the book. The author chose a difficult subject whose presentation requires perfect familiarity with the rich literature and complex problems of international organizations. Moreover, one must have a very good exploratory discipline not to dissolve oneself in the flood of suggestive questions and materials. The author has done her task very well. Miss Sonnenfeld has succeeded in presenting a broad and complicated problem in a concise manner, always keeping clarity of her guiding idea. She has taken into account all its aspects, both theoretical and normative ones, giving at the same time a good picture of the practice of the Community, particularly in the field of international trade. I think that the book will to a large extent fill

the loophole in the literature of the subject and that it makes a valuable contribution to our knowledge of international organizations. It is worth adding that the book contains also a good summary of the arguments in the English language.

Jan Kolasa

Polish Bibliography of International Law, 1972

Public International Law

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