ADAM MICKIEWICZ UNIVERSITY
LAW REVIEW

The 100th Anniversary of the Department
of International Law and International Organizations

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Foreword

In 2019 the Faculty of Law and Administration of the Adam Mickiewicz University celebrated its 100—year Jubilee. In order to mark this celebration, a jubilee edition has been published as a collection of 20 texts written by Professors of the Faculty, spanning the course of the century.

From this context, an idea was born—to edit a publication of selected texts of Professors from the Department of Public International Law. Indeed, this was a noteworthy idea. Above all, it permits us to present the rich and varied scientific output of prominent specialists in public international law from the university's Faculty of Law.

The importance of the publication is two—fold: both personal and substantive. It plays an important role in informing both the younger generation and readers from abroad. The names that are mentioned have been inscribed not only in the pages of Poznań's Law Faculty but cover a much broader international context. Many of them played historical roles during Poland's breakthroughs in the 20th century. The collection begins with the great figure of Bohdan Winiarski, a participant in both the Paris Peace Conference of 1919 and the First Congress of the Assembly of the League of Nations of 1921, as well as the President of the International Court of Justice in the Hague. He was associated with the Law Faculty in Poznań from 1921. Next, there is Alfons Klafkowski, a member of the Sejm, the first President of the newly established Polish Constitutional Court, who was also very active on the UN level.

Another key historical figure, who played an extremely important role as Minister of Foreign Affairs during the breakthrough period in Poland from 1989 to 1993, is Krzysztof Skubiszewski. As a minister of the first four governments after 1989, he outlined the foundations of Poland's new foreign and treaty policy after the collapse of post—Soviet bloc. The collection also includes texts by well—known specialists of a younger generation in international law who held expert positions in the international forum, such as Bolesław Wiewióra, Anna Michalska, Jan Sandorski, Jerzy Tyranowski and Tadeusz Gadkowski.

When citing this list of names, one can say that it presents a history filled with strong characters. The essence of this publication, however, is not only to recall the individuals themselves, but above all their achievements. A selection of texts has been made from the rich work of each of the authors, which particularly reflect the discussions and disputes that took place in the international arena at that time and, which did not lose their relevance in the modern world. Thus, there is a classic text written by Winiarski entitled "A contribution to the deliberations on the relationships between international law and Roman law". It is a profound text, which provides a basis for conducting research on international law and its embedding in Roman law. The next text in this volume is that of Klafkowski, which deals with the extremely important subject of the new shape of borders and their legal and international consequences after World War II.

The publications presented in the collection constitute clear evidence of the involvement and reaction to these problems of the representatives of the Poznań international law community. The collection includes three texts written by Skubiszewski. Each of them is of great legal and political significance. One of the most important is the text on the relationship between international and national law. That text provided a substantive basis for the work of the Constitutional Committees of the Polish Parliament, which were preparing the new Polish Constitution and for whom it was important to create a formulation of the

relationship between international and national law. Disputes are still ongoing today. However, the arguments used by Skubiszewski in his texts have lost none of their relevance.

The texts of the subsequent authors, namely Bolesław Wiewióra, Jan Sandorski, Anna Michalska, Jerzy Tyranowski, and Tadeusz Gadkowski, all address important international issues. These publications remain current and constitute a source of further reflections and inspiration. Therefore, the initiative to present them in this collection is extremely important. This jubilee edition is a perfect link between the historical legacy of the Poznań School of International Public Law and its significance and relevance for contemporary science and international debates.

Hanna Suchocka

Editors' Introduction

The Department of International Law was founded in July 18, 1919 as one of the first eighteen Departments of the newly established Legal Faculty of the University of Poznań. Over the last hundred years its history has been co—created by the academic biographies of people who have contributed to its scientific and teaching life—Professors of the highest standing in the study of international law, both in Poland and abroad; judges and presidents of the highest international and national judicial institutions; members of the most important international scientific and political bodies; deputies and ministers, ambassadors, rectors and deans; authors of multilingual monographs and textbooks awarded many times with the highest distinctions; and recipients of the highest orders and decorations, both Polish and international. The pages of the jubilee volume present their achievements, with their work taking on a new form thanks to the English language translations.

The development of research directions conducted by representatives of the Poznań school of international legal scholarship was determined by the scientific work of three generations of international lawyers. Their initiator and the creator of the Department of International Law was Bohdan Winiarski—expert in the field of international river law, politician, and the first Polish President of the International Court of Justice. His successor, Alfons Klafkowski, is known as a founder of the Poznań school of international legal scholarship who organized the research life

of the Department. The period when he managed the Department allowed for the development of its scholarly program with new research directions. Klafkowski himself focused on the legal approach to Polish—German relations. The issues he addressed were supplemented by topics proposed by his associates—Krzysztof Skubiszewski, who developed the Department's achievements with studies on the law of international organizations, international responsibility, and the use of force in international relations, and Bolesław Wiewióra, who devoted attention to the issue of territory. The list of research fields was then expanded by the students of Klafkowski and Skubiszewski—Jan Sandorski, Jerzy Tyranowski and Tadeusz Gadkowski—who added the legal aspects of economic integration, the invalidity of international agreements, the issue of succession in international law, and diplomatic and nuclear law. The subsequent development of the department for studies on international human rights law was initiated by Anna Michalska.

Looking at the achievements of three generations of international lawyers from the Poznań School from the perspective of the hundredth anniversary of the Department of International Law allows us to reread their works. Their achievements include texts rooted in historical contexts, which testify to the directions of thinking prevailing in the history of international legal scholarship, and also articles of a timeless status. The nature of these works proves the ability to combine theoretical work with the diagnosis of the current needs of the international and national community that characterized the Department of International Law in the times of Winiarski and still characterizes the Department of International Law today.

The publication is indebted to the institutional and financial support of the Ministry of Science and Higher Education, His Magnificence the Rector of Adam Mickiewicz University in Poznan, and the Dean of the Faculty of Law and Administration, to whom we wish to express our heartfelt thanks. We would also like to thank Professor Hanna Suchocka for accepting our invitation to contribute in the jubilee volume

by writing a foreword, the team of translators who prepared the translation of the works collected here: Stephen Dersley, Szymon Nowak, Ryszard Reisner and Tomasz Żebrowski; the reviewers of this volume for their invaluable observations and comments—Professor Brygida Kuźniak and Katarzyna Łasak, as well as the heirs of the copyrights, who agreed to the publication to the selected works.

Tadeusz Gadkowski and Paweł Kwiatkowski

Bohdan Winiarski

A Contribution to the Deliberations on the Relationships Between International Law and Roman Law[1]

In *Wileński Przegląd Prawniczy*, Professor F. Bossowski published a summary of his lecture, entitled *The principles of Roman law as a source of auxiliary law in international law*. Even though I would much like to, I cannot—relying on the summary alone—dispute the proposition which in no uncertain terms encapsulates the relationship between both domains of law in the title of the lecture by this esteemed author. Still, it may perhaps be worthwhile to examine the issue in at least one detail, taken as an example. Such an attempt at verification, even conducted with respect to but one aspect—*un coup de sonde*, no more—may sometimes prove interesting, not only for an amateur. This is precisely what this modest contribution sets out to do.

The direct incentive behind the aforesaid lecture was a book published several years ago, namely H. Lauterpacht's *Private Law Sources and Analogies of International Law.*[2] Significantly enough, assertions of propinquity between Roman and international law, which at times go as far as considering the former the source of the latter, are encountered most often in Anglo-Saxon scholarship. The famous judge Lord Stowell, Sir R. Phillimore—also

1 Translated from: B. Winiarski, *Przyczynek do rozważań nad stosunkiem prawa międzynarodowego do prawa rzymskiego*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1934, no. 14, vol. 1, pp. 11–24 by Szymon Nowak and proofread by Stephen Dersley. The translation and proofreading were financed by the Ministry of Science and Higher Education under 848/2/P-DUN/2018.

2 H. Lauterpacht, *Private Law Sources and Analogies of International Law*, London 1927.

an outstanding judge—as well as Sumner Maine, Westlake, Holland—to name only a few—associate international and Roman law in the closest of terms. Why is this the case? Why is it that in the countries of the European continent, which after all had not infrequently been exposed to much greater influence of Roman law than England, jurists do not go anywhere near as far as that? Perhaps because according to the well-known Anglo-Saxon formula (which in any case must not be construed all too... straightforwardly), international law is a part of the domestic law; because there that domestic law is chiefly common law that develops largely through case law of the courts, which for their part enjoy an authority unknown elsewhere; because the notions of equity and the reason of the thing play a great role in that case law; because when resolving the questions of international law, Anglo-Saxon judges readily look for inspiration and guidance in the solutions adopted in Roman law, which is always considered there a *ratio scripta*, the most perfect expression of that *recta ratio*, which is *iuris gentium magistra*. This is coupled with the idea of natural law, to which Anglo-Saxon jurists have generally always been faithful. Let us then choose international riparian law as our testing ground.

*

Towards the end of the eighteenth century, the United States have demanded that the lower Mississippi and its outlets, which at the time belonged to Spain, be open to their navigation and, next to treaties and natural law, they invoked Roman law to justify their claim. In the instructions to the envoy in Madrid, Secretary of State T. Jefferson emph sized this argument. “The Roman law, which, like other municipal laws, placed the navigation of their rivers on the footing of nature, as to their own citizens, by declaring them public (*flumina publica sunt pax est, populi Romani*. Inst. 2. T. 1. §. 2.) declared also that the right to the use of the shores was incident to that of the water. Ib. §. 1. 3. 4. 5.”[3]

3 J.B. Moore, *A Digest of International Law*, Washington 1906, I, p. 624. Cf. also H. Wheaton, *Histoire des progrès du droit des gens étc*., 3rd edition, Leipzig 1853, vol. II, p. 195.

In the nineteenth, and even in the twentieth century, one would often cite Roman law to substantiate the thesis that the law of nations requires that international navigation be able to access not only those rivers which in their navigable course are divided or intersected by two or more states, but also national rivers; Roman law would thus partly overlap with the law of nations; perhaps there would be a need to treat it as auxiliary law; not infrequently, it is argued to be one of the sources of international law. Let us examine this argumentation in greater detail.

Edouard Engelhard, a jurist and a diplomat, as well as a long-standing French delegate to international riverine committees, sought legal foundation for navigation in foreign territory in natural law, whose sublime expression was Roman law. Quoting a well-known paragraph from the *Institutes*: *Et quidem naturali iure communia sunt omnia haec: aer, aqua profluens et mare et per hoc litora maris... Flumina autem omnia et portus publica sunt* (I. II, 1, 1 and 2), the author observes that "Roman legislation compared watercourses to air and sea, in other words to things that are common to all and can never be monopolized. It firmly rejected any thought of appropriation which, by conveying the disposition of waterways either to the state or to private persons, would have divested the community as a whole of the benefits to which it held undeniable rights. Any watercourse freely and continuously flowing wit in permanent banks, *naturalem cursus sui rigorem tenens*, belonged to public property, and every domestic sailor was able to have use of it under protection of the state which reserved itself the supervision, maintenance and fiscal administration. These very simple principles relied on the fundamental tenets of natural law; they were dictated by that *aequm ius* which is proclaimed by the public conscience and whose principles are invariable and universal.

"Exclusive possession," Engelhardt continues, "is understandable when state territory or private property is concerned. Land, regardless of its area and configuration, can indeed be permanently occupied; it is demarcated, divided, boundaries are imposed; it is inevitably doomed to bear the tyranny of ownership; its nature of stable land does not permit

it to evade the yoke of government, union, an entity to which it belongs. Things are otherwise with the second element which circumscribes it with a seemingly immeasurable girdle and penetrates it with permanent current. Without doubt, water can be imprisoned in a very small estate. But the sea which surrounds lands, and the rivers that feed into the sea cannot belong to anyone, for no one can fetter them, because captivity cannot be reconciled with their ceaseless mobility. In any case, no one has any interest in appropriating a thing which is inexhaustible and continually renews itself, a thing anyone may have use of without diminishing the benefit of others."[4]

This long quote has been deliberately cited, since it delivers a characteristic argumentation which has invariably been reiterated until the present day, as those evil laws that Goethe compared to a hereditary disease which recurs in each generation:

> Es erben sich Gesetz' und Rechte
> Wie eine ew'ge Krankheit fort.
> Sie schleppen vom Geschlecht sich zum Geschlechte,
> Und rücken sacht von Ort zu Ort....

Carathéodory had already asked whether water does not belong to everyone, like air, fire, and light?[5] Vernesco follows in his footsteps[6], and Demorgny in particular, who unreservedly accepts Engelhardt's argumentation. "Natural law," says the latter, "is opposed to the fact that any state—by appropriating a thing which is common to all—should dictate to others such laws that they have not voluntarily acknowledged themselves. This is particularly true for water, which is one of the most vital natural factors and which, as a whole, as seas and rivers, has all the capacity to serve eternal and universal use by humankind. Natural law does not know

4 E. Engelhardt, *Du régime conventionnel des fleuves internationaux*, Paris 1819, p. I ff.
5 *Du droit international concernant les grands cours d'eau*, Leipzig, 1861, p. 26.
6 *Des fleuves en droit international*, Paris 1888.

riparian, privileged peoples; rivers are a common asset of all, and cannot be object to servitude or co-ownership."[7] After the lapse of many years, in a report submitted to the Institute of International Law[8], J. Vallotton d'Erlach substantiates the demand for freedom of international navigation chiefly by invoking Roman law, according to which rivers are *res publicae*, and *iure gentium* in addition, as opposed to merely *iure civitatis*. According to this author—who is by no means alone in his opinion—Roman law is one of the sources of international law.

It is clear that the sentence quoted by Engelhardt from the *Institutes*, almost identical with the provision in the *Digest* (D. I, 8.2,1) and the *Basilica* (XLVII, 3, 2), does not bear in any way on the matter discussed here. *Aqua profluens* means water as a substance which is indeed suited to be universally used: the water coming down with the rain, the water of sea or river waves. From that common thing anyone can appropriate a portion for direct use, fill a vessel, a cistern, a ditch or a pond, but at that point the water becomes their property. Water found on private land belongs to that land. "Each proprietor," to quote only the French civil code, "has the right to make use of the rainwater falling on their land, and dispose of it." (Art. 641 (1)). "Whoever has a spring on their land, may always use its water at will within the bounds and for the needs of their estate." (Art. 642 (1))

Taken in its entirety, as a natural element, water is *res communis omnium*, but water on land, a spring, a stream, or a river, do not necessarily belong to that category. Ossig, who wrote a very interesting and arguably the best book on Roman water law, surmises that Marcian's paragraph concerning *aqua profluens* was distorted in *Corpus Iuris* through omission of a phrase, and that one can only conjecture how that determining phrase was formulated. It is possible that it was "vom Himmel, aus den Wolken herabfliessende Regenwasser."[9] Ossig

7 *La question du Danube*, Paris 1911, p. 171.
8 Annuaire de l'Institut, 1929, vol. I.
9 S. Ossig, *Römisches Wasserrecht*, Leipzig 1898, p. 73.

does not state whether he used the Gloss, but it is there that he may have found the characteristic supplement. The aforecited sentence from the *Institutes* is provided in the Gloss with the following addition: *vo profluens: id est de coelo cadens*. Only then does no contradiction arise with other sections of *Corpus Iuris*, which explicitly presume the possibility of ownership of not only springs, streams, irrigation or drainage ditches; even larger rivulets could be private, given that Roman law recognizes the servitude of *aquaeductus* as well as *navigandi* on private waters (D. VIII, 3, 23, 1). *Nihil enim differt a caeteris locis privatis flumen privatum* (D. XLIII, 12, 1, 4).[10] Engelhardt himself admits that water on private land (also flowing water) constitutes *portio agri*; it is therefore also subject to the "tyranny of ownership."

The fact that, like sea water, *aqua de coelo cadens* is a common thing, does not permit one to derive any argument to support freedom of navigation on foreign territory. These are altogether different things which function on different planes. Air represents a similar instance: sources mention *aer* among common things, such as *aqua profluens*, but the air space above land belonged to the proprietor of the land. The view that ownership of land extends *usque ad coelum* may be considered erroneous or exaggerated; still, the holder of a property, as the owner, had the disposal of overground space, as much as was practicable. After all, air is not the same as air space.

In the paragraph we have cited, Engelhardt argues further that any permanent watercourse belonged to public property. Let us then leave aside the main argument, since *res publicae* constitute a completely different category from *res communes*: nobody could appropriate even the tiniest part of the public thing intended for public use. As for rivers,

10 The most important outcome of Ossig's studies is that the author does not assume *fons* to mean a spring, but a stream, a rivulet. This hypothesis, supported in numerous Roman writers, makes it possible to interpret many provisions in *Corpus Iuris* without contradictions, but it may be noted that St. Isidore of Seville, who was not that remote from its compilers, clearly explicates *fons* as *caput aquae nascentis quasi fuiidens aquas*. The same author clarifies: *proprie autem flumen ipsa aqua, fluvius cursus aquae. Etymologiarum Libri XX, lib. XIII, cap. 21* (Migne, vol. 82).

Roman law distinguished permanent ones (*perennia*) and those which flowed only periodically (*torrentia*); the former were able to flow permanently only in general, which did not rule out interruptions in certain periods, e.g. during draught (Gloss ad D. XLIII, 12, 1, 3 explains: *perenne i.e. perpetuum et si non omni tempore fluat*), and only those could be public, even when unnavigable. Views are strongly divided here. A well-known passage in the *Digest* reads: *publicum flumen esse Cassius définit quod perenne sit* (D. XLIII, 12, 1, 3), but the *Institutes* state that *autem omnia et portus publica sunt* (I. II, 1, 2) whereas the *Digest* that *flumina pene omnia et portus publica sunt* (D. I, 8, 4, 1); indeed the Gloss clarifies the word *pene* (nearly all) in a manner which excludes *torrentia*: *propter ea que ad tempus fluunt*. However, we know that it was possible for rivers to be private, and very serious scholars assume that they were intended solely for public use, which appears to be corroborated in the sources. For instance, Paul claims that (*flumina publica quae fluunt ripaeque eorum publicae sunt (D. XLII, 12, 3, pr.)*, in which he compares the legal status of the river to the banks held by littoral owners; nevertheless, the Gloss adds that river shores are public only *quoad usum, sed flumina etiam quoad proprietatem*.

Elsewhere, one reads that *riparum usus publicus est iuris gentium sicut ipsius fluminis* (I. II, 1, 4). An island which formed on a river was not public property but became, as any no man's land, the property of the first one to take it if the adjoining land was demarcated (*agri limitati*); otherwise (*si arcifinales*), it fell to the nearest owner or was divided; the same happened to a waterless river bed. However, other authors—Ossig among them—assume that essentially *all major rivers were public property*, most often simply belonging to the state.

Quite, but how should one comprehend the term *res publicae*? The *Digest* states that: *quae publicae sunt, nullius in bonis esse creduntur: ipsius enim universitatis esse creduntur*; while the Gloss rectifies that only the property of Rome, and therefore no corporation, town or province, can be called public; hence, it concurs with Ulpian, who

in *De verborum significatione* (D. L. 16,15) says that *bona civitatis*. The Gloss adds: *civitatis alterius quam Romae abusive publica dicta sunt. Sola enim ea publica sunt quae Populi Romani sunt*. Still elsewhere the sources distinguish *quaedam publica,* or *quaedam universitatis*.

It appears that originally and for a long time afterwards the term "public" was used to denote only those things which were the property of or were intended to be used by the people of Rome in accordance with civil law. The provinces and the towns of the Empire were treated as corporations and could not own *res publicae*; it was only later, as *ius gentium* merged with *ius civile*, that the existence of public things under *ius gentium* was presumed throughout the Empire. Still, this has nothing to do with the issue at hand, while Vallotton d'Erlach seems to ascribe to it a significance it could never have had. Regarding the seashore, the Gloss supplies *et quidam naturali iure* (D. I, 8, 2, 1) with the following explanation: *litora: communia sunt quoad usum et dominium: ut hic. sed quoad protectionem sunt populi Romani*. Even later the following remark was added: *sed iurisdictio est Caesaris*. Thus, medieval jurists are perfectly conversant with the distinctions between *usus*, *dominium*, *protectio*, *iurisdictio*, which Hrabar also underlines with considerable appreciation in his book on Roman law in the history of international legal doctrines. [11] It may be suspected that the state element carried greater significance where the matter did not concern *res communis omnium* but *res publica*. Indeed, Engelhardt himself admits that any domestic sailor was entitled to use waterways in ancient Rome. For us, this would be much more interesting and, if this is so, it would be superfluous to draw on the legal principles relating to things common and public.

Regrettably, little is known about foreign navigation within the limits of the Roman Empire; even Kazanskiy, who discussed the history of riparian law most extensively, failed to find anything crucial.[12] We know that disputes concerning navigation on frontier rivers (the Rhine, the

11 Dorpat, 1901.

12 P. Kazanskiy, *Rzeki traktatowe*, Kazan 1895.

Danube) were frequent; that emperors would sometimes forbid barbarians to undertake navigation, and sometimes were compelled to allow it. But even this, however interesting, is not that significant precisely because barbarians were involved, and the difference of civilizational development was too great to compare relationships between the Empire and barbarian peoples to relationships which emerged between modern states and remain governed by the law of nations. And if the aforementioned reporter of the Institute of International Law finds that principles of Roman law are in line with the provisions of the most recent treaties, we are faced with yet another misunderstanding.

Roman riparian law was eminently a private law; Romans' legal principles concerning waters and rivers in particular became a shared heritage of probably all European legislations, falling within the purview of civil and administrative law in any case. Thus, for example, the substance of the interdicts by means of which a praetor ensured that river navigability and freedom of navigation were maintained is a matter for administrative law today. We shall not enumerate them here. However, if internal riparian law has endured until the present sustained by the legacy of the Roman genius, can the same be claimed of international law?

Incidentally, one should at this point reject the thesis that Roman law is one of the sources of international law. That technical term denotes a factor which renders a social norm legally binding. We know of two such sources of international law in the formal sense: custom and contract; thus Roman law has nothing to do with it. Still, one not infrequently understands sources to be factors which historically shaped the substance of the legal norm, and only in this sense can one sometimes speak of the influence of Roman law on international law[13]; but was there actually any influence in the domain we are interested in?

13 Thus it is conceived by e.g. J.B. Moore, *A Digest of International Law*, Washington 1906, I, p. 2., as he argues that Roman civil law (civil in the present-day sense) was the principal source of the international private jurisprudence.

The flourishing of the study of Roman law in the twelfth, thirteenth and fourteenth centuries, which should be credited to the endeavours of glossators and post-glossators, had a very limited impact on the development of international law, chiefly due to the fact that the law studied by the jurists was private law; the two titles in the *Digest* which do display a tenuous link with that law, namely those regarding captivity, *postliminum* and embassies, have led now and again to a confusion of terms (e.g. the long-lasting and persistent attempts to introduce the institution of *postliminum* into international law). When elucidating Roman law, glossators must have noticed the political changes which had occurred in Europe since Justinian and felt a need to adjust Justinian's law to contemporary circumstances. They had long evaded the issue, relying on the fiction of the unity of the Empire and recognizing only one emperor (*imperator*, *dominus mundi*); other monarchs were treated as Roman clients, their states as Roman provinces, and therefore *universitates*[14]; they sought to apply the norms of Roman law to international relations, seeing the former as a universal law of the community of Christian nations. Hence, if glossators occasionally extend the notion of *res publica* to "all nations", one should always bear the fiction of state unity in mind. For instance, this is how the Gloss clarifies the word *public* (Inst. II, 1, pr) *quasi populica, scilicet omnium populorum ut... § flumina*: meaning solely that various peoples subject to the political power of the emperor are concerned, not unlike in that section of the Code which caused so much ink to be spent in the Middle Ages: *Cunctos populos quos clementiae nostrae regit temperamentum:* those were always the peoples living within one state, i.e. the Empire.

In the age of the glossators, the weakening of the Empire's unity went much further; the independence of states which did not want to recognize imperial authority anymore were no longer treated as usurpation. On the contrary, the sovereignty of those *exterae nationes* was

14 A trace of such a conception may be seen in the English term 'municipal law' (referring to internal as opposed to international law).

acknowledged, and the only concession to the principle of the political unity of the Christian world was that a distinction was drawn between the state of fact, which actually existed in the fifteenth century, and the legal state, which essentially should have existed but had already expired.[15]

Post-glossators accord the control of the seas to states; not only territorial waters, whose boundaries are in any case traced very widely, but also open seas. As regards rivers, they left evidence that only peoples ruled over by one and that specific sovereign power were entitled to use them. In his remarks on the *Institutes* (I, 1, 5) Bartolus explains that things at the disposal of all are commonly shared, but makes an exception for rivers. *Communia sunt maioris communitatis quam publica* (one needs to remember that *maior communitas* encompasses a community broader than the subjects of one state)—*unde pluribus se offerunt, ut aer, mare, aqua de coelo profluens, litora maris, unde appropriant sibi hoc nomen commune. Sed flumina*—significantly enough—*non tot offerunt se*.[16]

Each sovereign state, *superiorem non recognoscens*, had its law, under which navigable and floatable rivers were available to be used by its people, in line with the principles of Roman law; each state adhered to the same principles, but they did so on their own account and for their own purposes.

A certain repertory of legal notions, principles and even provisions was transferred via glossators and post-glossators from Roman

15 Claiming that "Imperator est de iure totius orbis dominus", Bartolus nevertheless adds: "licet de facto ei non oboediatur" (in remarks *in Extrav. Ad reprimendum* of Henry VII). Ecclesiastical law is largely favourable towards monarchs aspiring to independence, and yet already in the sixteenth century a work such as *Summa Sylvestrina* mentions—next to the lawfully sovereign pope and emperor (*in temporalibus*)—those who are independent only *de facto*: *cuiusmodi etiam est is qui superiorem non recognoscit de facto, ut rex Franciae, Hispaniae et huiusmodi*. (p. 89, c. 2, 90, c 1). Quoted in Beaufort, *La guerre etc*., The Hague 1933, p. 106. *Summa* was published in 1514, but in 1532 Fr. Vitoria in his now renowned *Relectiones morales* recognizes the independence of the kings of Spain and France without reservations: *licet glossator ex capite suo addat quod hoc non est de iure, sed de facto*. (De Indis, II).

16 Hrabar, where this passage was found, established that it had originated from the writings of Faure's (Johannes Faber), who had nonetheless used *omnibus patent* instead of *pluribus se offerunt.*

law into the emerging international law. Thus, the rules of Roman law concerning land ownership, means of acquisition, riverine frontier, *alluvio*, *avulsio*, *alveus derelictus*, *insula in flumine nata*, were suitably applied to state territory, although they fairly often distorted the picture of actual relationships, inaccurately reflected international realities; many of those principles were adopted in practice; much the same applies to international agreements, in which the rules governing Roman covenants were employed. Sometimes, the outcomes were excellent; now and then, however, that transfer of the notions and principles of Roman law into international jurisprudence proved dismal, as in the case of the so-called international easements or the aforementioned *postliminum*. Still, with respect to international river navigation, there is naught to be found. Exploring the writings of such an eminent jurist as Bartolus, we have found quite an extensive treatise, entitled *De fluminibus* in his *Consilia, tractatus et quaestiones*.[17] Faithful to the premises of Roman law as an internal law, the work cannot offer even the meanest clue relating to international river navigation in Roman or medieval law. The feudal period, during which elements of public and private law, of authority and ownership were heavily intermingled, left its mark on the history of riparian law with multiple and diverse privileges and monopolies acquired by feudal lords, towns (e.g. staple right and related rights) and corporations, some of which were very ancient indeed, such as *collegia nautarum,* whose beginnings go back to Roman times. Relying on the principles of Roman law, rulers strove to regulate the freedom of navigation against feudal lords, towns and corporations; however, having breached those privileges, the rulers constrain river navigation on their own account. Anything associated with that mode of navigation is subject to so-called *iura regalia* and governed by numerous statutes and ordinances; in addition, there are the many navigation levies, particularly onerous

17 *De Fluminibus* is dedicated to issues within private law; it touches upon public law only in the section discussing boundaries of jurisdiction following changes of the river bed.

in the period of absolutist fiscalism, as well as customs barriers and formalities at the borders which covered Central Europe at that time so densely. This is an interesting and little studied chapter in the history of riparian law, but again it offers nothing of interest from the standpoint of international law. On the other hand, the claim that international river navigation did not exist at all in the pre-revolutionary period should be approached as an exaggeration; it did exist where it was economically profitable, always pursuant to international agreements. As an example one could mention two which pertained to navigation on the Oder river: the treaty of Trzebieszów of 29 January 1619, concluded between Poland and the Electorate of Brandenburg, or the treaty of Warsaw of 18 November 1705, between Poland and Sweden.

One more observation is due by way of conclusion. We know already that if according to the *Digest* navigation on public rivers was free *iure gentium*, it had nothing to do with our law of nations. However, the previously cited *Etymologiae* by St. Isidore of Seville had preserved a trace of a slightly different understanding of *ius gentium* than the one we became accustomed to on the basis of *Corpus Iuris,* an understanding which—as some would have it—is more akin to our international law. One reads in St. Isidore that *ius gentium est sedium ocupatio, aedificatio, munitio, bella, captivitates, Servitutes, postliminia, feodera, paces, induciae, legatorum, non violandorum religio, connubia inter alienigenas prohibita; et inde ius gentium quod eo iure omnes fere gentes utuntur*. This designation, rather than a statement of the substance of *ius gentium*, was later incorporated in Gratian's Decree and, undoubtedly, could have later contributed to the name being employed to denote international law. Dirksen cogently argues that St. Isidore took that passage from Ulpian's *Institutes,* from which only minor fragments have survived until our times.[18]

However, this does not warrant the conclusion that in ancient Roman law *ius gentium* meant something similar to international law today, for

18 *H.E. Dirksens Hinterlassene Schriften*, Leipzig 1871, vol. 1, p. 185 ff.

one thing because the very excerpt mentions matters belonging to internal law side by side with those belonging to international law, and secondly because Justinian's codification adopted Hermogenian's definition, in which *ius gentium* is first and foremost private law, and thus a non-formalistic, flexible law observed in all parts of the Empire, unlike the formalistic civil law, which was applicable solely to Roman citizens (quiritians); in the relationships between the peregrini, as well as between them and Roman citizens, that law not only existed alongside civil law but also prompted its development towards emancipation from anachronistic forms, concepts, and institutions, ultimately absorbing it altogether. Certain norms in *ius gentium* are also encountered today in public law and even—to a minimal extent—in international law, although those in the latter domain are approached from the perspective of internal law; yet it was Roman law nevertheless. It was not a law which was earlier and superior to the state, as some describe it, but simply the entirety of rules, principles, and institutions whose existence (or presence of similar ones) was observed by Romans among peoples other than the Populus Romanus, and which may have been considered expressions of norms common to all people, for they derived from the nature of things and reasons of equity. In fact, the term "natural law" carried multiple meanings in Roman law and later – glossators and post-glossators enumerate five, if not more. Now, in one of those meanings *ius naturale* is no more and no less than *ius gentium*; the Gloss states this on many occasions and provides examples from private law.[19]

The great legal historian H. Sumner Maine, professor of Roman and comparative law who ultimately became professor of international law at the Whewell Chair (Cambridge), refers twice to the Roman provenance of international law.

19 E.g. ad I. I, 2, pr. v° *quod natura: et nota quia quatuor modis ius naturale ponitur: quandoque pro iure gentium...* I. I, 2, 1, *v°ius civile; iuris naturalis id est iuris gentium*. I. II, 1, 1, v° *naturali iure: id est de iure gentium* etc. Cf. Gaius's *quod vera naturalis ratio inter omnes homines constituit* etc.

> Setting aside the Conventional or Treaty Law of Nations, it is surprising how large a part of the system is made up of pure Roman law. Wherever there is a doctrine of the jurisconsults affirmed by them to be in harmony with the Jus Gentium, the Publicists have found a reason for borrowing it, however plainly it may bear the marks of a distinctively Roman origin.[20]

A great part, then, of International Law is Roman Law, spread over Europe by a process exceedingly like that which, a few centuries earlier, had caused other portions of Roman Law to filter into the interstices of every European legal system.[21]

The view formulated in this manner is without doubt considerably exaggerated, at least where international public law is concerned; still, we have seen above that indeed, chiefly thanks to the work of glossators, post-glossators and, may it be added, through theologians and canonists, numerous solutions, norms, principles of Roman law penetrated into the nascent international law. Some remained, as a permanent acquisition, other did not hold or had to be discarded. Whence that material influence? In his *Commentaries Upon International Law*, R. Phillimore subscribes thoroughly—even enthusiastically—to the words of Leibniz: *Dixi saepius post scripta Geometrarum nihil exstare quod vi ac subtilitate cum Romanorum scriptis comparari possit: tantum nervi inest, tantum profunditatis*.[22] Perhaps nowhere else are the words of the Dutchman Bynkershoeck comprehended as in the Anglo-Saxon countries, namely that *qui id* (i.e. Roman law) *audit, vocem fere omnium gentium videatur audire*[23] or, concerning a principle of Roman law: *ipsa iuris gentium, non sola Ulpiani vox est*.[24] Undoubtedly, Roman law owes its material impact on international law to the genius of Roman jurists who, combin-

20 H. S-M., *Ancient Law. Its Connection to the History of Early Society and Its Relation to Modern Ideas*, Beacon Press, Boston, 1863, p. 93; H. S-M., *International Law. The Whewell Lectures*, London 1890, p. 20.

21 H. S-M., *International Law.*..., p. 20.

22 3rd edition, London 1879, vol. I, p. 34.

23 *De foro legat*, c. XI.

24 *Questiones iuris publici c.* VIII in f.

ing an unshakeable sense of equity with tremendous common sense in a truly admirable manner, created things which endure eternally. But it is that inner value of solutions, norms, and principles which has caused and still causes them to serve as a model, even in the domain of international law to some extent, while not being the source of this law nor its auxiliary law, for the term of auxiliary law has a strictly defined meaning. However, the very nature of things to which Roman jurists paid such great attention makes it impossible to apply the measure of internal, inherently private law that Roman law is to the relationships between states, which differ so vastly from domestic relationships. Instead, one can speak of general legal principles, of the few principles shared by any law of a given civilizational family to which Article 38 of the Statute of the International Court of Justice in The Hague refers: here, Roman law can never be omitted.

It would be nothing short of harmful if—invoking Roman law—one strove to fill the so-called gaps in international law, for instance by using analogy, which in view of the nature of that law can only have limited significance. At this point, however, we enter into issues relating to the state, international law, international human rights and the attempts to exploit the undeniable revival of natural law for that end. One cannot but recall the words of Cicero: *Neque erit alia lex Romae alia Athenis*. Or: *Cum animus... seseque non unius circumdati moenibus loci, sed civem totius mundi quasi unius urbis agnoverit...*[25]— would that not be again within the extent of the Roman state? That, however, lies beyond the scope of this brief paper.

25 *De republica* III, 22. *De legibus* I. 23.

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SUMMARY

A Contribution to the Deliberations on the Relationships Between International Law and Roman Law

The paper is an English translation of *Przyczynek do rozważań nad stosunkiem prawa międzynarodowego do prawa rzymskiego* by Bohdan Winiarski, published originally in Polish in "Ruch Prawniczy, Ekonomiczny i Socjologiczny" in 1934. The text is published as a part of a jubilee edition of the "Adam Mickiewicz University Law Review. 100th Anniversary of the Department of Public International Law" devoted to the achievements of the representatives of the Poznań studies on international law.

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The Forms of Recognition of State Borders After World War II (With Particular Focus on the Arrangements Pertaining to the Polish-German Border)[1]

The analysis of this issue requires a preliminary determination of several basic theoretical premises, specifically:

1) The notion of a change of state borders needs to be precisely defined.[2]

1 Translated from: A. Klafkowski, *Forma uznania granic państwowych po drugiej wojnie światowej*, "Życie i Myśl" 1964, no. 11–12, pp. 80–94 by Szymon Nowak and proofread by Stephen Dersley. The translation and proofreading were financed by the Ministry of Science and Higher Education under 848/2/P-DUN/2018.

2 This study has been developed on the basis of several of my monographs, cited further on in the footnotes. The direct incentive to write it was the series of lectures I had delivered at a number of faculties of law at universities in Belgium. A substantial fragment of one of those lectures was published as "The Forms of Recognition of State Frontiers after the Second World War" in a periodical of the Institute for Western Affairs in Poznań, *Polish Western Affairs*, 1963, no. 2; pp. 211–222. Subsequently, the paper was reprinted—indicating the Polish source—in *Jahrbuch für Ostrecht* (journal of the Institut für Ostrecht in Munich), 1964, vol. 5, pp. 71–81. In May 1964, the article was published in the version from *Polish Western Affairs* in a leading Soviet law journal, *Sovetskoye Gosudarstvo i Pravo* (periodical of the USSR Academy of Sciences), 1964, no. 4, pp. 102–108. The following handbooks provide the theoretical foundations of the paper: L. Oppenheim, H. Lauterpacht, *International Law*, 1957, vol. I, pp. 530–581, and W.N. Durdenevski, S.B. Krylov, *Podręcznik prawa międzynarodowego*, Polish edition, Warszawa 1950, pp. 246–259. My own views on the theoretical matters addressed here are presented in my handbook, entitled *Prawo międzynarodowe publiczne*, Warszawa 1964, 365 pp., in particular in Chapter III, *State Territory*, where changes of state territory are discussed on pp. 164–173, as well as in Chapter V, *Population*, where the matter of citizenship in the context of changes of state borders is considered, esp. on pp. 186–190. The notion of territorial change encompasses only such acquisition, loss or exchange of territory as a result of which the state does not cease to exist as a subject of international law. At the same time, the territorial change does not lead to the creation of a new state. From the legal standpoint, each such territorial change entails a change in terms of territorial supremacy. Changes of state territory may be effected un-

2) The legal forms through which changes of borders are effected need to be systemtized.[3]
3) The legal substance of recognition of border changes has to be specified.

If these preliminary premises were to remain undetermined, the analysis of specific detailed issues would be impossible. The above theoretical questions are therefore addressed below:

Ad 1. Changes to state borders is a matter which arises with virtually every war. Both world wars are a particularly eloquent proof of this. As soon as the example of both conflicts is considered, one cannot but focus one's attention on the frontiers of Germany, which are among the most mobile in Europe, and—most likely—in the world. During the peace conference of 1946–47 a calculation was made to demonstrate the "mobility" of the borders of Germany.[4] It follows from the reckoning that in 1918–1945 Germany saw its borders change as many as 33 times. Neither Rome under Caesar, France under Napoleon, nor China in the age of Genghis-Khan, changed its frontiers as often as Germany during those few decades. It is therefore obvious that the issue of the German borders serves as a principal illustration when deliberating on the recognition of state borders. From the legal point of view, it needs to be emphasized that territorial changes—both increase and loss of territory—do not affect a state's subjectivity in international

der universal international law or under international agreements concluded by the states involved. Universal international law ensures only framework-level legal control of the possibility of peaceful territorial changes. It is related to those norms which lay down guarantees of territorial integrity and inviolability.

3 See the source documents and an analysis of the issue in A. Klafkowski, *Granica polsko-niemiecka a konkordaty z lat 1929 i 1933*, Warszawa 1958, particularly Chapter I, *Polish-German Border in the Light of International Covenants*, pp. 29–44. UN International Law Commission is currently about to conclude its long-lasting work on treaty law. The work itself as well as a considerable part of the completed project are discussed in A. Klafkowski, *Prawo międzynarodowe publiczne*, Chapter VII, *International Agreement*, pp. 237–277. Here, I should particularly underline that fragment of the chapter which analyzes the position of the third state in relation to an agreement, pp. 256–259.

4 On the basis of the summary with the journal *Les Lettres Francaises* presented in February 1947 at the peace conference in Paris.

law. The territory of a state is a condition of its existence, and it constitutes one of the vital elements of statehood. However, a state does not rule "over a territory" but "as part of" a territory. It follows, therefore, that a state's subjectivity in international law is not associated with territory in such a manner that loss or expansion by each square kilometre has consequences for the legal subjectivity of that state. Territorial changes do not in fact interfere with the sameness of a state. It suffices to quote the example of Germany of the 1919 Treaty of Versailles. Even though its frontiers and the political system changed—on the day the Treaty was ratified, i.e. 10 January 1920, the German Reich lost 12.02% of its territory in relation to the *status quo ante bellum*—the Germany after the Treaty of Versailles was identical in the eyes of international law with the Germany from before 1914. As for territorial loss, the distinction between partial and complete loss of state territory is a matter of decisive significance. If loss of state territory is only partial, it has no adverse consequences in terms of state subjectivity in international law. This is the case with territorial cession. One could add that, in contemporary science, cession tends to be described as "abdication" of a state from a part of its territory. Simultaneously, one employs the term "dismissal" to denote the relationship of the population in the ceded part of territory to the cedent state. However, regardless of the above terminology, territorial cession is not considered to undermine state subjectivity in international law.

Ad 2. With respect to legal forms in which changes of borders are affected, it has to be observed that, in the practice to date, changes of the kind were most often associated with war and the manner in which it ended.[5] For this reason, a change of a state border is usually considered jointly when one of the modes of concluding the war is discussed. The following ways in which a war may end are known in international law:

A. Termination of warfare by both sides without any conclusive agreement as to the legal effects of that state. After war operations

5 C. Phillipson, *Termination of War and Treaties of Peace*, London 1916, p. 486, here p. 3.

have ended, a normal termination of the state of war ensues and normal peaceful relationships are established. From the legal standpoint, the relations between the former combatants go through a period of uncertainty, which precedes the liquidation of the aftermath of war. This mode is very seldom employed, as states usually avoid ending a war without any definitive decisions. In particular geographical circumstances—as may be inferred from the history of the United States[6]—such a termination of warfare can be practiced relatively often. Regarding territorial matters, this way of ending a war encourages recognition of the principle "uti possidetis."[7]

B. The second mode of terminating a war involves the utter destruction of the hostile state. It is variously referred to in the science, as e.g. conquest, subjugation or debellation.[8] Most recent literature strives to

6 Ibidem, p. 5.

7 W.W. Bishop Jr., *Judicial decisions involving questions of international law*, "The American Journal of International Law" 1948, pp. 194, 470, 690, 927. The study contains numerous rulings of US courts listed in accordance with the dates of ending military operations against Germany, Japan, and Austria during World War II. The material illustrates the smooth operation of the US legal policy in that respect.

8 This issue is analyzed in A. Klafkowski, *Sprawa traktatu pokoju z Niemcami*, Warszawa 1955, 174 pp., here pp. 69–72. Debellation is often mentioned as a mode of original acquisition of state territory. It is not regulated by international law, but developed through the practice of states and was then systematized by international jurisprudence. Based on that systematization, two essential concepts of debellation emerged: a) According to the concept originating in continental science, two periods of development of the notion of debellation are distinguished. In the first period, until 1815, debellation meant armed seizure of a state, its conquest and annexation. In the second period, after 1815, it was argued in science to include the following components: military invasion and occupation of the enemy territory, annexation of that territory, and finally its incorporation. At present, positive international law does not recognize debellation and deprives it of any traits of lawfulness. During World War I, debellation was considered by international jurisprudence as one of the modes of terminating the state of war by means of destroying the opponent and putting an end to their existence as a state. This led to the conclusion that war may be ended in this manner without having to conclude a peace treaty. Consequently, the continental conception appears to distinguish two kinds of debellation. One is destruction of the military force of a state and seizure of its territory, which translates into the factual state. The second is destruction of the military force of a state, seizure of its territory, and annexation, meaning a factual state combined with a unilateral legal act. b) The English concept of debellation shifts its focus to the manifestation of will. Here, debellation is defined as conquest, i.e. a fact of military and political nature, which does not automatically involve the destruction of the defeated

define the meaning of those notions in greater detail. As far as territorial issues are concerned, it is worthwhile to note that although this manner of ending war is deemed "the least desirable" while science rejects the "rights of the victor"—and thus rights deriving from conquest—this manner of terminating war was found to be "legally justified" during World War I. It was even admitted that considerations of morality[9] and common interest may justify territorial cessions resulting from conquest.[10] The differences of opinion concerning this mode of ending war can be aligned with the differences of political views between nations and particular national schools in international jurisprudence.[11] However, it remains indisputable that the total destruction of a hostile state is contrary to the principle of self-determination of nations.

C. The most often practiced mode of terminating the state of war is concluding a peace treaty. This method developed particularly extensively over the last hundred years, as attested by the number of peace treaties entered into in that period: 22 were signed from 1815 to 1913.[12] In general, a treaty is considered the "normal way of ending a war." It is worth emphasizing that the earliest peace treaty, concluded in 1278 BC

state as a subject of international law. Only conquest and the ensuing unilateral legal act of annexation yield the notion of debellation, defined as "subiugatio." Thus, the act of annexation changes conquest into debellation. It should be added at this point that annexation is an act of internal law which incorporates foreign state territory (in part or in its entirety); it is not an act of international law. During World War II, the German Reich asserted debellation of Poland in 1939. As a result, the German Reich believed that it is entitled to sovereignty over the occupied Polish state territory, and therefore was under no obligation to respect—even ostensibly—the provisions of the Hague Convention (IV) of 1907, nor was it required to conclude a peace treaty with Poland. While alleging such a position, the German Reich ignored the obvious continuity of Poland's sovereign state authority, recognized by all United Nations, among which Poland—despite having its entire state territory seized by the enemy—was considered a state engaged in war.

9 C. Phillipson, *Termination of War…*, p. 30, quotes Fiore, who had formulated such a view in 1880.

10 E. Nys, *Le droit international*, vol. II, 1905, p. 44.

11 The assessment of the approach adopted by particular national schools in international jurisprudence may of course rely solely on the representative method. In the German school, such views have been expressed by Heffter, Ullmann and Strupp. Respective views of the French school are represented by such authors as Calvo, Foignet, Le Fur.

12 C. Phillipson, *Termination of War…*, pp. 337–454.

between Ramesses II (Egypt) and Hattusilis III (the Hittite state), demonstrates the same elements one finds in the most recent peace treaties, especially where they pertain to territorial issues.[13]

D. International practice also knows rare cases of termination of war following a unilateral declaration of a combatant. The defeated state must accept such a declaration, even tacitly, so that it may achieve its intended effect, i.e. terminate the war. This is how the World War I conflict between the German Reich and China came to an end. It may be recalled that China did not sign the Treaty of Versailles. This mode was also employed following the end of hostilities in World War II. The Western powers ended the state of war with the former German Reich in 1951 by virtue of unilateral declarations, while the USSR and other socialist states did so in a similar form in 1955. After World War II, American science advanced a proposal of ending the war by way of "declaration of peace" issued unilaterally by the victorious state, and containing all those provisions which are usually included in a peace treaty, i.e. a bilateral or multilateral agreement.[14] The project did not go beyond the theoretical stage, though some of its elements may be found in the relationships between the United States and the Federal Republic of Germany. This theoretical concept does not offer any indication as to the manner of the territorial solutions that a potential unilateral "declaration of peace" would comprise.

Ad 3. As for the recognition of changes to state borders, one may venture to simplify the matter. Recognition of changes to state borders is strictly connected with determining the lawfulness criteria for such changes. The simplification adopted here consists in the fact that changes of state borders are deemed lawful when they have been effected in accordance with international law. In turn, changes conforming to international law are changes grounded in international agreements. Thus,

13 G. Bouthoul, *Huit mille traites de paix*, Paris 1948, here pp. 7–8.

14 F.C. Balling, *Unconditional surrender and a unilateral declaration of peace*, "The American Political Science Review" 1945, no. 3, pp. 474–480, here pp. 478–480.

lawful—in other words recognized—changes of state borders are those which derive from international agreements.

The above sets out the basic theoretical premises. In addition, it needs to be noted that international law is not free of controversy, in jurisprudence and in practice alike. However, rarely does one encounter a matter so controversial as the recognition of changes to state borders. Hence, the observation that neither the science of international law nor its practice have developed general criteria for recognizing the criteria of the lawfulness of territorial acquisitions is one of crucial significance. The extensive scholarly literature dedicated to the subject reflects numerous contradictions.[15]

Having made these general remarks, one can proceed to discussing the issue proper, namely the forms of recognition of state borders after World War II.

The question is examined here relying on my own systematization, which in itself adheres to the chronological sequence of the cited legal acts. The systematization yields the following issues which need to be addressed:

I) International legal acts regulating the termination of warfare—armistice agreements.
II) International legal acts regulating the termination of the state of war—peace treaties.
III) Legal acts which do not constitute armistices or peace treaties, but nonetheless end war operations and regulate affairs relating to the termination of the state of war.
IV) Particular issues outside the scope of the systematization.
V) Conclusion—territorial cession is independent of the peace treaty.
VI) It is now necessary to discuss these problems in detail.

15 B. Wiewióra, *Uznanie nabytków terytorialnych…*, pp. 132–148.

I
International Legal Acts Regulating the termination of Warfare—Armistice Agreements

The armistice agreements which brought an end to warfare on the various fronts of World War II deserve particular attention here, naturally with respect to territorial changes which such armistices introduced.[16] The following agreements are taken into consideration:

1) The armistice with Italy of 3 September 1943 does not regulate territorial issues directly, but merely announces that political, economic and other conditions would be communicated to Italy at a later date (Article 12). Territorial matters were referred to the Council of Foreign Ministers and its auxiliary bodies, to be regulated in the peace treaty with Italy.
2) The armistice with Romania of 12 September 1944 restores the border between Romania and the USSR as they were on 28 June 1940 (Article 4) and declares the so-called Vienna award regarding Transylvania to be invalid and non-existent (Article 19).
3) The armistice with Finland of 19 September 1944, surrenders the district of Petsamo (Article 7) and the base in Porkkala-Udd (Article 9) in favour of the USSR, and restores the status of the Aland Islands as provided for in the agreement with the USSR of 11 November 1940 (Article 9). An appendix to the armistice agreement covers the territories of Finland which are subject to restitution or cession under the armistice.
4) The armistice with Bulgaria of 23 October 1944 contains indirect territorial clauses which specify how Bulgaria should leave the territories it had annexed or incorporated (Article 2).

16 The entirety of relevant documents is provided in *Recueil de textes à l'usage des conférences de la paix*, Paris 1946. The issue is analyzed in A. Kalfkowski, *Umowa poczdamska z dnia 2.VIII.1945 r*., Warszawa 1960, particularly in the chapter entitled *The Potsdam Agreement and Peace Treaties*, pp. 468–540. Another work one should mention in this context is J. Sawicki, *Zawarcie i wygaśnięcie układu rozejmowego*, Warszawa 1961, p. 182, esp. the discussion of armistice agreements, pp. 5–15.

5) The armistice with Hungary of 20 January 1945 contains indirect territorial clauses which determine the rules of withdrawal of Hungary from the territories it had occupied: Czechoslovakia, Yugoslavia and Romania (Article 2).
6) The surrender of Japan of 2 October 1945 invokes the so-called Potsdam Ultimatum of 26 July 1945 which contained territorial decisions. The act of capitulation enumerates the territories which are subject to Japanese sovereignty (Article 8).

In general, it may be stated that the end of war operations in World War II involved two types of armistice agreements.

The first kind of armistice agreement is exemplified by the truces with Italy and the German Reich. Their distinctive feature is that after a military agreement of unconditional surrender of the respective power as been signed on behalf of all United Nation, they give rise to a number of additional legal acts promulgated in the military act of surrender. Those additional acts of surrender regulate numerous issues, not infrequently laying down conclusive solutions prior to signing the treaty, also with respect to territorial changes.

The truces with Romania, Finland, Bulgaria and Hungary represent the second kind of armistice agreement. Here, one single armistice instrument and its appendices comprise all provisions, including military, territorial, economic, and political clauses, as well as those relating to the occupation mechanism etc.

The analysis of links between those armistice agreements and the treaties concluded after 1945 demonstrates that, for the most part, the latter adopt almost all provisions of the armistice instruments, which are then elaborated and formulated in strictly precise terms. The territorial clauses from the armistices are also integrated into the peace treaties.

Only the peace treaty signed in 1951 with Japan departs from that pattern. Still, it should be remembered that one of the four powers, i.e. the USSR, as well as a number of United Nations states, did not sign that treaty.

One can therefore conclude that after World War II, armistice agreements became the basic form of recognition of new state borders in those cases where this occurred.

II
International Legal Acts Regulating the Termination of The State Of War—Peace Treaties

Moving on to a review of peace treaties concluded after World War II, I confine my remarks only to the forms of recognition of new state borders contained in those treaties.[17] I discuss the treaties successively in the light of that particular aspect:

1) The peace treaty with Italy restores the frontiers of Italy to the those of 1 January 1938, with certain changes to the benefit of the neighbouring states, and with changes resulting from the return of annexed territories, as well as separate arrangements relating to the territories in Africa. In its territorial provisions, the peace treaty with Italy draws on the additional provisions to the armistice agreement of 29 September 1946, which were subsequently formulated definitively and in precise terms in the treaty. In general, it may be stated that the treaty adopts the norms laid down in the armistice agreement and its appendices.
2) The peace treaty with Romania adopts the territorial provisions of the armistice agreement, meaning that the latter instrument determined the changes of state borders prior to the treaty being signed.
3) The peace treaty with Finland adopts and confirms the territorial clauses of the truce. It is a unique characteristic of the treaty that it draws on—as far as changes of state borders are concerned—the 1940 peace treaty between Finland and the USSR.

17 The entirety of related documents is analyzed in A. Klafkowski, *Umowa poczdamska*…, pp. 468–540.

4) The peace treaty with Bulgaria adopts and confirms the changes of state borders effected in the armistice agreement, with the exception of one change which was added in the treaty itself.
5) The peace treaty with Hungary adopts and endorses the territorial clauses of the armistice agreement.
6) The 1951 peace treaty with Japan does not derive from the legal acts from the World War II period nor from the instrument of Japan's unconditional surrender. In view of its territorial provisions, the peace treaty with Japan deserves particular attention. Articles 2 and 3 of the treaty enumerate the territories which Japan would lose as a result of World War II. It has been calculated that under the treaty Japan lost over 1.5 million square kilometres of territory and a population of 60 million people over whom it had exercised state authority. The treaty itself does not mention the legal acts by virtue of which those territorial changes are made. The legal foundation of the changes was thoroughly developed in the course of preparatory works for the treaty. It is particularly noteworthy that Articles 2 and 3 make no reference to the states which benefited from those territorial changes. It is then observed in the commentaries to the articles that Japan lost territories it had not acquired during military operations of World War II. Thus, the peace treaty with Japan effected territorial changes with respect to territories which had not been formally called into question prior to the commencement of warfare. These territorial changes rely on the legal acts from the World War II period, formulated after the conferences in Cairo, Yalta, and Potsdam. Consequently, the view has been put forward that very often a peace treaty—of which the peace treaty with Japan is a new proof—regulates such territorial changes which could not be resolved as a result of normal, peaceful international relations.

In conclusion, it may be stated that as legal acts which constitute forms of recognition of state borders, post-World War II peace treaties appear to be derivative forms of such recognition. This is because they largely adopt pre-treaty solutions regulating state borders which were set forth in armistice agreements. Without doubt, this is a very noteworthy characteristic of the phenomenon after World War II.

III
Legal Acts Which Do Not Constitute Armistices or Peace Treaties, but Nonetheless End War Operations and Regulate Affairs Relating to the Termination of the State of War, Conclusively Resolving Such Affairs Prior to Signing a Treaty— the Potsdam Agreement of 2 August 1945

The above systematization cannot encompass the methods and means which served to regulate the affairs of the former German Reich, due to their specificity. Hence, a number of special acts of international law were exclusively devoted to the legal issues of the former German Reich. The Potsdam Agreement of 2 August 1945 occupies a prominent place among them.

It is evident that numerous aspects of tackling the legal aftermath associated with the former German Reich is closely linked to institutions of international law, both past and present. Still, the institutions in question very often display departures from their typical paradigms.

When analyzing the forms of recognition of German borders after World War II, I confine myself to the fundamental legal act, i.e. to the Potsdam Agreement. The agreement refers to those issues on two occasions:

1) In Chapter V, entitled *The City of Konigsberg and the Adjacent Area*,
2) In Chapter VIII, entitled *Poland* (specifically section B of the chapter) and in Chapter XII, entitled *Orderly Transfer of German Populations*.

Here are the remarks concerning these two issues.

Ad 1. In Chapter V, the Potsdam Agreement stipulates that before territorial matters are finally resolved in the peace treaty, a change of border is made in favour of the USSR in the coastal region of the Baltic Sea. The parties to the agreement approve the transfer of the city of Konigsberg and its adjacent area to the USSR. At the same time the President of the United States and the Prime Minister of Great Britain declare with respect to this provision that they will "support the proposal […] at the forthcoming peace settlement." These provisions of the Potsdam Agreement constitute a pre-treaty decision pertaining to the border between German and the USSR. The prospective peace treaty with Germany may only adopt these decisions in its provisions.

Ad 2. with regard to the Polish-German border, Chapter VIII, section B of the agreement draws on the Yalta agreement, which provided a general description of the future Polish-German border. The provisions of the Potsdam Agreement delineate that border in detail. In view of the fact that France co-signed the Potsdam Agreement later, it may be said that that the Polish-German border was determined by virtue of decision of four superpowers acting on behalf of the United Nations.[18] It is therefore a form of adjudication of the border (*adiudicatio*). Neither Poland nor Germany—as directly interested states—are parties to Potsdam Agreement (although Poland was consulted and, with respect to the Polish state, the agreement constitutes a *pactum in favorem tertii*). The fact that the agreement effects territorial cession in favour of Poland is evinced in the use of the phrase "former German territories" to denote the ceded land. The ceded territories were to be governed by Polish administration and excluded from the Soviet occupation zone. The land in question became subject to fully sovereign Polish authority and, from the date that the Potsdam Agreement came into effect, constitutes an integral part of the territory under Polish sovereignty. These decisions of the Potsdam Agreement were corroborated by the

18 Related documents and analysis of the issue in A. Klafkowski, *Umowa poczdamska…*, esp. Chapters III, IV, and V.

obligation to effect a transfer of the German populations from the Polish territory to the territory of the four occupation zones of Germany. The issue is regulated in detail in Chapter XIII of the Potsdam Agreement. Poland has discharged that obligation on the basis of agreements concluded with the representatives of the four occupying powers and under international supervision. This, in short, is the legal status of the matter. If doubts of a political nature are expressed regarding the issue, they by no means pertain to the lawfulness of the Polish-German border. Political doubts—devoid of any legal substance—are concerned only with the ultimate character of that border. Political doubts are associated with the future peace treaty with Germany in which this border should be approved. However, a peace treaty with Germany has failed to materialize for the past 20 years, a fact which Poland cannot be faulted for. In any case, the prospective peace treaty with Germany can only adopt the provisions of the Potsdam Agreement.

The performance of the Potsdam Agreement to date warrants the following general conclusions:

First, peace treaties after World War II are concluded by the United Nations, on behalf of which a substantial part of the preparatory work was carried by the powers-parties to the Potsdam Agreement. All peace treaties after World War II draw directly or indirectly on the Potsdam Agreement. It was only in two cases that a power-party to the Potsdam Agreement did not sign a peace treaty with a World War II hostile state. The United States did not sign the peace treaty with Finland, as they had not been at war with each other. The USSR did not sign the 1951 peace treaty with Japan for reasons presented at the conference in San Francisco. One could say that the provisions of the armistice agreements and other legal acts were incorporated in their entirety into the later peace treaties.

Second, the Potsdam Agreement provides the foundation for the entire body of the formal law of peace treaties. Even at the peace conference with Japan in September 1951, the Potsdam Agreement was the

chief topic of discussion. The Council of Foreign Ministers established by the Potsdam Agreement developed drafts of peace treaties. The works of the Council are not fully documented, precluding a thorough analysis of their efforts. However, it was the latter organ which, having been instituted by the Potsdam Agreement, drafted the peace treaties and is appointed with the task of developing the peace treaty with Germany.

Third, in all peace treaties—except for the treaty with Japan—there are references to all the legal acts concerned with Germany or other hostile states. The references include the Potsdam Agreement in particular, as well as other legal instruments, especially those dating from 1945. All those references in the treaties account for their conciseness, and simultaneously link those treaties with the entire framework of legal acts from the World War II period, particularly with the Potsdam Agreement.

Fourth, all the peace treaties—except for the treaty with Japan—provide for the mutual recognition of the peace treaties concluded after 1945. These clauses received almost identical wording in all those treaties. Furthermore, the hostile states signed an obligation contained in those treaties, which required them to recognize the peace treaties that would be concluded with Germany and Japan in the future. After all, the content of those treaties remained unknown in 1947 and in 1955 (when the Austrian State Treaty was signed), since they were not yet signed at the time. The obligation is predicated on the unquestionable recognition—on the part of all states—of the Potsdam Agreement and the associated legal acts as a fundamental underpinning of the future peace treaty with Germany.

IV
Particular Issues Outside the Scope of the Systematization

When discussing the forms of recognition of state borders after World War II, one cannot fail to mention two issues which hardly fit

in the systematization employed in this study. The issues in question cannot be ignored, either. Specifically, two legal problems need to be addressed:

1) the matter of the border between the two German states,
2) the matter of the border between Czechoslovakia and the Federal Republic of Germany, following nullification of the Munich Agreement of 1938.

The two issues are discussed here very briefly, as the main intention is to underline that they exist.[19] Both involve various legal complications which certainly deserve a detailed study.

Ad 1. The border between the two German states evolved. The demarcation line between the forces of the United Nations which occupied the territory of the former German Reich was transformed in 1945 into boundaries between separate occupation zones in Germany. In 1946–1949, a singular frontier developed between the three Western zones and the Soviet occupation zone. When the two German states were created, the latter demarcation line became the actual border dividing the two German states. It needs to be underlined that in the internal legislation and in the diplomatic acts of both German states that border is still referred to as the demarcation line. However, for all intents and purposes—factual and legal—it is a border between two states.

Ad 2. From the standpoint of international law, the border between Czechoslovakia and the Federal Republic of Germany is a border between two states. There can be no legal doubt arising from the Munich Agreement of 1938, as it had been declared null and void, non-existent: an agreement whose legal force had been obliterated *ab initio* during World War II. Thus, in the light of international law, the status quo ante of the Czechoslovak-German border was restored. The only changes of a legal nature are laid down in the legal acts of the World War II period. I draw attention to the issue only because the government of the Federal

19 See a detailed study in B. Wiewióra, *Uznanie nabytków terytorialnych.…*, pp. 195–220.

Republic of Germany pursues a policy which attempts to question the lawfulness of the border between Czechoslovakia and the FRG.

V
Conclusion—Territorial Cession is Independent of the Peace Treaty

The analysis of legal acts and international practice based thereon is not infrequently an arduous and highly complex process. The effort is often unrewarding, as the findings of such an analysis appear straightforward and self-evident. In such instances, one may have the impression that extensive disquisitions and interpretation of legal acts are superfluous or not particularly useful. However, international practice dismisses such doubts and requires thorough and meticulous analyses, especially where they concern such fundamental acts of international law as multilateral agreements regulating legal rectification of the aftermath of World War II. Correct interpretation of those legal acts is decisive not only for the elimination of the adverse outcomes of the last war. The potential future war may also be forestalled thanks to correct interpretation of those legal acts.

The conclusions which may be drawn from the above deliberations very often require one to reiterate the premises which constitute their essential foundation. Sometimes, it may prove worthwhile to repeat those premises so as to avoid making inadequate statements which put the clarity of the conclusions themselves at risk. Hence certain elements making up the premises of these final conclusions need to be restated, though very briefly, of course.

The First Conclusion—the Potsdam Agreement of 2 August 1945 Effected Formal Territorial Cession

The term “cession” is an ambiguous one. In contemporary theoretical studies it is described as “not particularly felicitous” and gives rise

to numerous reservations. In international law, the term "territorial cession" denotes treaty-based transition of a part of the territory of one state under the authority of a second state. In international practice, the term is used to refer to a transfer of a part of territory, the surrender of sovereignty by the cedent state over the population living on that territory, who now become subject to the sovereignty of the cessionary state (acquirer). Cession of a part of territory is considered a lawful mode of territorial acquisition in international law. A cession agreement is public law act, whose aim is to transfer the sovereignty from one state to another. The current body of international law includes universally binding norms which regulate territorial cession. The practice of states in that respect is not consistent, either. A vital element of each territorial cession is the change of sovereignty with respect to a part of state territory. In each case, such a change is regulated by an international agreement.

The notion of cession in international law differs in terms of substance from its counterpart in private law. Also, it needs to be added that even in private law "cession" is not used to denote the transfer of property, in particular real estate, from one person to another, but a transfer of liabilities. Despite the multiplicity of meanings, international law widely uses such terms as the transfer of territory, cession, retrocession, restitution, exchange of territory, sale etc. in a manner analogous to the transfer of ownership in private law. It has often been observed that the transference of terms from property law into the branches of public law is an expression of an incorrect approach to the issues of territorial supremacy. This is due to the fact that the relationship of the state to the territory does not consist in *dominium* but in *imperium*.

When drawing conclusions from these observations, one should avoid such notions as property, sovereignty, succession and transfer of *imperium* while discussing territorial cession. Such an understanding of the essence of territorial cession leads to grave consequences. First, the principle *nemo plus iuris in alium transferre potest quam ipse habet* is out of

the question where territorial cession is concerned. The principle may be employed where a transfer of rights takes place. It cannot apply to territorial cession, whose essence lies in the change of sovereignty. Secondly, a part of state territory cannot have its "own" position in international law. Only states or state-like entities can have such a position.

In theory, the agreement on territorial cession is considered "merely a title." When effecting a territorial cession, two eventualities are presumed in international law. The first is that when the ceded territory was occupied pre-treaty by the cessionary, the peace treaty transfers—drawing on the analogies discussed above—the legal title to the new sovereign, who already is in the possession of that territory. The second eventuality is when the ceded territory has not yet been taken by the cessionary, in which case the peace treaty is an act of handing over the territory to the cessionary. However, that handing over is not an indispensable condition for the cession to be effective.

The fundamental criterion of cession is the intention of the parties and the determination of the legal title by means of a legal act. It is underlined in contemporary monographs that agreement on territorial cession does not convey sovereignty to the cessionary state. Such an agreement is a purely probationary instrument and, in a sense, corroborates the fact that the cedent state surrenders a part of its territory and a proportion of its population. This nature of the agreement of cession requires detailed supplements in the shape additional agreements concluded by the states involved.

Now, moving on to conclusions concerning the Polish-German border after World War II, it has to be stated that the part of the former German Reich which was transferred to Poland under the Potsdam Agreement is a cession of a particular kind. Namely, this is an instance of retrocession and therefore the lands which were returned to Poland in 1945 are referred to as "Regained Territories." The name signifies that the home state recovered lands which have witnessed various changes in the course of history, as is usual with frontier territories.

The term "retrocession" is not a novelty associated with the Potsdam Agreement nor an interpretive figment of the Polish diplomacy. The most recent monograph devoted to territorial cession lists numerous examples of retrocession. For instance, the term is used in the agreement of 10 August 1877 to describe the transfer of l'Ile Saint-Barthelemy. Retrocession has a rich history in French-German relationships in connection with the extension of German rule over Alsace-Lorraine. The return of Alsace-Lorraine to France in 1918 constituted retrocession, which also happened to be called reintegration in French juridical literature.

In this case, the theory and practice of international law shows that the notion of retrocession-reintegration is associated with the restoration of the legal-political status which a territory had had prior to the conquest. The territory which is subject to retrocession is considered a part of the territory of the home state as if it had uninterruptedly belonged to the latter. If the annexation of the retroceded territory lasted an excessively long time, the principle of recovery and determination of the legal status of that territory undergoes corresponding modifications. Such a principle was adopted in 1918 with regard to Alsace-Lorraine, which France had lost after the war of 1870, as it was found that German occupation "lasted too long for all principles of reintegration to apply."

The rules governing the retrocession of the Regained Territories were also suitably modified. Further instances of retrocession are known to have taken place after World War II.

When quoting the above examples, it should be added that no analogies between the Regained Territories and any other instance of retrocession-reintegration are sought. Here, the goal is merely to demonstrate that the notion of retrocession-reintegration is neither a Potsdam nor a Polish invention devised for the sake of interpretation of the Potsdam Agreement.

The theory and practice of international law determines the component elements of cession-retrocession.

Following an analysis of the retrocession of Polish territory effected under the Potsdam Agreement in the light of international legal theory and practice to date, one arrives at the following outline of the issue:

1) In international law, cession means surrender of a part of state territory. The term "territorial cession" can only be used in that specific sense. Usually, the ceded territory is already occupied by the cessionary state. The cession of territory in favour in Poland is referred to by the representatives of the three powers at the conferences in Yalta and Potsdam as well as by the commentators of those agreements. In the Potsdam Agreement, the territory ceded to Poland is called "former German territories"; moreover, it is set apart from the Soviet occupation zone in Germany.
2) Territorial cession is effected by means of international agreement. However, it is not the form of international agreement which is decisive for the execution of a territorial cession, but rather the intention to bring it about. The Potsdam Agreement stipulates that the cession of territory in favour of Poland will take place by virtue of the concord of powers signing that agreement. It follows unequivocally from the provisions of the Yalta and Potsdam agreements that the western border of Poland on the Odra and the Lusatian Nysa is final, while the "former German" land to the east of that line is returned to Poland.
3) The state ceding a part of its territory does not forfeit its international-legal subjectivity. The loss of a part of state territory does not affect the legal nature of a state. Retaining its international capacity, a state may continue to act even when its capacity for legal action has been handicapped.
4) The state ceding a part of its territory should survive the international agreement under which the cession has been executed. This is what distinguishes cession from annexation. With cession, the subject of international law endures—this is the requi-

site of cession. With annexation, a subject of international law is terminated.

5) Cession constitutes legal title to effective transfer of the ceded territory. International law does not set forth the norms which would regulate the manner and the scope of the transfer of territory. Such norms are established individually in each particular case. Within international law, cession represents a title under which the cedent is obliged to leave and evacuate the part of state territory concerned, while the cessionary (acquirer) is simultaneously authorized to acquire that territory. For a cession to be effective, a territory has to be handed over and subsequently taken over by the state which acquires it. The handing-over of territory is redundant if the cessionary state (acquirer) holds the territory when the international agreement is concluded.
6) By virtue of cession, the cessionary state obtains exhaustive competence with respect to the acquired territory. This condition is satisfied in the provisions of the Potsdam Agreement pertaining to Poland, while the said competence is exercised by Poland.

For a legal picture of territorial cession to be complete one should add that the provisions of the Potsdam Agreement are not subject to any time limit. The Potsdam Agreement does not specify any duration, which means that the agreement remains valid indefinitely. The negotiators of the Potsdam Agreement advance the argument that it was concluded only for the "initial period of occupation and control", on the basis of which they conclude that currently the agreement is no longer in force. The fact which weighs against this claim is that a proportion of the provisions of the Potsdam Agreement relating to Germany actually includes two types of provisions. One set of provisions represents a normative regulation of the German issues with a view to ensuring security and peace in Europe. The other group of provisions sets out specific tasks which should be carried out forthwith on the German territory to achieve peace and security in Europe, e.g. dissolution of the NSDAP, disbandment of

the armed forces etc. These provisions are evidently intended to apply in the transitional period, and the fact that they become irrelevant once they have been satisfied is indisputable.

In other words, the Potsdam Agreement comprises a number of provisions covering the "initial period of occupation and control", but the latter designation is understood to mean the period of intense eradication of all the elements of German militarism, whereby it is not the purpose to make those provisions void after the "initial period of occupation and control", such that the elements of German militarism eliminated during that period would be restored. There are no such political or legal arguments which could undermine the fact that the agreement remains in force for an unlimited term.

The cession of territory in favour of Poland was effected in the Potsdam Agreement in accordance with the fairly often communicated intentions of the occupying powers. The intention to enact a cession of territory in favour of Poland is particularly conspicuous in the preparatory works which preceded the formulation of the provisions of the Potsdam Agreement. The fragmentary documents published so far leave no doubt as to the diplomatic dealings in that respect; clearly, the occupying powers in Germany decided—even prior to Germany's unconditional surrender—to resolve the matter of borders of the German state in a new, equitable way which would correspond with the anticipated arrangement of international relationships after World War II. This is evinced in the meticulous preparatory work for the demarcation of the borders of the German state, regarding which only partial information has been made available. The fragmentary data still warrant the conclusion that the territorial provisions of the Potsdam Agreement, especially the delineation of the western border of Poland, are an outcome of prolonged preparatory efforts, characterized by experience and prudence. If that preparatory work, carried out during World War II, was disclosed much later, it happened for the same reasons for which the aims and the rules governing occupation of Germany were publicized only after

the unconditional surrender of the Nazi Reich. Besides, the drafts of changes of the post-war borders of the German state were not kept secret. It needs to be emphasized that after its unconditional surrender, the borders of the German state took shape in accordance with those blueprints between 8 May 1945 and 2 August 1945. It was in the period from the unconditional surrender of the German Reich to the promulgation of the Potsdam Agreement that the occupying powers addressed and decided on the entirety of the German problem, relying on the principles agreed in the course of previous conferences.

The documents relating to the preparatory work for the Potsdam conference which have been disclosed to date confirm such an interpretation of the provisions contained in the Potsdam Agreement.

The Second Conclusion—the Act of Territorial Cession is Independent of the Peace Treaty

A principle established in practice presumes that territorial changes are expressed in international agreement by virtue of which territorial cessions take place.

However, theory—at least a considerable part of theoretical inquiry—appears to draw erroneous conclusions from practical experience. The error consists in the fact that according to a proportion of theorists territorial cession can be effected only during peacetime, or that only a peace treaty renders a cession lawful and legitimate. In this case, territorial cession is confused with a peace treaty.

In actual fact, a peace treaty is essentially concluded under the principle of *uti possidetis*. The principle is manifested in a cession being effected most often prior to the conclusion of a peace treaty. Thus, territorial cession precedes a peace treaty.

Due to theoretical misunderstandings in this respect, the issue needs to be re-examined in the light of practice and pertinent literature. Here, one should draw both on the practice of states with regard to termina-

tion of war as well as on theory; references to customary law may also prove helpful.

The so-called *communis opinio doctorum* is not a source of international law, yet it offers valuable aid when elucidating the norms of emerging or existent customary law. Hence, it is aptly observed that the representatives of science are "les témoins des sentiments et des usages des nations civilisées." The concurring views of many authors, especially when they represent different nationalities, are a valuable indicator if an international legal norm is to be effectively construed.

At the outset, it has to be noted that there is no norm in international law which would stipulate that territorial cession should be effected in a peace treaty.

The *modus procedendi* in a treaty-based termination of war places considerable emphasis on the stage of proceedings which is referred to as "preliminaries of peace." It is acknowledged both in practice and in theory that preliminaries lay the structural groundwork of peace, and that there exists an organic link between the preliminaries and the peace treaty. The fundamental premises of a peace treaty cannot be different from the provisions in its preliminaries. Very often, preliminaries include provisions concerning territorial cession. It is also acknowledged that preliminary provisions may "enter into force" before a peace treaty is concluded. A distinctive feature of the preliminaries of peace concluded by a coalition of states as a party is that they entail an obligation not to conclude a separatist peace treaty.

Preliminaries providing for territorial cessions are encountered very frequently. Examples of such preliminaries were known in the eighteenth century and became even more numerous in the centuries that followed. In the Napoleonic period, the frequent changes of state borders took place as part of cession agreements, without waiting until a peace treaty was signed. The practice continued in the later periods as well. History knows instances when after territorial cession had been effected in the preliminaries, the delimitation commission would not wait for

the peace treaty and set to work without delay. For instance, one could quote the treaty signed in 1897 in Constantinople, which ended the war between Greece and Turkey. The preliminaries were signed on 18 September 1897, and the delimitation commission started working immediately afterwards. The peace treaty was signed only on 4 December 1897.

The practice of the nineteenth-century German state relating to the provisions on territorial cession in the preliminaries of peace is particularly interesting. Between 1830 and 1864 the borders of Germany saw no major territorial shifts, so cession agreements concluded in that period were few. However, things changed considerably in the decades towards the end of the nineteenth century. The war of 1864 ends with a preliminary concord in which Denmark cedes certain territories (Schleswig-Holstein, Lauenburg). The war of 1866 also ends with a preliminary agreement which, among other things, dissolves the Austrian-Prussian condominium and incorporates Schleswig-Holstein into Prussia as its province. Then the war of 1870 ends again with a preliminary treaty, which provides for the cession of Alsace-Lorraine to Germany. Characteristically enough, the peace treaty of 10 May 1871, which introduced certain frontier amendments in favour of France, refers to the "cession" of certain territories ceded in the preliminaries of 18 January 1871. The delimitation commission worked for six years: from May 1871 to 26 April 1877. The cession on the part of France was executed at a pre-treaty stage with all legal effects thereof, as it refers to the renunciation of sovereignty and ownership. Certain territorial concessions made by Germany with respect to the cession laid down in the preliminaries are also worded as "cession." The return of Alsace-Lorraine again relied on pre-treaty preliminaries, while the 1919 Treaty of Versailles authorized that state of affairs. The legal effects of cession in the peace treaty of 1871 and in the Treaty of Versailles of 1919 are associated with the dates of the preliminaries.

This line of development can be observed in the practice of states after World War II. In that period, the relation of territorial cession enacted in the preliminaries to the peace treaties concluded later is as follows:

The peace treaty with Bulgaria, signed on 10 February 1947 in Paris, establishes borders in accordance with the territorial situation of 1 January 1941. Consequently, it confirms territorial cessions effected prior to that date. When signing the treaty, the representative of Bulgaria made a statement of protest against some of the territorial provisions.

The peace treaty with Romania, signed on 10 February 1947 in Paris, implicitly confirms the pre-treaty territorial cessions. When signing the treaty, the delegate from Romania expressed the conviction that "certain obligations are excessive, while others are unjust."

The peace treaty with Hungary, signed on 10 February 1947 in Paris, also endorses territorial cessions which have taken place previously. The Hungarian delegate declared that he signed the treaty "with a heavy heart." Furthermore, he added that Hungary "did not introduce a single provision that would be favourable to it", after which he discussed several territorial issues decided by the treaty.

The peace treaty with Italy, signed on 10 February 1947 in Paris, contains territorial provisions which, in the words of the Italian delegate, "exacerbate the sense of oppression in the Italian nation." He added that Italy "expects the future to revise this treaty."

Only the peace treaty with Finland, signed on 10 February 1947 in Paris, did not elicit any protest. The treaty was accepted as an instrument which conclusively settled the matter of the Finnish borders. Article 1 of the treaty corroborates the retrocession of a part of territory effected prior to the treaty itself.

The peace treaty with Japan, signed on 8 September 1951 in San Francisco, contains provisions which draw on the outcomes of the Cairo Conference, on the Potsdam Declaration of 26 July 1945 and the unconditional surrender of Japan of 2 September 1945. It should be underlined that the provisions of the treaty cede certain Japanese territories,

but the cessionary is not mentioned. Thus, the peace treaty with Japan authorizes territorial cessions applicable to both the pre-war and post-war territory of that state.

The state treaty for the re-establishment of an independent and democratic Austria, signed on 15 May 1955 in Vienna, also deserves to be discussed here, despite the fact it is not a peace treaty. In the preamble, reference is made to the Moscow Declaration promulgated on 1 September 1943 by the governments of the USSR, the United States, and Great Britain. Article 11 of the treaty stipulates an obligation for Austria to recognize the legal force of the peace treaties of 1947 and "other agreements or arrangements which have been or will be reached by the Allied and Associated Powers in respect of Germany and Japan for the restoration of peace." Article 22 refers twice to the "Protocol of the Berlin Conference of 2nd August, 1945", meaning the Potsdam Agreement. In the extent pertaining to Austria, the treaty formally recognizes the preliminaries of peace which preceded it.

On the basis of a comparative study of state practice spanning a period of approximately 300 years, it may be stated that there is no norm in international law which would posit that territorial cession can be effected only through a peace treaty. Also, none of the existing norms requires that a peace treaty should "render territorial cession lawful." Interested states conclude international agreements concerning cession by taking into account the specific conditions and circumstance in each case. Territorial cession is very often effected in the preliminaries.

The practice of states after World War II demonstrates that the conditions of armistice are treated as preliminaries which should then be reflected in the peace treaty. This is observed in all the aforementioned peace treaties (of 1947). This highlights the organic development of preparatory works for peace treaties, which involved various acts of international law from the World War II period – the Potsdam Agreement in particular. It is the post-war practice which most prominently shows that peace treaties formally incorporate pre-treaty decisions con-

cerning border changes into their provisions. The latter fact underscores the momentous role of the Council of Foreign Ministers in the preparatory work which culminates in peace treaties.

The Third Conclusion—the Final Settlement of the Polish-German Border Complies with International Law

In the light of the above theoretical considerations and analysis of practice, the following conclusions may be advanced regarding the Polish-German border:

1) In the practice of states, territorial cession is distinctly separate from the peace treaty. Consequently, monographic studies of the issue already speak of cession or cession-related clauses in peace treaties, while "treaty (i.e. agreement) of cession" is becoming an established term. It is underlined in the theory that territorial cessions outside peace treaties are so frequent that in the course of recent centuries certain rules have developed to which states widely adhere in that respect.
2) No less fundamental a conclusion concerns the relation between the peace treaty and the agreement of cession which precedes it. Theoretical approaches highlight the fact that, by and large, the goal of a peace treaty is to change a title which is sovereign *de facto* into a title which is sovereign *de iure*. However, when deliberating on the constitutive or declaratory significance of the "legalization" of a pre-treaty cession, it is maintained that the essence of such legalization is in the transformation of a historical fact into a legal one. Obviously, the change does not create anything, since its sole capacity is expressed in the determination that a historical fact exists. The practice of states after World War I demonstrates that a cession of territory—even when effected in a peace treaty—must be

a definitive one. As discussed above, the practice of states after World War II proves that states sign peace treaties with reservations or protests pertaining to territorial provisions. In such circumstances, the proposition that territorial cession is "legalized" by the peace treaty is untenable.

3) The practice of states presented above permits one to formulate the view that in and of itself a peace treaty does not create anything, as crucial significance should be attributed to the existing preliminaries.
4) The conferences in Tehran, Yalta and Potsdam established the rules which governed the cooperation of the USSR, the United States, and Great Britain as they strove to restore world peace, both during the war and afterwards. Also, the preliminaries of peace were agreed on during those conferences. The peace treaties concluded to date after World War II formally confirmed the provisions which obtained that particular form or which were laid down in other armistice instruments—also preliminaries of peace which terminated military operations on particular fronts. Most notably, all the discussed peace treaties recognized those provisions of the preliminaries which resolved the questions of borders prior to the treaties themselves. These preliminaries are therefore implemented in the peace treaties. Tehran, Yalta and Potsdam also constitute preliminaries of peace for those treaties which have not yet been concluded after World War II, in particular for the peace treaty with Germany. There is no shortage of British opinions which view the preliminaries concluded as part of the Tehran—Yalta—Potsdam paradigm in that very manner. Also, the president of the United States approached the Yalta agreement in the same way. In its draft of the foundations of the peace treaty with Germany, the government of the USSR invokes the provisions of the Potsdam Agreement concerning Germany on several occasions, in a sense accentuat-

ing the fact that the agreement represents a preliminary. Much the same is observed in the decrees issued by the USSR, Poland, and other states in connection with the termination of the state of war with Germany. The preliminary nature of the Potsdam Agreement is underlined in the communique of the Warsaw conference of 8 states, held on 22 April 1948, and in the communique of the Prague conference of 8 states in 1950, in which the German Democratic Republic participated as well. The Potsdam Agreement settles numerous issues in a pre-treaty mode; for instance it conclusively resolves the matter of the western border of Poland on the Odra – Lusatian Nysa line. No grounds can be found in post-World War II practice or in the theory to support the conjecture that the territorial provisions of the Potsdam Agreement regarding Poland's western border will be approached in the prospective peace treaty with Germany differently than the already implemented territorial provisions in previous peace treaties. In line with the post-World War II practice, the peace treaty with Germany will formally adopt the territorial clauses of the Potsdam Agreement pertaining to the border arrangements between Poland and Germany, integrating them in its provisions.

5) It is sometimes emphasized in theoretical deliberations that formal consent is required in those cases when territorial cession is a component of an imposed agreement. The practice of the German Reich after the 1919 Treaty of Versailles shows that the diplomatic interpretation of the matter differs from the juridical one. Here, one could cite the memorandum formulated by Professor Erich Kaufmann, in which it was asserted that Germany's territorial cessions provided for in the Treaty of Versailles cannot be criticized or challenged. The diplomatic interpretation of the same issue—at least on the part of the German Reich—was altogether different.

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SUMMARY

The Forms of Recognition of State Borders After World War II (With Particular Focus on the Arrangements Pertaining to the Polish-German Border)

The paper is an English translation of *Forma uznania granic państwowych po drugiej wojnie światowej*, by Alfons Klafkowski, published originally in Polish in „Życie i Myśl" in 1964. The text is pub-

lished as a part of a jubilee edition of the “Adam Mickiewicz University Law Review. 100th Anniversary of the Department of Public International Law” devoted to the achievements of the representatives of the Poznań studies on international law.

Keywords: public international law, forms of recognition of state borders, Polish-German border.

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International Responsibility for Occupation Currency[1]

The present article attempts to answer the question of how the responsibility of a State for occupation currency is defined in international law.

Introductory Explanations

Occupation currency appearing during a war in an occupied territory is a new currency from the perspective of both the occupant and the occupied country. For the former it is new because it is not a currency that was obligatory legal tender in the territory subject to its sovereignty, for the latter, because it is not the currency that is in circulation there pursuant to its own regulations and directives concerning money.

Examples of occupation currencies include the francs issued by the Belgian *Société Générale* on the orders of the German authorities during the occupation of Belgium in 1914–1918, the zlotys put into circulation by the Issuing Bank in Poland in 1940–1945, or the marks printed by the United States and the USSR and used in occupied Germany between 1944 and 1948.

When and on what terms an occupying power is allowed to issue occupation currency is a question that this article shall not discuss. From

1 Translated from: K. Skubiszewski, *Odpowiedzialność międzynarodowa za pieniądz okupacyjny*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1960, no. 2, pp. 65–82 by Tomasz Żebrowski and proofread by Stephen Dersley and Ryszard Reisner. The translation and proofreading were financed by the Ministry of Science and Higher Education under 848/2/P-DUN/2018. This is a fragment of the final chapter of the post-doctoral dissertation *Pieniądz na terytorium okupowanym. Studium prawnomiędzynarodowe ze szczególnym uwzględnieniem praktyki niemieckiej* published by the Institute for Western Affairs.

The Hague Convention IV of 1907, certain norms can be derived in this respect. However, for the sake of the problem discussed in this article, it is enough to say that, under certain circumstances, the occupying power enjoys the right to issue occupation currency and under others, it does not. This article takes the liberty of not discussing this right of the occupant in any greater detail for the following reason (anticipating the discussion below): to this very day, the practice of states has not made the responsibility for occupation currency dependent on whether the occupant issuing the currency acted in agreement with the Hague rules or violated them. It is for this very reason that the responsibility for occupation currency deserves to be discussed, because this is a case when lawful or unlawful conduct does not automatically settle the question of responsibility.

Responsibility for a currency in an occupied territory is to be understood as the obligation to pay the equivalent of occupation coins and notes withdrawn from circulation, which had a fixed rate of exchange during the occupation.

The question of responsibility in the above meaning also arises in the case of a local currency in the occupied territory (i.e. the currency that was legal tender there when the occupation began) and the occupant's own currency (i.e. the currency that is legal tender in the occupant State). In both cases, however, the attribution of responsibility does not pose any difficulty. An occupying power does not bear any responsibility for a local currency, while it always does for its own currency.[2]

Nevertheless, it is not possible to formulate such a simple and clear rule each time the question of responsibility for occupation currency comes up. This question does indeed always come up, because occupation currency is a temporary phenomenon. When the occupation is over,

2 For an occupying power's own currency see F.A. Mann, *Money in Public International Law*, "British Year Book of International Law 1949" vol. 26, p. 275. Cf. E.H. Feilchenfeld, *The International Economic Law of Belligerent Occupation*, Washington 1942, p. 78 footnote 2; F.A. Southard, *The Finances of European Liberation with Special Reference to Italy*, New York 1946, p. 23.

the sovereign of the territory withdraws the occupation currency from circulation. The question arises then: who is to bear the costs of this operation?

Law Versus State Practice. Responsibility for an Occupation Currency

It would seem that there is a connection after all between the obligations and rights of an occupying power in the monetary sphere, on the one hand, and its responsibility for the occupation currency on the other. This is the case of an occupying power acting within its rights and obligations. It is assumed that it issues an occupation currency in accordance with The Hague Regulations. Since an occupying power complies with the law, the question arises if its responsibility for an occupation currency is an issue at all. It could be claimed that in such a situation a change in the monetary system of the occupied country took place according to international law. The maintaining or removing of the effects of change is already a matter that does not concern the former occupying power once the occupation is over. The case is the same in the reverse situation: if it has breached international law by its monetary policy, then its responsibility arises in the same manner as in the case of the breach of any other provision of law.

The practice of countries, however, consistently departs from the above rules. Thus, it can hardly be claimed that these rules reflect the actual legal framework, although in theory they follow from the law on international responsibility, in particular from Article 3 of The Hague Convention IV.

In fact, the practice of countries in relation to the issue at hand is best studied by scrutinising agreements concerning reparations for war damage. Peace treaties often pass over the question of the responsibility of an occupying power in the money sphere. If an occupying power has lost the war and pays damages under a treaty, there are grounds

for speculating as to whether the overall amount of the damages covers compensation for the issue of an occupation currency. There are, however, peace treaties or other agreements or documents that explicitly deal with responsibility for an occupation currency. In them, the following rule is recurrent: responsibility for an occupation currency is borne by the defeated country that on one occasion is the occupying power and the occupied country on another. Hence, this regulation provides no guidance as to what the law on responsibility is because in one case it could be claimed that the issue of a currency by the occupying power was legal, while in another it raised doubts. Meanwhile, there is only one answer: the defeated country has to pay.[3] This regulation reflects the domination of the victor at the moment when signatures are affixed to a treaty. It follows that responsibility for an occupation currency is regulated on a case-by-case basis, according to the wishes of the winner, and not whether The Hague rules have been breached while issuing an occupation currency.[4] The fact that the "will" of the winner finds its expression in an international treaty is of no significance for the legal aspect of the matter under discussion. Recently, while repairing certain types of WWII damage, the winners have felt so free to dictate their "will" to the defeated countries that they have availed themselves of a unilateral act. This conduct could be reconciled with the law under the special conditions prevailing in Europe and Asia in 1945 when the hostilities ended. However, the fact that the binding force of various documents related to the end of the war is not questioned does not mean that such documents are a source of universally binding law on responsibility for a currency in an occupied territory.

3 Cf. F.A. Mann, *Money…*, p. 275.

4 Cf. ibidem: 'From the question of the legality of the currency system adopted by the occupant for the occupied territory, it is necessary to distinguish clearly the problem of responsibility'. Whereas, G.G. Fitzmaurice, *The Juridical Clauses of the Peace Treaties*, "Académie de Droit International. Recueil des Cours" 1948-II, vol. 73, pp. 342–343, joins both problems to a degree. Specifically, he makes the legality of an occupation currency dependent on guaranteeing its possible exchange.

The legal aspects of responsibility for an occupation currency were discussed by Germany and Belgium as well as Germany and Romania after the First World War. Agreements concluded by these countries settled Belgian and Romanian claims[5], which arose out of German monetary regulations enforced in those countries during their occupation. Each party viewed the question of responsibility differently. In both cases, each party kept to its legal point view, which is made explicit in the preambles to the agreements.[6] For this reason, these agreements—similarly to peace treaties sanctioning the domination of a winner—do not allow us to learn what the law is in the matter under discussion.[7]

As far as The Hague Regulations are concerned, responsibility for breaching them is provided for by Article 3 of The Hague Convention IV:

> A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

This provision was absent from the 1899 text; it was included in the Convention only during the Second Hague Conference. It was then that the German delegation submitted a draft annex to the Regulations concerning responsibility. The annex consisted of two articles. The first laid down the rule that if the aggrieved person was a national of a neutral

5 German-Romanian Convention of 10 November 1928, G.F. de Martens, *Nouveau recueil général de traités, 3e série*, 1929, vol. 21, p. 484; German-Belgian Agreement of 13 July 1929, "League of Nations Treaty Series" 1930, vol. 104, p. 201.

6 The Belgian-German Agreement: "Le Gouvernement belge et le Gouvernement allemand […] tout en maintenant chacun leur point de vue juridique […]," "Die Belgische Regierung und die Deutsche Regierung […] unabhängig von dem beiderseitigen Rechtsstandpunkt […]."

7 This aspect is rightly considered by the memorandum of the U.S. Department of Treasury of 24 September 1943. Hearings before the Committees on Appropriations, Armed Services, and Banking and Currency, United States Senate, Eightieth Congress, First Session, on Occupation Currency Transactions, Washington 1947, p. 80. A different view is represented—wrongly as it seems—by Boris Nolde, *La monnaie en droit intenational public*, Académie de Droit International. Recueil des Cours, 1929-II, vol. 27, p. 311.

country, the duty to pay damages was to burden the belligerent party that perpetrated the damage. As regards damage inflicted on persons being the nationals of the hostile party (*personnes de la Partie adverse*), the German draft in its Article 2 said only that "damages will be settled during peace negotiations."[8] The German stance was thus close—as regards responsibility for an occupation currency—to the practice of the countries summarised above: responsibility is allocated on a case-by-case basis and shifted to the defeated country since a peace conference is the best opportunity to do it. The German draft was approved by the Conference as a step towards an explicit regulation of the question of responsibility.[9]

At the same time, however, doubts were raised as to the merits of the draft. The French delegation had twofold objections. First, they believed that the German draft limited responsibility to the cases provided for in the Regulations, therefore, any breach of other duties would not incur the obligation to redress damage. Second, they criticised the draft for distinguishing between nationals of neutral and hostile countries, claiming that both categories should be accorded the same protection. The British delegate, in turn, observed that under the German draft any award of damages to hostile nationals would depend on the terms of a peace treaty while the terms would be a result of negotiations between the parties.[10] Although the text that was finally adopted—quoted above—does not make responsibility for any breaches dependent on the result of peace negotiations, the practice in the area in question has evolved in the opposite direction. So far, Article 3 of the IV Convention has not been relied upon by countries in determining responsibility for an occupation currency.[11]

8 *Deuxième Conférence Internationale de la Paix, La Haye, 15 juin – 18 octobre 1907. Actes et Documents 1907*, vol. 3, La Haye 1907, p. 247.

9 Ibidem, p. 144. A statement by the chairman of a subcommittee, Beernaert.

10 Ibidem, pp. 146 and 147. Cf. the German reply, p. 148.

11 For responsibility for an occupation currency viewed mainly from an economic point of view see F.A. Southard, *The Finances of European Liberation…*, pp. 49–55.

The responsibility of the occupying power for an occupation currency

The academic literature has expressed the view that an occupying power bears the responsibility for an occupation currency by the operation of law.[12] It appears, however, that neither from the Hague Regulations nor the practice of states can such a rule be deduced.

In certain cases, an occupying power did bear responsibility for the new currency it issued in the occupied territory. However, in the majority of these cases, there are circumstances that prevent the formulation of the general rule about the responsibility of an occupying power.

During the occupation of Korea and Manchuria in 1904–1907, the First Bank of Japan exchanged military pay vouchers issued by the Japanese authorities for cash.[13] It must be remembered, however, that the pay vouchers were substituted for cash at requisitions and purchases made by the Japanese army. They were not contemplated as legal tender *sensu stricto*, albeit in practice, they did play this role.

Issuing mark notes in the Warsaw General Governorate, pursuant to the Regulation of 9 December 1916, the German occupation authorities pledged that: "The German Reich vouches that the banknotes of the Polish National Loan Association at their withdrawal (§ 16) will be paid for with *Reichsmarks* at face value (§ 5 of the Regulation, p. 47)." The notes of the Association bore the following inscription: "The German Government accepts responsibility for the redemption of the notes of the Polish National Loan Association in German marks at face value. Warsaw General Governorate Board" followed by three signatures. Between the Regulation and the inscription on notes, there were major dif-

12 B. Nolde, *La monnaie...*, p. 311; W.J. Ronan, *The Money Power of States in International Law*, New York 1947, p. 16. The latter author draws a false conclusion about the existence of such a rule from the practice of states. Out of the three examples he gives, two are imprecise (Belgium and Romania during WWI), while the third example—the Japanese occupation of Korea and Manchuria during the war with Russia—concerns not as much an occupation currency as requisition pay vouchers.

13 N. Ariga, *La guerre russo-japonaise au point de vue continentale et le droit international d'après les documents officiels du Grand État-Major Japonais*, Paris 1908, pp. 450–454.

ferences. The Regulation made any payment in *Reichsmarks* dependent on the withdrawal of the notes, which in turn could take place only in the event of the Association being disbanded, pursuant to § 16 of the Regulation. It read: "The Polish National Loan Association shall be disbanded on the orders of the Chancellor of the German Reich two years after the foundation of the formal Kingdom of Poland at the latest." As it turned out, the rebirth of an independent Polish State prevented the application of § 16.[14] To estimate the duties of the occupying power, § 5 of the Regulation could be relied on more than the inscription on banknotes. Nevertheless, the *Reichsbank*, on the orders of the German government, exchanged the occupation issue notes of the Loan Association for *Reichsmarks* during a few months in 1919.[15] However, the exchange was put on hold in 1919, and in 1921, the Reich's legislation and court decisions argued against the duty to exchange. A provision to this effect was included in the so-called *Verdrängungsschädengesetz*.[16] As regards court decisions, the Reich's Treasury won an action brought against it by a holder of Association banknotes for their exchange into German marks. The Reich's Supreme Court in the judgement of 28 November 1921[17] held *inter alia* that an owner of notes issued by the Association could not make a claim to have them exchanged until the notes were in circulation. The guarantee given by the Reich in respect of the note issue by the Association meant only that the Reich would redeem the notes that would not be covered by the Association's assets at its

14 The difference between § 5 of the Regulation and the inscription on banknotes is noted by Zygmunt Karpiński, *Gospodarcze i prawne podstawy pierwszej emisji marek polskich (tzw. "not Kriesa")*, "Ruch Prawniczy i Ekonomiczny" 1923, vol. 3, p. 412. The text of the Regulation of 9 December 1916 in: Verordnungsblatt für das General-Gouvernement Warschau, Dziennik Rozporządzeń dla Jenerał-Gubernatorstwa Warszawskiego, 1916, no. 57, item 222.

15 Z. Karpiński, *Gospodarcze i prawne podstawy…*, p. 415. It follows from Art. 3 of the treaty quoted below (footnote 17) that 110,000,000 Polish marks (about 1/8 of the issue) were exchanged.

16 Ibidem, pp. 417 and 418.

17 S.W.J in den deutschen Reichsfiskus, VI 282/21, Entscheidungen des Reichsgerichtes in Zivilsachen, vol. 103, p. 231. The decision is discussed in Z. Karpiński, *Gospodarcze i prawne podstawy…*, pp. 415–416.

disbanding. On 18 December 1922, Poland and Germany signed a treaty settling the matter of Kries's notes.[18] In Article 1 of the treaty, the parties agreed that: "Poland and the Polish National Loan Association, on the one part, and the German Reich, on the other part, shall not make any claims against each other by reason of the guarantees for Kries's notes taken over by the German Reich." Under Article 3 of the treaty, the sum of 110,000,000 marks was debited against Association accounts in Berlin banks. The sum represented the value of Association notes exchanged by the Reich after the occupation ended. Hence, the operation of a partial exchange encumbered the Association or the institution that by virtue of the 1916 Regulation was not to bear any responsibility for the issue. With respect to the rest of the issue, the Association took a stance analogous to that adopted by the Reich Treasury and refused to exchange occupation notes for *Reichsmarks*. The stance of the Association was borne out by German judicial decisions.[19] However, the Association was ready to exchange occupation notes for its post-occupation notes, which it had already issued as an issuing institution operating in Poland.[20] With time, inflation in Poland and Germany deprived the whole issue of any practical significance.[21] Nevertheless, it must be said that in the case in question, the responsibility of an occupying power for an occupation currency was not enforced. In part, the responsibility was shouldered by the Polish National Loan Association, that is, an institution which after the occupation—despite the fact that it kept the same name as during the occupation—was not a foreign entity anymore but a Polish association and a legal person organised under Polish law.[22]

18 "League of Nations Treaty Series" 1925, vol. 34, p. 283. The term 'Kries's notes' referred to the occupation issue of banknotes by the Polish National Loan Association. The term derived from the name of the head of the Civil Authorities in the Warsaw General Governorate whose signature appeared first on the Association's notes.

19 Z. Karpiński, *Gospodarcze i prawne podstawy…*, pp. 420–421.

20 Ibidem, p. 420.

21 Ibidem, p. 423.

22 The occupation-time Association was, in contrast, a legal person governed by German law. See the decision quoted in footnote 16.

Banknotes issued by the British Army in Archangelsk during the intervention and civil war in Russia bore an inscription saying that they could be exchanged in London at a fixed rate. The limitation as to the place of exchange made it illusory for banknote holders residing in the occupied territory.

During World War II, the German occupying power did not assume any responsibility for occupation currency. On the other hand, the defeat of Germany facilitated or should have facilitated the enforcement of German responsibility. The agreement on German reparations of 2 August 1945 reached by the United States, United Kingdom and USSR at the Potsdam Conference did not mention any claims arising from the issue of occupation currency.[23] However, the Agreement on Reparation from Germany opened for signature at Paris on January 14, 1946, contained a clause stipulating that the respective shares of reparation as determined by the Agreement covered all the claims, "including costs of German occupation, credits acquired during occupation on clearing accounts and claims against the *Reichskreditkassen*" (Part I, Art. 2, para. A).[24] Thus, reparation covered, in the Agreement at least, a significant portion of claims arising out of the exchange of occupation currencies. On the other hand, a later agreement, concluded already with the participation of the Federal Republic of Germany, leaves no doubt that a future peace treaty will revisit the question of reparations despite earlier agreements.[25] Hence, the question of German reparations also for the issue of an occupation currency may be still considered open. However, the quoted clause from the 1946 Agreement, as well as rules concerning reparations in treaties repairing damage caused by the war with Germany, do not contribute much to the question of German responsibility

23 Collection of documents edited by Julian Makowski, 1946, no. 1, p. 19.

24 United States Treaties and Other International Acts Series, no. 1655.

25 See Chapter VI, Art. 1, para. 1, of the Convention on the Settlement of Matters Arising Out of the War and the Occupation signed at Bonn on 26 May 1952 and revised at Paris on 23 October 1954, ibidem, no. 3425 and "American Journal of International Law" 1955, vol. 49, Supplement, pp. 55 ff.

for occupation currency. For it is not known whether the overall sum covers claims arising out of the issue of currency or whether former occupied countries waived respective claims—in full or in part—in return for settling other claims against defeated Germany.

During the occupation of the Philippines, the Japanese government accepted "full responsibility" for military banknotes and declared that it "had a sufficient sum to cover them."[26] However, in the Treaty of Peace with Japan of 8 September 1951[27], no provision enforced Japanese responsibility, unless this was done in separate agreements on war reparations announced in the Treaty, Article 14, para.(a), item 1.

During the occupation of Italy in 1943 and in the following years, the Allied Powers did not accept any responsibility for the occupation currency. Actually, this was the rule in the occupied Axis countries. However, in the case of Italy, the U.S. and British governments took steps which suggested that they were contemplating the exchange of the military lira, possibly carried out by themselves. Specifically, these governments paid sums in their currencies into special accounts. The sums corresponded to the occupation lira currency expended in the occupied territory.[28] The Peace Treaty of 10 February 1947 encumbered Italy with the exchange of this currency (see below). However, in 1944 the U.S. government paid Italy a sum in dollars equal to the net amount of remuneration paid to military personnel in the occupation lira.[29] Hence,

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26 Proclamation of 3 January 1942 quoted in the judgement of the Philippines Supreme Court in re Haw Pia v. China Banking Corporation, "The Lawyers's Journal" 1948, vol. 13, p. 173; the proclamation is quoted in the judgement on page 180.

27 "American Journal of International Law" 1952, vol. 46, Supplement, p. 71.

28 See the press reports in the "New York Times" of 11–12 October 1944 quoted by Donald L. Kemmerer, *Allied Military Currency in Constitutional and International Law*, in collective work *Money and Law, Proceedings*, The Institute on Money and the Law, New York 1945, p. 91. See also F.A. Southard, *The Finances of European Liberation.*..., p. 25; F.A. Mann, *Money.*..., p. 273.

29 F.A. Southard, *The Finances of European Liberation.*..., p. 30. Charles Cheney Hyde, *Concerning the Haw Pia Case*, "Philippine Law Journal" vol. 24, 1949, p. 150 claims that the U.S. government contemplated the reimbursement of Italy in dollars for the expenses not only on personnel remunerations but also on provisions. Hyde believes that such a limited responsibility for occupation currency is consistent with The Hague Regulations.

to a limited degree, the U.S. government did accept responsibility for an occupation currency.

The Cases of Romania and Belgium After WWI

The question of Romanian and Belgian claims against Germany arising out of the occupation currency issued during the First World War must be discussed separately, because the settlements reached then can hardly be considered an illustration of the responsibility of an occupying power or an occupied country. These cases rather resemble the principle of occupying power responsibility. Finally, Germany did accept certain financial obligations that repaired at least in part, or were to repair the damage Belgium and Romania sustained due to the issue of an occupation currency in their respective territories. On the other hand, Germany consistently took the view that it had no duty to former occupied countries and for this reason any concessions to the other party were an expression of good will on the part of Germany and followed from all new international relations concerning reparations, etc. As mentioned earlier, the German-Romanian and German-Belgian agreements explicitly said that each party kept to its different legal point view. Thus, despite the financial obligations incurred by Germany, it can hardly be said that either of the agreements enforced an occupying power's responsibility for an occupation currency as a rule following from the law.

The question of occupation currency in Romania was settled first by an additional legal and political treaty added to the peace treaty with Romania of 7 May 1918.[30] The peace treaty ended the war between Romania and the Central Powers, and reflected their domination over defeated and occupied Romania. In Article 3(2) of the additional treaty, Romania undertook to exchange the notes of the General Bank of Romania for the

30 1063. der Beilagen zu den stenogr. Protokollen des Abgeordnetenhauses. — XXII Session 1918, Regierungsvorlage betreffend die Friedensschlüsse mit Russland, Finnland und Rumänien, p. 149.

notes of the Bank of Romania or other legal tender within six months from the ratification of the peace treaty. The exchange was to take place at Romania's expense. Romania undertook not to put into circulation the withdrawn notes. The cover for the occupation issue, deposited in the *Reichsbank*, was released (but of course remained at the occupying power's disposal and was not applied towards the exchange).[31] The occupying power only undertook not to issue occupation banknotes after the ratification of the peace treaty. However, in the Armistice Convention of 11 November 1918, Germany considered the treaty in question to have lapsed (Article XV: "Renouncement of the treaties signed in Bucharest and Brest-Litovsk and additional treaties").[32] In actual fact, the exchange of occupation legal tender encumbered Romania. The Versailles Treaty did not provide for responsibility for occupation currencies. When Romania, already after the signing of the Treaty, filed claims against Germany, the government of the Reich replied that it did not have other duties apart from those stemming from the Versailles Treaty provisions on reparations. Ultimately, on 10 November 1928, after reaching a compromise, the parties signed a convention[33] that settled the dispute. The settlement was not based on legal provisions: each party maintained its point of view on the legal aspect of the dispute. The crucial point of the convention was Germany's undertaking to help stabilise the Romanian currency.[34]

Once the occupation of Belgium was over in 1918, Germany paid Belgium 1,600,000,000 RM deposited until then in a *Reichsbank* ac-

31 From the theoretical point of view, the following questions could be asked: Did Article 3(2) of the additional treaty apply the general principle of the responsibility of the occupied State? Was Article 3(2) an exception to the rule that currency is the responsibility of the occupying power? Was Article 3(2) a provision to plug a loophole in the law? There are no doubts, however, that Article 3(2) was the codification of a practice independent of the law, namely, that responsibility was to be borne by the defeated State.

32 B. Winiarski, *Wybór źródeł do nauki prawa międzynarodowego*, Warszawa 1938, p. 144.

33 G.F. de Martens, *Nouveau recueil…*, p. 484.

34 By awarding Romania 75,500,000 RM. As regards German objections to Romanian claims prior to the convention see G. Antipa, *L'occupation ennemie de la Roumanie et ses conséquences économique et sociales*, Paris–New Haven 1929, pp. 163–164.

count and earmarked for covering the occupation issue of the General Society. Soon, however, the deposit in marks was devalued. Had it not been for this circumstance, Belgium would not have had any claims against Germany because of the occupation currency. Germany long opposed Belgian claims, using arguments similar to those it invoked in the Romanian case (there was an additional circumstance that Belgium accepted the deposit in marks, hence it could be claimed that the country had done so at its own risk). Finally, the two countries concluded an agreement on 13 July 1929 whereby Germany undertook to pay Belgium 600,000,000 RM in many instalments.[35] The question of Belgian claims was discussed by experts during the negotiations over the Young Plan. Germany was told then that the new reparation plan would not come into force, unless Germany settled Belgian claims.[36] It is not surprising that the Reich's government yielded to the demand in this case but at the same time made a reservation that it did not do it out of a legal duty.[37]

The Responsibility of the Occupied State for an Occupation Currency

The scholarly literature has advanced the view that an occupying power may decline any responsibility for an occupation currency.[38] The shifting of responsibility to the occupied State was considered "only natural

35 "League of Nations Treaty Series" 1930, vol. 104, p. 201.

36 Amtlicher deutscher Text des Schlussberichts der Pariser Sachverständigenkonferenz vom 7. Juni 1929 mit Allen Anlagen, Anlage VI, reprinted in Friedrich Raab, *Young-Plan oder Dawes-Plan?*, Berlin 1929, p. A 101.

37 A German expert attending the conference on the Young Plan, Hjalmar Schacht, in a letter to Owen D. Young of 3 June 1929, mentioned a German proposal to settle the dispute with Belgium. Having described the proposal, Schacht wrote: 'Vorstehender Vorschlag ist von der Deutschen Regierung in Geiste des Entgegenkommens und aus dem ehrlichen Bemühen heraus gemacht worden, dieses Hindernis für die normale Entwicklung freundnachbarlicher Beziehungen zwischen den beiden beteiligten Ländern zu beseitigen,' ibid. Anlage VI A, p. A 103. A mention on this matter included in the agreement itself was quoted already above, footnote 5.

38 R.A. Lester, *International Aspects of Wartime Monetary Experience*, Princeton 1944, p. 2.

and convenient" by one author.[39] Invoking the practice of states, some authors criticised the opinion that the law, supposedly, provided for the responsibility of an occupying power.[40]

In certain cases, the parties involved indeed adopted the rule that the occupied State was responsible for an occupation currency. However, in every such case, the occupied State was also the defeated State. Hence, it was easy for the victorious powers to impose such a responsibility on it. The fact alone that a defeated State yielded to the "will" of a victorious power, does not justify the conclusion that the "will" reflected the law.

Above, mention was made of a clause in the additional treaty to the peace treaty with Romania of 7 May 1918, wherein responsibility for the exchange of an occupation currency was shifted to occupied Romania by the Central Powers. The defeat of Germany abrogated the clause.

During the Second World War, Germany left the care for the fate of occupation currencies to the former occupied states. The agreements on German reparations quoted above are not—at least from a theoretical point of view—the last word on the matter. The fact that Germany was defeated in the war and already has had to pay certain reparations prevented Germany, as it seems, from implementing its war-time demand that the issuance of occupational currencies would be borne in full by the occupied countries.[41]

The adversaries of the Reich—the Allied Powers—adopted the same policy in this respect as their German opponent. They did not shoulder responsibility for the occupation currency they issued. This is how it was decided the issue should be dealt with when the Allies only intended to use occupation currency in various territories.[42] There were subsequently only a few exceptions to this rule: the covering by the United States of

39 G.G. Fitzmaurice, *The Juridical Clauses…* p. 343, writing about the settling of the matter in the peace treaties of 10 February 1947.

40 F.A. Mann, *Money…*, p. 275 – criticism of Nolde's view quoted above, *La monnaie...*, p. 311.

41 Cf. e.g. the objections of the USSR to possible responsibility for occupation marks, *Hearings (…) on Occupation Currency Transactions*, p. 231.

42 See above.

a part of a lira issue by making a payment in dollars to the Italian government and the honouring of occupation currency transfers to the United States made by the U.S. military, where they were paid out in dollars.[43]

Before reviewing the decisions of the Allied Powers concerning the responsibility of occupied countries for an occupation currency, the form in which the decisions were taken in two cases ought to be scrutinised. The form could be used as an argument in favour of the view that by operation of law, the occupying power, and not the occupied country, is responsible for occupation currency. Specifically, the following two cases are meant here: the Treaty of Peace with Italy and the State Treaty with Austria. The former, signed on 10 February 1947[44], provides for the responsibility of Italy for the occupation lira currency in its Article 76(4). The Article is to be found in Part IV, Section III of the Treaty, entitled 'Renunciation of Claims by Italy'. In turn, the State Treaty for the Re-establishment of an Independent and Democratic Austria signed on 15 May 1995[45] provides for the responsibility of Austria for the occupation schilling currency in its Article 24(4). The Article is entitled: "Renunciation by Austria of Claims Against The Allies."

A question arises as to how significant is the fact that provisions about the responsibility of the occupied country are placed in the context of norms making the country renounce the claims it has. Does it mean that if Italy and Austria had not been explicitly made responsible for the occupation currency, the responsibility of the occupying powers would have arisen automatically? Do Italy and Austria renounce in the respective treaties claims having grounds in international law and assume obligations they would have never been burdened with, had it not been for the treaty provisions? Viewing these issues from the point of

43 The matter of transfers was a major issue in the cited hearings in the U.S. Senate, *Hearings (…) on Occupation Currency Transactions*, passim. Only for a short time, was the amount of transfers unlimited. As regards responsibility for occupation mark currency in this respect, see ibidem, pp. 8 and 95.

44 Journal of Laws of 1949, no. 50, item 378, attachment.

45 Journal of Laws of 1957, no. 19, item 94, attachment.

view of the Allies, one can ask the question: did the victorious powers believe that the silence of the Treaty on the problem of responsibility would mean that Italy and Austria could lodge a lawful claim and that the Allies, consequently, would have to bear responsibility for occupation currency? An answer in the affirmative to these questions will support the thesis that legally, responsibility for occupation currency is to be borne by an occupying power. However, this argument will not suffice to invalidate all that has been written in this chapter on the practice of states and their actual discretion in regulating the question of responsibility for an occupation currency on a case-by-case basis.

The following international documents concern the responsibility of the occupied Axis Powers for the currency issued by the Allies:

The Instrument of Surrender of Italy of 29 September 1943[46] provided in its Article 23 that Italy would withdraw occupation currency from its territory issued by the Allied Powers and pay its equivalent in the Italian currency. The Allies were to give time limits for, and the terms of, the exchange. Whereas in the Treaty of Peace, Italy assumed 'full responsibility' for all Allied military currency issued in Italy by the Allied military authorities (Article 76(4)). Between these two instruments, there is a difference: the Instrument of Surrender speaks of the holdings of occupation currency held in Italy (which means that it could be other occupation currency than the lira), whereas the Treaty of Peace mentions the currency issued in Italy (hence, irrespective of the fact of whether it currently was held within the Italian borders or not). The difference was of little practical significance in the sense that at the moment the Treaty was signed, there were no other occupation currency notes in Italy apart from lira ones. However, there could have been sums of the occupation lira abroad and Italy was responsible to the parties to the Treaty for the exchange of such sums as well.[47]

46 "American Journal of International Law" 1946, vol. 40, Supplement, p. 2.

47 In the British-Italian Agreement expressed in the notes of 20 and 21 March 1950 (Great Britain, Treaty Series, 1952, No. 14) Italy undertook to exchange all East-African currency in circulation in former Italian Somaliland. Italy lost sovereignty over Somaliland after

In the peace treaties of 10 February 1947, Romania[48] (Article 30(4)) and Hungary[49] (Article 32(4)) assumed responsibility for the respective occupation currencies issued in their territories.

The Allies shifted responsibility for occupation mark currency to Germany. A duty to this effect was imposed on Germany in the Allied Control Council Proclamation No. 2 of 20 September 1945 (Section VI, Article 20).[50] In 1948, three western occupation zones witnessed a currency reform (in the eastern zone it took place later). It involved the exchange of occupation marks. The legal provisions introducing the reform considerably limited the amount of old currency that could be exchanged for a new one.[51] Thus, it was not the German treasury, but rather the inhabitants of the German territory that directly bore the financial burden of the occupation issue.[52] The currency reforms in Germany caused the occupation mark to disappear from circulation. Hence, responsibility for an occupation currency is not covered by agreements providing for the duties of both German states in their changed—with respect to the period of occupation—legal situation. The question of responsibility for Allied marks must be considered closed.

In Austria, the occupation schilling currency was withdrawn from circulation as early as 1945. The so-called schilling law of 30 Novem-

WWII. It concluded the Agreement in a new capacity, namely as a United Nations Trustee. British Armed Forces occupied Italian Somaliland during WWII. The Agreement, however, is not representative of the relation under discussion between the sovereign and occupying power in matters of the responsibility for an occupation currency. Nonetheless, the Agreement illustrates a tendency to shift responsibility for military currency to that party which stays in and administers the territory in which the currency circulated.

48 United Nations Treaty Series, vol. 42, p. 3.

49 Ibidem, vol. 41, p. 135.

50 "American Journal of International Law" 1946, vol. 40, Supplement, p. 21.

51 Excerpts from the British military law no. 60 on currency reform were reprinted in *Documents on Germany under Occupation 1945–1954* edited by Beate Ruhm von Oppen, London 1955, p. 292. Cf. the case of Eisner v. United States, U.S. Court of Claims, Federal Supplement, vol. 117, 1954, p. 197.

52 Above, it was mentioned that the United States had exchanged a certain sum in occupation marks for dollars in connection with money transfers from Germany to the United States. The sum, however, was so small that it can be ignored altogether while studying the economic aspects of the exchange of occupation marks.

ber 1945[53] provided for the exchange of occupation notes and coins for a new currency. The exchange covered only a part of the cash, the rest was deposited in accounts, which were completely or partially blocked. In the already quoted State Treaty of 15 May 1955, the Austrian government assumed: "full responsibility for Allied military currency of denominations of five schillings and under […]. Notes issued by the Allied Military Authorities of denominations higher than five schillings shall be destroyed and no claims may be made in this connection against any of the Allied or Associated Powers (Art. 24(4))."

In the Treaty of Peace with Japan, signed on 8 September 1951,[54] there are no provisions on an occupation currency.[55] No Allied Power, in particular the United States, took responsibility for the occupation yen currency vis-à-vis the Japanese State or yen note holders.

The fact that the occupied country, even when the occupation is over, keeps an occupation currency in circulation for some time does not mean that it assumes responsibility for it and that the former occupying power does not have any duties in this respect.[56] Everywhere where an occupation currency has supplanted the local currency, continuing the former in circulation after the occupation ends is an economic necessity. Such a situation could be witnessed for instance in Poland[57] and Lithuania in 1918[58], or in Poland in 1944 and in early 1945.[59] In 1918 and 1919 in Poland, the Polish government continued to print mark banknotes using occupation

53 *Staatsgesetzblatt für die Republik Österreich*, 1945, p. 419.

54 "American Journal of International Law" 1952, vol. 46, Supplement, p. 71.

55 Article 14(b) invalidated any claims for direct military costs of occupation. In Article 10 (a) Japan waived all claims it could have on account of the occupation of its territory.

56 A similar situation holds when a formerly occupied country exchanges occupation notes and coins. An exchange is an act of domestic law and does not prejudice its right of recourse in the international forum.

57 Z. Karpiński, *Gospodarcze i prawne podstawy…*, pp. 413–414.

58 O. Lehnich, *Währung und Wirtschaft in Polen, Litauen, Lettland und Estland*, Berlin 1923, p. 168.

59 See art. 4 of the Decree of the Polish Committee of National Liberation of 24 August 1944 on the issue of bank notes, keeping in circulation the notes of the Issuing Bank in Poland, "Journal of Laws of the Republic of Poland" 1944, no. 3, item 11. The provision was abrogated as of 10 January 1945 pursuant to Art. 1 of the Decree of 6 January 1945, ibidem, 1945, no. 1, item 2.

plates, because at first the printing of new-design banknotes was not possible originally for technical reasons. Of course, any issue after 11 November 1918, similarly to any further issue in Lithuania after its occupation ended, encumbered solely the sovereign of the respective territory.

Conclusions

Under the international law currently in force it is not possible to shift responsibility for occupation currency in advance to the occupying power or the occupied State. Responsibility for an occupation currency is regulated on a case-by-case basis. In most cases, responsibility is shifted to the defeated State. This is not always reconcilable with the international rule of law. Viewed from this perspetive, the practice of states until now with regard to occupation currency can hardly be considered satisfactory. It must be concluded, therefore, that the question presented here is ripe for regulation by law when the customary law of war will be codified further and the written law of war comes up for revision.

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SUMMARY

International Responsibility for Occupation Currency

The paper is an English translation of *Odpowiedzialność międzynarodowa za pieniądz okupacyjny* by Krzysztof Skubiszewski, published originally in Polish in "Ruch Prawniczy, Ekonomiczny i Socjologiczny" in 1960. The text is published as a part of a jubilee edition of the "Adam Mickiewicz University Law Review. 100th Anniversary of the Department of Public International Law" devoted to the achievements of the representatives of the Poznań studies on international law.

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The Relationships and Connections Between International and National Law[1]

The Scope of the Problem

While considering the connections and relationships between international and national law, it is easy to engage in the discussion of the fundamental questions of our field, because putting the two orders side by side induces one to study their similarities and differences. This, in turn, leads to the examination of such general questions as the nature of international law, its sources, and the role and significance of state sovereignty. In this approach, the relation between international and national law is, in the opinion of some authors, a central theoretical issue of our field. This can be clearly seen in the major conceptions of this relation, namely, dualism and both versions of monism.

The connections between international and national law are diverse and in fact a number of international law problems can be viewed from the angle of national law. Approaching them from this angle, however, would produce a monograph, which would scrutinise various international law institutions and the way they function from within the State. Examples of this may be such issues as entering into treaties in agreement with national law requirements, exhausting the national due course of in-

1 Translated from: K. Skubiszewski, *Wzajemny stosunek i związki pomiędzy prawem międzynarodowym i prawem krajowym*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1986, no. 1, pp. 1–16 by Tomasz Żebrowski and proofread by Stephen Dersley and Ryszard Reisner. The translation and proofreading were financed by the Ministry of Science and Higher Education under 848/2/P-DUN/2018.

stances in the context of diplomatic protection extended by the State to its own citizens, and assuming international responsibility.

When studying the various relationships between international law and the law of a specific State, one must work on the assumption that both kinds of law are positive. This assumption excludes from the subject matter of the present article consideration of the view that takes international law to be a law of nature, or various opinions denying the legal nature to our field. For both the naturalistic and negatory approaches—despite their complete opposition—cause us to lose sight of various questions that call for a resolution each time the relationship between international and national law is studied from the position of legal positivism.

We should focus on the binding force, application and observance of international norms in a national legal order, including conflicts between national and international norms. To ensure a full picture, the opposite question must not be left out, namely the role of national law norms in the international law order. However, the mutual impact of legal orders poses problems chiefly for a national legal order and therefore it is there that the impact is particularly current. For most of the time, national courts (and not international ones) and national administration (and not the international one) face the question of whether the matter they are about to rule on has been regulated in the other legal order (i.e. the international one) and specifically how to resolve a possible conflict between a national norm and an international one. It is true that the law of nations faces similar problems in this area. International organs have had to give their opinion more than once regarding if and to what extent national law is adequate for a specific international-law relation, but these are in fact very rare situations. In other words, there is no — and cannot be any — symmetry in this respect between national and international law. The positioning of the latter in the former is an almost daily problem in the law of every State. The opposite situation—the application and observance of a national norm in the international law order—is a problem

of much smaller proportions. Hence, it is necessary to focus on how international law permeates the legal order of a State and what helps and what hinders its full implementation there.

National law is to be taken to mean the law enacted by the State; in those legal systems where customary law still plays a role, it is to include customary norms recognised by the State and applied by State courts. Other legal orders are not covered by this study. In particular, it does not discuss possible connections and relationships between the law of nations and the law developed by other communities than state ones, especially by religious ones: Jewish, Canon, Islamic and other kinds of law. The increasing penetration of the interests of a human individual by international law makes the correlation between it and the law of a religious group extend beyond purely academic interests. This may be especially true of Canon Law since the Holy See and Vatican State are subjects of international law.

The Impact of One Law on the Other

As shown above, our problem first of all concerns the enforcement of international norms in a national legal order; a parallel problem—the application of national norms in the international legal order—is much less significant. This is not to say that there is no correlation between one law and the other on another plane, even with a certain predominance of national law. This other plane is the flow of the same matter and content between international and national law. A dissertation published in 1840 reads that „one lends to and supplies the other with building materials."[2] A quite surprising thing to say, as at that time the scope of matters regulated by international law was still rather narrow. Yet, the author of the quoted words had already noticed a number of issues regulated by both one and the other law. In his opinion, this mutual exchange is observed

2 H.C. von Gagern, *Critik des Völkerrechts. Mit praktischer Anwendung auf unsre Zeit*, Leipzig 1840, p. 6.

especially in federations and confederations, but it is also found in relation to such problems as conquests, overseas colonies, currency, credit, banking, postal service, railways, passports and outlaws.[3]

When generally discussing specific issues, many authors notice the mutual impact of one law on the other in terms of content and, thus, their interrelationship, with the latter being variously understood.[4] Sometimes national law is seen as having a great impact. Some Soviet authors see the impact of national law on international law in the very fact that the latter is made by States. They also emphasise the role of "progressive systems of law" in the development of international law.[5]

Naturally, the conceptions and ideas that have arisen in various States, or even ready-made solutions adopted in national law, make their way into treaties in large numbers when a treaty becomes an instrument of national law unification or serves to develop, reform and improve national law. When included in treaties, the norms of labour, commercial and transport law, or laws for the protection of the fundamental interests of an individual (human rights), follow models developed in this or that national legal system. However, a treaty is never a mere repetition of the norms in force in a State. It is supposed to contribute to the improvement of the law in a given field, or even writing it anew. In fact, an example is hard to come by of a unifying treaty that would be limited to merely reflecting the law already in force in a State. Such a treaty would rather always take on a law-making role by influencing the way law is shaped in that State. This means that national law is internationalised—its norms are of treaty provenance, being a result of work conducted in the international arena, serving the purpose of developing

3 Ibidem, pp. 11–12, 17.

4 E.g. D.B. Lewin, *Osnoionoje problemy mieżdunarodnogo prawa*, Moskwa 1958, Ch. IV, § 2, stresses the mutual impact of both kinds of law. E.R. Huber, *Deutsche Verfassungsgeschichteseit 1789*, vol. 5: *Weltkrieg, Revolution und Reichserneuerung*, Stuttgart 1978, discussing the Weimar Republic constitution, writes about the interrelationship between the constitution (political system) of the State and the "international order" in which the State remains included.

5 G.I. Tunkin, *Osnovy sovriemiennogo miezhdunarodnogo prava*, Moskwa 1956, Ch. I, § 3.

national law—by bi- or multilateral negotiations, at international conferences or in international organisations.

A State sometimes legislates on matters that are international par excellence, e.g. diplomatic and consular law, the conclusion of treaties, etc. Such legislation will not have much significance for international regulation if a given branch of law is stabilised, especially if it has been internationally codified. Formerly, when multipartite treaty law was far less developed, such national legislation influenced the practice of other States and gradually brought improvements to customary law, for instance, in the field of diplomatic privileges and immunities or maritime law. In the last-mentioned field, also today, the pressure of national solutions on international norms is easily seen. The reason for this is not the absence of international regulation, but rather the strong desire of many States to revise all of international maritime law and the questioning of many of its norms, not excluding its fundamental principles (3rd UN Conference on Maritime Law).

The Enforcement of International Norms in a State: Problem Origins, Difficulties and Obstacles

From the historical perspective, the convention of applying and observing international law in a State is a matter of a relatively recent origin. While many other issues belonging to our field were discussed in detail in the literature of the 16th, 17th and 18th centuries (even earlier examples can be cited), the relation of the law of nations to national law was not exhaustively considered before the beginning of the 20th century.[6]

6 H. Triepel, *Völkerrecht und Landesrecht*, Leipzig 1899. On pp. 3–7, he expresses his views on the fragmentary treatment of the question by the literature published hitherto. In the same year as Triepels book, a dissertation by Wilhelm Kaufmann was published entitled *Die Rechtskraft des internationalen Rechts und das Verhältnis der* Staatsgesetzgebungen *und der Staatsorgane zu demselben*, Stuttgart 1899. Contrary to Triepel's, Kaufmann was not rigorous about differentiating both legal orders.

Historically, international law developed as a legal system that was primarily meant to separate the power of sovereign States and divide the jurisdiction of their contiguous organs.[7] It also regulated agreements, legations and conflicts between States (these are the oldest areas covered by international law). However, other spheres of State activity were regulated much later; on a larger scale this was done only recently. Importantly, the separation of power and jurisdiction, as well as the regulation of agreements and wars between sovereigns, did not for the most part require respective norms to be given expression in the legal order of a State. The application and observance of international law was the business of monarchs and States in exclusively or almost exclusively external relations, and as such did not require any domestic legislative activity. When, however, such a need did exceptionally arise, regulations were enacted to help the situation, such as national laws of old on the treatment accorded to foreign envoys and legations.

The situation began to change in the 19th century when States entered into an ever-greater number of treaties (including multilateral ones), regulating various matters that until then had been left exclusively to national law. It was increasingly often necessary to harmonise national legislation with international rules and make the latter enforceable at home. Admittedly, English case-law and the authoritative juristic literature had already addressed the question of the relationship between international and national law in the 18th century, which attests to the fact that the issue had become pertinent there. On a larger scale, the problem was only tackled later on.

National organs, in particular courts, as a rule did not obstruct the application of customary international law or at least certain of its rules or

7 Nonetheless, already in this context, the problem of the relationship between the two kinds of law appears as it always does when the territorial, personal or temporal scope of the binding force or application of national law is determined. Cf. H. Kelsen, *Les rapports de système entre le droit interne et le droit international public*, "Recueil des Cours" (RC), 1926-IV, vol. 14, pp. 227, 250–252, — "Théorie du droit international public", RC 1953-III, vol. 84, p. 1.

principles whenever the case under consideration called for it. A treaty, however, came up against much greater obstacles. They resulted from the emergence of parliamentary democracy, with legislation being taken over by elected bodies and governments becoming accountable to parliaments. A treaty could not be applied within a country immediately after it came into force, for otherwise the head of state and the government (as entities concluding a treaty) would circumvent parliament by enacting laws by way of treaties. Therefore, the constitutional law of many States (not necessarily of the same political system) demanded that in particular those treaties that were to produce effects in internal affairs of a State (because, for instance, they concerned the rights and duties of its citizens or encumbered the State with a financial burden, etc.) had to obtain the consent of parliament before they were ratified. The next step was the rise of the procedure whereby a treaty norm came into force within a State only after an appropriate legislative measure had been taken.

There were (and are) other reasons why it is difficult for international law to penetrate a national legal order. First, state adjudicating bodies are sometimes seen to be inert or somewhat reluctant to go beyond their own law, unless the law expressly says that another law should be applied. Second, in most States, courts are expected to apply statutes, which is sometimes narrowly and literally understood, making courts ready to leave the care for the enforcement and fulfilment of international law provisions to the government. Third, a national authority is not always sufficiently familiar with the international norms that need to be applied to a given case. Contemporary States suffer from the inflation of native legal norms and many adjudicating bodies have difficulties with assimilating the excessive amount of legislation and navigating their way through the maze of national regulations. Is it thus surprising that courts are unwilling to look for grounds for their judgments in international law? The unwillingness is justified for yet another reason: establishing the meaning of a customary international norm sometimes calls for knowledge that many judges and officials do not have. In turn, treaties

are so numerous today that it is not always easy to figure out what each of them regulates. Finally, the official publication of treaties is usually delayed, sometimes for a very long time. By delaying the publication, governments simply prevent the enforcement of a treaty within their respective countries, with even the best will of courts notwithstanding.

At first glance, it would seem that the application and observance of international law in a State should not pose any difficulties. The is the subject of this law, it has international responsibilities; why then would this law not have binding force in the State and be enforced there on an equal footing with national law? This is a complicated matter. The reasons why international law in its entirety is not universally, automatically and by its own virtue made part of every individual state legal order are diverse and have accumulated with time. It cannot be denied that in many States, including those where transformation is in force, the courts apply certain principles of customary international law without express statutory authority.[8] Some countries have incorporated customary law in its entirety, with the national grounds for such a significant measure being sometimes more formal than real. In other States, however, the position of customary norms is less clear and almost everywhere problems arise with the application of treaties and the resolutions of international organisations. To various degrees, the resolution of such problems calls for the initiation of the national legislative process.

8 Cf. The judgment of an Italian court in Ministry of Defence v. Ergialli, "International Law Reports" 1958–11, vol. 26, p. 732. The judgment relied on the law as it stood prior to the adoption of the Constitution, Article 10. It follows from what J.B. Scott wrote, *The Legal Nature of International Law*, "American Journal of International Law" 1907, vol. 1, pp. 846, 863, he believed that the very fact that customary norms belonged to the law of nations made them an „integral part" of the national law of every State, while the national courts „consciously or unconsciously apply and enforce international law rules."

The Enforcement of International Norms in a State: The Diversity of Methods

A State is under an international obligation to enforce binding inte national-law norms in its domestic law, if the introduction of a given national-law measure is necessary for compliance with such norms. The fulfilment of the State's obligations under international law often requires that public organs in the State apply international norms or—in more general terms—bring about the state of affairs prescribed by these norms. In addition, it is necessary that national law entities comply with these norms. The Hague Permanent Court of International Justice had an opportunity to remind us of „a self-evident principle according to which a State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfilment of obligations undertaken."[9] Furthermore, the Court emphasised that a State cannot invoke its law and local difficulties to excuse a breach of international obligations.[10]

Nonetheless, the choice of the means adopted to ensure the enforcement of international law in a State is left, at the moment, to the discretion of each State, as international law does not indicate this or that means, despite the fact that the choice of a method may affect the intended result.

Of course, the situation where every State enjoys discretion in the choice of method may change, but exceptions are still very rare and do not alter the overall picture. A treaty may provide (i.e. States may agree in a treaty) that its norms will have a specific place in the national legal order of the contracting parties. In the event that such a provi-

9 The case of Exchange of Greek and Turkish Populations (1925), "Cour Permanente de Justice Internationale" (CPJI), B, no. 10, p. 20.

10 In the case of the Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory (1932), the Hague Court said that „according to generally accepted principles […] a State cannot adduce as against another State its own Constitution with a view to evadingobligations incumbent upon it under international law or treaties in force", ibidem, A/B, no. 44, p. 24. See also the case of competence of Gdańsk courts (1928), ibidem, B, no. 15, p. 17 and the case of Free Zones of Upper Savoy (1929), ibidem, A, no. 24, p. 29. Earlier this stance was adopted by arbitration court decisions, e.g. in the case of the *Alabama* (1872).

sion is made, each contracting party will incur an international obligation (i.e. obligation as against the other contracting parties) to ensure that the treaty occupies the place in the domestic law that is specified in the treaty. The scholarly literature form Western Europe has recently mentioned two examples. These are the European Convention on Human Rights and the treaties establishing the European Communities. As regards the Convention, in some quarters it is held that some of its provisions create an obligation for the parties to incorporate its text verbatim into national law, or at least Section I of the Convention.[11] When considering the place of the EEC Treaty in the law of Member States, the Court of the Communities spoke of the integration of the legal order created by the Treaty with the legal system of Member States. This integration entails an obligation on the part of national courts to apply and observe the common legal order, with national law being barred from abrogating the law derived from the ECC Treaty.[12]

Many of the obligations incumbent upon a State by virtue of international law can be fulfilled only in its own legal order. A number of international-law norms simply require national law to achieve the result intended by them.[13] Many norms, especially in present-day treaties, regulate relations that arise also—or even primarily—within national borders. If such treaties were not to find expression in national legal orders, their conclusion would prove pointless and unnecessary. In most cases, a private person exercises the rights granted to them by international law only through national law. Strictly speaking, an international norm not so much grants a right to an individual as provides that once national law is activated, the individual will acquire the right. Only when a private person has certain procedural rights in the international

11 H. Golsgong, *Die europäische Konvention zum Schutze der Menschenrechte und Grundfreiheiten*, "Jahrbuch des öffentlichen Rechts" 1961, vol. 10, p. 123, especially pp. 128–129.

12 Case no. 6/64, Flaminio Costa v. E.N.E.L., *Recueil de la Jurisprudence de la Cour*, 1964, vol. 10, pp. 1158–1160.

13 H. Triepel, *Völkerrecht…*, footnote 5, p. 271: "Das Völkerrecht bedarf des staatlichen Rechts, um seine Aufgabe zu erfüllen. Ohne dies ist es in vieler Hinsicht ohnmächtig. Der Landesgesetzgeber erweckt es aus der Ohnmacht."

forum, e.g. they may file petitions or take advantage of their capacity to be a party to proceedings, etc., or when they are able to file claims arising from international law on their own in an extra-national forum, is the incorporation of relevant international-law norms into national law of little significance. In such cases, these are matters of international law, rather than national law. These are, however, still very rare cases. As a rule, a private person benefits from international law through national law. This situation does not always satisfy the person involved, but nonetheless this is the legal reality.

Gradually, at various times and in various States, national law has developed certain channels (some better, some worse) for importing from international sources everything that needs to be fulfilled in the legal order of the State. The methods existing today for achieving this purpose have been devised by the law of this or that State and not by international practice. The choice of method is driven by various factors. Sometimes it is a desire to underscore the role of international law in the life of a given State, and at other times the legal tradition of a country, or the constitutional balance of power among the governing authorities. Additionally, the choice may simply be made on the spur of the moment and a pragmatic approach will have the upper hand. Interestingly enough, the political system is not a decisive factor in the choice of method. A comparative study of the law of various countries shows that the same method is adopted in different political systems and vice versa—different methods are sometimes employed by countries which have similar political and legal systems.

Thus, two major methods can be considered: the reception of an international-law norm or the incorporation of such a norm into the national legal order without reception. It happens, however, that the methods adopted in various countries lack the simplicity of these two major categories. Some methods do fit precisely into one or other of them. As regards others, it cannot always be said whether we are dealing with the binding force or application of international law without reception or

vice versa—reception has already taken place and the nature of a norm has been transformed. Such doubts tend to arise in some cases of incorporating large sets of international-law norms, e.g. customary law in its entirety, into a national legal order.

The incorporation of an international-law norm into the national legal order does not always lead to its enforcement within the State. If an international-law norm is in conflict with a national law norm, it is necessary to resolve the conflict in favour of the former. However, this is not what happens everywhere, in spite of the fact that usually a court will try to avoid conflict by adopting an interpretation reconciling both norms. Another difficulty may stem from an international-law norm itself; a norm may not be suitable (due to its wording) or not be designed (due to such an intention of States) for application in a State until executive provisions are enacted. If the State failed to enact them, it would breach its international obligations and possibly the national law. Such situations arise most often with treaties. If a treaty has a programme character, i.e. it makes it incumbent on the State to undertake appropriate legislative steps, upon its incorporation into the national law, competent state bodies have a national law obligation (not only an international one) to enact the norms enforcing the treaty.[14]

While not adopting the dualistic view that there is an absolute difference between relations and matters regulated by international law and national law, one can hardly deny that international law usually regulates matters that do not figure at all in the national sphere. In other words, these are matters that do not form part of the relations existing between the State and a citizen, between various State organs, or between private persons. Nevertheless, it does happen, and quite often too, that a norm regulating solely interstate relations, or the operations of international organisations, becomes part of a national legal order.

14 W. Wengler, *Völkerrecht*, vol. 1, Berlin 1964, pp. 464–465; P. Reuter, *Principes de droit international public*, RC, 1961–11, vol. 103, pp. 425, 472, distinguishes between *obligations de comportement* and *obligations de résultat*.

For example, the Charter of the Hague Court has been transformed into the law of various countries although very few of its provisions can be observed and applied within a State (e.g. Article 19, granting the justices diplomatic privileges and immunities). A correct distinction is made between treaties that are not intended to be effective in domestic legal orders, because they regulate solely relations between States or the operations of international organisations, and treaties the purpose of which is to „achieve specific results in the internal legal order of the contracting parties."[15] The distinction may be extended to cover norms deriving from other sources of international law.

Political treaties, international organisation charters and other agreements concerning strictly international policy are incorporated into national legal orders, despite this being unnecessary. Most of their norms will not be applied within a State, because they are not meant to affect internal relations. Such an incorporation mostly results from the parliamentary supervision of the government. As a matter of fact, however, this supervision could be exercised without any consequences for national law.

Unity or Separation of the Two Kinds of Law?

The phenomenon discussed above can also be viewed from the perspective suggested in the title of this section. The incorporation of international-law norms into a national legal order, including those which do not regulate internal relations within a State, makes them form a certain whole with national law. Can this already be called a unity? When a national-law norm is formulated as a result of transformation—one identical with an international-law norm in terms of content—the similarity of both orders in terms of content is beyond question.

15 J.A. Winter, *Direct Applicability and Direct Effect: Two Distinct and Different Concepts in Community Lazo*, "Common Market Law Review" 1972, pp. 425, 426.

However, parallel international and national norms also attest (or possibly even primarily attest) to something else. Since only the activation of the state apparatus makes an international norm bring about the intended results in the national sphere, one can hardly speak of the unity of national law and international law in this respect, or of their belonging to an all-encompassing legal system. In particular, the relationship between international law and national law cannot be described using the federation model in which the law of each federation member is in force alongside federal law, and the federal constitution regulates the relations between both kinds of law, including the relations between the federation and its members. With regard to particular national legal systems, international law does not play the role that a federal constitution does with respect to federation members and their law, nor are there any bodies in the international community that could regulate the relationship between the international and national legal orders.[16]

At first glance, the decisions of the Hague Court seem to support arguments that deny the unity of both kinds of law—international and national. Has not the Hague Court reduced state statutes to the rank of „mere facts, manifestations of will and activity of States?"[17] Such a radical approach has not prevented the Hague Court from examining the conformity of the law of a given State with international law, establishing the content of that law (as a preliminary question) independently of the question of its conformity with the law of nations, or even applying national norms to resolve an international dispute.[18] In the event of conflict between national and international norms, the Court did not hesitate to give precedence to the latter. Hence, the Hague Court by no

16 Cf. P. Guggenheim, *Traité de Droit international public. Avec mention de la pratique internationale et suisse*, ti I, (2nd ed.), Genève 1967, pp. 54–55.

17 The case of certain German interests in Polish Upper Silesia (précis), CPJI, A, no. 7, p. 19. The Court explained that it approached the matter „from the perspective of international law" and its own, calling itself an "organ" thereof.

18 K. Marek, *Les rapports entre le droit international et le droit interne à la lumière de la jurisprudence de la Cour permanente de justice internationale*, "Revue Générale de Droit International Public" 1962, vol. 66, p. 260, in particular pp. 268 ff.

means separated both legal orders on the model of the dualist doctrine, but to a large extent approached them as forming a certain whole.[19]

It is practice that best shows how strong the connections between one kind of law and the other are. They are so strong that separating them is not possible, despite the variety of methods for incorporating international law into a state legal order, despite the need to activate national law for this purpose, and despite the frequent differences between the norms of both legal orders and the fact that in certain situations national law is given precedence over international law in some States. Many national-law norms are of international origin; even ones of a constitutional rank. Since the State is, and will remain, the main entity applying international law[20], national law must conform to international law—whereas the executive apparatus of the State should serve international norms as well. The fact that States are subject to international law and their observance of the principle of *pacta sunt servanda* must necessarily reflect upon the problem under consideration. In the event of conflict, logic and the rule of law dictate the primacy of an international norm. Moreover, stable peaceful cooperation between States would hardly be imaginable if national legal orders were not in accord with the international order.[21]

This accord argues in favour of the unity of both kinds of law, or that is at least conducive to it. In the opinion of some jurists, both systems are underpinned by the same „general principles of law; in law, the most fundamental principles are common to all its branches […]. Hence, there is no unbridgeable gap between international law and national law."[22] There are authors who draw attention to another aspect of the problem by indicating that the "generally accepted principles of inter-

19 Ibidem, p. 298.

20 P. De Vissecher, *Les tendances internationales des constitutions modernes*, RC, 1952–1, vol. 80, pp. 511, 527.

21 Cf. H. Mosler, *L'application du droit international par les tribunaux*, RC, 1957–1, vol. 91, p. 619, who on page 634 writes even about the unity of legal orders because of the requirements of the peaceful co-existence of States.

22 D.P. O'Connell, *International Law*, vol. 1 (2nd ed.), London 1970, p. 3.

national law" are also national-law norms.[23] Both approaches, however, bring about a similar result: a rapprochement between both kinds of law in view of their accord and unity. This result would be achieved in a considerable measure if, in particular States, such general concepts as public order or public policy, which are crucial for the operation of every national system of law, were also to entail an obligation to respect international law.

Terminological Issues

When compared to international law, or sometimes even set in opposition to it, national law is not a clear-cut concept. When using this term, we are guilty of some simplification, because there is no such thing as national law in general. It must be considered in relation to a specific State, often to a specific period of its history, especially as defined by its constitutions. A temporal limitation becomes necessary when at a certain moment of its history a given State adopts a new and different way of regulating the relationship between its law and international law. For example, in 1946, a new French constitution accorded absolute precedence to international treaties over statutes; the Netherlands made significant modifications to the position of international-law norms in its legal system by revising its constitution in 1953 and 1956. More examples could be given, with most of them taking place in the years following the Second World War. Thus, strictly speaking, what should be studied is the relationships and connections between the law of nations and a specific national law.

Nonetheless, a certain generalisation is possible. A comparative analysis shows that most issues related to the problem at hand are common to all or almost all state legal systems: these issues appear in na-

23 E.A. Korovin, *Nekotoriye osnovniye voprosy sovremenney teoriy mezhdunarodnogo prava*, "Sovetskoye Gosudarstvo i Pravo" 1954, no. 6, p. 35. Korovin's view was criticised by Tunkin (ibidem, footnote 4).

tional legal orders regardless of the political system and are not a special feature of this or that socio-economic system. There are naturally unique issues which arise only in some States, as for instance the principle adopted in the decisions of English courts in the 18th century and upheld ever since— namely that the law of nations is part of national law, i.e. the law of England. This principle has been adopted by only few legal systems. Nevertheless, the fundamental issues are the same in various States; therefore, they can be discussed through reference to abstract "national law."

The Polish professional literature often uses the term "internal law" instead of "national law." The terminology in this case is to a certain extent conventional, so nothing prevents us from speaking and writing about „internal law" in the sense of the law of a given State. For the sake of full terminological symmetry, however, internal law should be contrasted not so much with international law as "external" law. The concept of "external state law" is a specific conception of the law of nations which boils down to it being denied the status of a separate legal order with respect to particular national legal systems. For this reason, the use of this concept is not recommended. "Internal law", juxtaposed or contrasted with international law, assumes the unity of all law. Since this law is "internal", it may be understood as only a part of a larger legal order, having its other external part. Meanwhile, the unity of all law in force around the world—the foundation of Kelsenian monistic construction—has yet to be proven and cannot be presupposed in advance by terminology. In our field, the term "internal law" is also employed in another sense: the proper law of an international organisation. Thus, for various reasons, it is better to use the term "national law."

While the use of the term "national law" as a general term does not present any difficulty, a number of doubts are raised by the detailed terminology associated with the problem under discussion. Legislators rarely explain the meaning of the expressions they use, but their meaning is vital for positioning international law in the legal order of a given

State. The language of drafters is sometimes imprecise or downright misleading. The same term is used to designate different phenomena and vice versa—different terms are sometimes supposed to mean the same thing, but due to their diversity, they may suggest that there are various methods for incorporating international law into the national order. For instance, it is not uncommon for "transformation" to be given a very broad sense, meaning the general introduction of an international norm into the legal order of a State, rather than the one specific manner of reception that transformation is.

Another example of a term that is not always clear-cut is the "direct" binding force of international law and its force or effectiveness *ex proprio vigore.* It must be remembered that the directness or proper force are in most cases relative, because they depend as a rule on (albeit to various degrees) the tolerance of the national legal system, if not on an express national norm, with exceptions being rare. The latter include the law of war[24], in particular the law protecting war victims. It binds addressees at home regardless of whether and how it has been introduced into the internal legal order of a given State. Let's repeat, however, this or that exception does not alter the overall picture of the problem: international law does not equip itself with direct force within a State and in the relations arising there.

A contrary opinion was expressed by arbitrator Asser in the decision on the Warsaw power station case (1936):

> A regularly concluded treaty is a source of objective law in the contracting States, having binding force in each of these States and in the international forum, and even when the rules of the treaty would contravene State statutes, preceding or subsequent to the date of its conclusion.[25]

24 Cf. H. Mosler, *L'application*, footnote 20, p. 631.

25 France vs. Poland, the arbitration award of 23 March 1936, concerning the amount of compensation, *Reports of International Arbitral Awards*, vol. 3, pp. 1688, 1696.

However, the opinion of Asser may be considered to be at best a postulate; it does not reflect an international norm and the obligation of States following from it, nor does it represent the actual state of law in a number of States. Thus, the so-called direct binding force of international-law norms in a national legal order is characterised by the fact that they are not transformed into national norms or otherwise received into this order but nonetheless are binding within the State. Directness must be understood here as the absence of reception (in particular transformation) and not as the automatic binding force of the law of nations, all by itself, in intrastate relations, because as has already been mentioned, the direct binding force always has some support in national law. The law of nations itself does not suggest such a solution; it leaves the matter to States to decide.

The term "direct binding force" or more precisely "direct effectiveness" has yet another meaning. The point here is not the incorporation of an international-law norm into a national legal order (this has already been done), but whether, owing to its purpose or wording, a norm is enforceable within a State, i.e. organs may apply and addressees obey it without enacting additional executive provisions in that State (the problem of self-executing treaties).

These two meanings of "directness" with respect to the position of an international-law norm within the legal order of a State need to be carefully kept separate and distinguished.

Doubts may also arise in connection with the concept of the effectiveness of an international-law norm in national law. Since a norm is effective, it could be believed that it will always be enforced even when it finds itself in conflict with a national norm. Meanwhile, some authors writing on effectiveness pass over the problem of conflict and limit the meaning of effectiveness to the possibility of applying an international-law norm within a State. If this is what is meant, such authors should give up using the term "effectiveness" and, depending on what is actually meant, write about the binding force, application or observance of an international-law norm within a State. This would be especially

recommended as legal theory has sufficiently defined and distinguished between these three concepts.[26]

The term "enforcement" of an international-law norm within a State means the emergence of a state of affairs postulated by a given international norm.[27] Various measures will bring about such a result. Hence, the term is sometimes synonymous with the application or observance of a norm, while on other occasions it covers more or even all the measures which, in a given case will lead to implementing in a State what an international norm has prescribed.[28]

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26 Cf. Z. Ziembiński, *Teoria prawa*, Warszawa–Poznań 1973, pp. 27–28, 117–120.

27 Ibidem, pp. 119–120.

28 The above article is a fragment of a larger work to be published in the future. It will conclude the research into the System of International Law conducted at the Institute of State and Law, Polish Academy of Sciences. Some views expressed in this article have already been published earlier, see especially the paper *Prawo międzynarodowe w porządku prawnym państwa* delivered at a conference in Warsaw in October 1977, Ossolineum 1980, p. 13.

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SUMMARY

The Relationships and Connections Between International and National Law

The paper is an English translation of *Wzajemny stosunek i związki pomiędzy prawem międzynarodowym i prawem krajowym* by Krzysztof Skubiszewski, published originally in Polish in "Ruch Prawniczy, Ekonomiczny i Socjologiczny" in 1986. The text is published as a part of a jubilee edition of the "Adam Mickiewicz University Law Review. 100th Anniversary of the Department of Public International Law" devoted to the achievements of the representatives of the Poznań studies on international law.

Keywords: relationships between international and national law, monism, dualism.

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The Significance of the Legislative Resolutions of International Organizations for the Development of International Law[1]

In this work, we will attempt to present and assess the place of the legislative resolutions of international organizations in the law of nations today, as well as the role of such resolutions for the future development of that law. Thus, our attention will focus first on the novelty of the phenomenon of laws for states being enacted by international organizations (Subchapter 1). At the same time, it is noted that the subjective and objective scope of the legislative competence that such organizations possess is limited (Subchapter 2). This is particularly evident with global political organizations—the League of Nations and the United Nations—which have not had and still do not have direct lawmaking powers with respect to states (Subchapter 3). Certain difficulties associated with investing organizations with such powers are illustrated by the developments in that respect in the European Communities, examined particularly in the light of the treaties which establish the Communities (Subchapter 4). The judicious, slow, and gradual emergence of the legislative resolutions of international organizations is evinced in the relics of the contractual concept, which remain present in the activities of a number of organizations capable of lawmaking. Simultaneously, the models of internal state legislation have been adopted by only a few

1 Translated from: K. Skubiszewski, *Uchwały prawotwórcze organizacji międzynarodowych: przegląd zagadnień i analiza wstępna*, Poznań 1965 by Szymon Nowak and proofread by Stephen Dersley. The translation and proofreading were financed by the Ministry of Science and Higher Education under 848/2/P-DUN/2018.

of the organizations in question, and by no means to a broad extent (Subchapter 5). Bearing all the resulting reservations in mind, one can speak of the inception of legislative bodies within the international community (Subchapter 6). Finally, we briefly discuss the reasons why in order to regulate certain matters, states opt for the enactment of law by an organization rather than proceed by means of a traditional treaty (Subchapter 7).

Enactment of Law for States by International Organizations as a New Phenomenon in International Life

The information provided in the preceding chapters and the deliberations conducted on their basis, compel one to state that in international life today the enactment of law for states by international organizations is an accomplished fact.

The involvement of international organizations in establishing legal norms addressed to states should be approached as a novel development process in the law of those organizations. The law of international organizations evolves quickly and its growth engenders changes of certain fundamental principles adopted at a time when the first international organizations came into existence. It may be noted for instance that today the principle of unanimous decisions has been overcome in the law of international organizations, and the right to veto for every member has been abolished as well; international bodies have been equipped with competence enabling them to use coercion with respect to states; physical persons have been granted the right to sue states (including their native state) before international instances; the actions and interventions of organizations have been extended to encompass those affairs and areas which until recently had been an inviolable domain of the exclusive competence of the state. The development and progress in the law of international organizations translates into simultaneous develop-

ment and progress in international law.[2] The fact that certain international organizations have gained the competence to enact law for states not only proves that organizations enhance their role with respect to states—upon consent of the latter in any case—but also shows that the international community is gradually improving its structure and is transitioning to a higher level of development.[3] The competence to enact legal rules for states appears increasingly often in the law of international organizations. This competence constitutes one of the major changes introduced by that law in the universal international law.

The competence of international organizations on which we are currently focusing our attention is a novel and contemporary phenomenon. This monograph is concerned exclusively with positive law, but it is only in that law that we find instances of an international organization being empowered to issue legislative acts that are binding on states. Our issue has actually no history of its own, as the phenomenon described here dates back to the end of World War II, while precedents from earlier periods are more than meagre. Among the organizations currently able to enact legal rules for states, only one originates from before 1939: The Central Commission for the Navigation of the Rhine. This organization may enact law only by way of unanimous resolutions (Chapter III, Subchapter 1), and therefore belongs to the least developed category of organizations equipped with legislative powers. Also, a few more organizations that are empowered to revise their own statutes trace their origin to before the last world conflict. Here, one can mention only the International Bureau of Education in Geneva (Chapter VI, Subchap-

2 See C.W. Jenks, *The Common Law of Mankind*, London 1958, specifically the study on p. 173 ff. entitled *The Impact of International Organization on International Law*. In his appraisal of legislative activities of international organizations, the author refers to the phenomena we are interested in only when discussing the manuals of the World Health Organization and the technical annexes of the International Civil Aviation Organization, pp. 186–188.

3 Cf. remarks by P. Reuter in *Organisations internationales et evolution du droit*, L'evolution du droit public, Études offertes à Achilles Mestre, Paris 1956, p. 453, concerning lawmaking as a "normal form of law in developed communities."

ter 2, Section 1) and the Revision Commission acting under Berne railway conventions (ibidem, Section 9). As regards organizations which no longer exist, two should be mentioned: the European Commission of the Danube, and the International Commission on Air Navigation. The European Commission of the Danube issued regulations concerning riparian navigation and policing.[4] When this information is compared with the present-day competence of the Central Commission for the Navigation of the Rhine, a body also established in the nineteenth century, one may conclude that the very first legislative acts of an international organization were effected in the area of riparian law in the previous century. However, those were isolated developments in a world in which there were very few international bodies and one could hardly conceive international law being created otherwise than through custom or treaties. The second body we would like to mention is the International Commission on Air Navigation, established under the Paris Convention of 1919. By virtue of majority vote, it was able to amend the annexes to the convention.[5] The Commission was created much later than the aforementioned organs for riverine affairs, but in the interwar years the legislative competence of international organizations remained largely an unprecedented phenomenon.[6]

4 The Commission is mentioned by M. Merle, *Le pouvoir règlementaire des institutions internationales*, "Annuaire Français de Droit International" 1958, vol. IV, p. 344; A.J.P. Tammes, *Decisions of International Organs as a Source of International Law*, "Académie de Droit International, Recueil des Cours" 1958-II, vol. 94, p. 284.

5 The Commission has been referred to previously, Chapter IV, Subchapter 1. See P.H. Sand, J. de Sousa Freitas, G. Prat, *An Historical Survey of International Air Law before the Second World War*, "McGill Law Journal" 1960, vol. 7, p. 34.

6 See further examples in H. Hart Jones, *Amending the Chicago Convention and Its Technical Standards—Can Consent of All Member States Be Eliminated?*, "Journal of Air Law and Commerce" 1949, vol. 16, pp. 194–197 and H.T. Adam, *Les établissements publics internationaux*, Paris 1957, p. 58 ff. The latter author is cited by M. Merle, *Le pouvoir règlementaire...*, p. 344. See also G. Schulz, *Entwicklungsformen internationaler Gesetzgebung*, Gottingen 1960, passim and on p. 55 on unrealized designs to introduce the contracting-out system in the International Labour Organization.

The Limited Subjective and Objective Scope of the Legislative Competence Exercised by International Organizations

The overview of the competences and activities of international organizations in Chapters III-IV leads to the conclusion that at present—the legislation of the European Communities notwithstanding—the norms established for states by international organizations have shifted the burden from the treaty as a basic instrument of international legislative technique only to a minimal extent. Formulated more than three decades ago, the words of an expert on the law of treaties, which characterize international agreements as "the only and sadly overworked instrument with which international society is equipped for carrying out its multifarious transactions"[7] are still relevant today. However, should the role of the treaty begin to diminish in the future, it will come to pass thanks to the development of the competences of international organizations to issue legislative and administrative acts. Even today, when one considers the abundant growth and development of those regulations we have called the internal law of organizations (Chapter I, Subchapter 4), it must be stated that the legislative and administrative activity of international organizations considerably disburdened the treaty in the domain of internal affairs of organizations. Still, this monograph concentrates on those legal norms which represent the actual rival to treaty law, i.e. norms addressed directly to states. When assessing the place and the role of the law enacted by organizations, we may leave internal law out of the equation, as from the outset it was created through legislative process by the organizations themselves, and the matters which it governed were as a rule beyond the scope of treaties. Trying to determine the extent to which the legislative acts of international organizations have replaced treaty law, one must—given the enormous body of the latter—conclude that the role of the law enacted for states by international organizations is still a minor

7 A.D. McNair, *The Function and Differing Legal Character of Treaties*, "British Year Book of International Law" 1930, vol. 11, p. 101.

one. It increases when such legislation is not compared with the entirety of treaty law, but with only with some of its branches. It follows from the overview in Chapter III-IV that in areas such as aerial navigation, public health, certain aspects of economic collaboration or meteorology, the legislative acts of organizations are extensive, at times display the nature of codification, and not infrequently replace many pertinent conventions, for instance in sanitary law.[8] As one examines the development of international law in those selected areas, one can hardly concur with the view that "the so-called normative competences of international organizations are very narrowly delineated."[9] The view is nonetheless correct in relation to the entirety of affairs within the purview of contemporary international law of treaties. Only in the European Communities, the European Economic Community in particular, can one see the beginnings of a process in which, in an area of such magnitude and importance as the economy, six European states have decided to give priority to legislative acts of organizations at the expense of both treaties and even their own legislation. The states in question have adequately equipped the bodies of the Communities with broad legislative competence. And yet, experience shows that the experiment with the legislation of the Communities not only fails to find followers among other groups of states, but also proves incapable of finding it for the time being.[10] After all, investing organiza-

8 M. Merle, *Le pouvoir règlementaire...*, p. 359: "Qu'il s'agisse de leur champ d'application ou de leur force exécutoire, Ies règlements internationaux ont donc une portée beaucoup plus grande, envers les États, que les traites et les conventions."

9 R. Ago, *Die internationalen Organisationen und ihre Funktionen im inneren Tätigkeitsgebiet der Staaten. Rechtsfragen der Internationaten Organisation*, Festschrift für Hans Wehberg zu seinem 70. Geburtstag, Frankfurt am Main 1956, p. 25. Earlier D. Anzilotti, *Lehrbuch des Völkerrechts*, Berlin–Leipzig 1929, vol. 1, p. 228 referred to norms established by international organizations as "zufällige und akzessorische Nebenprodukte", cited by G. Schulz, *Entwicklungsformen…*, p. 5. Anzilotti's view (in contrast to Ago's) is justified, having been formulated 35 years ago.

10 M. Sørensen, *Principes de droit international public*, Cours general, "Académie de Droit International, Recueil des Cours" 1960-III, vol. 101, p. 107 observes as follows regarding legislative competence of European Communities: "Sans méconnaître l'importance fondamentale pour l'Éurope de cette évolution, il faut admettre qu'elle pousse l'intégration internationale à un tel point qu'elle n'est plus typique des tendances générales qui se manifestent dans la communauté internationale." See also G. Jaenicke, *Völkerrechtsquellen*, Strupp-Schlochauer,

tions with such a far-reaching legislative competence as has been the case in two economic Communities (due to its tasks, the Atomic Energy Community did not need broad legislative powers), required on the one hand that states be sufficiently determined and decide to engage in very close cooperation, whilst going so far as to surrender the exercise of sovereignty in many economic matters. On the other, the actual political powers, productive forces and relations of production had to be aligned in a manner which objectively enabled such a close and lasting mutual association. In general, France, Western Germany, Italy, Belgium, the Netherlands, and Luxembourg met the posited requirements and thus were able to attempt to establish organizations which have then gone further in the area of international legislation than is politically feasible in other organizations and larger groups of states. It is noted further on that differences in terms of legislative competence exist between the Communities themselves; these differences demonstrate that even in a small group of states which agree on a common economic policy, the extent of legislative powers granted varied depending on the area to which these powers pertained. In all other international organizations the participation of states is possible only because these organizations operate under the premise that one agrees on and coordinates shared and opposing interests, but do not rely on the minority yielding to the majority, or on subordination to supranational bodies. The international community today is composed of sovereign states and it is remote from being a monolith, given that the states differ with regard to fundamental systemic arrangements and display tremendous discrepancies in economic development and national revenue. The resulting contradictions and rivalry do not permit the creation of an international law that is common to all states in any other manner than through treaties, i.e. by means of a method which still most effectively safeguards each state from having any obligations imposed by other states. Therefore, in numerous

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Wörterbuch des Völkerrechts, Berlin 1962, vol. 3, p. 772. A different, more optimistic position appears to be assumed by W. de Valk, *La signification de l'intégration européenne pour le développement du droit international moderne*, Leyden 1962, esp. p. 121.

issues, international organizations are competent to enact laws solely by way of unanimous resolutions (Chapter III). For this reason, for further matters—in which the considerations of purpose dictated the adoption of the principle of majority resolutions due to the numerous members of a given organization—the contracting-out system was invented, enabling states which dissented to a legislative act to object or state their reservations (Chapter IV). Lawmaking decisions which are enacted by majority vote and come into mandatory effect are, in practical terms, exclusive to the European Communities (Chapter V). As already observed, such decisions are only possible when the mutual ties are particularly strong and a community of goals exists between states[11]; even when the aforesaid conditions are met, granting substantial legislative prerogatives to organizations does not have to be the only form of international association in a given group of states.

Hence, what we are witnessing is merely the inception of the practice whereby international organizations enact law for states. In view of the current political structure of the international community, one should not expect prompt changes in the modest scope and reach that legislative acts of international organizations possess among the sources of international law.[12] However, the fact that these are but the beginnings of the legislation of international organizations should not overshadow the momentousness of the very development process discussed here nor—even less so—lead to the process being downplayed.

11 Cf. G. Schulz, *Entwicklungsformen…*, p. 72, who, quoting such authors as Mosler, Max Huber, Wright and Brierly, finds that in order for decisions taken by majority vote to be effective, they must be accompanied by a sense of solidarity and community of interests. Schulz adds: "Ein Mehrheitsbeschluss, dem die überstimmte Minderheit die Anerkennung verweigert, bewirkt keine Festigung der internationalen Organisation, sondern ruft die zentrifugalen Kräfte an die Oberfläche."

12 P. Reuter, *Organisations internationals…*, pp. 451–452: "Concéder à une organisation internationale les compétences nécessaires pour imposer aux États membres des règles générales et permanentes, c'est procéder à une délégation trop importante ·pour qu'elle ne reste pas jusqu'à présent exceptionnelle." Cf. also S. Bastid, *De quelques problèmes juridiques poses par le développement des organisations internationales*, *Grundprobleme des internationalen Rechts*. Festschrift für Jean Spiropoulos, Bonn [1957], p. 37.

At present, states and the international community are far from such a developmental stage in which the legislative acts of organizations will regulate international life to a substantial degree. This is eloquently attested by the fact that organizations whose tasks are political do not possess legislative competence. In particular, I am referring to the League of Nations and the United Nations (Subchapter 3). Also, the direction in which the development of legislative competence proceeded in the integration organizations of Western Europe in the wake of the bold and successful experiment with the European Coal and Steel Community demonstrates that international lawmaking—even in such a small group of states—depends on the political circumstances (Subchapter 4). These issues are discussed below.

World Political Organizations and Legislative Competence

Soon after the founding of the League of Nations, the view was expressed in the scholarly literature that the resolutions of the League are a "particular source of international law."[13] The matter was debated in the interwar period, as every now and then the Assembly of the League would pass resolutions which bore on this or that provision of international law. As an example, one could cite the resolution of the Assembly of 11 March 1932 on the adoption of the Stimson Doctrine in connection with the conflict in Manchuria.[14] A number of authors considered such resolutions to represent changes and new norms introduced by the Assembly into international law.[15]

13 P. Fauchille, *Traite de droit international public*, vol. I, Part 1, Paris 1922, p. 48.

14 League of Nations, Official Journal, Special Supplement, no. 101, p. 8. The Stimson Doctrine proscribed recognition of anything that happened following breach of the Kellogg-Briand Pact, which prohibited offensive warfare; in particular, the doctrine enjoined that territorial acquisitions made in violation of the Pact were not to be recognized.

15 E.g. H.A. Smith, *The Binding Force of League Resolutions*, "British Year Book of International Law" 1935, vol. 16, pp. 157–158.

A study of the Covenant of the League of Nations leads to the conclusion that the League had no legislative competence with respect to states.[16] The Covenant does not contain any provision which would equip the League with powers to establish legal norms addressed directly to states. Just as any other international organization, the League was able to create its internal law (Chapter I, Subchapter 4). Where authorized, it was capable of passing resolutions under which obligations for the member states arose.[17] However, as already explained, it is not that each binding act is a legislative one (Chapter I, Subchapter 5, Section 3), which is why League resolutions were not a source of international law owing solely to that circumstance. One could perhaps ponder whether the mandates of the League of nations were in fact international agreements or were rather legislation enacted by the League.[18] However, the International Court of Justice in The Hague ruled recently that the mandate pertaining to South-West Africa is a treaty or convention within the meaning of Article 37 of the Statute of the Court.[19] The opinion of the Court may be extended to apply to the remaining mandates. Even if it is assumed that the League of Nations did possess legislative competence in mandate-related cases (a view we do not share), it would have been

16 Smith, op. cit., p. 159; J.L. Brierly, *The Meaning and Legal Effect of the Resolution of the League Assembly of March 11, 1932*.

17 See views expressed by Pastuhov, Riches, Schindler and Wilcox, quoted by F.B. Sloan, *The Binding Force of a 'Recommendation' of the General Assembly of the United Nations*.

18 See dissenting opinions of justices Sir Percy Spender and Sir Gerald Fitzmaurice regarding South-West Africa cases (preliminary objections): "To all appearances [...], the Mandate was a quasi-legislative act of the League Council, carried out in the exercise of a power given to it by the Covenant to meet a stated contingency – a power which it was bound to exercise if the terms of the Mandate had not been previously agreed upon by the Members of the League." And further: "[...] the Mandate was the act of the League Council and is not and never was a "treaty or convention," (or other form of international agreement), or [...] if it was, it is no longer in force as such [...]."

19 Judgment of 21 December 1962 on South West Africa Cases (preliminary objections), I.C.J. Reports, 1962, pp. 330–332. The wording of the mandates followed the model of resolutions of the League Council, see M.O. Hudson, *International Legislation*, 1919–1921, vol. 1, p. 44 ff.

a competence exercised by way of exception given the absence of law-making powers in any other matters.[20]

The United Nations today represent a similar problem: the world political organization which functions currently does not have legislative powers with respect to its members either. At the 1945 conference in San Francisco where the Charter of the United Nations was drafted, one of the delegations in Committee II/2 submitted a project according to which the General Assembly was to be empowered to enact international legal norms. The norms would have been binding on the members after ratification by the Security Council. However, the committee rejected the proposal with 26 votes to 1.[21] The General Assembly and the other main bodies of the UN create the internal law of the organization, and its provisions are already very numerous.[22] Still, neither the General Assembly nor other organs of the UN have obtained the competence enabling them to enact law for states in designated domains.[23]

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20 A power granted exceptionally to the League was the competence of its Council to introduce changes in the clauses on the protection of minorities in peace treaties with Austria, Hungary, and Bulgaria, see A.J.P. Tammes, *Decisions of International Organs...*, pp. 283–284.

21 Documents of the United Nations Conference on International Organization, vol. 9, 1945, p. 70. Discussing the rejection of the project, F.B. Sloan, *The Binding Force…*, p. 7 observes: "But while this rejection indicates that the General Assembly was not intended to have general powers of enacting new law similar to those of a national parliament, it is not a decisive indication of the juridical consequences which were envisaged for a recommendation." The project is also mentioned by H. Field Haviland Jr., *The Political Role of the General Assembly*, New York 1951, p. 26.

22 See, in particular, the provisions cited as examples in Chapter I, Subchapter 4.

23 See literature cited in Chapter I, notes 33 and 34. See also C. Eagleton, *The Role of International Law*, Commission to Study the Organization of Peace. Charter Review Conference. Ninth Report and Papers presented to the Commission, New York 1955, p. 194. The ability of the General Assembly to resolve on "additional categories of questions to be decided by a two-thirds majority" under Article 18 (3) of the Charter is a legislative competence granted to the Assembly, which appears to be something more than merely a competence to enact internal law of the organization. The competence is referred to by M. Sibert, *Traité de droit international public*, vol. 1, Paris 1951, p. 36; E. Stein, *Constitutional Developments of United Nations Political Organs*, Lectures on International Law and the United Nations Delivered at University of Michigan Law School, June 23–28, 1955. Summer Institute on International and Comparative Law, Ann Arbor 1957, p. 351, quotes the so-called Douglas-Thomas Resolution presented at the US Congress in 1949, which called for a treaty under which the General Assembly would acquire broad competences to take

While articulating that view, we do not intend to conclude in the negative whether the recommendations of the Assembly and other bodies have legal effects for the members and whether they affect their conduct.[24] Nonetheless, recommendations are not legislative acts and are therefore marginal to the subject matter of this monograph.

World political organizations, such as the League of Nations formerly and the United Nations today, are entities within which there co-exist states whose interests and aspirations differ or, particularly, diverge. The organizations are expected to create the framework and the mechanism enabling states to cooperate in matters the latter find vital where the life and existence of each is concerned. The most significant task of the United Nations is to contribute to the upholding of world peace and to influence states to resolve their disputes in a peaceful manner. In order to carry out this task, an organization such as the UN does not require legislative competence. Instead, it needs executive powers and the Charter of the United Nations, in particular Chapter VII, contains provisions which set out the legal grounds for the organization to bring

binding decisions in the area of security. It remains unclear whether the proposal also aimed to endow the Assembly with lawmaking powers. L.B. Sohn, op. cit., p. 383, speaking with approval of the competences of the World Health Organization, declared: "I do not see at all any reason why we could not have a supplementary agreement giving the United Nations General Assembly power to make similar regulations in various fields of international law which do not have special political implications." See suggestions advanced by that author with respect to granting legislative competence to the Assembly, G. Clark, L.B. Sohn, *World Peace through World Law*, Second Edition Revised, Cambridge, Mass., 1960, p. 35 ff.

24 The issue goes beyond the scope of this book, although it is related to international lawmaking involving the UN. The author discussed the matter in the dissertation submitted in 1964 at the Columbia University, NYC, entitled *The Power of the U. N. General Assembly to Influence Policies of Members in Political Matters. A Preliminary Study*, typescript, 240 pp. See literature cited in Chapter I, notes 33 and 34. See F.B. Sloan, *The Binding Force.*.., pp. 6, 16, 20; M. Sibert, *Traité de droit.*.., p. 36; M. Sørensen, *Principes de droit...*, p. 92. In particular, see the often quoted remarks of Justice H. Lauterpacht in the dissenting opinion attached to the advisory opinion of the International Court of Justice in The Hague of 7 June 1955 on the voting procedure on questions relating to reports and petitions concerning the territory of South West Africa. I.C.J. Reports, 1955, pp. 118–119 and 122. An original view was advanced by M. Bartoš, *Medunarodno javno pravo*, vol. I, Belgrade 1954, pp. 112–113, who argued that a unanimously accepted recommendation of the General Assembly acquires the nature of a general legal rule adopted by civilized nations.

coercion to bear against states which threaten or violate peace. The political tasks of organizations such as the UN and the highly complex composition of its members permit it to act using persuasion, diplomatic pressures and demarches rather than by means of generally formulated injunctions and prohibitions. It clearly follows from the overview of legislative activity of international organizations (Chapters III–VI) that in strictly political matters it is still too early for even a limited range of lawmaking competence to be granted to an international organization.[25]

It is also too early for such competence to be granted to organizations with political tasks which gather a minor number of countries, even though the latter may at times function very harmoniously and pursue a foreign policy which proves identical in certain respects. None of the regional political organizations is equipped with legislative competence.[26] It may therefore be worthwhile mentioning the view according to which certain resolutions of the North Atlantic Council were allegedly a source of law for the member states.[27] Here, one specifically cites the resolution of the Council of 13 December 1956 on the peaceful settlement of disputes between the members and the resolution to implement Section IV of the Final Act of the London Conference of 3 October 1954. The latter instrument increased the competences of the Supreme Allied Commander in Europe, whereas the resolution concerning the peaceful settlement of disputes creates a new legal rule for the members of the Organization: they are obligated (subject to exceptions stated in the resolution) to submit unsettled disputes to good offices procedures within the Organization before resorting to any other

25 It is aptly observed that in the area discussed here the United Nations do not play and, apparently, will not play any greater role: see P.B. Potter, *An Introduction to the Study of International Organization*, New York 1948, p. 265; C.W. Jenks, *The Impact of International Organizations on Public and Private International Law*, The Grotius Society, Transactions for the Year 1951, vol. 37, p. 36.

26 The powers of the Western European Union and the European Council to amend certain provisions of the treaties, which are in fact very limited, are not taken into account here; see Chapter VI, Subchapter 2, Sections 5 and 6.

27 M. Merle, *Le pouvoir règlementaire...*, pp. 346–348.

international institution. As for the other resolution, the Supreme Allied Command in Europe is to exercise its powers after consultation and agreement with the governments concerned. Here, one may consider the matter further to determine whether the new obligations of a military nature which arise for the states are indeed the result of an act of lawmaking, or whether they are formulated only upon having been agreed between those states and the Organization. No treaty had granted lawmaking powers to the North Atlantic Council and therefore—as previously stated in Chapter I, Subchapter 5, Section 1—it has to be concluded that it does not possess legislative competence. If the resolutions of the council give rise to legal norms, then it has to be assumed that the norms are in force not because they have been enacted by the Council but because the states have consented, doing so through a resolution of an international body. If, on the other hand, one adopts the view to which the author quoted here seems to subscribe, namely that by virtue of its resolutions the Council enacts law for its members (who are subject to it as an act of the Council as opposed to contractual rules), we would be dealing—first—with an international organization enacting law in a domain which is thoroughly political and concerns the most vital interests of state, and second, with an organization obtaining legislative competence through practice rather than under an explicit treaty provision (which is indispensable, in our opinion). It seems, however, that the latter interpretation is untenable; in other words, one cannot but conclude that the North Atlantic Treaty Organization has no legislative competence.

Distinct Lawmaking Arrangements in Particular European Communities

The overview of lawmaking powers granted to the European Communities, presented in Chapter III, Subchapter 2–4, and in Chapter V, Subchapter 1–3, leads to the conclusion that there are differences in this re-

spect between the Communities, coming to light as one examines which organs enact law (subjective differences) and determines the scope of affairs that such competence covers (objective differences).

In our opinion, the differences are indicative of the difficulties involved in assigning legislative powers to an international organization, even in the case of organizations with so few members as the European Communities (six states). It turned out that the competence of the Communities to enact law required a distinct arrangement in each Community and that it proved impossible to adhere to one model whilst doing so. For one thing, the tasks of the Communities differ in terms of their subject matter, but the chief cause behind it was that when six Western European states established the first Community, the political circumstances were quite unlike those which the same states faced when deciding on further integration.

1. The first issue: the division of lawmaking competences between the organs of each Community was resolved in one particular fashion in the case of the European Coal and Steel Community, while a different approach was employed for the European Economic Community. The solution adopted for the European Atomic Energy Community follows the model of the EEC. However, given that pursuant to the treaty the legislative competence of the Atomic Energy Community is a minor one (which is also referred to further on), the difference between the latter and the Coal and Steel Community is less evident than in the case of the Economic Community.

Within the European Coal and Steel Community, the body invested with legislative powers is the High Authority. This is not an exclusive competence for—as we have seen—the treaty does not preclude lawmaking on the part of the Special Council (Chapter III, Subchapter 2, and Chapter V, Subchapter 1, Section 1). Still, the treaty authorizes the Special Council to engage in such an activity only in view of exceptional expedients. Let us recall that the High Authority is an organ composed of persons who are not representatives of the states. Under the treaty,

such persons act "in the general interest of the Community, [being] completely independent in the performance of their duties." (Article 9 (5)).

Meanwhile, the lawmaking function in the European Economic Community is delegated to a body composed of representatives of the states, namely the Council (Chapter III, Subchapter 3 and Chapter V, Subchapter 2, Section 1). Although the Commission of the Community, an organ equivalent to the High Authority of the Coal and Steel Community, also possesses the competence to enact specifically targeted law for the member states (Chapter V, Subchapter 2, Section 2), its role is indeed very minor compared with the powers of the Council, while the regulations it issues are rare and few. Analogous solutions were adopted in the treaty establishing the European Atomic Energy Community. The organ invested with the competence to enact legal norms is also a Council composed of delegates from respective governments (Chapter III, Subchapter 4 and Chapter V, Subchapter 3, Section 1), while a supranational body—the Commission—exercises lawmaking function only exceptionally (Chapter V, Subchapter 3, Section 2). It needs to be noted, however, that the shift of import in favour of the Council is less palpable in the Atomic Energy Community, since instances in which organs of that Community enact law are few and far between in any case.

Thus one sees a characteristic change compared with the solution adopted for lawmaking within the European Coal and Steel Community, where substantial legislative competence was granted to a body which does not comprise representatives of states. Here, i.e. in the Communities established by the Treaties of Rome of 1957, a more traditional solution was employed: the legislative competence was entrusted to diplomatic organs (composed of governmental delegates); in a range of vital affairs, the bodies were and remain entitled to enact law solely by virtue of unanimous resolutions (Chapter III, Subchapters 3 and 4). One should therefore ask why states decided to follow a different paradigm in the Treaties of Rome? After all, those were the same states which continued as members of the Coal and Steel Community, and had no

intention—regarding that Community—of introducing any changes that would affect the division of functions between its organs.

There are no grounds to claim that the five-year-long practice of the Coal and Steel Community prior to the signing of the Treaties of Rome compelled the signatories to abandon the model adopted previously. Admittedly, certain acts of the High Authority were disputed before the Community's Court of Justice, yet the lawsuits are no indication that the High Authority had abused its lawmaking competence or exercised it in an objectionable manner for any other reason.

The reason behind the change lay elsewhere. The 1957 Treaties of Rome which established the Economic Community and the Atomic Energy Community were drafted and signed after the failure of the project of the European Defence Community. In 1954, the French parliament refused to ratify the treaty based on which the Defence Community was to be established. This decided—at least for the time being—the fate of integration efforts undertaken by six Western European states in terms of military affairs and defence. The fact that integration in that area had to be discontinued made it necessary to put the idea of pursuing the project of a political community of the six European countries on hold for an indefinite period. The new steps towards integration in the economic sphere, which were evident in the Treaties of Rome, required one to fall back on the methods tested in organizations which had functioned before the Coal and Steel Community was created; in other words, the supranational elements in the structure and competences of the new Communities were not to be expanded, but suppressed instead.[28] In this regard, it is aptly observed that the way chosen by the authors of the Treaties of Rome is an intermediate solution between the two extremes of the full legislative competence of a supranational organ of the Community and

28 This is noted by R. Efron, A.S. Nanes, *The Common Market and Euratom Treaties: Supranationality and the Integration of Europe*, "International and Comparative Law Quarterly" vol. 6, 1957, p. 674 as well as E. Wohlfahrt, *Europäisches Recht. Von der Befugnis der Organe der Europäischen Wirtschaftsgemeinschaft zur Rechtsetzung*, "Jahrbuch für Internationales Recht" 1959, vol. 9, p. 23.

confining the powers of the Community to issuing recommendations.[29] One should also add that granting primarily legislative competence to a body composed of representatives of states—for which the treaty establishing the Economic Community provided—was not justified solely by the political difficulties that integration had to confront in the 1950s with respect to military matters and politics in the strict sense. In the case of the Coal and Steel Community, the basic law was formulated already in the very treaty which established it, but the same does not apply to the Economic Community. Here, one often needs to create even more fundamental provisions, since the Treaty of 1957 does not contain a complete set of those. It seems, therefore, that even if the integration had proceeded more efficiently ten years ago, at least a part of the legislative competence would have fallen to the body composed of delegates of governments, because the system of basic norms set out in the Treaty would still have had to be supplemented and elaborated. This required political decisions to be made concerning the substance of the Community law. In practice, only governments could take such decisions, but a body more or less independent of governments did not have such an ability.

Thus the division of lawmaking functions among the Community organs was made according to different principles for the European Coals and Steel Community on the one hand and the remaining Communities on the other.

2. Let us now discuss the other issue referred to at the beginning of this subchapter: the differences in the scope of the matters covered by legislative competence.

An overview of treaty provisions and the practice relying on those provisions in Chapter III, Subchapters 2–4, and in Chapter V, Subchapters 1–3, leads to the conclusion that among three communities the broadest lawmaking competence—*ratione materiae*—was granted to the European Economic Community.

29 E. Wohlfahrt, *Europäisches Recht…*

It has been observed in Section 1 above that the basic law pertaining to the Coal and Steel Community is contained in the treaty which established that Community. Whenever organs of the Coal and Steel Community, the High Authority in particular, exercise their lawmaking function, they legislate implementing rules with respect to the basic (fundamental) law formulated in the treaty. *Ratione materiae*, the law created by the Coal and Steel Community constitutes executive law to the treaty rules governing production and the common market of coal and steel.

In contrast, the treaty establishing the Economic Community has formulated a fundamental law on customs union and the free movement of persons, services, and capital between member states. Also, a proportion of transport-related affairs was provided for by means of fundamental rules in the treaty. This is a great deal, but it does not exhaust the entirety of affairs which should be uniformly regulated, so that one could indeed say that the members do form one community in terms of economy. The treaty does not supply fundamental rules pertaining to agriculture; the matters subsumed in the treaty under the designation of economic and social policy also need to be governed by fundamental provisions. *Ratione materiae*, the laws of the Economic Community cover not one or another area of production and commerce, however important, but the entirety of the economic life in the member states.

It has been emphasized in the scholarly literature that when compared with the European Coal and Steel Community the lawmaking competence of the Economic Community is broader.[30] Let us add that in view of the coordinating-administrative tasks facing the Atomic Energy Community, its lawmaking activity spans the least scope of affairs compared with the other Communities. In turn, enacting law for the member states is considered to be the chief task of the Economic

30 E. Wohlfahrt, *Europäisches Recht…*, p. 24, draws attention to the more extensive lawmaking competence of the Economic Community and concludes that, in consequence, the intervention of the latter into the internal legislation of individual member states goes accordingly further.

Community[31], while less importance is attached to its administrative or coordinating functions. The Economic Community is supposed to create law on its own, to ensure its existence and development, and the accomplishment of its goals; a law whose fundamental rules are only partially laid down in the treaty of 1957.

One therefore observes quite a considerable fluctuation of directions in which the legislative competence of the European Communities developed. The reason why these fluctuations are a noteworthy phenomenon is that they have occurred over a period of merely several years in a group of only six states. If such substantial differences arise in conditions which otherwise qualify as the most favourable for solutions based on a uniform model, then it is no wonder that in larger groups and in longer periods of time there is even less scope for lasting and regular progress in the domain discussed here.

The changing relations between the members of organizations and the shifting directions of their foreign policies determined which organ would exercise legislative powers in each of the three communities and dictated the extent of that competence. Thus, we see that the complete absence of legislative competence in one organization and the varied nature and degree of such competence in others can only be explained in the light of its dependence on international politics, on the role which individual states play in that politics, and finally the goals these states pursue within that framework. The disparities between organizations with respect to the issue under discussion result from specific circumstances and specific opportunities which exist at a given developmental stage of international relations. Reasoning theoretically and leaving the actual international situation aside, one could have anticipated that the model adopted by the six states for the European Coal and Steel Community—namely legislation exercised by a supranational body—would be applied in later integration undertakings. However, it turned out that in 1957—when further Communities came into exis-

31 Ibidem, p. 13.

tence—this would not have been a practicable solution. One the other hand, even though the Treaties of Rome were something of a step back with respect to the Coal and Steel Community, it was offset in a sense by the broad legislative competence granted to the European Community *ratione materiae*. From such a standpoint, the Economic Community is an international organization equipped with the most extensive law-making powers. If the development of the competence to establish legal norms in international organizations could be illustrated by means of a curve, its line would alternately move upwards and downwards. Naturally, since 1939 the curve has displayed an upward trend. The level it has reached thus far seems maximal, both for the present and for a number of years to come.[32]

Relics of the Contractual Concept and Inter-State Models in the Legislation Of International Organizations

The presence of contractual elements in the resolution-making activities of organizations is eloquent proof of how cautiously the legislation of international organizations develops. Here, yet again, a dividing line should be drawn between the European Communities and all other organizations.

The review of law in Chapters III–V demonstrates that organizations other than the Communities enact law for states either through unanimous resolutions or as part of the contracting-out system. These methods show the extent to which the authors of treaties which grant legislative powers to international organizations adhere to the principle that a sovereign state enters into an obligation and acquires rights un-

32 Here, we do not wholly share the optimistic view expressed by Krylov, who envisions increase of the role of resolutions of international organizations as a source of international law, see S. Krylov, *Les notions principales du Droit des gens*, "Académie de Droit International, Recueil des Cours" 1947-I, vol. 70, p. 444. Cf. idem, *K obsuzhdeniyu voprosov teorii mezhdunarodnovo prava*, "Sovetskoye Gosudarstvo i Pravo" 1954, no. 7, p. 74 ff.

der its own consent.[33] The European Communities hold a monopoly on lawmaking resolutions which are passed by majority vote and become mandatorily binding on the minority, that is with the exception of the competence exercised at times by certain bodies concerned with fisheries (Chapter V, Subchapter 5). However, given the current state of organized cooperation in the international community, the methods and means adopted in the European Communities have to be considered inapplicable in a broader group of states.[34] It is to be surmised that in universal organizations as well as in regional organizations with a more diverse membership, the traces of the contractual concept—unanimous resolutions, the possibility of opting out from the law enacted by an organization, the possibility of raising objections—will persist for a long time yet.

However, let us recall a previous observation, namely that the element of state's consent to a legislative act of organization is not conclusive for the act, in that it does not make it a treaty. The lawmaking acts of international organizations are not treaties (Chapter IX). Consequently, do organizations which exercise their legislative competence act in accordance with the model of internal legislative process adopted by the states as such? In other words, do legislative acts of international organizations contribute to creating certain rules of international law in a manner resembling internal legislation?

In general, authors find that there are analogies between the exercise of lawmaking powers by the legislative body of a state and by an international organization.[35] The fact that the legislative competence of the Eu-

33 A.J.P. Tammes, *Decisions of International Organs...*, pp. 344–345: "... a regulation adopted by international organs is rarely capable of becoming binding on a Member without some form of consent or (in order to make acceptance more easily assumed) of absence of rejection."

34 See M. Sørensen, *Principes de droit...*, p. 107. Cf. also the general remark by G.I. Tunkin, *Voprosy teorii mezhdunarodnovo prava*, Moscow 1962, p. 136.

35 M. Sørensen, *Principes de droit...*, pp. 91–92. R.H. Mankiewicz, *L'adoption des annexes à la convention de Chicago par le Conseil de l 'Organisation de l'Aviation Civile Internationale*, *Beiträge zum internationalen Luftrecht*. Festschrift zu Ehren von Prof. Dr iur. Alex Meyer, Düsseldorf 1954, p. 92, underlines those analogies in the lawmaking activity of the Council of the International Civil Aviation Organization. M. Merle, *Le pouvoir règlemen-*

ropean Communities is broader and more developed than the equivalent competence of other international organizations compels one to discern such analogies primarily in the case of the Communities.[36] On the other hand, one does encounter assertions[37] that the mode in which domestic legislations developed cannot serve as a model for the development of international lawmaking in the strict sense. The analogy is allegedly hindered by the circumstance that in either case the addressees of the norms are all too different.[38] However, even opponents of the analogy agree that enacting rules through the resolutions of international organizations presents certain problems which previously occurred in the inter-state legislative process.[39]

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taire..., p. 347, notes a similarity between the legislation of the Coal and Steel Community and the state legislation in the judicial review of normative decisions of the High Authority. J.L. Kunz, *Sanctions in International Law*, "American Journal of International Law" 1960, vol. 54, p. 328, makes a following observation: "[...] there exist today sectors of international law, the rules of which directly obligate individuals and where, therefore, the problem of sanctions takes on an entirely different form [...]. Today a great deal of the internal law of international organizations, particularly the whole law of international officials, as well as a part of the law of the supranational organizations in Europe·, belongs here. We have here to deal with international norms, international by their creation, reason of validity and function; ·but the internal structure of these norms is not different from that of advanced municipal legal orders."

36 E. Wohlfahrt, *Europäisches Recht…*, p. 20, is of the opinion that in matters concerning enactment of rules, the treaties establishing the Communities draw not so much on the models supplied by the international organizations which have functioned so far, as on the constitutions of the federal states. In this regard, the author quotes G. Jaenicke, *Bundesstaat oder Staatenbund. Zur Rechtsform einer europäischen Staatengemeinschaft*, Festgabe für Bilfinger, 1954, p. 71; L. Cartou, *Le Marché Commun et la téchnique du droit public*, Revue du Droit Public, 1958, March-April, p. 203. Elsewhere, Wohlfahrt expresses the view that the European Economic Community is closest to the German Customs and Trade Union of 1867. The Union possessed legislative powers with respect to member states in the following areas: export and import duties, salt, sugar, and tobacco taxes, governance of customs and the aforesaid taxes, criminal, customs, and tax law; ibidem, p. 12, note 4a. Concerning analogies between the common market and the Customs Union see G.W. Keeton, *The Zollverein and Common Market*, Current Legal Problems, 1963.

37 G. Schulz, *Entwicklungsformen.…*, p. 5.

38 Let us add at this point that a major part of the law enacted by the European Communities, the Coal and Steel Community in particular, is not addressed to states but to undertakings; consequently, the difference underscored in the cited view ceases to exist.

39 Ibidem, on p. 30, Schulz finds that in internal law of the present-day states the determination of the subject matter of a statute (*Feststellung des Gesetzesinhalts*) coincides in the same act

As regards the European Communities, the predominant view is that the legislation of the Communities and the lawmaking in individual states display considerable similarities. These similarities motivate certain authors to deliberate on a question which has thus far emerged only in the sphere of internal law, namely of whether the normative powers of the Communities constitute a legislative competence or a competence to issue regulations.[40] In such instances, one draws on the institutions of public law in force within the states to explain the norm-giving process in the Communities. This is particularly conspicuous in the debate of the Belgian and French lawyers concerning the extent to which the High Authority of the European Coal and Steel Community uses it competence to issue regulations (*pouvoir réglementaire*). Let us immediately clarify that it is the rank of the normative act of the Community which is debated rather than its name. We know, after all, that the term regulation (*règlement*, *Verordnung*) appears in the case of the Economic Community and the Atomic Energy Community, but it is not employed in the Coal and Steel Community. On the one hand, contributors to the aforesaid discussion claim that the High Authority of the latter Community does not have a general competence to issue regulations (*pouvoir réglementaire général*, *pouvoir proprement réglementaire*), since its issues provisions only where empowered by the treaty.[41] Still, on the other hand there are authors who believe that the High Authority does possess general competence and argue that it may enact generally applicable provisions in all those cases in which it is empowered to take individualized decisions.[42] It seems that the resolution of that dispute lies in the

with giving legal effect to its text (*Gesetzbeschluss*). Although the author observes that in international law both actions are separate in the temporal sense, it needs to be noted that legislative acts of international organizations are not subject to such a separation in time; see above remark concerning non-ratification of those acts, Chapter VII, Subchapter 2.

40 P. Reuter, *La Communauté Européenne du Charbon et de l'Acier*, Paris 1953, pp. 49–50, 99; E. Wohlfahrt, *Europäisches Recht…*, pp. 28–29.

41 P. de Visscher, *La Communauté Européenne du Charbon et de l'Acier et les Etats membres*, Milan 1957 (Congres International d'Etudes sur la Communauté Européenne du Charbon et de l'Acier).

42 P. Reuter, *La Communauté...*, p. 49. See also M. Merle, *Le pouvoir règlementaire...*, p. 343.

principle according to which an international organization, including a supranational organization such as a European Community, is competent to enact law for states only when it is explicitly authorized to do so by the treaty which established it, or by another international agreement concluded by all member states. Thus, no Community may enact legal norms if the act of enactment is not founded—beyond any doubt—on the statute of the Community or supplementary treaties. Furthermore, whenever one seeks to account for the phenomena belonging to the sphere of international law through reference to institutions of internal law, they choose a path of the most likely lucid and telling analogies, providing that one does not overlook the separate natures of both legal systems and one remains aware of the fact that an act which functions under the same name may in fact mean something else in either system. The risk of foregoing accuracy for the sake of compelling analogies can be seen in the previously cited views of the Belgian and French lawyers. It cannot be denied that certain institutions and terminology of the French public law had their impact on a number of provisions in the treaties establishing the European Communities, primarily on the treaty creating the Coal and Steel Community (e.g. provisions pertaining to the Court of Justice). Where law is created by virtue of enactment, there must exist an essential similarity between the legislative activities of persons or organs which establish the norms. Nevertheless, the analogies do not go as far as to warrant setting the inter-state competence to issue regulations (on the part of the head of state, the government or the ministers) side by side with the legislative competence of the European Communities. When the legislative acts of the Communities are compared with the ordinances in force within states, one immediately sees that numerous issues covered by the provisions enacted by the Communities are not governed by regulations but by statutory acts.[43] Therefore,

43 Thus aptly P. Reuter, *La Communauté...*, p. 99. To provide examples, the author cites efforts to define practices which constitute unfair competition and determine what enterprise audit is.

it seems pointless to engage in a general consideration of whether the treaties establishing the Communities represent a constitution or a plain statutory act with respect to the law enacted by the organs of the Communities, and subsequently whether that law qualifies as a statutory act or a regulation. The question of the rank—statutory act or regulation—has its practical significance in specific member states, where it bears on another issue, namely the place of the law enacted by the Communities in the hierarchy of internal norms of a given state. However, this is not what this paragraph focuses on (see Chapter VIII, Subchapter 2 and 3).

We shall thus conclude that the analogies between the legislation within states and the legislation of the European Communities are confined to shared characteristics observed in both legislative processes, due to the fact that both create law by way of enactment; when the enactment of a norm meets the requirements of validity, the norm becomes binding on the addressee regardless of their will. Another analogy with internal law consists in the fact that a judicial body may review the legality of provisions enacted by the communities.[44] However, these provisions cannot be identified with the categories of internal legal norms, i.e. with statutory acts, decrees, regulations etc., nor can the Communities' competence to issue such provisions be put on a par with the constitutional competence of particular state bodies to pass statutory acts, decrees or regulations. In the internal sphere of a member state, the law enacted by the Communities may have the rank of a statutory act, regulation or another legislative act. But, as already observed, this is a different matter, unrelated to the question of whether the European Communities follow the models proper to the inter-state legislative process while enacting law. Let us recall that international treaty, a source of law that

44 Discussing legislative decisions of the High Authority of the Coal and Steel Community, M. Merle, *Le pouvoir règlementaire...*, p. 347, observes as follows: "L'assimilation a la technique du pouvoir réglementaire en droit interne est ici poussée très loin puisque l'exercice de l'activité réglementaire par la Haute Autorité fait l'objet d'un contrôle juridictionnel en vue d'assurer la conformité des décisions prises à la lettre et à l'esprit du Traite." See ibidem, p. 359.

is thoroughly distinct from the one discussed here, has on multiple occasions undergone a transformation procedure in specific states which, in view of the needs of its specific internal law, recognized it as a statutory act, regulation or another legislative act that constitutes a source of law in that country.

International Legislative Bodies

If certain international organizations have acquired the competence to enact law for states, then we are dealing with the presence of legislative organs within the international community. Naturally, there is no one organ in that community with the powers to enact laws for all states and in every domain.[45] An international legislator modelled on the state legislator is still lacking as well, but there are bodies which may be said—within the limits of their usually minor lawmaking authority—to be international legislative organs.[46]

One reads in the literature that the emergence of an international legislator will affect the position of states, deprive them of sovereignty, and transform international law into the public law of a world state.[47]

45 In this sense, W.W. Bishop, *The International Rule of Law*, "Michigan Law Review" 1961, vol. 59, p. 557 is right to have stated the following: "Our international legislative process is solely that of agreement upon treaties by all the notions bound by them; we have no international legislature empowered to enact by majority votes laws obligatory on those not taking part in the legislative process." G.I. Tunkin, *Voprosy teorii…*, p 136, writes that if universal international organizations were able to enact law for states, we would be dealing with a world government and a world state.

46 Cf. M. Merle, *Le pouvoir règlementaire...*, pp. 350, 360, who, referring to the European Coal and Steel Community and its normative competence, speaks of autorité gouvernementale and *l'avènement de la fonction gouvernementale dans la société internationale*.

47 J. de Louter, *Le droit international public positif*, vol. 1, Oxford 1920, p. 59; Louter is quoted by H. Lauterpacht, *The Function of Law in International Community*, Oxford 1933, p. 400, note 4. Lauterpacht himself admits: "The setting up of an international legislature would constitute the most fundamental change in the present organization of international society", the paper entitled *The Absence of an International Legislature and the Compulsory Jurisdiction of International Tribunals*, "British Yearbook of International Law", vol. 11, 1930, p. 142, is cited by G. Schulz, *Entwicklungsformen.…*, p. 1. P.I. Lukin, *Istochniki mezhdunarodnovo prava*, Moscow 1960, p. 110, rejects the claim that international organizations

Numerous authors believe that there arise obstacles which, qualified by these authors as legal ones, allegedly prevent an international legislator from functioning as such. They point to the fact that no world parliament exists; that one cannot reconcile the sovereignty of states with the activity of an international legislator; finally, the activity of the latter would violate the principles of equality and the independence of states, that is the fundamental rules of the contemporary international order.[48] Also, it is underlined that in order to regulate relationships by means of an enactment, there must occur a multiplicity of actual circumstances which could be subject to normative measures. Meanwhile, there are such substantial differences when it comes to the potential and interests between states that a uniform regulation for all entities resembling a statutory act in a state is hardly conceivable in reality.[49]

It appears that the above reservations and concerns relating to the enactment of international legal norms have one feature in common. These are reservations and concerns which—in theory—could be legitimate, but which are not validated by the practice to date. The above overview of provisions in the statutes of international organizations in terms of the aspect with which we are concerned has demonstrated that the instances when an international organ possesses the competence to enact law for states are not that frequent. In any case, those were the states themselves which granted that power to the organ in the treaty, as they found it expedient to have law created—in the domain they designated and within the extent they have delineated—in a different manner than through custom or treaty. It is not the sovereignty of the states which is subject to limitation here, but its exercise—a daily phenomenon in current international life, which does not take place exclusively when an international organization receives normative competence from its

have legislative competence with respect to states, for states are sovereign. He nevertheless admits that some organizations can establish technological norms (*tekhnicheskiye pravila*).

48 See the views of authors cited by G. Schulz, *Entwicklungsformen…*, pp. 1–2.

49 Ibidem, p. 2, where names such as Brierly, Erler, von der Heydte, Ross, Schwarzenberger and Verdross are mentioned.

members.[50] Law enacted by an organization does not cease to be international law, nor does it become the "public law of a world state", a state which after all does not exist and—let us add—has not and will not be established as an automatic product of the discussed legislative technique. International life proves that for international law to be created in a way which is to some degree analogous to the legislative processes within a state, no world parliament has to come into existence beforehand. The equality and independence of states has not been diminished because certain international organizations were invested with lawmaking powers. Finally, it has to be emphasized that such competences appeared precisely where the multiplicity of states of fact that required regulations as well as the identical needs and interests of various states made a uniform normative solution—through enactment—the best solution available.

Let us also add that before legislative competence began to feature as an attribute of certain international organizations, international life had known, while international law had tolerated, fairly numerous cases in which a norm created by some states became binding for others. Specifically, this means treaties which established a legal order considered binding on all states, including those which were not parties to the treaties.[51] The most often cited are e.g. the provisions of the Åland Islands demilitarization convention of 1856[52], provisions on perpetual

50 A good example of confusing different matters and seeing eradication of sovereignty where it by no means occurs are the views of M. Le Goff, *L'activité des Divisions Techniques au sein de l'O.A.C.I.*, "Revue Générale de l'Air" 1951, vol. 14, pp. 425, 426, expressed with respect to the aforementioned technical annexes enacted by the International Civil Aviation Organization. Noting that the annexes are passed by the Council of the ICAO (in which 27 of 103 members are represented—as of 1 April 1964), Le Goff asks: "Que revient, dans ce cas, la souveraineté des Etats? Demeure-t-elle entière? Elle se restreint et peu à peu disparait." And further, speaking of the application of the annexes in particular states: "C'est la règle internationale qui s'applique seule. Les Etats et leur souveraineté sont définitivement morts."

51 The term which tends to be used in English nomenclature is "treaty of international settlement."

52 See the opinion on that matter formulated by the International Committee of Jurists, League of Nations, Official Journal, Special Supplement, no. 3, pp. 17–19. Ch. de Visscher, *Théories et réalités en droit international public*, Paris 1953, p. 325.

neutrality[53], provisions of the Treaty of Versailles regarding internationalization of the Kiel Canal[54], provisions of the Charter of the United Nations on the international subjectivity of the UN[55], provisions pertaining to the legal status of South West Africa[56], etc. As a rule, treaties are concluded with the participation of superpowers. The latter phenomenon, whereby superpowers impose a legal regime to which uninvolved states become subject in practice, has been witnessed in recent history from the 1815 Congress of Vienna until the present day.[57] In particular, when one juxtaposes the activity of the "superpower directorate" with the activities of organizations equipped with legislative competence by virtue of consent of states, one cannot fail to conclude that the technique and method of international organizations is both more progressive, more democratic, as well as respectful of the sovereignty of states.

The Choice Between a Treaty and a Legislative Act of an International Organization

In the course of the deliberations to which this monograph is dedicated, the following question is likely to have arisen more than once: what are the reasons why in certain areas states decide to equip an international organization with legislative competence? In other words, why in particular matters do states waive the traditional and tested option of a treaty?

53 Ch. de Visscher, *Belgium's Case*, 1916, p. 17, quoted by Harvard Research in International Law, Treaties, American Journal of International Law, Special Supplement, 1935, pp. 922–923 and idem, *Théories…*, p. 325.

54 The example is noted by McNair, quoted by Harvard Research in International Law, p. 923.

55 See advisory opinion of the International Court of Justice in The Hague of 11 April 1949 on compensation for losses incurred in service of the United Nations, I.C.J. Reports, 1949, p. 177 ff. This particular example as well as others are cited by H. Lauterpacht, *Report on the Law of Treaties*, UN document A/CN.4/63, 24 March 1953.

56 See advisory opinion of the International Court of Justice in The Hague of 11 July 1950 on the international position of South-West Africa, I.C.J. Reports, 1950, p. 128 ff.; cf. also the opinion of Sir Arnold D. (now Lord) McNair, ibidem, pp. 155–157.

57 See A.D. McNair, *The Law of Treaties. British Opinions and Practice*, Oxford 1938, p. 128; Ch. de Visscher, *Théories...*, pp. 325–326; A.J.P. Tammes, *Decisions of International Organs...*, pp. 282–283.

The reasons which have caused the legislative act to replace the treaty as a means to regulate affairs are complex and vary depending on the case at hand.

At times, prompt action is required, while the treaty method does not always ensure immediate regulation. A treaty as such tends to be negotiated and signed within a reasonable time-frame, but the moment at which it comes into effect is sometimes very considerably delayed, or never actually takes place with respect to some—and often numerous—states. At a meeting of the International Law Commission in 1951, one of its members drew attention to the fact that among the American republics there is a state which had signed 61 treaties, but ratified only nine, which happened "not because of the opposition of the people, but because of the inertia of those in the seat of government."[58] In this respect, the legislative acts of an organization, also under the contracting-out system, provide a better instrument than treaties.

In other instances, it is the special nature of the matter to which the new law is to apply that compels states to opt for the regulation contained in a resolution of an international organization. This is the case with all highly detailed and technical provisions, such as norms pertaining to aerial navigation. It is easier for an international organization to procure or sometimes even have the exclusive advantage of a team of experts who are needed to draft the provisions.[59] Here, a characteristic division of tasks often ensues: the purely technical questions remain within the purview of the lawmaking organizations, whereas those questions which may involve various solutions depending on the political situations, economic or legal systems of states, are regulated by means of treaties.[60]

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58 Mr. Alfaro at the 88th meeting of the Commission on 21 May 1951, Yearbook of the International Law Commission, 1951, vol. 1, p. 52, cited by G. Schulz, *Entwicklungsformen.*.., p. 48.

59 Cf. R.H. Mankiewicz, *L'adoption des annexes*..., p. 88, on the substantive competence of the International Civil Aviation Organization to enact law in the form of the often-mentioned technical annexes to the Chicago Convention of 1944.

60 E.g. liability of the air carrier is not governed by the annexes enacted by the International Civil Aviation Organization but by international agreements, cf. M. Merle, *Le pouvoir règlementaire*..., p. 346.

The political circumstances, especially the requirements of constitutional law and the power configurations in parliamentary bodies, have not infrequently dictated that a new norm of international law should be created through enactment rather than the conclusion of a treaty.[61]

In general, it may be stated that reasons of expediency necessitated the choice of a treaty on some occasions, whereas at other times they induced states to agree that a law should be enacted by an organization.[62]

It may happen, however, that the reason why preference is given to a legislative act of an organization is more fundamental, i.e. it is associated directly with the accomplishment of the goals that the organization has been entrusted to pursue. As an example in point, one should mention the European Communities to which economic tasks have been delegated. Economic integration of the member states is a process which changes their previous economic life to such an extent that a legislative technique other than a treaty had to be employed—one resembling inter-state legislation—so as to obtain an efficient means of carrying out the tasks that the European Communities are supposed to undertake. The technique makes it possible to achieve uniformity in many[63] areas of economic law in the member states, which is one of the foremost tasks of the economic Communities. Lawmaking based on the model adopted in the Communities supplements the internal legislation of the members with greater ease.[64] The activities and the achievements of the Commu-

61 This was the case with a number of norm-giving decisions of the now defunct Organization for European Economic Cooperation, H.T. Adam, *L'Organisation Européenne de Coopération Economique*, Paris 1949, pp. 184–185; A. Elkin, *The Organization for European Economic Co-operation. Its Structure and Powers*, European Yearbook, vol. IV, The Hague 1958, p. 129.

62 Cf. arguments in favour of the so-called delegated legislation, E.C.S Wade, G. Godfrey Philipps, *Constitutional Law*, Second Edition by E.C.S. Wade, London 1937, pp. 311–313.

63 The word "many" is used deliberately, as there are branches of law in which no uniformity is practicable, e.g. property law (Article 222 of the EEC Treaty) or tax and foreign currency law in the extent stipulated by Article 6 of the EEC Treaty; the fact is noted by E. Wohlfahrt, *Europäisches Recht…*, p. 15.

64 Cf. E. Wohlfahrt, *Europäisches Recht…*, pp. 29–30.

nities to date would have been unthinkable had the communities been unable to issue legislative acts.

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SUMMARY

The Significance of the Legislative Resolutions of International Organizations for the Development of International Law

The paper is an English translation of *Uchwały prawotwórcze organizacji międzynarodowych: przegląd zagadnień i analiza wstępna* by Krzysztof Skubiszewski, published originally in Polish in "Ruch Prawniczy, Ekonomiczny i Socjologiczny" in 1965. The text is published as a part of a jubilee edition of the "Adam Mickiewicz University Law Review. 100th Anniversary of the Department of Public International Law" devoted to the achievements of the representatives of the Poznań studies on international law.

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The Notion of the Recognition of Territorial Acquisition[1]

The Institution of Recognition in International Law

The institution of recognition plays a momentous role in the science and practice of international law. In the erstwhile doctrine of international law, recognition was even considered a source of that law: it was classified among the so-called direct sources of law. Ullmann defined it as "belonging to the material premises underlying creation of legal norms", and argued that it is coupled "with a psychological process while law is being created and accompanies or, alternatively, establishes the validity of legal norm (irrespective of the form in which a legal norm is extrinsically expressed as a manifestation of that process)."[2]

The above phrasing evinces a singular "ubiquity" of the element of recognition in international law. Lending recognition such broad significance compels one to discern it in all the forms that the norms of international law assume. Indeed, the element of recognition is found in all agreements, as well as in customary law.[3] This broad understanding of recognition is drawn upon in certain general definitions of recognition formulated by a number

1 Translated from: B. Wiewióra, *Uznanie nabytków terytorialnych w prawie międzynarodowym*, Poznań 1961, pp. 20–38 by Szymon Nowak and proofread by Stephen Dersley. The translation and proofreading were financed by the Ministry of Science and Higher Education under 848/2/P-DUN/2018.

2 E. Ullmann, *Völkerrecht*, Tübingen 1908, pp. 40–41.

3 Each international agreement comprehends recognition of particular rights and obligations of the parties, while customary law relies on the recognition of a given rule of conduct as applicable. The "general principles of law" referred to in Article 38 (d) of the Statute of the International Court of Justice also require recognition in order to provide grounds for the Court's adjudication.

of authors, including contemporary ones. For instance, in French science, Charpentier characterizes recognition as an obligation "whose immediate effect is the duty of the state which grants it to respect the situation which has been recognized."[4] Anzilotti asserts that "recognition is a declaration of will by virtue of which a given situation, a particular claim etc. is deemed lawful."[5] In his equally general delineation of the function of recognition, Verdross finds that "it precludes the recognizing states from questioning the legality of the recognized situation or claim."[6] In contemporary Polish science, Berezowski formulates the following view:

> Recognition is a statement made by the recognizing party affirming the existence of what is recognized. With recognition thus construed, its object may vary, although recognition occurs most often in connection with the question of legal-international subjectivity.[7]

In fact, most authors do discuss the institution of recognition in relation to legal-international subjectivity.[8] One may encounter the view that various instances of recognition of a state which is relevant from the standpoint of international law can be assigned to three categories of recognition: those of states, governments, and insurgents[9], i.e. such categories which involve the question of subjectivity.

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4 J. Charpentier, *La reconnaissance internationale et l'évolution du droit des gens*, Paris, 1956, p. 202.

5 D. Anzilotti, *Corso di diritto internazionale*, vol. I , Padua 1955, p. 294.

6 A. Verdross, *Völkerrecht*, Wien 1955, p. 133.

7 C. Berezowski, *Zagadnienia zwierzchnictwa terytorialnego*, Warszawa 1957, p. 13.

8 Besides the most widespread views, which distinguish recognition of a nation, government and insurgents (potentially also a combatant), may be said to include recognition of a nation as well. This is the case in the Soviet doctrine: W.N. Durdenevski, S.B. Krylov, *Podręcznik prawa międzynarodowego*, Warszawa 1950, p. 149 ff.; F.I. Kozhevnikov, *Mezhdunarodnoye pravo*, Moskwa 1957, p. 111 ff.; the framework of the institution of recognition presented in the latter study on p. 439 encompasses recognition of a state, government, nation, belligerency, and insurgency. Examples of the traditional approach to the issue of recognition in the context of subjectivity can be found in overwhelming majority of authors.

9 W. Bieberstein, *Zum Problem der völkerrechtlichen Anerkennung der beiden deutschen Regierungen*, Berlin 1959, p. 26.

Among the authors who affirm the presence of other instances of recognition, i.e. aside from those relating to subjectivity, some consider them jointly, in the conviction that these other types of recognition still overlap with the issues of subjectivity.[10] Only a few distinguish recognition of acts or situations which differ from the recognition of states, governments, insurgency or belligerency, perceiving them to be distinct in legal terms. One of the proponents of this approach in earlier English scholarship is Phillimore, who finds that recognition applies in three cases: 1) when a state effects a conquest of a new territory, to which it claims the right as an integral part of its own domain, 2) when a part of the state secedes and becomes independent, and 3) when a ruler of a state adopts a new title.[11] Disregarding the third case, as it is no longer relevant today, attention is due to the distinction between two essential and separate cases of recognition: in connection with territorial acquisitions or following the establishment of a new subject of international law.

In the two fundamental contemporary monographs on recognition by Lauterpacht and Chen[12], the authors discuss both the traditional categories of recognition of state, government, belligerency and insurgency, as well as the recognition of unlawful or legally doubtful acts, which are examined from the standpoint of so-called non-recognition, informed by the Stimson Doctrine. Oppenheim-Lauterpacht expresses similar views.[13] In addition to traditional categories of recognition associated with the issues of subjectivity, Starke distinguishes the recognition of territorial changes, treaties etc., also aligning those with the Stimson Doctrine.[14]

As for the most recent American scholarship, Gould states that although he is concerned with the recognition of states and governments,

10 W. Bieberstein, pp. 26–27, observes for instance that recognition of annexation is often expressed in that the government of the annexing state is deemed the competent government with regards to the annexed area.

11 R. Phillimore, *Commentaires upon International Law*, vol. II, London 1882, p. 21.

12 H. Lauterpacht, *Recognition in International Law*, Cambridge 1947; T.C. Chen, *The International Law of Recognition*, London 1951.

13 Oppenheim-Lauterpacht: International Law, London 1955, vol. I, p. 142 ff.

14 J.G. Starke, *An Introduction to International Law*, 3rd edition, London 1954, p. 133.

"it should not be forgotten that states recognize all sorts of other situations, including territorial changes", and concludes that generalizations in that respect are a difficult matter, since recognition is an acknowledgement of a fact, whose ramifications depend on the object recognized.[15] Examining various cases of recognition jointly, Kelsen also notes the distinct legal nature of recognition (or, alternatively, the non-recognition) of territorial acquisitions.

> Such recognition is an act quite different from the legal recognition of a community as a state or an individual or a body of individuals as the government of a state. [...]It is an act by which—according to this doctrine —one state creates law applicable in the relationship between two other states.[16]

Additionally, next to the "standard" objective scope of recognition in international law (states and governments), Sharp discerns a distinct scope which includes territorial acquisitions, agreements and situations. The characteristic trait of the latter scope is that it encompasses the effects of the actions of states and governments.[17]

Similarly, in the most recent West German scholarly literature recognition of territorial acquisitions is distinguished as a type of recognition in international law.[18]

As for contemporary Polish authors, Makowski[19] and Ehrlich[20] represent the traditional view, according to which the institution of recognition is exclusively linked to issues of subjectivity, whereas Berezowski sees recognition as possessing a broad scope. The latter finds that beyond

15 W.L. Gould, *An Introduction to International Law*, New York 1957, p. 213.
16 H. Kelsen, *Principles of International Law*, New York 1959, p. 293.
17 R.H. Sharp, *Duties of Non-Recognition in Practice*, "Geneva Special Studies" 1934, vol. 5, no. 4, p. 4.
18 W. Schaumann, *Anerkennung*, in *Wörterbuch des Völkerrechts*, ed. K. Strupp, H. J. Schlochauer, Berlin 1960, vol. I, p. 47 list recognition of territorial acquisitions among various other kinds of recognition.
19 J. Makowski, *Podręcznik prawa międzynarodowego*, Warszawa 1948, p. 61 ff.
20 L. Ehrlich, *Prawo międzynarodowe*, 4th edition, Warszawa 1958, p. 142 ff.

subjectivity "a right that a state or even a nation is entitled to can also be an object of recognition."[21] As examples of the recognition of such rights, Berezowski mentions the recognition of the right to self-defence in the Charter of the United Nations[22], the right to sovereignty of air space pursuant to the Chicago Convention on Aviation of 1944[23], and the right to self-determination which, in the opinion of the author, is held by the nation.[24] This is also where the author situates the recognition of the jurisdiction of a foreign court.[25] Finally, Skubiszewski maintains that recognition as such also comprises the recognition of entitlements and claims, which "ensues when those entitlements or claims lack legal grounds, or when those grounds are unclear or doubtful."[26]

The views of international legal science regarding the institution of recognition may thus be recapitulated as follows:

1) There is a substantial group of authors who associate the institution of recognition solely with subjectivity;

21 C. Berezowski, *Zagadnienia zwierzchnictwa…*, p. 21.

22 Ibidem, p. 22.

23 Ibidem, p. 23.

24 Ibidem, p. 26.

25 Ibidem, p. 23. It seems that Professor Berezowski does not present the issue with sufficient clarity. He employs the notion of "recognition" with a somewhat imprecise frame of reference. Doubts arise concerning the concept of recognition of rights held by a state (are so-called fundamental rights of state meant?) for which no recognition is required. At most, one can speak of their confirmation in pertinent legal acts. On the other hand, what the calls "recognition of jurisdiction of a foreign court" is nothing else than a waiver of jurisdiction immunity and a related act, resulting from the existence and recognition of a foreign state. The differences between the notions of recognition which has a legislative import and recognition of acts of foreign states follow from the systematization in K. Strupp, H. J. Schlochauer, *Wörterbuch des Völkerrechts*, vol. I, Berlin 1960, pp. 47–58, where recognition of states, governments, insurgents, combatant sides and territorial acquisitions is discussed separately from the recognition of acts of foreign authority and judgments of foreign courts. Referring to that act as "recognition" is a terminological licence which does not contribute to explaining the function of the institution of recognition in international law. It may be added that the instances enumerated by Berezowski do not exhaust the catalogue of issues in which the doctrine sees presence of the institution of recognition; for example, the author overlooked the question of territorial acquisitions. Doubts of a different kind arise when an attempt is made to reconcile declarative and constitutive theory. See B. Wiewióra, *Niemiecka Republika Demokratyczna jako podmiot prawa międzynarodowego*, Poznań 1961, p. 78, note 206.

26 M. Muszkat ed., *Zarys prawa międzynarodowego publicznego*, vol. II, Warszawa 1956, p. 21.

2) There is a group of scholars who, besides the traditional categories of recognition, distinguish the recognition of territorial acquisitions as a separate institution of international law; the majority approach it in the context of territorial acquisition which is illegal or whose lawfulness is doubtful;
3) Finally, there are authors who endorse a broad meaning of recognition, thus going beyond the domain of subjectivity and territorial acquisitions (Ullmann, Berezowski, Gould), while others attempt to formulate their definitions of recognition in international law in such a way that they encompass the broadest possible range of instances in which the element of recognition can be found (e.g. Verdross, Charpentier).

The Territory in International Law

In accordance with the premises of this work, one should now examine the legal nature of territorial supremacy. For a point of departure, the discussion will be confined to the issue of land territory, whereby it needs to be noted that conclusions in that respect pertain—*mutatis mutandis*—to that part of the maritime territory which is subject to the territorial supremacy of a state, as well as to overground space.[27]

The legal essence of state territory has been described in a variety of ways. Currently, the following theories which account for the legal nature of territorial supremacy are formulated in the Western world:

1) The objective theory (territory as an object of state ownership),
2) The spatial theory (territory as a space in which state sovereignty is exercised),
3) The competence theory (power over a territory represents the sum of local competences granted under international law).[28]

27 Excluding the peculiar issues of the so-called space law, which are being lively debated.

28 For a critical review of the theories see I. G. Barsegov, *Territoriia v mezhdunarodnom prave*, Moscow 1958, p. 19, ff. Cf. also F.I. Kozhevnikov, *Mezhdunarodnoye pravo*, pp. 174–176.

The objective theory, deriving from the patrimonial concept of the state (according to which the private-legal dominion absorbed the public-legal empire, i.e. the supremacy of the erstwhile slave state) restores the former notion of empire (construed as the supremacy of the nation), but in external relationships maintains the ownership-like nature of the state's territorial supremacy, manifesting in the exclusive right to use and dispose of its territory with respect to other states.[29]

The spatial theory in its diverse variants[30] rejects both the concept of dominion and empire, asserting that the territory is a component part of the state and therefore it cannot be an object of its governance. The territory constitutes a space within which state authority is exercised.

The competence theory, formulated under the influence of the normative Vienna School, defines the essence of the territorial supremacy of the state in an abstract fashion, as a sum of local competences exercised by state organs. As Barsegov aptly underlines[31], the concept makes it possible to separate the actual power held over a territory from the abstractly maintained "sovereignty", as there are no obstacles to transferring some or even all local competences to another state.

Some authors are of the opinion that those theories offer a number of correct conclusions, but they do not exhaust all territory-related issues.[32]

In Polish science, Makowski opts for the competence theory[33], whereas Ehrlich observes with respect to territory as follows:

> Territory is obviously no subject of international law. Territory is not an object of international law, either: an object of international law, i.e. the ob-

29 H. Lauterpacht, *Private Law Sources and Analogies of International Law*, London 1927, pp. 91–92.

30 Ibidem, p. 93, and literature cited in the note. Cf. definition of the legal essence of territory by W.A. Niezabitowski, quoted by I.G. Barsegov, *Territoriia*…, p. 23.

31 I.G. Barsegov, *Territoriia*…, p. 42.

32 F.A. Váli, *Servitudes of International Law. A study of Rights in Foreign Territory*, London 1958, p. 12, holds that states possess competence not only within their territory, but also have certain rights beyond it; the latter may be an object of international agreements regardless of exercising public functions on the state's own territory.

33 J. Makowski, *Podręcznik prawa.*.., p. 97.

> ject of norms whose body is constituted by international law are the relationships between the subjects of international law; for its part, territory is not a relationship between the subjects of international law, but relationships between the subjects of international law may also concern territory, that is, the subjects of international law may have reciprocal rights and obligations in respect of territory. Thus the mutual relationships of the subjects of international law in respect of territory—though not only those—are an object of norms of international law.[34]

Stating that mutual relationships of states concerning territory are an object of interest for international law, Ehrlich evades defining the legal essence of territory. He also believes that attempts at formulating such a definition have no practical usefulness.[35] He is against analogies derived from private law when discussing legal issues relating to territory.

In contrast, Váli argues that all three theories contain elements which may lead to practical consequences for a jurist, but none of those covers the entirety of legal relationships which characterize the mutual dependence of state and territory, and subsequently concludes that the state possesses competence not only within its territory, but also certain rights over the territory, i.e. such rights which may become the subject matter of international agreements, regardless of the actual exercise of public functions on a given area.[36]

Soviet doctrine defines the legal essence of territory thus: it is a portion of the earth's globe which, spanning land, water, and air, is subject to the authority of a state.[37] It represents a material expression of the supremacy, independence, and inviolability of the nation which inhabits it.[38] The territory constitutes the property of the people and, within its territory, each nation has the right to settle and organize themselves as they see fit,

34 L. Ehrlich, *Prawo międzynarodowe*, 4th edition, pp. 502–503.
35 Ibidem, p. 504.
36 F.A. Váli, *Servitudes of International Law…*, p. 12.
37 W.N. Durdenevski, S.B. Krylov, *Podręcznik prawa…*, p. 227.
38 F.I. Kozhevnikov, *Mezhdunarodnoye pravo*, p. 177.

choose the form of state authority and resolve the problem of the state affiliation of their territory. The supremacy of the state with respect to territory is one of public-legal nature. The state exercises its power in accordance with the will of the people—on their behalf and in their interest. In consequence, the state cannot dispose of the territory as of its own property, contrary to the interest of its inhabitants. The borders of the state should be determined pursuant to the will of nations.[39] For the sake of comparison, it may be worthwhile to quote how Soviet science views Soviet territory: "The Soviet territory marks the extent of the effect of Soviet authority in space and at the same time constitutes the object of socialist ownership and a sphere of socialist economy."[40] The latter description appears to incorporate elements of all three theories.[41]

The definitions of the legal nature of territory advanced by Soviet science demonstrate an essential trait which sets them apart from the definitions formulated in Western doctrines. They all underscore the authority of the nation, a vital political element which has a momentous practical significance especially for the disposal of territory, which must follow the will of the inhabitants. In line with its ideological premises, Soviet science underlines the inadmissibility of the state authorities disposing of territory without the consent of the inhabitants, which may impose a practical limitation on the exercise of territorial supremacy. Nevertheless, it seems that apart from ideological differences which Soviet science emphatically stresses, in the formal-legal sense and for

39 I.G. Barsegov, *Territoriia*…, pp. 55–56. The author also draws on L. Cavaré, *Le droit international positif*, vol. I, Paris 1951, p. 264, according to whom state is merely a depositary of a nation's right to territory—it cannot dispose of it nor yield it against the will of the residents. Territorial supremacy belongs to the nation, being only actualized by the organs of the state.

40 W.N. Durdenevski, S.B. Krylov, *Podręcznik prawa.*…, p. 231.

41 F.I. Kozhevnikov, *Twórcza rola ZSRR w słusznym rozwiązywaniu zagadnień terytorialnych*, "Państwo i Prawo" 1950, no. 12, p. 4, explains: "However, the Soviet theory of combining the aforesaid elements within the notion of territory has nothing in common in terms of substance with the bourgeois doctrine, as its point of departure is in a real foundation that represents a contradiction to the bourgeois society—in socialist ownership. Here, the complexity is only external, just as with other issues of the theory of state and law."

practical purposes there are no major differences between how state territory is conceived in the Western doctrine and Soviet science: the latter claims that territory is the property of the people (or, alternatively, socialist property).

With practical purposes in mind, it would also seem legitimate to conclude that in the relationships between states, territory always features as an object of legal transactions. This is not contradictory to Soviet science, if one takes into account that the sanction of the inhabitants it posits refers chiefly to internal relations, i.e. to the consonance of the declaration of will of state organs and the will of the nation.

Territorial supremacy, also often referred to as territorial sovereignty or territorial jurisdiction, is—according to the scientific consensus—a notion which stipulates that on its own territory the state exercises the highest power over persons and things found within the limits of its territory. Heffter defines the scope of territorial sovereignty (*Territorialrecht*) as a right to exclusive use of natural resources on the territory of a state and the sole ownership of that territory. Consequently, no state can exercise power within the borders of another state, diminish—directly or indirectly—the possessions of another state, no state can diminish territorial appurtenances of another state or use its own territory for an activity detrimental to the territory of another state.[42]

In the renowned arbitration ruling concerning the Palmas Island, territorial sovereignty is characterized as follows:

> It appears to follow that sovereignty in relation to a portion of the surface of the globe is the legal condition necessary for the inclusion of such portion in the territory of any particular State. Sovereignty in relation to territory is in the present award called "territorial sovereignty". Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the ex-

42 A.W. Heffter, *Das europäische Völkerrecht der Gegenwart*, 8th edition, Berlin 1888, pp. 70–71.

> clusion of any other State, the functions of a State. The development of the national organisation of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations. [...] Under this reservation [relating to composite State and collective sovereignty] it may be stated that territorial sovereignty belongs always to one, or in exceptional circumstances to several States, to the exclusion of all others.[43]

Oppenheim-Lauterpacht argues that the importance of state territory is in the fact that it is the space in which that state exercises its highest authority. International law recognizes the highest state power within its territory. If any person or thing happens to be found or staying on that territory, it is therefore subject to the highest authority of the state. No foreign authority possesses any power within the borders of a territory.[44]

Verdross defines territorial sovereignty as the right to dispose of a given area to the fullest extent, in accordance with international law.[45] The author distinguishes between territorial sovereignty and territorial supremacy, finding that a given state may possess sovereignty on a given area, while another state exercises supremacy over the former. As an example, Verdross adduces the right of the United States in the Panama Canal zone, whilst preserving the territorial sovereignty of the Republic of Panama.[46]

In French science, Rousseau suggests two aspects of territorial sovereignty: a positive and a negative one. The positive aspects manifests in the concentration of legal power granted to the state to enable it to discharge its state functions on a specific area, i.e. issue acts intended to pro-

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43 Island of Palmas Arbitration Case, *Annual Digest of Public International Law* (1927–1928), p. 104. The definition is adopted by M. Sibert, *Traité de droit international public. Le droit de la paix*, Paris 1951, p. 649.

44 Oppenheim-Lauterpacht, 8th edition, vol. I, p. 452.

45 Verdross, p. 190.

46 Ibidem, p. 192. This division will be discussed further on.

duce legal effects (legislative, administrative and judicial acts). The negative aspect is evinced in the exclusivity of state power, i.e. in the exclusion of the activity of other states (the exclusive use of coercion, the exercise of judicial powers, and the organization of public services).[47] Váli defines territorial sovereignty as "that portion of public rights of which the state makes regular use under international law within its own territory. This category should naturally also include disposal of territory."[48]

The same author finds that the right of the state over its territory and the right to deal with certain affairs relating to that territory is an "absolute" or "real" right. Once acquired, the right in question should be respected by all other states or international legal persons. Obviously this right can be limited, but unless it is limited, it imposes a negative obligation on any other state to refrain from violating it.[49] Váli espouses the view that international law should also adhere to the division between rights which are "absolute" or "real" (*iura in rem*) and "relative" or "personal" (*iura in personam*). According to the author, the characteristic which sets the two kinds of rights apart is that "absolute" rights result in effective legal title with respect to everyone, whereas relative rights only with respect to particular persons.[50]

Barsegov, a Soviet expert on territorial issues, also determines the rights of the state on its territory to be absolute (*ius contra omnes*), claiming that only the state possesses authority over the population and disposes of the territory itself.[51]

The definitions of sovereignty (supremacy) cited above differ in terms of approach but display shared features: 1) exclusivity of the state's exercise of public-legal power 2) the association of that power with a given area[52], 3) effectiveness of the rights of state *erga omnes*.

47 Ch. Rousseau, *Droit international public*, Paris 1953, p. 225.

48 F.A. Váli, *Servitudes of International Law…*, p. 14.

49 Ibidem, p. 29.

50 Ibidem, pp. 22–23.

51 I.G. Barsegov, *Territoriia*…, p. 10.

52 Here, we leave aside the question whether state power extends beyond its territory, e.g. the authority over its own citizens. The matter is of course beyond the scope of this work.

Without doubt, these features have practical significance when considering the recognition of territorial acquisitions in international law.

Territorial Acquisitions

The notion of territorial acquisitions makes one think of a situation in which a state increases the extent of its territorial supremacy. In contemporary international relationships, this increase may ensue at the expense of the territorial supremacy of another state or other states, or without such a loss. The first is the case when a state assumes control of an area which has thus far remained under the authority of another state or states, while the second—when a state has taken possession of an area over which no one holds any authority (e.g. an extension of the belt of territorial waters).[53]

Given the premises of this work, the scope of inquiry does not include territorial acquisitions following the extension of territorial supremacy over territorial waters (coastal sea) and in overground space. The remaining instances of territorial acquisitions can be divided—according to the traditional doctrine of international law—into original territorial acquisitions, whereby territorial supremacy is extended over areas which have not been previously subject to the territorial sovereignty of any state, and derivative acquisitions, whereby a state assumes sovereign authority over an area which has hitherto been under the sovereign power of another state.

In view of the already completed division of the world and the end of geographical discoveries, the original acquisition of territory has no greater significance in contemporary international law— setting aside the matter of space discoveries, which may have to be resolved in the future. One therefore needs to examine current instances of the derivative acquisition of territory, which still play a crucial role in contemporary international relationships.

One of the chief modes of the derivative acquisition of territory is territorial cession, which denotes surrendering—usually under an agreement—

53 It is likely that in the future this may apply to acquisitions in space.

a portion of territory by one state to the benefit of another. Another one is adjudication (*adjudicatio*), i.e. awarding a state a part of another state, or an area which is the object of dispute between two states, though it is less often seen employed in practice. The institution of adjudication requires a decision of an international tribunal or arbitrator. The conditions in which the acquisition of territory may take place by virtue of adjudication is a matter of contention in the doctrine of international law.[54]

There are two further modes of derivative acquisition of territory, which continue to be debated in the international legal doctrine, namely conquest, i.e. annexation of a given area by way of armed seizure (so-called debellation or subjugation)[55] and prescription (*prescriptio*).[56]

54 E.g. the Western German doctrine of international law, substantiating territorial claims with respect to Poland, maintains that the prerequisite of lawfulness of adjudication is authorization by a state directly involved. H. Kraus, *Das Selbstbestimmung der Völker*, contained in the collective volume entitled *Das östliche Deutschland. Ein Handbuch*, Wurzburg 1959, formulates such a thesis in connection with the reservation that great superpowers have never been entitled to dispose of the German territory without the consent of Germany itself.

55 Acquisition of territory through subjugation, i.e. conquest and formal annexation is deemed admissible in English doctrine: e.g. Oppenheim-Lauterpacht, 8th edition, vol. I, pp. 566–575; J.L. Brierly, *The Law of Nations*, 5th edition, Oxford 1955, p. 155; J.B. Starke, *An Introduction…*, p. 141. Also, the more recent American doctrine admits conquest as a form of acquisition of territory: Ch.Ch. Hyde, Interna*tional Law*, 2nd edition, vol. I, p. 391; H. Kelsen, *Principles…*, p. 214. Austrian doctrine assumes a similar position: Verdross, p. 212. The French doctrine espouses conditional admissibility of conquest; Ch. Rousseau, *Droit international* public, Paris, 1953, pp. 250–251 and Sibert, vol. I, p. 891 (with the reservation that it may apply to a part of a territory in the form of sanctions against the aggressor). A dissimilar view is advanced by J. Charpentier, *La Reconnaissance Internationale et l'Évolution du Droit des Gens*, Paris 1956, p. 147. In Polish science, only J. Makowski, *Podręcznik prawa…*, p. 103 supports admissibility of conquest (debellation), defining it as an original mode of territorial acquisition. L. Ehrlich, *Prawo międzynarodowe*, pp. 148, 541, rejects the admissibility of conquest in international law, constructing the institution of *iuris postliminii*. Albeit for different reasons, so does C. Berezowski, *Terytorium*, p. 16 and K. Kocot, who draws on the prohibition of conducting warfare and the right to self-determination. The current Soviet doctrine also rejects conquest as a means of acquiring territory. In the textbook by Durdenevski-Krylov, p. 233, debellation was still listed among derivative modes of territorial acquisition, but the textbook *Mezhdunarodnoye pravo*, p. 182, states that territorial change may take place only in accordance with the principle of self-determination. I.G. Barsegov, *Territoriia…*, p. 92, rejects debellation as admissible in international law.

56 Contemporary English doctrine admits prescription: Oppenheim-Lauterpacht, 8th edition, vol. I, p. 575; Brierly, 5th edition, p. 157. J.G. Starke, *An Introduction…*, pp. 142–143, remains undecided. In American doctrine, positive opinion is expressed by Hyde, 2nd edition, vol. I, p. 387. In French doctrine, prescription is affirmed by Sibert, vol. I, pp. 888–891, and

At this point one should examine how recognition bears on all those types of territorial acquisition—both the generally accepted and the debatable ones. This issue may prove to have momentous practical significance for the determination of the legal position of parties in a given territorial dispute.

The Separate Nature of the Recognition of Territorial Acqusitions

The arguments presented in the preceding sections enable one to identify the elements which are encompassed by the notion of the recognition of territorial acquisitions in international law.

The notion involves three institutions of international law: recognition, territorial sovereignty and its changes. The problem which needs to be solved is the question of whether a separate institution of the recognition of territorial acquisitions exists, and if so, to ascertain the function of that institution in contemporary international law.

Within the extent under consideration, the recognition of territorial acquisitions appears to have certain particular characteristics. In the first place, a confrontation with the institution of recognition demonstrates singular differences: there is a tendency in the majority of the doctrine to associate the institution of recognition with international legal subjectivity, hence the institution is approached as an issue of legal personality. However, it is only in few cases that the recognition of territorial acquisitions is correlated with legal personality, namely where acquisition of territory is connected with the creation or liquidation of an international legal entity.

At this point, attention should be drawn to another terminological problem which needs to be resolved, specifically the divergence of two notions: territorial changes and territorial acquisitions.

Rousseau, pp. 248–249. Also in the affirmative Verdross, p. 212. In Polish doctrine, J. Makowski, *Podręcznik prawa…*, p. 103, K. Kocot, *Zarys prawa międzynarodowego publicznego*, vol. I, pp. 229–230 remain uncommitted to either position, while L. Ehrlich, *Prawo międzynarodowe*, 4th edition, p. 541, is opposed. In Soviet science, Durdenevski-Krylov, p. 233, are undecided, whereas I.G. Barsegov, *Territoriia…*, pp. 107–112, takes a negative approach.

The notion of territorial changes is undoubtedly broader than the notion of territorial acquisitions. Each acquisition of territory is simultaneously a territorial change—in the legal sense. In contrast, not every territorial change is unconditionally linked to an acquisition of territory. The change of legal status of a particular area, e.g. its demilitarization, will not constitute territorial acquisition, even though in the legal sense this will clearly mean a territorial change. Then again, the creation of a new state following a struggle for national liberation (through secession) is indisputably a territorial change and involves the depletion of the territorial supremacy of the metropole state. The question of the acquisition of territory by a newly established state is a complex one, given that possession of a territory is in general a prerequisite for a new state to exist. Thus, a new state does acquire a territory, but the acquisition is implicitly entailed in the comprehensive fact of the creation of a new international legal entity, which requires that three conditions be met: it must have its population, possess a territory and exercise the highest power. Debellation may also take place, meaning conquest and annexation of the entire territory of a state, which naturally leads to the liquidation of the latter as a subject of international law. The extent of territorial supremacy is seen to increase or, alternatively, decrease in both cases, i.e. when a state is created or liquidated. Still, these matters are so closely related to subjectivity that the granting or refusal of recognition pertain primarily to the question of subjectivity. Changes in territorial supremacy which occur in such circumstances remain entirely within the broader scope of international legal subjectivity. Recognition may also take place in such instances of territorial acquisitions in which the extent of the territorial supremacy of the states involved does change, but their legal personality is unaffected.[57] In fact, the legal per-

57 This is an issue which also concerns the questions of identity and continuity of states. Cf. K. Marek, *Identity and Continuity of States in Public International Law*, Geneva 1954, pp. 22–24, who argues that loss of territory has no essential impact on the identity of a state but—drawing on Guggenheim, *Lehrbuch des Völkerrechts*, vol. I, Basel 1948, p. 406—makes an exception for total or very substantial loss of territory.

sonality of the states involved is not altered in any of the widely known derivative modes of territorial acquisition, except for debellation.

It must therefore be concluded that the institution of recognition may operate in international legal practice on three planes:

1) Solely in relation to subjectivity—as a recognition of a state, a government, an insurgency and belligerency (through analogy to personal law)[58],
2) Solely in relation to changes in territorial supremacy—as a recognition of territorial acquisitions which nevertheless preserve the personality of the states involved (in analogy to real law),
3) Jointly on both planes—as a territorial change resulting in the liquidation or creation of the legal personality of a state.

One should add that debellation is largely questioned in the contemporary doctrine of international law and is deemed an unlawful act in the practice of many countries. Still, the issue requires a more extensive analysis, precisely from the standpoint of the recognition of territorial acquisitions, in which the recognition or non-recognition of unlawful acts plays a momentous role.

It seems, however, that the above deliberations provide grounds for the assumption that the recognition of territorial acquisitions is associated with unique legal issues, which warrant considering it separately from the institution of recognition construed in the light of subjectivity.[59]

The very notion of recognition is the common denominator which correlates the recognition of territorial acquisitions with the recognition of states, governments, etc. If one isolates recognition from the various contexts in which it is encountered in practice, it turns out that it is a uni-

58 The scope of subjectivity will also encompass recognition of a number of the so-called subjective rights of state, such as the right of legation of a particular state or other rights to which an international legal entity is entitled.

59 Consequently, it is doubtful that recognition of territorial acquisitions should be considered—in view of how international law is structured—as part of or in connection with the institution of recognition of states, governments etc. as it is approached by e.g. H. Lauterpacht, *Recognition…* and T.C. Chen, *The International Law…*, as well as a fair number of textbook authors.

lateral legal act which produces legal effects when a state formulates its position with respect to a situation. Defined in this manner, the act of recognition can subsume all possible forms and types of recognition, including so-called tacit recognition, *de facto* recognition etc. The already mentioned general definitions of recognition, formulated by Anzilotti, Charpentier and Verdross[60], exclusively emphasized the legal effects for a state resulting from recognition construed as a positive act, but failed to take into account the legal effects of a negative act, i.e. non-recognition or absence of recognition.

The legal effects of the act of recognition will of course vary, depending on the situation to which such an act pertains. One should expect different effects in terms of subjectivity[61], and still different ones with respect to the recognition of territorial acquisitions.

The questions associated with the legal effects of the recognition of territorial acquisitions, the circumstances in which this institution happens to occur, as well as the forms it assumes, all constitute an object of research which necessitates both theoretical analysis and confrontation with practical application on the part of states. All these issues are contained within the function of recognition of territorial acquisitions in contemporary international law. A study of this function requires detailed analysis of the role which recognition plays in conjunction with the modes of acquisition of territory in contemporary practice and the doctrine of international law. This inevitably involves a thorough inquiry into the significance of recognition in cases of territorial cession, adjudication, conquest, and prescription.[62]

60 Presented at the beginning of this chapter.

61 We leave aside the traditional contention between declarative and constitutive theory regarding legal effects of recognition for international legal subjectivity. Concerning that issue see B. Wiewióra, *Niemiecka Republika Demokratyczna jako podmiot prawa międzynarodowego*, Poznań 1961, esp. Chapter III.

62 Given our premises, the modes of the so-called original territorial acquisition is not included in the scope of our inquiry.

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SUMMARY

The Notion of the Recognition of Territorial Acquisition

The paper is an English translation of *Uznanie nabytków terytorialnych w prawie międzynarodowym* by Bolesław Wiewióra, published originally in Polish in 1965. The text is published as a part of a jubilee edition of the "Adam Mickiewicz University Law Review. 100th Anniversary of the Department of Public International Law" devoted to the achievements of the representatives of the Poznań studies on international law.

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Anna Michalska

Public Emergency Threatening the Life of the Nation[1]

Normative Dimension

The existence of a public emergency threatening the life of the nation is a condition stipulated by most human rights treaties which allows a State to avail itself of the power to derogate from some international obligations.

The European Convention on Human Rights allows States to derogate from some of the obligations under the Convention "in time of war or other public emergency threatening the life of the nation" (Article 15(1)). This clause was taken into consideration in the discussion of the International Covenant on Civil and Political Rights, with the United Kingdom being its strongest proponent. At the initial stages of its drafting, the clause drew criticism. On the one hand, suggestions could be heard which advocated dispensing with the derogation clause in favour of a general provision on allowable limitations on human rights, modelled on Article 29(2) of the Universal Declaration of Human Rights:

> In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of oth-

1 Translated from: A. Michalska, *Niebezpieczeństwo publiczne, które zagraża życiu narodu*, in: *Prawa człowieka w sytuacjach nadzwyczajnych, ze szczególnym uwzględnieniem prawa i praktyki polskiej*, red. T. Jasudowicz, Toruń 1997 by Tomasz Żebrowski and proofread by Stephen Dersley and Ryszard Reisner. The translation and proofreading were financed by the Ministry of Science and Higher Education under 848/2/P-DUN/2018.

> ers and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

On the other hand, suggestions were made that the derogation clause should be formulated as precisely as possible, so that States would be left with little discretion. In the Drafting Committee and Human Rights Commission, there were also opponents of any derogation clause, who argued that a treaty on human rights should not allow for a possibility to derogate from its obligations. Furthermore, animated discussions focused on the proposal to include in the derogation clause "war" or "natural disaster."[2] One of the arguments used in this case was that any mention of war in a human rights treaty could suggest that the UN accepted military conflicts. The Third Committee of the UN General Assembly was almost unanimous in its opinion that an international military conflict was a model case of "public emergency threatening the life of the nation." In the course of a discussion, an agreement was reached that the derogation clause also covered natural disasters.[3] Finally, Article 4(1) of the Covenant was drafted to read as follows: "In time of public emergency which threatens the life of the nation…".

In turn, the American Convention on Human Rights in its Article 27(1) says, "In time of war, public danger, or other emergency that threatens the independence or security of a State Party…". This wording clearly differs from that of the European Convention and the Covenant, so it is surprising that the authoritative juristic literature has shown little interest in the American solution. The international documents that shall be discussed below rarely refer to the American Convention, either, while defining "public emergency."

In Article 30, the European Social Charter allows for derogation from the obligations stipulated in it "in time of war of other public emer-

2 U.N. Doc.E/CN.4/SR.127.

3 For a broader discussion, see M. Bossuyt, *Guide to the "travaux préparatoires" of the International Covenant on Civil and Political Rights*, Dordrecht 1987.

gency threatening the life of the nation." The wording has been taken over *in extenso* from the European Convention, thus it can be reasonably expected that its interpretation made by the Commission and the Court of Human Rights will also be binding for the State Parties to the Charter. It is worth mentioning here that States have not availed themselves of this power so far, even when declaring a state of emergency and derogating from some obligations under the European Convention.

Derogation provisions referring to the clause "public emergency threatening the life of the nation" can be also found in OSCE documents. For instance, the Document of the Copenhagen Meeting (1990) contains the following clause "[…] any derogations from obligations relating to human rights and fundamental freedoms during a state of public emergency must remain strictly within the limits provided for by international law…" (Item 25). The Document of the Moscow Meeting (1991) says that:

> The participating States confirm that any derogation from obligations relating to human rights and fundamental freedoms during a state of public emergency must remain strictly within the limits provided for by international law […]. The participating States will endeavour to refrain from making derogations from those obligations from which, according to international conventions to which they are parties, derogation is possible under a state of public emergency (Items 28.6 & 28.7).

In the Document of the Moscow Meeting, we can also find an attempt to lay down the conditions for declaring a state of emergency which is "[…] justified only by the most exceptional and grave circumstances, consistent with the State's international obligations […]."

The "public emergency" clause not only excuses the derogation of some international obligations as in the international instruments quoted above. The 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment says, "No exceptional circum-

stances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture" (Article 2(2)).

On the regional level, this principle is laid down in the Document of the Copenhagen Meeting, in which the participating States stress that "no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture" (Item 16.3). Moreover, the Covenant and both regional Conventions list the ban on torture among the provisions that cannot be derogated from under any circumstances.

The phrase "public emergency threatening the life of the nation", as any general clause, is subject to various interpretations. To attempt to determine some universal meaning of this clause, it is necessary to take into account the practice of States, the position of international bodies overseeing the implementation of human rights treaties, and the authoritative juristic literature.

The Practice of States

Between 1985 and 1991, 80 States declared a state of emergency for a shorter or a longer period, which entailed the derogation from some international obligations in the sphere of human rights.[4] The States being parties to the Covenant explained the reasons for their decisions in notifications to the Secretary-General under Article 4(3). Thus, they interpreted the phrase "public emergency threatening the life of the nation." Here are some examples:

- In connection with public riots threatening the stability of institutions, safety of the population and their property, and the nor-

4 *Fifth revised annual report and list of States which, since 1 January 1985, have proclaimed, extended or terminated a state of emergency*, presented by Mr Leonardo Despouy, Special Rapporteur appointed pursuant to Economic and Social Council resolution 1985/37.E/CN.4/Sub.2/1992/Rev.1 (hereinafter: Despouy).

mal functioning of public services (notification by Algeria of 19.06.1991).

- In connection with mass assaults and devastation of shops, vandalism and the use of firearms, with such acts seriously threatening the effective exercise of human rights and fundamental freedoms by the whole population (notification by Argentina of 12.06.1989).
- For the purpose of maintaining the rule of law, constitutional system, democracy and public order as well as continuing economic reforms and safeguarding against the hyperinflation that begins to threaten seriously the life of the country (notification by Bolivia of 29.10.1985).
- In connection with serious political and social unrest, including hyperinflation that affects the entire country; the need to modernise the structure of the State; illegal and terrorist activities of the extreme left; the activities of mafias smuggling narcotics (notification by Bolivia of 28.10.1986).
- For the purpose of protecting the public order in connection with the activities of the extremist groups that attempt to destabilise the government by force (notification by Chile of 7.09.1976).
- In connection with the escalation of terrorism that has caused the death of many people, trespassed on both public and private property, and seriously disturbed the economy (notification by Chile of 14.10.1984).
- Because of the activities of armed groups that attempt to destabilise the constitutional system by causing public disturbances (notification by Columbia of 11.04.1984).
- Due to terrorist activities headed by former high-ranking servicemen supported by extremist groups (notification by Ecuador of 17.03.1986).
- In consequence of illegal calls for a national strike which may lead to acts of vandalism, assaults on people and their property, and may disturb peace in the State and the exercise of civil rights (notification by Ecuador of 28.10.1987).

- In connection with the danger of war, imminent danger of armed attacks, acts of terrorism as a result of which people perish (notification by Israel of 3.10.1991).
- In connection with the unjust, unlawful and immoral aggression by the United States against the Nicaraguan people and their revolutionary government. The Nicaraguan government points to the following circumstances: the presence of US forces in the border area, which poses the constant threat of a military intervention, the activity of illegal sabotage groups sponsored by the US government, a trade blockade and an economic crisis in the country, which causes a major deterioration of the living conditions of the whole population (notification by Nicaragua of 11.10.1985).
- In connection with violent clashes between demonstrators and police forces, and calls—by individuals and political groups—for acts of violence, causing human casualties and major damage to property. The emergency measures undertaken are aimed at restoring the rule of law and order, and the protection of the life, dignity and property of citizens and foreigners (notification by Panama of 11.06.1987).
- Because of the danger of a civil war, economic anarchy and the destabilisation of the State and social structures, for the purpose of protecting the supreme national interest (notification by Poland of 29.01.1982).
- Due to nationalistic demonstrations often accompanied by the use of firearms, which causes damage to State and private property and puts State institutions in danger (notification by the Russian Federation of 18.10.1988).
- Because of the activities of extremist groups which disturb the social order, increase hostility between nations, do not hesitate to mine roads, use firearms in populated areas and take hostages (notification by the Russian Federation of 17.01.1990).

The above examples of arguments used by States to justify their decisions to proclaim a state of emergency and derogate from human rights obligations are too weak a foundation to determine the meaning and scope of the phrase "public emergency threatening the life of the nation." This is due to the fact that the reasons for taking emergency measures vary greatly. Moreover, States rarely try to prove that events they invoke actually "threaten the life of the nation." This phrase sometimes merely serves the purpose of embellishing the notification document.

The Decisions of International Bodies

The Position of the Human Rights Committee

A. The General Comments

The General Comments adopted on 2 July 1991 are an attempt to interpret Article 4 of the Covenant and specify the obligations of States under it. The Committee stresses that only few States give reasons for derogating from human rights in their reports. Measures taken under Article 4 are exceptional and may be applied as long as a threat to the life of the nation prevails. The short and laconic General Comments are essentially a repetition, using a slightly different style, of the Covenant, Article 4. Our aim to specify the meaning of the phrase "public emergency threatening the life of the nation" is not furthered in any way by the Comments. They do not contribute any new elements to its normative construction.

B. Reports by States

The Committee's competence to examine the measures taken in the period of a state of emergency derives from Article 40(2) of the Covenant, which makes States report "difficulties affecting the implementation of the present Covenant." Adopted by the Committee, the "Guidelines" on the content and form of such reports do not specify any requirements

as to what information ought to be submitted in relation to Article 4. In practice, States do not submit detailed information on the application of Article 4. What they as a rule do instead is merely quote the notification submitted to the Secretary-General.

In the course of discussions of reports, Committee members asked the representatives of States about the political, social and economic circumstances or the natural disasters justifying the proclamation of a state of emergency. They also inquired about the meaning, in relation to the internal law of particular States, of such phrases as "public order", "public safety", "public security", "national security", "international terrorism", "subversion", etc. The Committee, however, did not make any attempt to define the criteria of "public emergency threatening the life of the nation." The few attempts at a more thorough discussion that did take place took on a political hue and ended in a fiasco. For instance, in relation to the report of the United Kingdom mentioned earlier, the Soviet member of the Committee had doubts if terrorist attacks confined to a relatively small territory constituted a "public emergency threatening the life of the nation." In reply, the British representative argued that the existence of such an emergency was obvious and invoked the ruling of the European Court of Human Rights (see below).

The general wording of the supervisory powers of the Committee confined the discussion on the application of Article 4 to questions asked by particular members and prevented any conclusion being reached. The most popular view was that the State was obliged "to ascertain whether there was justification for each and every derogation under that article."[5] However, Committee members did not study the reasons for a state of emergency given by particular States.

Indeed, it was the case that a state of emergency proclaimed pursuant to Article 4 of the Covenant was not studied by the Committee at all. The martial law declared in Poland in 1981 completely escaped the attention of the Committee, owing to the time limits for submitting

5 E.g. in relation to the report by the United Kingdom; A/34/40, p. 55.

periodic reports, which were fortunate for the government of People's Poland.

Beginning with April 1991 (41st Session), the Committee made it a practice to ask State Parties to submit urgently relevant information when human rights are threatened due to a state of emergency. Usually, States were given a three-month time limit for sending in explanations. Radical steps were taken by the Committee only in 1993, when during the 47th Session, Article 66 of its rules of procedure was amended by the addition of para. 2, reading as follows:

> Requests for submission of a report under article 40, paragraph 1 (b), of the Covenant may be made in accordance with the periodicity decided by the Committee or at any other time the Committee may deem appropriate. In the case of an exceptional situation when the Committee is not in session, a request may be made through the Chairperson, acting in consultation with the members of the Committee.

In the same year (during the 49th Session), the Committee decided that if the analysis of a report submitted by a State under Article 40 of the Covenant led to the conclusion that there was a "grave human rights situation", it could ask the Secretary-General to inform of the situation competent UN bodies, including the Security Council.[6]

C. Individual Complaints

Considering individual complaints, the Committee studied *ex officio*, if circumstances called for it, if a State complied with the requirements of Article 4 of the Covenant. The Committee many times expressed the view that:

6 *Report of the Human Rights Committee*, vol. I, G.A. Official Records, Forty-ninth Session, Supplement No. 40/A/49/40.

> […] the State party concerned is duty-bound to give a sufficiently detailed account of the relevant facts when it invokes article 4(1) of the Covenant in proceedings under the Optional Protocol […]. In order to assess whether a situation of the kind described in article 4(1) of the Covenant exists in the country concerned, it needs full and comprehensive information.[7]

In connection with complaints against Uruguay, its government referred to the emergency measures it undertook in the submitted explanations. However, the Committee consistently argued that the State was duty-bound "[…] to give sufficiently detailed information on the relevant facts to show that the situation of the kind described in article 4(1) of the Covenant exists in the country concerned." In addition, it asserted that the State "has not made any submission of fact or law to justify such derogation."[8]

As far as the procedure of considering individual complaints is concerned, the Committee's view is that the burden of proof for the existence of "a public emergency threatening the life of the nation" lies with the State. In the strongest criticisms, the Committee expressed the view that "the reasons given in the official notification are insufficient to justify the derogations from rights…" The Committee demanded detailed information on the reasons for proclaiming a state of emergency but it neither studied nor commented on it.

The Decisions of the European Commission and the Court of Human Rights

A. State complaints

State Parties to the European Convention took advantage of their right to derogate from human rights pursuant to Article 15, with some decisions

7 Cf. Silva vs. Uruguay, complaint no. 34/1978, Doc. A/36/40; S. de Montejo vs. Columbia, complaint no. 64/1979, Doc. A/36/40.

8 L. Weinberger Weisz vs. Uruguay, complaint no. 28/1978; L. Buffo Carballal vs. Uruguay, complaint no. 44/1979; D. Sallias de López vs. Uruguay, complaint no. 52/1979; Doc. A/36/40.

being contested by other States filing complaints. The positions taken by the Commission and Court were rather consistent on the question of the definition of "public emergency." Therefore, they shall be illustrated with only two examples.

In the case of Denmark, Norway, Sweden and the Netherlands vs. Greece, the government of the last-mentioned country argued that it was necessary to proclaim a state of emergency due to the following circumstances: communist threat, a crisis of constitutional bodies, and a crisis of public order. Specifying these arguments further, the Greek government claimed that communists active in the country and abroad conspired to carry out an armed coup and planned a takeover of power. To make matters worse, some other political parties collaborated with the communists, incessant cabinet reshuffles made it impossible to govern the country, continued strikes had brought the country to the verge of bankruptcy, and violent street demonstrations threatened the onset of anarchy. The Human Rights Commission found that the Greek government did not prove to a sufficient degree that the situation in their country corresponded to the above description. Thus, the Commission took the stance that the application of Article 15 depended on the prior finding if the values that are to be protected by derogation measures are indeed threatened. It is worthy of note that the Commission relied on witness testimonies, press reports and other information besides the explanations submitted by the Greek government.

In the case in question, the Commission opined that an "emergency that threatens the life of the nation" had to answer the following description:

- The emergency is imminent and serious,
- The consequences of the emergency affect the whole population,
- The organised life of the community of which the State is composed is under threat,
- The crisis or emergency must be exceptional, i.e. the ordinary measures or restrictions provided for in the Convention are plainly

inadequate to maintain public safety, order and the health of the population.[9]

The concept of "public emergency" was the subject of decisions by the Commission and Court in the case of Ireland vs. United Kingdom. The British government first and foremost invoked the extensive activity of paramilitary organisations in Northern Ireland. Both the Commission and the Court found that these circumstances constituted a "public emergency" within the meaning of Article 15 of the Convention.[10]

The procedure of hearing complaints filed by States is objective in nature, that is, its purpose is to protect the values proclaimed by the European Convention and not the rights or interests of parties. It follows that even when the complaining State does not question the existence of a public emergency in the State it levels charges against, the Strasbourg bodies conduct appropriate inquiries. The finding that a public emergency occurred is in principle the starting point for the evaluation whether the measures taken by a State complied with the Convention requirements. It must be realised that it is difficult to draw a clear line between these two stages because an international body, while evaluating measures taken by a State, does this keeping in mind the assessment of the gravity of a public emergency.[11]

B. Individual Complaints

The definition of a "public emergency threatening the life of the nation" was formulated in 1959 in connection with the Lawless Case. It was a precedent then and together with the definition adopted in the Greek case mentioned earlier, it is a benchmark for international overseeing bodies. In relation to the complaint of Lawless vs. Ireland, the Commission found that the country witnessed "an exceptional situation of crisis

9 The Greek Case (1969), *Report of the European Commission of Human Rights of 5 November 1969, Yearbook of the European Commission of Human Rights*, vol. XII, p. 72.

10 *Report of the European Commission of Human Rights* of 25 January 1976; *Judgment of the European Court of Human Rights* of 18 January 1978, Publications of E.C.H.R., A.25(1978), p. 78.

11 Cf. P. van Dijk, G.J.H van Hoof, *Theory and Practice of the European Convention on Human Rights*, Sec. Ed., Kluwer, Deventer–Boston 1990.

or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed."[12] This finding was affirmed by the Court, who in its opinion found that the Irish government had had the following grounds to conclude that a public emergency threatening the life of the nation existed. Firstly, the existence in the territory of the Republic of Ireland of a secret army engaged in unconstitutional activities and using violence to attain its purposes; secondly, the fact that this army was also operating outside the territory of the State, thus seriously jeopardising the relations of the Republic of Ireland with its neighbour; thirdly, the steady and alarming increase in terrorist activities immediately prior to the proclamation of the state of emergency.[13]

From the decisions of the Strasbourg bodies, the clear principle can be deduced that State Parties are empowered to, and responsible for, judging if a specific situation "threatens the life of the nation." Article 15 of the Convention gives some discretion, which, however, may not be identified with full power. The Court and Commission are, under Article 19 of the Convention, responsible for ensuring that States observe the engagements they have undertaken. These bodies investigate if States "[…] have gone beyond the extent strictly required by the exigencies of the crisis." In other words, the margin of discretion is subject to international oversight, including the establishment of the existence of a public emergency.[14]

The Position of the American Human Rights Commission

In a resolution adopted in 1968, the Commission expressed the view that the suspension of constitutional guarantees or the proclamation of

12 *Report of the European Commission of Human Rights* of 19 December 1959, *Yearbook…*, vol. VII, pp. 472–474.

13 European Court of Human Rights, Judgment of 1 July 1961, Publications E.C.H.R. A.3 (1961), pp. 57–59.

14 Cf. Handyside Case, Judgment of 18 January 1978, *Publications…* A.25(1978), p. 78; and the case of Ireland vs. United Kingdom.

a state of emergency was admissible in a democratic system of government "when adopted in the case of war or other serious public emergency threatening the life of the nation or the security of the State."[15] Adopted a year later, the Convention uses in its Article 27 a slightly different wording (see Item I above) from which the phrase "threatening the life of the nation" disappeared. The reasons for the discrepancy are difficult to indicate, but it should be stressed that in the procedure of international oversight, the Commission invoked both instruments.

The quoted resolution authorises the Commission to investigate whether exceptional measures were taken in accordance with the constitution (letter a), and whether they are proportional to the exigencies of the situation (letter b). However, no mention is made of the powers of the Commission to assess whether a state of war or another serious public emergency exists in a State (letter c). Nevertheless, the Commission has made pronouncements on this matter several times. Here are the examples.

In the Report on the Situation of Human Rights in Chile, the Commission acknowledged that "[…] although the situation in the country is not completely normal, it is far from a state of war. Consequently, there are no reasons for a further suspension of constitutional guarantees." In the Report on the situation in Paraguay, the Commission did not question the necessity or advisability of the proclamation of a state of emergency but accused its government of not indicating the period for which human rights were derogated from. In the Report on Nicaragua, the Commission ascertained that successive decisions to extend the state of emergency made it "[…] permanent in fact, although the situation in the country does not justify such measures."[16]

In the Report on Colombia, the Commission took the view that "proclamation of a state of siege was justified by the circumstances, but it contravened Article 27 of the American Convention nonetheless."

15 *Resolution on the Protection of Human Rights in Connection with the Suspension of Constitutional Guarantees or the State of Siege*, OEA/Ser.L/V/II. 19 Doc. 32.

16 Cf. T. Buergenthal, R. Norris, D. Shelton, *Protecting Human Rights in the Americas. Selected Problems*, N.P. Engel, Kehl-Strasbourg 1982, p. 212.

The American Commission was unable to define more closely the concept of "public emergency threatening the life of the nation", because it is not found in the Convention. Instead, the Commission judged if the situation in a country threatened the values listed in Article 27 of the American Convention. In the Report for the OAS General Assembly drawn up in 1980–1981, the Commission recommended that Member States resort to derogation from human rights in truly exceptional situations.[17] Analogous resolutions were adopted later as well.

The Position of the UN Human Rights Commission

In 1977, the Sub-commission on Prevention of Discrimination and Protection of Minorities decided to monitor continuously the impact of states of emergency on human rights. Nicole Questiaux submitted the first report on this question in 1982.[18] A year later, the Sub-Committee decided to include in its annual agenda the item "Realisation of the right to derogation established in Article 4 of the Covenant on Civil and Political Rights, and human rights violations."

Questiaux distinguished three types of situations, which she classified as a "public emergency threatening the life of the nation."

First, a political crisis involving an international military conflict, a war for national independence, a military conflict of a non-international character, riots or internal tensions. The humanitarian law applies to the first two situations.

Second, *force majeure* such as an earthquake, flood, cyclone, volcano eruption, etc. Such events may justify derogation from human rights,

17 The Report was drawn up in connection with the complaint filed by Pedro P. Camargo and explanations submitted by the State concerned. Camargo also filed a complaint with the Human Rights Committee, making very similar allegations. The view of the Committee was similar (not identical, though) to the position of the American Commission.

18 *Question of the Human Rights of Persons Subjected to any Form of Detention or Imprisonment: Study of the implication for human rights of recent developments concerning situations known as states of siege or emergency*, U.N. Doc. E/CN.4/Sub.2/1982/15, hereinafter quoted as "Questiaux".

but only when the events are rare and unusual in a given area. It is worth mentioning in this context that Erica-Irene Daes (also a Rapporteur of the Human Rights Commission) believed that *force majeure* could justify a restriction of certain human rights but not their derogation.[19]

Third, an economic crisis, including chronic economic underdevelopment. In the course of discussion on the draft Covenant, views were expressed that such circumstances could not justify the application of Article 4.

A "state of emergency", which in national law is sometimes referred to as "state of siege, of alert, of prevention, of internal war, or as martial law and special powers, is treated by Questiaux as a "state of law being a consequence of exceptional circumstances." She defines the latter as "a crisis situation affecting the population as a whole and constituting a threat to the organised existence of the community which forms the basis of the State."

The Ad Hoc Working Group of the Human Rights Commission that investigated human rights violations in Chile in the light of Article 4 of the Covenant "has not found, so far, any serious elements attesting to the existence of danger of a degree of internal disturbance which could have motivated the extensive suspension of constitutional guarantees that has occurred in Chile" (170).[20] It was this report among others that was a starting point for the discussion of severity, which shall be discussed in section IV.

Authoritative Juristic Literature

In 1984, a group of 31 outstanding experts on international law adopted a document entitled "The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political

19 *Study of the individual's duties to the community and the limitations on human rights and freedoms under article 29 of the Universal Declaration of Human Rights,* E/CN.4/Sub.2/432/Rev.1.

20 *Report of the Ad Hoc Working Group on the Situation of Human Rights in Chile*, U.N. Doc. A/10285/1975.

Rights", popularly known as the "Siracusa Principles", in reference to the conference venue. Item II, letters A & B, of the document analyses the meaning and scope of application of the clause "public emergency threatening the life of the nation." It reads as follows:

> 39. A state party may take measures derogating from its obligations under the International Covenant on Civil and Political Rights pursuant to Article 4 (hereinafter called "derogation measures") only when faced with a situation of exceptional and actual or imminent danger which threatens the life of the nation. A threat to the life of the nation is one that: (a) affects the whole of the population and either the whole or part of the territory of the state; and (b) threatens the physical integrity of the population, the political independence or the territorial integrity of the state or the existence or basic functioning of institutions indispensable to ensure and protect the rights recognized in the Covenant.
> 40. Internal conflict and unrest that do not constitute a grave and imminent threat to the life of the nation cannot justify derogations under Article 4.
> 41. Economic difficulties *per se* cannot justify derogation measures.[21]

The Siracusa Principles strongly emphasise two circumstances. First, the ultimate purpose of derogation from obligations is the protection of human rights. Second, only serious disturbances of social and political life may be classified as a threat to the life of the nation. Hence, these proposals go further than the linguistic interpretation of Article 4 of the Covenant and Article 15 of the European Convention allows. They meet halfway, however, the interpretation put on these articles by the Strasbourg bodies. Furthermore, the Principles impose unequivocally, albeit implicitly, a prohibition against derogation from human rights

21 *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, https://www.icj.org/wp-content/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf.

obligations for preventive purposes. In other words, a threat must be imminent for derogation to take place.

The Siracusa Principles do not provide a typology of the situations that may be recognised in good faith as a threat to the life of the nation. What they underscore, as does the Questiaux report, is the principle that economic difficulties cannot justify derogation from human rights because, as a rule, they do not satisfy the requirement of "exceptionality."[22]

An attempt to clarify the meaning of the phrase "public emergency threatening the life of the nation" was made by J. F. Hartman, one of the authors of the Siracusa Principles.[23] First, Article 4 of the Covenant should be invoked only in extraordinary and extreme states and not in situations of chronic political or social tension. Second, an emergency must threaten the population as a whole and equally, and also the functioning of democratic institutions. Third, an emergency must be imminent and serious, not only potential or barely noticeable.

As examples of this understanding of a public emergency, Hartman gives military conflicts, internal riots, natural and nuclear disasters, if their effects seriously destabilise social life. Further, a large-scale economic crisis or chronic famine and underdevelopment, causing social or political unrest, may justify derogation from obligations in exceptional cases.

When interpreting Article 4 of the Covenant, faced with rather general and laconic decisions of the Human Rights Committee, the juristic literature turns to the accumulated decisions of the Strasbourg bodies. M. Nowak proposes the following criteria for a "public emergency": it must be real, direct, affect the population as a whole, prevent organised social life from continuing, while limitations provided for in specific regulations are inadequate.[24]

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22 Cf. D. O'Donell, *Commentary by the Rapporteur on Derogation, Human Rights…*, "Human Rights Quarterly" 1985, vol. 7, no. 1, pp. 23–27.

23 *Working Paper for the Committee of Experts on the Article 4 Derogation Provision, Human Rights*…, pp. 89–91.

24 *UN Covenant on Civil and Political Rights, CCPR Commentary*, N.P. Engel, Kehl-Strasbourg 1993, p. 78 ff.

Moreover, the juristic literature discusses the geographic scope, degree of severity and time in which an emergency occurs. Hartman believes that an emergency having a limited geographic scope (raids by terrorist groups across the border) justifies derogation from obligations, provided that it affects the operation of State institutions. He clearly alludes to the position of the European Human Rights Commission which in the Lawless Case found that "armed raids by the IRA across the border jeopardise the external relations of Ireland and, consequently, the life of the nation." However, industrial unrest of a local character does not justify the declaration of a state of emergency in the whole country.[25]

The severity of an emergency must be "exceptional" indeed in order to avoid the situation Questiaux calls a "permanent and institutionalised" state of emergency. Different political views shared by a part of society and political unrest must be—at least to some degree—tolerated in a democratic State. Competent bodies may limit particular rights on account of State security or public order, but derogation serves only "to protect the life of the nation."

The clause "public emergency threatening the life of the nation" is functionally tied to other conditions for derogating from human rights, which are stipulated in relevant regulations. The juristic literature and international bodies are chiefly interested in the scope of derogation and the principle of the proportionality of measures.[26]

Conclusion

The study of international instruments, decisions and the authoritative juristic literature leads to the conclusion that a public emergency threat-

25 The Chilean government declared a state of emergency in response to the "lunch-box campaign" conducted by workers in the El Loa province. This decision was strongly criticised in: *Report of the Ad Hoc Working Group.*..., U.N. Doc. E/CN.4/1210 (1979).

26 Cf. International Commission of Jurists, *States of Emergency. Their Impact on Human Rights* (1983); *Rule of Law in a State of Emergency* (1988); D. McGoldrick, *The Human Rights Committee*, Oxford 1991.

ening the life of the nation may have a military, social, political, economic or finally ecological character. Moreover, an emergency may be external or internal. It seems, however, that the assessment of whether a public emergency exists should be based more on its severity than on its character. In other words, the severity of a threat, not its kind, should be considered a reason for derogation from international obligations. In this respect, however, one can hardly expect international bodies to work out tolerably uniform benchmarks. A factor that in one State is considered a major threat to the life of the nation may be considered a minor occurrence in another State, with the assessment always being made by those who govern, not the governed.

In October 1996, the Polish Sejm debated the motion to bring to trial before the Tribunal of State persons responsible for proclaiming martial law in Poland on 13 December 1981. The report of the Constitutional Accountability Committee argued that "the then authorities had compelling reasons to be afraid of a foreign intervention and moreover, the threat consisted in "activities of the opposition attempting to change the system of government and the possibility of the eruption of street fighting due to demonstrations announced by the Solidarity." The well-known *Gazeta Wyborcza* columnist Ewa Milewicz in her commentary on the report wrote, "It is not known whether the proclamation of martial law was a prohibited act. This matter could not be decided by ruling coalition deputies, members of the Sejm Constitutional Accountability Committee." Let these words be the conclusion to the present article.

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SUMMARY

Public Emergency Threatening the Life of the Nation

The paper is an English translation of *Niebezpieczeństwo publiczne, które zagraża życiu narodu* by Anna Michalska, published originally in Polish in *Prawa człowieka w sytuacjach nadzwyczajnych, ze szczególnym uwzględnieniem prawa i praktyki polskiej* in 1997. The text is published as a part of a jubilee edition of the "Adam Mickiewicz University Law Review. 100th Anniversary of the Department of Public International Law" devoted to the achievements of the representatives of the Poznań studies on international law.

Keywords: public international law, human rights law, public emergency threatening the life of the nation.

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Jan Sandorski

The Invalidity of International Treaties and *Jus Cogens*[1]

The Place of Conflict with Jus Cogens Among the Causes of the Invalidity of International Treaties

A conflict with a norm of *juris cogentis* ranks high among the causes of the invalidity of international treaties. If international law norms can be arranged in a hierarchy at all, it can be argued that a breach of a higher-order norm by a treaty will rank high among the causes of invalidity. When the causes of absolute invalidity are compared, i.e. a conflict with *jus cogens* and coercion, it can be concluded that a treaty made under coercion will be invalid by reason of the prohibition on the use of force, which is the least questioned norm of *juris cogentis* today. However, it is not only the prohibition on the use of force that is included in the peremptory norms of general international law. The scope of the norm providing for the invalidity of treaties in conflict with *jus cogens* is thus broader than that of norms on coercion. Had the Vienna Convention left out the provisions on coercion, treaties made under coercion would have been invalid regardless, since they breached a peremptory norm. Hence, it can be justifiably said that in the hierarchy of the causes of invalidity, a conflict with *jus cogens* occupies a principal place, reflecting the special position of the norms of *juris cogentis* among the norms of contemporary international law.

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1 Translated from: J. Sandorski, *Nieważność umów międzynarodowych*, Poznań 1978 by Tomasz Żebrowski and proofread by Stephen Dersley and Ryszard Reisner. The translation and proofreading were financed by the Ministry of Science and Higher Education under 848/2/P-DUN/2018.

The special position of a conflict with *jus cogens* among the causes of invalidity is reflected not only in Article 53 of the Vienna Convention, which is specifically devoted to it, but also in the provisions on the separability of treaty provisions (Article 44), loss of a right to invoke a ground for invalidating a treaty (Article 45), and the consequences of a treaty's invalidity (Articles 69 and 71).

The question of the separability of international treaty provisions was settled by adopting the rule of the inseparability of treaties in the case of their invalidity. An exception was made to the rule in order to cover the situations where the cause of invalidity related solely to particular clauses. They will be held to be invalid if they can be separated from the remainder of the treaty, if their acceptance was not an essential basis of the consent of the other party, or if parties to be bound by the treaty as a whole and the continued performance of the remainder of the treaty would not be unjust. It follows from Article 44(5), however, that the principle of separability does not apply to treaties concluded under coercion and others remaining in conflict with *jus cogens*. The adoption of this clause ran into strong opposition from the Finnish delegation to the Vienna Conference. It was headed by a professor of international law, Erik Castrén, who emphasised the novelty and practical usability of the principle of separability and demanded that it be extended to treaties in conflict with *jus cogens* as well. The Finnish delegate argued that "*Jus cogens* was itself a new principle and some writers and governments seemed to be opposed to its introduction in the international sphere."[2] This stance met with a rejoinder from the Polish delegate, Andrzej Makarewicz, who said that the rules of *jus cogens* were so fundamentally important that any conflict of a treaty with those rules was dangerous and inadvisable.[3] At the meetings of the Committee of the Whole, a similar stance was adopted by L. Koulichev (Bulgaria), F. Alvarez Tabio (Cuba) and K. Rattray (Jamaica)[4], with the

2 United Nations Conference on the Law of Treaties, p. 228. Hereinafter: UNCLT
3 Ibidem, p. 236.
4 UNCLT 1969, pp. 75–76.

Finnish amendment being rejected by 66 votes to 30, with 9 abstentions. At every opportunity, Erik Castrén repeated the argument of the impracticality of the solution proposed by the International Law Commission, expecting that he would primarily convince the practitioners, who outnumbered jurists at the conference. The delegates of a majority of States, however, thought it was right to underscore the special significance of incompatibility with *jus cogens* and, therefore, voted down the Finnish amendment. Hence, both coercion and a conflict with *jus cogens* were recognised as grounds for invalidity, making a treaty void as a whole, and thus inseparable.

Moreover, the importance attached to *jus cogens* in the Vienna Convention is attested by the exclusion of Article 53 from the provision on the loss of a right to invoke a ground for invalidating a treaty. Article 45 of the Convention admits revalidation only when the State has either expressly agreed to consider a treaty valid, or by reason of its conduct the State must be considered as having acquiesced in the validity of the treaty. Article 45 has made use of an *estoppel in pais* (acquiescence). In international relations, the estoppel is justified by the principle of good faith. At the Vienna Conference, its usability for the law of treaties was questioned by F. Alvarez Tabio (Cuba). He believed that the invalidity *ab initio* should dominate in the Convention.[5] A radically different stance was taken by the Swiss delegate, R.L. Bindschedler, who demanded that the *estoppel in pais* be extended to treaties concluded under coercion as well. He maintained that the law of treaties, as no other branch of international law, was closely related to internal law and developed on the basis of civil law. Therefore, with respect to the problem referred to in Article 45, the experience of the latter ought to be taken advantage of. The *estoppel in pais* with regard to international treaties is supported—in his opinion—by the principles of effectiveness, good faith, and the stability of international relations.[6] For this reason,

5 Ibidem, p. 79.
6 Ibidem, p. 80.

even if a treaty has been concluded under coercion, which has relented after some time, there are no reasons why the coerced State could not give its consent to the performance of a treaty.

R.L. Bindschedler's pragmatism did not go as far as to attack in a similar manner the significance of a conflict with *jus cogens* for the invalidity of an international treaty *ab initio*. Contrary to the opinion of the Swiss delegate, at the meetings of the Committee of the Whole, arguments were put forward for deleting that part of Article 45 that concerned implied revalidation. This was the purpose of a Venezuelan amendment extensively supported by Ramón Carmona.[7] However, it was rejected, with the socialist countries abstaining. Article 45 was adopted by the vast majority of votes (84 States voting in favour). Despite taking opposite stances, neither side questioned the special role of incompatibility with *jus cogens* and agreed that it should be maintained as a ground for absolute invalidity.

The provisions of the Vienna Convention on the consequences of the invalidity of treaties (Part V, Section 5) highlighted the conflict with *jus cogens* by devoting a separate article to it (Article 71). The consequences of invalidity were scrutinised by the third rapporteur of the International Law Commission, Sir Gerald Fitzmaurice, who wrote that a conflict with *jus cogens* merely barred one party from demanding from the other party that it fulfil its obligations under a treaty.[8] The International Law Commission went much further, by specifying the consequences of invalidity and a termination of a treaty incompatible with *jus cogens* in a separate article in its 1966 draft, and stressing in a commentary that invalidity due to this cause had to be considered a special case of invalidity.[9] The special nature of invalidity due to a conflict with *jus cogens* follows from—in the opinion of the Commission—the fact that unlike other causes, whose effect is the restoration of a situation in the

7 Ibidem, p. 78.

8 Yearbook of International Law Comission, vol. II, p. 25 – the third report by Gerald Fitzmaurice. Hereinafter: YILC

9 Report of International Law Comission 1966, p. 93. Hereinafter: RILC.

mutual relations between the parties which would have existed, had the treaty not been concluded, in the case of a conflict of the treaty with *jus cogens*, the parties are bound to bring their relations to agreement with a peremptory norm of general international law. Similarly, a special case of termination and at the same time of invalidity involved, in the opinion of the Commission, the emergence of a new norm of *jus cogens* with which a previously concluded treaty was in conflict. Consequently, it was held that in this case invalidity did not reach *ad initium* but only to the moment when a new norm of a peremptory nature emerged. The position of the Commission was accepted by the Vienna Conference, by 87 votes to 5, with 12 abstentions. The British delegate, I.M. Sinclair, giving reasons why his delegation abstained in the voting, returned to the question of the separability of treaty provisions and charged that Article 71 of the Convention did not provide for the situation where some clauses of a treaty that was in conflict with *jus cogens* did not share this characteristic.[10] The delegation of the FRG concurred with these reasons.[11] In the opinion of the vast majority of Vienna Conference participants, however, the fundamental significance of *jus cogens* for international law called for giving special prominence to the effects of a conflict with peremptory norms.

A conflict with *jus cogens*, in agreement with the will of the majority of States attending the Vienna Conference, was recognised, like coercion, as a cause of absolute invalidity, making any treaty affected by it automatically void, i.e. not only when one of the parties alleges its invalidity. The provisions of such a treaty are inseparable and cannot be revalidated. The obligations of the parties that have concluded a treaty that is incompatible with *jus cogens* are more extensive than those in the wake of invalidity due to other causes. When such causes are arranged in a hierarchy, it is observed that within absolute invalidity, a conflict with *jus cogens* ranks higher than coercion, because the prohibition on

10 UNCLT 1969, p. 127.
11 Ibidem.

the use of force is part and parcel of contemporary peremptory international law. Paraphrasing a well-known legal maxim, one can say that *confligere cum iure cogente est regina nullitatis.*

The Origins and Concept of Jus Cogens as Viewed by International Law Studies

The conflict with *jus cogens* as defined in the 1969 Vienna Convention is a certain novelty whose highlighting makes us take a closer look at the role of *jus cogens* in contemporary international law. In its context, the international legal order is frequently mentioned and seen as crowned by the principles laid down in the UN Charter.[12]

Today, views questioning the existence of *jus cogens* are rare, but if they are expressed[13] at all they seem to derive from the idea of full freedom of contract. Hence, they argue that it is pointless to transfer the invalidity criteria characteristic of internal law to the sphere of international law that lacks the highest authority capable of imposing certain standards of international justice and morality on States.[14]

The opinions questioning the existence of *jus cogens* show clear traces of positivist ideas. Legal positivism developed in the heat of struggle against the ideas of natural law ideas and dominated jurisprudence in the second half of the 19th century. The common denominator of positivist ideas was recognising as law only the norms that had been enacted in one form or the other by a sovereign state organisation (so-called positive law). It was considered merely accidental whether such norms corresponded to some systems of moral, religious or social norms.[15] Karl Magnus Bergbohm argued that the law enacted by

12 Cf. *Zarys prawa międzynarodowego publicznego*, ed. M. Muszkat, vol. II, Warszawa 1956, p. 113; G.I. Tunkin, *Zagadnienia teorii prawa międzynarodowego*, Warszawa 1964, p. 151 ff; S.E. Nahlik, *Kodeks prawa traktatów*, Warszawa 1976, p. 387.

13 E.g. in the verbal note of Luxembourg of 23 Oct. 1964. *Law of Treaties. Comments by Governments* – A/CN.4/175, pp. 99–100.

14 Ibidem, p. 100.

15 H. Olszewski, *Historia dokryn politycznych i prawnych*, Warszawa–Poznań 1973, p. 306.

States was set above both citizens and the State, which, however, did not lose the ability to change the norms it had enacted.[16] With regard to international law, this denied the existence of peremptory norms and, thus, gave full freedom to conclude international treaties. It was limited only by a prohibition on their conflicting with obligations towards other States contracted earlier.[17] Integral positivism in a pure form, however, did not dominate long in the theory of international law. As early as the late 19th century, Johann C. Bluntschli wrote that treaties breaching universally recognised human rights or the peremptory norms of international law were void.[18] Approaching *jus cogens* with great caution, Hans Kelsen did not deny its existence, but stressed that international law studies could not name the universal peremptory norms whose application could not be precluded by concluding a treaty.[19]

Recently, it seems that views denying the existence of *jus cogens* in international law have been revived out of sheer spite for, and in a negative response, to the unanimous position taken by the International Law Commission. When discussing the law of international treaties, it adamantly argued for introducing the conflict with *jus cogens* to the convention codifying this law.

The criticism levelled at the International Law Commission revolved around a concern about the binding force of treaties, which could be undermined by alleging that a treaty was incompatible with *jus cogens*. This concern was made specific by Georg Schwarzenberger, who claimed that the international law governing the international community was not cognisant of any norms of *juris cogentis*.[20] He analysed customary law, the basic principles of law and international treaties by examining the seven fundamental principles of international law, i.e. sovereignty, good faith, recognition,

16 In the work *Jurisprudenz und Rechtsphilosophie* 1892, quoted after: ibidem, p. 308.

17 This view was propounded by D.D. Field, *Outline of an International Code*, New York 1872.

18 J.C. Bluntschli, *Das moderne Völkerrecht der zivilisierten Staaten, als Rechtsbuch dargestellt*, Nördlingen 1872, p. 410.

19 H. Kelsen, *Principles of International Law*, New York 1952, pp. 322–323.

20 G. Schwarzenberger, *International Ius Cogens?*, "Texas Law Review" 1965, p. 476.

free expression of will, international responsibility, freedom of the seas, and self-defence. Georg Schwarzenberger concluded that there was nothing to justify the view that peremptory norms existed. He also claimed that the principle adopted by the International Law Commission enabled the parties, depending on particular interests, to undermine the binding force of a treaty by reason of its alleged conflict with peremptory norms. Incompatibility with *jus cogens*, if it was alleged by one of the parties, also allowed third States to morally condemn a treaty that had not been concluded by them or applied to them. Due to the absence of the obligatory international judiciary, a State, alleging that a treaty was in conflict with *jus cogens*, might attempt, by way of a unilateral declaration, to free itself from unfavourable international obligations. Taking all this into consideration, Schwarzenberger gainsaid the principle adopted by the International Law Commission, arguing that it could be used, on an equal level with the *rebus sic standibus* clause, to undermine contracted obligations.[21]

Angelo Piero Sereni has also questioned the existence of *jus cogens*, with similar arguments.[22] He has denied the existence of norms that could allow one to speak of the morality of international law subjects. Following from this, Sereni concludes that immoral acts are not invalid, because it is difficult to prove their immorality. He maintains that the principle of free negotiations by the parties plays a crucial role in international law, while requirements of a moral and social nature, so often taken into consideration in internal law, are forced into the background and have little impact on the conduct of States.

Before specifying the norms that international law studies and practice have considered peremptory, it is necessary to explain the concept of *jus cogens*; especially as its proponents have outnumbered its opponents. This fact is reflected in the 1969 Vienna Convention. To define this concept is by no means easy, for many reasons. The very origin of *jus cogens* gives rise to many doubts, while its spelling variants (*ius*

21 Ibidem, p. 478.

22 A.P. Sereni, *Diritto internazionale*, vol. III, Milano 1962, p. 1307.

or *jus*?) have become a symbol of the uncertainties related to the legal phenomenon behind this name.

Both the conception and concept of *jus cogens* derive from sources that cannot be precisely identified. The concept was not alien to Roman law, but the usual term for it was *jus publicum*, which referred not only to the law enacted by the State, but also the law that could not be derogated from by way of contract.[23] Thus, *jus publicum* resembled contemporary *jus cogens*. At this juncture, it must be noted that the term *jus cogens* had not been used in any legal text until the 19th century. This fact comes as a great surprise, because the idea of law peremptorily binding the parties to a contract had been known to the theory and philosophy of law for a long time.

The most familiar example of a theoretical conception being based on *jus cogens* is the doctrine of natural law. At the Vienna Conference, the delegate of Monaco, J.Ch. Rey, pointed out that the draft of Article 50 drew on natural law.[24] Can this charge be considered as detracting from the conception submitted by the International Law Commission and does the conception indeed strongly resemble the doctrine of the naturalists?

Having its origins in Aristotelian philosophy, the conception of natural law developed in the 17th century thanks to the writings of two outstanding jurists and philosophers: Hugo Grotius and Samuel Pufendorf. Both worked on the assumption that natural law rested on the precepts of reason which tells us that a certain act is morally wrong or morally necessary. Natural law is universal and timeless, comprising four fundamental principles: the duty not to trespass upon somebody else's property, the duty to compensate for damage, *pacta sunt servanda*, and the duty to suffer punishment for committed offences. Natural law was extended by its proponents to cover international relations, by claiming that a just war could be waged only in defence of threatened natural

23 V. Kaser, *Das römische Privatrecht*, 1955, pp. 174–175.
24 UNCLT 1968, p. 324.

rights. Under them, all States enjoy an equal right to avail themselves of the seas. The principles following from natural law cannot be changed, since the nature of man cannot be changed. Therefore, the principles of international relations could be called international *jus cogens*. In this context, one can observe that the International Law Commission departed from the classic view of *jus cogens* since it did not assume that *jus cogens* was timeless and immutable. After all, in Article 50 of the 1966 draft, it stipulated that *jus cogens* could be modified only by a subsequent norm having the same character.[25]

One can hardly concur with the view that *jus cogens* has been introduced into international law by mechanically transposing it from internal law. The Turkish delegate to the Vienna Conference, Talât Miras, expressly charged that the International Law Commission had borrowed almost all the grounds of invalidity from civil law, including conflict with *jus cogens*.[26] He argued that the introduction of the concept of *jus cogens* to international law without ensuring to it guarantees provided by the legislator in internal relations of the State, opened the door to all kinds of abuse. At the same time, this was an attempt to establish a hierarchy of norms, relying on the concept of public policy (*ordre public*), which is unjustifiable in international law. The charges made by the Turkish delegate call for a brief description of the position of *jus cogens* in internal law.

Both in international and internal law, the term *jus cogens*is very rarely used. In fact, the 1969 Vienna Convention is the first multilateral treaty to use this term. With respect to internal law, the term "public policy" is much more often used. In the 1929 judgment on Serbian and Brazilian loans, the Permanent Court of International Justice referred to the term *jus cogens* and stressed that "its definition in any particular country is largely dependent on the opinion prevailing at any given time in such country itself."[27] In this way, the Court drew attention to the rela-

25 RILC 1966, p. 73 – arguments can be found in the commentary on pp. 76–77.
26 UNCLT 1968, p. 300.
27 Permanent Court of International Justice, 1929, series A, no. 20/21, p. 46.

tivity of the concept in various systems of internal law. Nevertheless, keeping in mind the differences between political systems, it is possible to determine the most important characteristics of *jus cogens*, which form a common denominator for many States.

After finding that *jus cogens* is usually identified with public policy, it must be observed that it is widely believed that the subjects of law must not disregard it. The purpose of public policy is the protection of the fundamental interests of the State and society as well as obedience to the principal laws underpinning the economic and social systems of a given State. The chief task of any legal system is the protection of the interests of society, considering the interests of individuals and the protection of the interests of individuals in their mutual relations. Thus, public policy is based on the subordination of civil-law relations to the elementary needs of society as a whole. This forces the legislator to restrict the will of the subjects of law. Their failure to respect the principles and norms of public policy makes their acts void. Public policy in internal law is, therefore, a concept which is moulded to suit the interests of the ruling class in the State and whose application restricts the autonomy of the will of the subject of law for the sake of the supreme interests of society as a whole.[28]

The socialist literature on this issue stresses that legal norms are not the only rules of conduct holding in relations among people. Accord-

28 The international equivalent of this concept is the public interest of the international community. It is not unambiguously defined in international law studies, though. International practice shows that the public interest of the international community is best seen when there is a *res communis* in international relations. Norms protecting this interest include space law norms that hold outer space and heavenly bodies should be free from appropriation by States capable of necessary space penetration. A prohibition on outer space appropriation cannot be imposed by the agreement of several States, ones that are the most active in space exploration. Cf. C.W. Jenks, *Space Law*, London 1965, pp. 200–201. This is an example of subordinating States' freedom of action to peremptory law on account of the interest of all the members of the international community. International practice shows that States do not intend to derogate from the prohibition on appropriation even when a heavenly body has been explored directly by man and not an automatic device sent to outer space from the Earth. There is no doubt that new norms of *juris cogentis* will emerge in the future to protect the interests of the human civilisation in pace with advances in technology and transport (e.g. atomic energy, environment protection).

ing to Marxist doctrine, both legal norms and norms of morality are rules of conduct, that is, one of the forms of social consciousness following from the material conditions of social life. The relationship between legal and moral norms has a special significance for understanding such a general concept as the principles of community life. The principles set limits on the exercise of rights following from legal norms and stipulate the invalidity of any act-in-law found to contravene these principles. Hence, they can be called principles determining the mutual relations of people under the conditions of socialist society, having been derived from the demands of socialist morality.[29] They are not, however, identical with moral rules, because they are not general but specific, and are tied to particular forms of social relations.[30] It is in them that one should look for the origins of the legal principles characteristic for socialist legal relations (e.g. principle of brotherly help and cooperation).[31]

It appears that—*per analogiam*—*jus cogens* should not be identified with the rules of international morality. The question of international morality has given rise to serious controversies in international law studies for a long time. The absence of any definition of this concept has served many a time as a pretext to abuse it in situations where a State was determined to void a treaty. German law studies used arguments based on international morality to undermine the binding force of the Versailles Treaty in the interwar period. They were countered by Hersch Lauterpacht, who suggested that an impartial international organ should decide whether an international treaty was moral. Any authoritative and unilateral voiding of a treaty due to its alleged conflict with international morality must be considered inadmissible.[32]

29 Cf. D. Gienkin, *Sovetskoye grazhdanskoye pravo*, vol. I, Moskva 1950, p. 87.

30 Cf. A. Wolter, *Prawo cywilne*, Warszawa 1963, p. 64.

31 On the principle of mutual brotherly help, see J. Sandorski, *RWPG – forma prawna integracji gospodarczej państw socjalistycznych*, Poznań 1977, pp. 72–73.

32 H. Lauterpacht, *Régles générales du droit de la paix*, "Recueil des Cours" 1937, vol. 62, pp. 307–308.

The question of international morality with regard to treaty invalidity was tackled by the rapporteur of the International Law Commission in a commentary to Article 20 of the 1958 draft. In it, he wrote that the immorality of an international treaty was not in itself grounds for voiding it in relations between the States that had concluded it.[33] An international court, however, may refuse to recognise such a treaty as valid if it is manifestly inhumane or is in conflict with international order and the ethical principles shared by the international community. Sir Gerald Fitzmaurice believed that the norms of *juris cogentis* were both legal and moral. Hence, it was impossible to draw up their exhaustive list.

The question of international morality was also discussed by Arnold Duncan McNair. He defined the norms of *juris cogentis* as ones that, adopted either expressly in international treaties or tacitly by custom, were necessary to protect the public interest of the international community and maintain the moral standards it shared.[34] The concept of moral standards is one of those vague ideas the definition of which runs up against major difficulties. Arnold Duncan McNair did not explain what he meant by this concept. Alfred Verdross also came to the conclusion that States were obliged to respect a minimal moral standard, by which he understood respect for the legal order prevailing among States, defence against external attack, protection of the spiritual and physical well-being of citizens and their diplomatic protection during their stay abroad.[35]

Alfred Verdross took the view that in the case of treaties incompatible with *jus cogens*, a party may refuse to perform its obligations without the need to demonstrate the incompatibility in question. If, however, a party denies that a treaty has some immoral content, the dispute should be settled by diplomatic channels. Should this mode prove ineffective,

33 YILC 1958, vol. II, p. 28.
34 A.D. McNair, *The Law of Treaties*, Oxford 1961, p. 215.
35 A. Verdross, *Völkerrecht*, Berlin 1937, p. 172.

the dispute ought to be submitted to arbitration or an international court. Furthermore, Verdross stressed that every treaty incompatible with international morality had to be considered void; to support this view he analysed internal public policies. He claimed that since agreements incompatible with morality were void under internal law, the same principle must hold in international law as well.

Similar moral principles adopted in various States show that the *jus cogens* of these States may be identical, or very similar. The question arises: when public policies are similar, will a norm of international law evolve whose purpose will be identical with these policies? Some authors believe that one can speak in this context about the general principles of law set out as the third source of international law in Article 38 of the Statute of the International Court of Justice.[36]

Although it is difficult to indicate the formal source of *juris cogentis*, it can perhaps be suggested that it is not international morality, understood abstractly, or the public policies of States, but rather a tacit agreement between States. It is founded on the conviction that a conduct consistent with the agreement promotes the interests of the international community as a whole, along with those of particular members as well. This question needs to be revisited when discussing the development of the norms of *juris cogentis*.

The charge levelled by the Turkish delegate, namely that of establishing a hierarchy of international law norms on the model of internal law, seems ungrounded, because every legal system allows legal norms that can be neither breached nor modified by the subjects of law. On what account then would international law give up selecting norms that would make up international public policy, sometimes also known as the public order of the international community? The argument offered by Miras, i.e. that international law has no legislator who could enforce adherence to a public policy, leads to the question of sanctions. It is common knowledge, how-

36 E.g. H. Rolin, *Vers un ordre public réellement international*, Hommage d'une générations de juristes au Président Basdevant, Paris 1960, p. 448.

ever, that attempts to depreciate law by questioning its sanctions belong to the outdated means of undermining the importance of international law norms. In contemporary international relations, there are means of finding out if the conduct of States is consistent with their obligations.[37] If the norms of *juris cogentis* are clearly specified, their enforcement should not pose any greater difficulty than exacting respect for the norms of *juris dispositivi*. It is hoped that, respecting *jus cogens*, States will be guided above all by the conviction that complying with it is necessary, while the fear of coercion will recede into the background with time.[38]

To define *jus cogens*, it is necessary, on the one hand, to make the concept more specific and, on the other, to indicate peremptory international law norms and make their intent clear. This task has been taken up by international law studies. First of all, it is necessary to determine how the concept of *jus cogens* was understood by law studies and whether it is possible, relying on suggested definitions, to differentiate between peremptory norms and other norms of international law. To assess the solution adopted at the Vienna Conference, it is necessary to take into consideration the latest views of jurists on *jus cogens*. They are very cautious in offering any definitions, which shows that the task is by no means easy. Consequently, they have only made general statements and indicated the sources of *juris cogentis*.

Karl von der Heydte wrote that *jus cogens* comprised the fundamental principles of law recognised by all civilised nations and the constitutional principles of international law related to the legal capacity of the subject of that law.[39] He maintained that differentiating between *jus cogens* and *jus dispositivum* was possible only by a careful analysis of the content and purpose of a norm.

Alfred Verdross defined *jus cogens* as a set of norms that States could not derogate *inter se* and emphasised that every legal system con-

37 J. Symonides, *Kontrola międzynarodowa*, Toruń 1964, p. 182.

38 The importance of conviction here in relation to compliance with legal norms is pointed out by A. Klafkowski, *Prawo międzynarodowe publiczne*, Warszawa 1969, pp. 21–22.

39 K. von der Heydte, *Völkerrecht*, vol. I, Berlin 1958, p. 23.

tained principles that made up *jus cogens*.[40] With the growth of the international community, international *jus cogens* is gaining in importance. Hence, it represents the interests of the entire international community.

The problem of the sources of *juris cogentis* was addressed by Georg Dahm.[41] He asserted that *jus cogens* was the law that was comprised of customary norms or the general principles of law recognised by civilised nations. The peremptory nature of *jus cogens* is an exception in international relations, as the vast majority of general international law falls into the category of *jus dispositivum*.

Many definitions of *jus cogens* have referred to international morality. Rolando Quadri wrote that the body of positive law principles that cannot be derogated, reflecting the moral standards of the international community in the sphere of positive law, makes up international public policy, which he identified with *jus cogens*.[42] Furthermore, he emphasised that treaties incompatible with fundamental moral principles are void. However, Quadri did not treat international morality and *jus cogens* as one. The latter, he claimed, was positive law and only reflected moral principles. A different and unconvincing stance was taken by Friedrich Berber, who asserted that *jus cogens* comprised the fundamental moral principles of international law.[43] Treating the two phenomena in this way, he confused morality with international law principles. Were Berber's suggestions to be accepted, the false conclusion could be reached that the binding force of an international treaty fol-

40 A. Verdross, *Forbidden Treaties in International Law*, "31 American Journal of International Law" 1937, p. 572; A. Verdross, *Völkerrecht…*, pp. 171–172.

41 G. Dahm, *Völkerrecht*, vol. III, Stuttgard 1961, p. 140.

42 R. Quadri, *Diritto internationale pubblico*, Palermo 1963, p. 131. A different position was taken by H. Mosler, who maintained that the concept of public policy of the international community was broader than the concept of *jus cogens*, on account of the fact that the latter referred only to the members of the international community acting as parties to a treaty. *International Society as a Legal Community*, "Racueil des Cours" 1974, vol. IV, p. 35. Further on, Quadri reached the conclusion that general international law rested on the decisions of the superior force of the international community. The term "superior force" was criticised as conflicting with the principle of the equality of rights of States by G.I. Tunkin, *Zagadnienia teorii…*, pp. 126–127.

43 F. Berber, *Lehrbuch des Völkerrechts*, vol. I, München 1960, p. 439.

lows from its compatibility with moral principles and that the absence of this force was a result of its incompatibility with them. A similar error was made by Vladimir Mikhaĭlovich Shurshalov, who replaced morality with the concept of social development regularities.[44] Criticising his views, Grigorij Ivanovič Tunkin wrote that the content of the common principles of international law was ultimately determined in a broad outline by social development regularities, which are real in nature.[45] Thus, they are neither principles of international law nor its part. Consistency with the regularities of social development affects the effectiveness of an international law norm. However, effectiveness and legal binding force cannot be treated as one.[46]

Grigorij Ivanovič Tunkin did not define the concept of *jus cogens,* but made many important comments concerning its role in contemporary international law and noticed the expansion of international relations and the growth in the number of problems whose free regulation by multi- or bilateral treaties may harm the interests of other States. For this reason, a considerable growth in the number of peremptory principles and norms has been witnessed, necessarily comprising all fundamental, universally recognised international law principles.[47] The identification of *jus cogens* with the universal principles of international law is characteristic of Soviet international law studies.[48] A.N. Talalayev defined the norm of *juris cogentis* as a norm of a higher order, depriving any action or situation that was not in agreement with it of binding force.[49] Hence,

44 V.M. Shurshalov, *Osnovnye Voprosy Teorii Mezhdunarodnogo Dogovora*, Moskva 1959, p. 232.

45 G.I. Tunkin, *Zagadnienia teorii…*, p. 149.

46 Ibidem, p. 150.

47 Ibidem, p. 155.

48 Cf. e.g. F.I. Kozhevnikov; *Nekotorye voprosy teoryi i praktiki mezhdunarodnogo dogovora*, "Sovetskoye Gosudarstvo i Pravo" 1954, no. 2, *passim*; A.N. Talalayev, *The Fundamental Principles of International Law Soviet* "Yearbook of International Law" 1959, p. 513; E.T. Usenko, *Formy regulirovanya socyalisticheskogo mezhdunarodnogo razdelenya truda*, Moskva 1965, pp. 137–139. Soviet studies stressed the peremptoriness of the fundamental principles of international law and the invalidity of treaties that breached them – *Kurs mezhdunarodnogo prava*, vol. II, Moskva 1967, p. 13.

49 A.N. Talalayev, *Mezhdunarodnye dogovory v sovremennom mire*, Moskva 1973, p. 174.

jus cogens is made up of the norms of considerable importance that are general and bind all States, regardless of their political or social system. Both G.I. Tunkin and A.N. Talalayev look for the source of *juris cogentis* in a broadly understood agreement between States that may become apparent in the form of a customary or conventional norm. In this light, the expression "norm of a higher order" does not mean a moral norm, but a legal norm occupying the highest position in a hierarchy of norms.

In Polish international law studies, a similar stance was adopted by Stanisław E. Nahlik, who claimed that the norms of *juris cogentis* could be both conventional and non-conventional; the latter, according to him, comprised the principle of freedom of the seas and the fundamental rights of States.[50] He held *jus cogens* to mean the peremptory norms that cannot be breached by the parties to any treaty.

This brief review of the views on the meaning of *jus cogens* shows that most authors stressed the absolute inviolability of *jus cogens* and the invalidity of all acts incompatible with it. As far as the sources of *juris cogentis* are concerned, however, their opinions widely differed. They looked for its sources in morality, regularities of social development, general principles of law, and international customs alone, as well as in international treaties and international customs taken together.

Other authors, being aware of the difficulties encountered while attempting to define *jus cogens*, in order to make their views on this concept more specific, resorted to enumerating its norms and attempted to classify them.

In the opinion of von der Heydte, peremptory norms may be divided into three categories.[51] The first encompasses the norms that are necessary for any legal system to exist. Their derogation would be tantamount to depriving the whole system of its legal character. This category comprises

50 S.E. Nahlik, *Wstęp do nauki prawa międzynarodowego*, Warszawa 1967, p. 219.

51 K. von der Heydte, *Die Erscheinungsformen des Zwischenstaatlichen Rechts: Jus cogens und Jus dispositivum im Völkerrecht*, "Zeitschrift für Völkerrecht" 1932, vol. 16, p. 472. Quoted after: E. Suy, *The Concept of Jus Cogens in Public International Law—Lagonissi (Greece)*, Geneva 1967, p. 27.

such legal principles as *pacta sunt servanda*, *vis maior* and *civiliter ut*. To the second category, von der Heydte assigns the norms that are closely related to the nature and exigencies of international relations, the maintenance of which depends on adherence to these norms. Any newly-founded State must submit to them. The third category is made up of norms in the correct functioning of which all States—members of the international community—are interested. The division proposed by von der Heydte raises doubts, because some norms may be assigned to either the second or the third category, while the principle of *pacta sunt servanda* listed in the first category could be considered necessary for the proper functioning of the international community and placed in the third category.

Jus cogens norms have been divided into four basic categories by Alfred Verdross.[52] The first comprises norms laid down in treaties which stipulate obligations towards third States, provided that the treaties do not breach *jus cogens*. The second covers norms laid down in treaties by which States limit their sovereignty to the extent that they cannot perform their international duties on their own. Norms of humanitarian purposes make up the third category. Alfred Verdross formed the fourth category from the three principles laid down in the UN Charter. These principles are the prohibition on the use of force except in self-defence, peaceful resolution of disputes and the duty of all UN Member States to give help to the organisation in every effort it undertakes in agreement with the UN Charter.

Some authors disparaged *jus cogens* norms by enumerating treaties that remain in conflict with them. Dahm considered international treaties on offensive alliances and others violating human rights to be examples of this.[53] He also considered steps aimed at the annexation of an occupied State before the state of war is over to be a violation of *jus cogens*. Dahm's list is fragmentary and is not meant as an exhaustive presentation of all the treaties that can possibly be considered in this

52 A. Verdross, *Völkerrecht…*, p. 173.
53 G. Dahm, *Völkerrecht*, vol. III, p. 140.

context. The list of treaties incompatible with *jus cogens* presented by Berber is much longer and covers such treaties as ones depriving third States of sovereignty, providing assistance to a State in breach of international law, consenting to extradition when it is known that the extradited people will be subjected to inhuman treatment in another State, treating another State arbitrarily, establishing provisions for the confiscation of property belonging to the citizens of a third State which is at war with another State, imposing obligations on third States, taking advantage of the economic crisis of another State and enacting laws which make it possible to sell its citizens abroad.[54]

Much more moderate in indicating the norms of *juris cogentis*, Ignaz Seidl-Hohenvelden believes that the prohibition on the use of force and elementary humanitarian norms raise no doubts as to their peremptory nature.[55] He warns against too rashly considering the universal principles of international law as *jus cogens*. As an example of an apparently peremptory norm, he gives the principle of compensating for the damage done to a State and stresses that despite its universality it is often derogated with the consent of the aggrieved State. A treaty derogating international liability will not be invalid, because the principle it breaches does not have the character of *iuris cogentis.*

Stanisław E. Nahlik, citing the reports of the International Law Commission, wrote that there were already many clear reasons for believing in the existence of international *jus cogens.*[56] For most of present-day States, a treaty contravening the UN Charter would be invalid, as would be any treaty leading to an international tort or preventing its prosecution, or a treaty making its parties perpetrate aggression, genocide or human trafficking.

A different method for making the concept of *jus cogens* more specific was taken by Erik Suy, later a member of the Belgian delegation to

54 F. Berber, *Lehrbuch…*, p. 440.
55 I. Seidl-Hohenveldern, *Völkerrecht*, Wien 1965, p. 40.
56 S.E. Nahlik, *Wstęp do nauki…*, p. 282.

the Vienna Conference in 1968.[57] In his view, to transform international law from a primitive legal system into a highly organised one, it was necessary to develop an international form of *jus cogens*. The subordination of a State to international law must be seen in absolute respect for the principles of international public policy. Any legal order is in constant flux; consequently, at each stage, there are elements in it that are already fixed and others that raise doubts. For this reason, Suy, while determining the principles of international public policy, which he identified with *jus cogens*, distinguished their definitely determined components and other uncertain ones. The former comprised a certain minimum of obligations that States cannot derogate from by means of a specific treaty.[58] Its peremptoriness, the minimum, is due to the principle of *pacta sunt servanda*. However, it cannot be considered universal *jus cogens* as it only binds parties to a specific international treaty. It seems that Suy could have simplified the matter if instead of introducing the concept of a minimum of obligations, he had underscored the peremptoriness of the principle of *pacta sunt servanda*. If States undertake in a treaty not to conclude any treaties inconsistent with it, then by virtue of this principle they cannot derogate from such an obligation unless all the parties to the treaty give their consent. In the same group, Suy placed the obligations whose fulfilment may be the object of claims of the entire international community (e.g. obligations following from the protection of human rights), the procedural rules of international courts and the formal rules of international treaties (the duty to register treaties with the UN Secretariat).

In contrast, Suy assigned the elementary considerations of humanity and the principles laid down in the UN Charter to the category of

57 R. Suy, *The Concept*…, pp. 70–76.

58 Here, Suy has in mind treaty obligations precluding the conclusion of treaties incompatible with them. In the earlier discussion, he gave many examples of such obligations, e.g. Article 10 of the 1921 Barcelona Convention on the Freedom of Transit, which said: "Contracting States also undertake not to conclude in future treaties, conventions or agreements, which are inconsistent with the provisions of this Statute, […]." Ibidem, p. 66.

uncertain components. The latter principles, pursuant to Article 103 of the Charter, take precedence over the obligations of UN Member States under other international agreements and make up the supreme legal order. However, Suy is right to emphasise that they are often unclear, leaving space for various interpretations and means of performance. For example, a State may conclude a treaty by which it will grant the right to interfere with its internal affairs to another State. According to Suy, under these circumstances the principle of non-intervention will not make the treaty invalid. The UN Charter principles are thus too general to provide a solid foundation for resolving all legal problems that may arise in international practice.

One can only concur with Suy's conclusion that without first precisely defining such concepts as aggression, independence or intervention, the norms of international *jus cogens* cannot be established with any accuracy. It may be added that until such time, the relevant concepts cease to remain vague, any allegation that a treaty is in conflict with *jus cogens* will trigger protracted international disputes that are difficult to resolve.

How do the Norms of Juris Cogentis Arise?

Divergent views on the sources of *juris cogentis* in international law studies provide a stimulus for tracing how peremptory norms arise. This should facilitate an answer to the question of the legal grounds on which States are obliged to respect the norms of *juris cogentis*. Any comments made in respect of this question are worth comparing with the specific examples of the rise of *jus cogens* norms and the legal problems that accompany the process.

Against this background, a link will be seen between the difficulties with determining a legally unambiguous meaning of *jus cogens* and the practical possibility of applying the provision on the conflict of a treaty with a peremptory norm of international law.

While discussing the concept of *jus cogens* as used in the juristic literature, it was observed that some authors looked for the sources of *juris cogentis* only in international custom. It is widely accepted in international law studies that a starting point for the moulding of a customary law norm is repetition (*frequens usus*). This begets a rule of conduct that is increasingly consolidated with the passage of time, following its emergence. For a norm of international morality or courtesy to arise, *frequens usus* is enough, but for a legal norm to develop, declarations of will by States are necessary, to the effect that they consider a given rule of conduct as binding. In this manner, a State undertakes to observe the norm and acquires the right to demand from the other States that have made identical declarations of will to act in agreement with their undertakings. Thus between these States a tacit agreement is reached.

A stimulus for the rise of a customary legal norm comes from the first instance of conduct in a particular manner by a State. If another State copies this conduct, a rule of conduct will be born. The moment that States agree to treat this rule as a law, a customary norm emerges. The range of application of this norm may expand until all States join the tacit agreement. Then, a particular norm becomes a universal norm of customary law.

Tracing the stages of the rise of a universal customary norm reveals how universal norms of *juris cogentis* come about. A stimulus for the birth of a universal customary norm having the character of *juris cogentis* may come from an act or omission of one or two States, or a multilateral international treaty.[59] Owing to a tacit agreement of the entire international community, after going through the stages of a rule of conduct and a particular customary norm, the norm becomes a universal norm

59 An example of an act by a single State is offered by a decree of the National Assembly issued in December 1791 in which France proclaimed the principle of equal rights of States. The case of a multilateral international treaty that could be adhered to by other States is illustrated by the 1928 Briand-Kellogg Pact. It stimulated the emergence of a universal customary norm prohibiting an aggressive war. On the treaty norms that became stepping stones for the development of an identical universal international custom writes, in connection with *jus cogens*, J. Gilas, *Norma prawa międzynarodowego*, in: *Polska i świat*, Poznań 1978, p. 133.

of customary law. It will not have the nature of *juris cogentis* if States confine themselves to only giving their consent to its relative binding force.[60] For a norm of *juris cogentis* to arise, it is necessary to accept its peremptory nature, that is, to waive the possibility of derogating from it *inter se*. States bound by a relatively binding customary norm may establish a new norm, different from the one hitherto in force, by agreement or custom anytime. Such States must take care, however, not to breach obligations they have towards third States. No derogation *inter se* is possible if States are bound by the norm of *juris cogentis.* When the entire international community consents to it by a tacit agreement, it takes on a universal character.

The universality of the norm of *juris cogentis*, must therefore be tantamount to consent to its peremptoriness given by all States belonging to the international community. It is unacceptable for the majority of States, despite their actual predominance, to impose legal norms on the other States. After all, newly-founded States may not recognise a norm of universal international law. They must do this expressly, however, by notifying other States of their objection. Otherwise, they will be presumed to have tacitly consented to a given universal norm of *juris cogentis.*

The findings so far may suggest that the only source of universal peremptory norms is international customary law. Actually, thanks to the advances in technology and transport, all members of the international community, gathered at a universal conference, can conclude an international treaty that will become a source of such norms. If, however, not all States become parties to the treaty, then a universal international custom will be the source of a universal norm of *juris cogentis*. Unless

60 For the sake of illustration, the comments by I. Seidl-Hohenveldern, referring to the universal principle of compensation for damage done to another State, can be remembered in this context. It happens that the central organs of state authority take decisions yielding to *vis maior* (e.g. flood, severe frost) that frustrate trade agreements. This gives rise to a liability of the State involved for failure to fulfil international obligations. By concluding a new trade agreement, aggrieved States often waive damages. This does not detract from the universality of the principle in question, but shows that it is not a norm of *juris cogentis.*

any State that has not adhered to the treaty objects, it can be presumed that the entire international community consents to a given norm.[61] This conclusion is borne out by Article 38 of the Vienna Convention, which states that "Nothing […] precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such." A pertinent comment on the problem in question was offered by Kazimierz Kocot who wrote that "a relevant treaty is then a source not of obligations, but a source in the meaning of the evidence of an international law norm" in agreement with the rule of *consuetudo est servanda*.[62] It follows that States are bound to respect the peremptory norms of general international law pursuant to universal customary law, that is, the law to which the entire international community has consented. In exceptional cases, such norms will originate with multilateral international treaties.

The question arises: can *use cogens* proceed from a resolution adopted by an international organisation? Those who answer in the affirmative cite the advisory opinion of the International Court of Justice on reservations to the Convention on the Prevention and Punishment of the Crime of Genocide.[63] In the opinion, the International Court of Justice ruled that States were bound to cooperate in the prevention of genocide. The duty in question has the nature of *juris cogentis*. Its source, however, is not the Convention, but the resolution of the General Assembly on this matter.[64] Shabtai Rosenne, taking into account the opinion of the International Court of Justice, said that although he did not believe

61 G.I. Tunkin, Z*agadnienia teorii…*, contradicted himself by saying that "multilateral treaties in which all or almost all States participate […] create situations where they become a manner of directly laying down […] universal international law" (p. 133). Meanwhile, a few pages earlier, he wrote that "the recognition of any rule as a norm of international law by a greater number of States may give grounds for presuming that the norm has been widely recognised, but only for a presumption and not for a final conclusion" (p. 129).

62 K. Kocot, *Pacta sunt servanda w prawie traktatów*, "Sprawy Międzynarodowe" 1973, no. 12, p. 64.

63 *International Court of Justice Reports* 1951, *Advisory Opinion. Reservations to the Convention on Genocide*.

64 Ibidem, p. 27.

that every resolution of the General Assembly had *per se* the nature of *iuris cogentis*, even if it was called a declaration, it nonetheless might have legal effects,[65] which may vary from case to case. Rosenne allowed for the possibility of laying down *jus cogens* by adopting a declaration by the UN General Assembly of special significance for the international community. An argument took place between Rosenne and Tunkin over this very view in the International Law Commission. The latter was strongly against any attempts to lend resolutions a norm-giving character.[66] UN General Assembly resolutions—Tunkin claimed—did play a certain role in laying down international law norms, but were not factors supplementing the lawmaking process. Roberto Ago put this thought succinctly, asserting that resolutions were not a source of international law and consequently could not be a source of peremptory norms.[67] The view that resolutions may play a role in the emergence of peremptory norms, without establishing them, is correct. The unanimous declarations of the General Assembly may therefore be considered evidence of a universal practice, recognised as law by UN Member States.

How a universal norm of *juris cogentis* arises can be seen from the example of the right of nations to self-determination. The example will make it easier to understand problems connected with the conflict of treaties with this right and to draw some general conclusions regarding the invalidity of treaties contravening *jus cogens*.

While due credit must be given to the French Revolution of 1789 for paving the way for the self-determination of nations, later obstructed by the policies of Legitimism, the stimulus for the emergence of the right to self-determination came from Lenin's Decree on Peace adopted by the 2nd Congress of Soviets on 8 November 1917. For the first time ever, nations were treated not as objects but as subjects of international relations. Begotten in this way, the principle of self-determination was

65 YILC 1963, vol. I, p. 73.
66 Ibidem, pp. 65–76.
67 Ibidem, p. 75.

reflected in Woodrow Wilson's "14 points" formulated in his address to Congress on 8 January 1918.[68] Slowly, a rule of conduct regarding self-determination began to take shape. A milestone in the process of its transformation into a norm of customary law was the adoption of the UN Charter. With time, opinions questioning its legal character subsided but considerable differences in its interpretation continued between States.[69]

The right to self-determination found expression in the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights adopted on 16 December 1966. Article 1(1) of both Covenants states that "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." The same Article stresses the right of peoples to freely dispose of their natural wealth and resources. For each Covenant to come into force it had to be ratified or acceded to by 35 States. The International Covenant on Economic, Social and Cultural Rights came into force on 3 January 1976 and the International Covenant on Civil and Political Rights—on 23 March 1976. States who are parties to the Covenants undertake to implement the right to self-determination and respect it pursuant to the provisions of the UN Charter.[70] Thus the Covenants have to be recognized as constituting evidence that the peremptory norm of

68 It must be noted that the address of 8 January 1918 was quoted during the campaign conducted at the UN for the right of nations to self-determination. Criticising the view that the principle of self-determination was devoid of any legal consequences, a delegate quoted at the 20th Session of the UN General Assembly the words of President Wilson: "Self-determination is […] an imperative principle of action, which statesmen will henceforth ignore at their peril and without which there cannot be and should not be peace" (GAOR (XX), Sixth Committee, 891st meeting, p. 320) – speech by Cypriot delegate, Rossidess.

69 This conclusion is suggested by the reports and records of the sessions of the Special Committee on the Principles of International Law — doc. A/AC 125.

70 The United States refrained from taking an unequivocal stance for a long time. During the discussion on terrorism in the UN General Assembly in 1975, it clearly endorsed, however, the right to self-determination and the principle of majority rule. The significance of this fact was stressed in a press interview by the UN Secretary General, Kurt Waldheim, *Frankfurter Rundschau*, 6.08.1976, quoted after "Forum" 2.09.1976.

universal customary law, proclaiming the right of nations to self-determination, actually exists.

Establishing that the right to self-determination has the nature of the norm of a higher order does not solve all the legal problems that may arise in connection with it. The actual content of the right still gives rise to controversies and leaves much to be desired in terms of the legal precision necessary for a norm of *juris cogentis* to function properly. Differences in the positions adopted by States prevented a definitive resolution of many particularly sensitive problems. For instance, there is still no legal basis for explaining who the subject of the right to self-determination is.[71] The UN Charter only states that independent and sovereign States are excluded from the subjects of this right.

Another major problem that also cannot be finally resolved is the admissibility of intervention at the request of a colonial nation. Current international developments bear out the practical significance of this problem.[72] The delegates of African States have emphasised on many occasions that the practice of colonial powers, based on apartheid and genocide, and involving military actions as well as other repressive measures, contravenes the aims and principles of the UN Charter and is not one of the internal competences of these powers. Nations, therefore, enjoy the right to self-defence against colonial rule, which justifies an intervention in favour of a colonial nation.[73] In this context, with regard to the invalidity of international treaties, the question may be asked of whether a treaty in which consent to intervention is given is consistent with the right to self-determination or not. If the question is answered in the affirmative, then a doubt may arise as to the possibility

71 *Encyklopedia prawa międzynarodowego i stosunków międzynarodowych*, Warszawa 1976, p. 349.

72 E.g. Assistance given by the Cuban government to the People's Movement for the Liberation of Angola (MPLA) in its struggle against UNITA and FNLA guerrillas in 1975 and 1976. Cf. *Angola: brzemię zwycięstwa*, "Le Monde" 2–5.09.1976, quoted after "Forum" 30.09.1976, p. 15.

73 Cf. Address by the Malian delegate, N'Diaye, at the session of the Legal Committee of the UN General Assembly – GAOR (XX), Sixth Committee, 882nd meeting, p. 249.

of the same treaty being invalid due to its conflict with another norm of *juris cogentis*, namely the principle of non-intervention.

There are countless more examples of problems posed by the ambiguity of the right to self-determination.[74] Meanwhile, international practice has witnessed allegations of conflict between international treaties and the right to self-determination, which are aimed at proving such treaties void. [75] Thus, the practice bears out the claim that the catalogue of the norms of *juris cogentis* is not limited solely to the prohibition on the threat or use of force.

On 21 November 1975, the text of the treaty on the Western Sahara was published, following its ratification at Rabat on 14 November 1975 by the representatives of Spain, Morocco and Mauritania.[76] It provided for the liquidation of Spanish administration in this territory by 28 February 1976 and the establishment of provisional Moroccan and Mauritanian administration by the same date.[77] The Algerian government lodged a protest against this

74 An interesting legal question related to the right to self-determination is mentioned by Jerzy Tyranowski, *Spory graniczne i spory terytorialne a sukcesja*, "Sprawy Międzynarodowe" 1976, vol. 10. He maintains that the right to self-determination is completely consumed upon the emergence of a new and independent State. Subsequent efforts at secession are treated as violations of the territorial integrity of a State. Jerzy Tyranowski believes that present-day tendencies deny the existence of the right to secession (p. 90).

75 E.g. The Somali government challenges the treaties concluded by Abyssinia and Italy in 1897 and 1908, by Abyssinia and the United Kingdom in 1897 and the United Kingdom and Italy in 1924. The treaties delineated the current border between Somalia and Abyssinia and Kenya. The Somali authorities challenge their validity, because they breach a protectorate treaty concluded by the United Kingdom and the Somali people, and allege that the treaties are in conflict with the right to self-determination (RILC 1974, *Annex, Observations of Member States on the Draft Articles on Succession.*..., A/9610/add. 1 of 13.09.1974, p. 22).

76 "Trybuna Ludu" 22.11.1975.

77 The territory of the Western Sahara had been a Spanish colony of 273,000 sq. km since 1884. In 1976 its indigenous population—mainly Arab nomads—stood at 75,000 people. Almost an identical number of Spaniards worked in the territory periodically at local bauxite mines. After many years of diplomatic efforts aimed at postponing the final decision, Spain agreed to follow the recommendations of the UN Decolonization Committee in 1975 and grant Western Sahara nomads the right to decide their fate. With respect to the Western Sahara, their right to self-determination was to be enforced. Meanwhile, neighbouring Morocco and Mauritania concluded a secret agreement on dividing the Sahara and embarked on a diplomatic campaign to defend their position in the UN. Both States filed statements with the Sixth Committee of the General Assembly, arguing in favour of their claims to the

treaty, claiming it was not valid on account of its supposed breach of the right to self-determination of the people of the Western Sahara. Challenging the treaty validity, Algeria invoked the will of the Sahara people as expressed by the Liberation Front POLISARIO. The Front, in the Amagala region granted to Morocco, set up a liberated zone, provoking the Moroccan military to an offensive against it. In late January 1976, Moroccan and Algerian forces clashed there.[78] Algeria reiterated its allegations of the violation of the principle of self-determination of peoples and accused Morocco of attempts to maintain control over the Western Sahara by forcing its population into loyalty, using measures of a genocidal nature.[79] The Algerian president, Boumedien, sent a letter to the heads of state of all the countries of the world on 28 January 1976, in which he stressed the conflict of the agreement of 14 November 1975 with international law and appealed for universal support for the people of the Western Sahara.[80]

Further developments in the Western Sahara conflict were of little significance for assessing the position of the Algerian government, attempting to invalidate an agreement in conflict—in its opinion—with *jus cogens.*

Western Sahara. Algeria objected to the claims, —A/C.4/SR. 2125. Due to the differences that had arisen between the States interested in the Sahara's fate, the General Assembly adopted Resolution 3292 (XIX) on 13.10.1974, in which it requested the International Court of Justice to give an advisory opinion. The Court was to answer the following questions: Was the Western Sahara a no-man's-land (*terra nullius*) at the moment of its colonial acquisition by Spain? And, if not, are there any legal ties between the territory in question and Morocco, and Mauritania? In the opinion dated 16.10.1965, the International Court of Justice reaffirmed the right of the population to self-determination but also found that in the past it had recognised the authority of the rulers of Morocco—*International Court of Justice Reports* 1975, p. 68. Western Sahara. Advisory Opinion of 16 October 1975, p. 68. The opinion provoked Moroccans to organise a liberation march to the territory of the Sahara. Algeria filed a protest and the Liberation Front of the Western Sahara POLISARIO decided to take military action against the march participants. In these circumstances, the march was stopped, and the Moroccan diplomacy negotiated the agreement of 14 November 1975.

78 "Trybuna Ludu" 28.01.1976.

79 The measures involved primarily the bombing of civil camps located close to the town of Dakhla on the Atlantic coast.

80 "Trybuna Ludu" 30.01.1976.

The position of the Algerian government spawned two legal issues. The first boils down to the question of whether Algeria, not being a party to the agreement of 14 November 1975, had the right to challenge its validity. The issue of the right of a third State to challenge the validity of an international treaty on account of its incompatibility with peremptory norms has not been properly settled in Article 65 of the 1969 Vienna Convention.[81] It appears that not only the States that have concluded a treaty have the right to challenge its validity on account of a conflict with *jus cogens.* A party to such a treaty places itself in an awkward position if it subsequently denies its validity, since it thereby takes action against the legal effects that it wanted to bring about. Thus the curtain is drawn, setting oneself in contradiction to one's own previous conduct (*venire contra factum proprium*). Nevertheless, there is no doubt that a party to a treaty may take action aimed at finding it void. It also appears that the same right is enjoyed by any third State because of the fact that a breach of a norm of *juris cogentis* by a treaty incompatible with it harms the entire international community. It is the duty of the international community to take care that obligations following from *jus cogens* are fulfilled. Since there is no organ that would be authorised to question the validity of treaties inconsistent with *jus cogens* on behalf of the international community, States making up the community must try to expose any violations of the peremptory norms of universal international law and deprive treaties perpetrating such violations of any legal effects. In this light the stance of Algeria seems right, even more so as

81 To the issue of the role of a third State in challenging the validity of international treaties, attention was drawn by the government of Luxembourg in a 1965 commentary. However, it did not propose any specific resolution of the issue whether a third State has the right to allege that a treaty in conflict, in its opinion, with a peremptory norm of general international law is invalid—*Law of Treaties. Comments by Governments*, A/CN. 4/175, p. 100. Articles 65 and 66 of the Vienna Convention, reserving the right to raise the allegation of the invalidity of a treaty on account of its conflict with *jus cogens* only to the parties to the treaty, were quite rightly criticised by Ch.L. Rozakis, *The Concept of Jus Cogens in the Law of Treaties*, Amsterdam–New York–Oxford 1976. Cf. review by A.A. Fatouros – 71 "American Journal of International Law" 1977, p. 574.

the Algerian authorities have shown considerable concern about the fate of Sahara nomads.

The other legal issue raised by the protest of the Algerian government involves the question of whether the agreement of 14 November 1975 indeed violated the right of nations to self-determination. On account of the fact that there are no international agreements that would derogate from this right in bi- or multilateral relations and that States do not question its peremptoriness by unilateral declarations, it may be considered *jus cogens*. It is doubtful whether an agreement concluded by a former colonial power and States neighbouring on the colony in question, and ignoring the will of its people, could be considered a step towards the enforcement of the right to self-determination. The problem of whether the agreement of 14 November 1975 breaches a norm of *jus cogens* could be easily solved were it not for the 1961 statement of the Moroccan government claiming that the Western Sahara "is an integral part of Morocco and its colonial status is in conflict with international law, sovereignty and territorial integrity" of this State.[82] The Moroccan government remained steadfast in its opinion and denied that the Western Sahara was *terra nullius* when Spain took possession of it.[83] Hence, the agreement of 14 November 1975 was, in the opinion of the Moroccan authorities, consistent with the principle of sovereignty and territorial integrity of States, which is a peremptory norm of general international law.

The question whether the agreement between Spain, Morocco and Mauritania should be considered void is thus hard to answer, because of the involvement of the competing norm of *juris cogentis* with which the agreement is supposedly consistent. In this context, the complex problem of the relationship of individual norms of *juris cogentis* to one another and their interference arose. It has not been tackled yet in any meaningful way by the international law studies. Without precisely de-

82 *International Court of Justice Reports*, 1975, p. 25.
83 Ibidem, p. 22.

fining the content and scope of the norms of *juris cogentis* or related concepts, international practice in relation to the above will continue to run up against obstacles difficult to surmount. Little help in this respect is offered by international court decisions[84], while the codification of norms of *juris cogentis* so far, due to the varied opinions of States, can hardly be considered sufficient if one thinks of the practical need to improve them legally. The reasons why legal problems related to *jus cogens* accumulate should be sought, above all, in the way peremptory norms arise. They do so chiefly as norms of universal customary law the content of which is much harder to establish than that of norms laid down in international treaties. For this reason, it is imperative to transform the norms of *juris cogentis* from customary to conventional ones by increasingly detailed codification that would eliminate any uncertainties.

The Conflict of a Treaty with Jus Cogens In the 1969 Vienna Convention— Antecedents and Problem Resolution

International practice has shed little light on problems connected with *jus cogens*. The discussion of the provision on the conflict of a treaty with *jus cogens* was therefore dominated by the authoritative juristic literature and only rarely did it refer to practice and international court decisions in the International Law Commission and at the Vienna Conference.

In 1963, Humphrey Waldock suggested formulating a norm finding a treaty to contravene international law and thus to be void if it entailed a breach of a general norm or principle of international law,

84 Certain general comments on *jus cogens* can be found in the judgment by the International Court of Justice of 9.04.1949 regarding the Corfu Channel Incident, *International Court of Justice Reports* 1949, p. 22 (notification of the existence of mine fields is a duty following from the fundamental requirements of humanitarianism). Such comments are also included in the advisory opinion in the matter of reservations to the Genocide Convention, *International Court of Justice Reports* 1951, pp. 22–24 (Convention principles are recognised by civilised nations as binding even when they are not parties to the Convention).

having the nature of *juris cogentis*.[85] His two predecessors—Lauterpacht and Fitzmaurice—were also in favour of such a norm. Lauterpacht claimed that treaties were invalid if their enforcement led to an act that would be unlawful from the point of view of international law.[86] Fitzmaurice was of a similar opinion and was the first rapporteur to use the term jus cogens.[87] The fourth rapporteur of the International Law Commission suggested holding void "in particular" such treaties whose subject and performance entailed a threat or use of force in contravention of the UN Charter, an act or omission considered an international tort under international law or an act or omission the prosecution and punishment of which is the duty of every State. Waldock believed it was advisable to adopt a rule that provisions on the invalidity of treaties incompatible with *jus cogens* did not apply to multilateral treaties, which abolished or modified a norm having the nature of *jus cogens*. Such treaties must be universal, though, in this light.

The proposal made by Waldock in the form of Article 13 of the 1963 report was extensively discussed by members of the International Law Commission. No member questioned the point of departure for the proposal, namely, the assertion that peremptory norms existed. Many members, however, objected to the term *jus cogens*. It was to be replaced by such terms as: a peremptory norm of general international law, international public order, generally recognised principles of international law from which States could not derogate, fundamental principles of international law, or a general peremptory norm of international law from which derogation is not permitted.[88]

The criticism levelled at the term *jus cogens* chiefly concerned chiefly its theoretical character and diversity of interpretations, remaining un-

85 YILC 1963, vol. II – the second report of Humphrey Waldock, p. 52.
86 YILC 1953, vol. II – the first report of Hersch Lauterpacht, p. 154.
87 YILC 1958, vol. II – the third report of Gerald Fitzmaurice, p. 28.
88 Herbert Briggs said that *jus cogens* should be replaced by another term but none of the suggested terms was fully convincing to him – YILC 1963, vol. I, p. 62.

der the influence of civil law.[89] The criticism did not eliminate the term but resulted in the change of the title of Article 50, which in the final version adopted by the International Law Commission in 1966 read as follows: "Treaties conflicting with a peremptory norm of general international law"[90] and was followed by the term *jus cogens* in parentheses. The article itself read as follows: "A treaty is void if it conflicts with a peremptory norm of general international law from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

The criticism of Article 50 should be viewed in its two main aspects: the denial of the rightness of the article *in principio* and challenge to the solutions adopted in it *in merito*.

The position taken by the International Law Commission had in principle already been accepted by the Legal Committee of the 18th Session of the UN General Assembly in 1963.[91] Legal Committee members stressed that it would be absurd to continue to uphold the unrestrained principle of the freedom of contract. In times when the principle is constantly restricted in public and private internal law by the use of the principle of social justice, its domination should be curbed in international law as well.[92] The International Law Commission was universally held to have been right to reject the classical principle of freedom of contract and find international law to be comprised of *jus cogens* norms.[93] Some members of the Legal Committee were in favour of the solution adopted by the International Law Commission aimed at shifting the burden of defining which norms had the nature of *juris cogentis* onto practice and international court decisions. However, voices were also heard encouraging drafters to make the concept more specific. They expressed the concern that an overly general wording of the convention

89 The question of interpretation was emphasised by Milan Bartoš – YILC 1963, vol. I, p. 66.
90 RILC 1966, p. 76.
91 *General Assembly. Summary Records 1973. Legal Committee.*
92 Ibidem, Quintero (Panama), p. 47.
93 Ibidem, Angelov (Bulgaria), p. 33.

could have an adverse impact on the application of its provisions in the future. The representatives of socialist countries put forward a proposal to consider international law principles related to friendly relations and cooperation between States laid down in the UN Charter as *jus cogens*.[94] They had in mind mainly the prohibition on the threat and use of force, non-intervention in the internal affairs of States, the peaceful resolution of disputes and the sovereign equality of States.

Opinions claiming that the International Law Commission was wrong to adopt the principle in question were contained in the commentaries sent by States before February 1965.[95] Out of the overall number of 21 commenting States, two were clearly against including a provision on the conflict of treaties with *jus cogens* in the Convention on the Law of Treaties. The government of Luxembourg maintained that there was no competent organ in international relations that could determine which norms were absolutely binding on the international community.[96] Hence, the clause proposed by the International Law Commission could only cause serious legal problems. The Turkish government, in turn, believed that the draft provision lacked an exhaustive definition of the concept of *jus cogens.* In the opinion of this government, the examples given in the commentary were not that important, as modern international practice did not witness any treaties whose purpose would be the use of force, slave trade or genocide. Including a provision on the conflict of treaties with *jus cogens* in the draft Convention on the Law of Treaties was therefore held to be pointless, especially as there was no mechanism of compulsory jurisdiction that would enable the International Court of Justice (ICJ) to settle disputes between States over *jus cogens*.[97]

The International Law Commission did not heed the critical comments sent in by the States that were against the principle. In the commentary to Article 50 of the 1966 draft (Article 37 of the 1963 draft), noticing some dissatisfaction transpiring from the commentaries by States, the

94 Ibidem, Wyzner (Poland), p. 35, Angelov (Bulgaria), p. 34 among others.
95 *Law of Treaties, Comments by Governments* – A/CN. 4/175.
96 Ibidem, p. 99.
97 Ibidem, pp. 145–146 — verbal note of 15 Jan. 1965.

Commission admitted that drafting the provision was by no means easy, because there was no criterion for identifying a general norm of international law having the nature of *juris cogentis*.[98]

The negative response of some jurists and States to the stance adopted by the International Law Commission at the Vienna Conference triggered opinions criticising the very idea of putting the principle forward. The inclusion of the provision on conflict with *jus cogens* met with strong opposition from Talât Miras (Turkey), Paul Rügger (Switzerland), Jean Charles Rey (Monaco) and Erik Dons (Norway).[99] In 1969, L. Hubert (France) spoke against Article 50.[100] In his long speech, he mentioned almost all the arguments that had been used to strike out the article from the draft of the Convention on the Law of Treaties. The French delegate expressed his appreciation for the noble intentions guiding the article proponents, but observed that in life intentions had to yield to facts. The facts included the invalidation of the entire group of treaties without specifying either them or the norms the breach of which made them void. Hubert criticised the mechanical transfer of the concept of *jus cogens* from internal to international law and warned that the validity of international treaties was threatened by the retroactivity of the provision in question.

Besides the charges well-known to the authoritative literature on international law, he also cited the argument of compulsory jurisdiction. He maintained that any organ resolving disputes over *jus cogens* would not only interpret the law, but would have to make it, which had to be considered undesirable.[101] However, the absence of compulsory jurisdiction would lead disputes up blind alleys by a conciliation procedure. For these reasons, the French delegate decided that Article 50 posed a danger to international relations and announced that he would vote against its adoption.

98 RILC 1966, p. 76.
99 UNCLT 1968, pp. 323–325.
100 UNCLT 1969, pp. 93–95. A similar stance was taken by Brazil (Australia), p. 95.
101 Ibidem, p. 94.

The criticism of Article 50 *in merito* at the Vienna Conference relied in part on the same arguments as the ones used by the provision opponents. It was driven by both views expressed in legal studies and opinions held by some members of the International Law Commission. In the context of these criticisms, a discussion was held at the Vienna Conference as to whether the concept of *jus cogens* could be made more specific by enumerating treaties in conflict with it. The question was discussed by the International Law Commission as early as in 1963. The enumeration of treaties contravening *jus cogens* made by Waldock at this time was held to be incomplete.

Most International Law Commission members objected to the enumeration, claiming that it wrongly suggested that only actions leading to international torts breached *jus cogens*. Therefore, it was suggested that either the list be supplemented or case law be given up altogether.

In contrast, two Commission members—Shabtai Rosenne and Mustafa K. Yasseen—strongly stressed the need to solve the problem on the basis of examples of treaties in conflict with *jus cogens*. Rosenne was adamant that their omission would harm the entire draft of the law on treaties.[102]

The examples given by Waldock in Article 13 of the 1963 draft give rise to many questions that are crucial for the practical application of the article. First and foremost, why did the rapporteur of the International Law Commission, out of many possibilities, choose only three and ignore others? Presumably, his choice might have been motivated by two reasons. First, the *jus cogens* with which the enumerated treaties were in conflict was formulated in multilateral international treaties. Second, it was reflected in international court decisions, which can be considered an additional touchstone of its peremptoriness. For instance, the prohibition on the threat and use of force, mentioned in Article 13, features in the UN Charter. The prohibition has its origins in the Briand-Kellogg Pact of 1928 and was recognised as *jus cogens* by the International Military Tribunal in Nuremberg.

102 YILC 1963, vol. II, p. 74.

The treaties leading to international torts listed by Waldock are associated with the judgements of the International Military Tribunal and other tribunals that punished war criminals. The Tribunal, hearing the case of Krupp, implicitly found a treaty concluded by Germany and the Vichy government to be invalid. The treaty made it possible for French prisoners to be employed in German munitions factories.[103] The Tribunal found the treaty to be inconsistent with international morality. The obligation binding States to refrain from actions that could lead to international torts followed from the Hague Conventions of 1899 and 1907. It was also the Conventions that provided grounds for the obligation of States to prosecute and punish war criminals.

Since 1948, the obligation of States in this field has additionally stemmed from the Convention on the Prevention and Punishment of the Crime of Genocide. In 1951, in connection with the Convention, the ICJ issued an advisory opinion on reservations, cited previously. In the opinion, the ICJ defined genocide as the violation of the right to exist of entire groups of humans. The violation is in conflict with morality, and the spirit and goals of the UN Charter. In the opinion of the ICJ, the principles underpinning the Convention are recognised by civilised nations as binding on States even when there are no relevant obligations following from international treaties.[104] Hence, the Convention principles are peremptory. The ICJ opinion reflected the conception of international public policy that had limited freedom of contract by eliminating the possibility of making reservations.[105]

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103 *Law Report of Trials of War Criminals*, vol. X, 1949, p. 141.

104 *International Court of Justice Reports* 1951, *Advisory Opinion. Reservations to the Convention on Genocide*, pp. 23–24.

105 R. Szafarz was right to observe that the elimination of reservations depended on the subjective assessment by other parties to a treaty, who may file an objection and claim that the reservation in question is inconsistent with *jus cogens*. In the absence of an objective assessment mechanism, the ineffectiveness of filing such a reservation will thus manifest itself only *ex post*. Cf. R. Szafarz, *Zastrzeżenia do traktatów wielostronnych*, Warszawa 1974, pp. 87, 97. This finding attests to the subjectivity of assessments of the legal nature of norms made from the perspective of their peremptoriness. The subjectivity is a result of both the absence of unequivocal rules for determining which norms have the nature of *juris*

Waldock was aware that the partial enumeration of the norms of *juris cogentis* he had made was only a half measure for solving a difficult problem. Bowing to pressure from the majority of International Law Commission members exerted during a discussion in 1963, the Commission's rapporteur not only refrained from extending the list of examples, but also dropped the examples he had included in Article 13 of the draft. In doing so, he avoided the difficult task of specifying the norms of *juris cogentis* currently in force. The task was left to practice and international tribunals. This manner of proceeding adopted by the International Law Commission accelerated its work, but had an impact, too, on the significance of the provision on the conflict of a treaty with a peremptory norm of international law for international practice.

The delegates criticising *in merito* Article 50 of the draft made by the International Law Commission did not hide their conviction that the absence of a guideline on which norms constituted *jus cogens* was a major deficiency of the proposed solution. To eliminate it, in 1968 the British delegation proposed an amendment to introduce the rule whereby the norms of *juris cogentis* would be placed in protocols to the convention negotiated already after its conclusion. Speaking in support of the amendment, I.M. Sinclair expressed the opinion that it would help codify norms reflecting international morality and international public policy.[106] Codification could not be replaced, the British delegate maintained, by any system of compulsory jurisdiction. Even if it were put in place, the ICJ could hardly be expected to find whether a given international law norm was peremptory and if so,

cogentis and the absence of bodies equipped with the necessary competen ceto adjudicate on this matter. Caution is recommended in judging Rosenne's proposal to consider the inadmissibility of reservations to be an objective assessment criterion of the nature of an international law norm – YILC 1963, vol. I, p. 74. In the opinion of Rosenne, the criterion of inadmissibility of reservations is more certain than the criterion of derogation. An international convention that admits the filing of reservations does not comprise any norms of *juris cogentis*. Otherwise, it is presumed that articles of a convention in fact constitute *jus cogens*. The proposed criterion"s disadvantage is the fact that it would be applicable only to *jus cogens* formulated in multilateral treaties. Meanwhile, the criterion of derogation can be applied to both *jus cogens* following from treaties and general customary international law.

106 UNCLT 1968, pp. 304–305.

as of when. The British amendment, despite the fact that many States were in favour of it[107], was withdrawn by its authors because of the support they lent to an American amendment. The purpose of the latter was to adopt the rule that the norms of *juris cogentis* had to be recognised by various legal systems—both national and regional.[108] To make the picture complete, it must be mentioned that some state delegations to the Vienna Conference were against the British amendment, alleging chiefly that the enumerative wording of the provision would contravene codification principles.[109]

The final wording of the provision on the conflict of a treaty with *jus cogens* was arrived at after the adoption of two amendments: an American one and another one proposed together by Finland, Greece and Spain. The first supplemented Article 50 by expressing that a treaty was void if, "at the time of its conclusion", it conflicted with a peremptory norm. The expression "at the time of its conclusion" was accepted by the Conference.[110] The amendment of Finland, Greece and Spain, in turn, intended to make the concept of *jus cogens* more specific by introducing the rule of the recognition of *jus cogens* by the international community into the provision. The Greek delegate, Dimitrios Evrigenis, arguing in favour of the common amendment on behalf of the three countries, stressed that the essential element of international *jus cogens* was its universality, i.e. its recognition by the international community.[111] The amendment was referred to the drafting committee who used it in the final wording of the article. The committee chairman explained that following the example of Article 38 of the ICJ statute, besides the word "recognised", the word "accepted" was introduced.[112] Moreover,

107 Among others by Adolfo Maresca (Italy), ibidem, p. 311, who said that the amendment accounted for the constant evolution of law. In the same spirit, R. L. Harry (Australia) spoke, who however denied protocols bore any codifying character and reduced them to the role of lists of existing peremptory norms. Ibidem, p. 317.

108 Ibidem, p. 330.

109 This stance was adopted among others by S.E. Nahlik (Poland), ibidem, p. 302.

110 Ibidem, p. 333.

111 Ibidem, p. 295.

112 Ibidem, p. 471, explanation by Mustafa Yasseen.

the committee divided the article into two sentences of which the first laid down the rule and the second defined the concept. Thus, Article 53 of the Vienna Convention was drafted to have the following final wording:

> 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 of States 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.

It appears that the second sentence of Article 53 formulated in this way should have been included in Article 2 of the Convention where the terms used in it are defined. Ultimately, Article 53 was adopted with 72 votes for, 3 against and 18 abstentions.

An Assessment of the Legal Solution Adopted in Article 53 of the 1969 Vienna Convention

The need to include a provision on the conflict of a treaty with *jus cogens* in the Convention on the Law of Treaties should not give rise to any major doubts in the age of peaceful coexistence and cooperation of States. Provisions on *jus cogens* dialectically develop the principles of *pacta sunt servanda* and *consuetudo est servanda*.[113] In principle, they are to prevent arbitrary acts by States and reaffirm the principle of their equality before the law. Undeniably, these provisions carry great weight in the process of elevating the legal rank of the norms the observance of which guarantees peace and security to the whole international community. The threat of invalidity posed by Article 53 for treaties incompatible with the international public policy should discourage States from concluding agreements universally considered unlawful. Does the wording of Article 53

113 K. Kocot, *Pacta.*..., p. 65.

constitute a reliable guarantee of attaining this goal? In other words, does the legal solution adopted by the Vienna Conference guarantee an effective use of Article 53 against these States, ones that have violated the peremptory norms of general international law by concluding international treaties that remain in conflict with these norms?

The discussion so far supports certain critical reflections on Article 53, its wording and meaning that shall be presented below. Focusing on the way of defining *jus cogens* and its emergence will provide answers to the above questions.

1. Defining the concept of *jus cogens* without naming which norms are peremptory does not seem the best solution to the problem of the inconsistency of treaties with *jus cogens*. The general definition of the concept included in Article 53 in itself does not raise any major objections and shows that the codifiers approached the task entrusted to them with care. Considering the state that international law is in today, it does not suffice, however, to give a general answer to the question of what *jus cogens* is. Furthermore, for the sake of international practice, it is necessary to name the norms that have been considered higher order norms.

The conduct of States in today's international relations shows that they are aware of the necessity to respect these norms. Still in the early 20th century, certain canons of sovereignty justified the claim that States did not have to agree to any limitation of their full freedom of action.[114] With time, the view on the conception of sovereign equality began to change. The view began to gain ground that States were indeed sovereign, but were not absolutely free in their conduct.[115] It was stressed that the Hegelian conception of sovereignty, coming down to the acceptance of any conduct arbitrarily considered appropriate by State authorities, underpinned the German doctrine of law in the period of fascism and brought anarchy to the world. The awareness of the consequences of the

114 Cf. M.S. Korowicz, *The Problem of the International Personality of Individuals*, "American Journal of International Law" 1956, p. 533.

115 Cf. G. Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law*, "Recueil des Cours" 1957, vol. 92, p. 5.

implementation of the doctrine of absolute freedom underlays peaceful coexistence. Its legal dimension is moulded by the fundamental principles of contemporary international law.

States are aware that they avail themselves of their sovereignty in a specific environment. This is why they consult their policies with other States and consent to reciprocal limitations, following from far-reaching interdependencies found in the international community. Hence, the traditional view of sovereignty had to be modified. The rise of the principle of peaceful resolution of disputes and the prohibition on the use of force has abolished the classic prerogative of sovereign states that the right to declare and wage war had been, regardless of its character. The supremacy of international law, developed in the interest of human civilisation as a whole, over sovereignty understood an absolutist manner, is clearly evident in this case. The principal characteristic of modern sovereignty is, therefore, equality of States and independence from one another, which does not mean independence from the law they have made. The law is peremptory and universal if the international community as a whole consents to it. Therefore, there is no conflict between the concept of *jus cogens* and the principle of the sovereignty of States.[116]

It is by no means easy to ascertain to which norms of *juris cogentis* the international community has already consented; those *in statu nascendi* and those only apparently peremptory, whereas in reality they are merely norms of general international law. An attempt was made above to show that as long as the norms of *juris cogentis* stay primarily in the sphere of general customary international law, their identification remains difficult. Meanwhile, it is indispensable for finding an international treaty void pursuant to Article 53.

Article 53, lacking a specification of the norms of *juris cogentis* that are binding on States, can be compared to a provision of the Criminal Code which says that immoral deeds will be punished with impris-

116 For more on the question of sovereignty in today's international relations see J. Sandorski, *RWPG…*, pp. 34–59.

onment without explaining which immoral deeds are crimes or mentioning the norm they violate. Politicians and jurists must know which norms have the nature of *jus cogens* so that treaties concluded by their States would not contravene them. The lack of an unassailable codification of the norms of *juris cogentis* prevented the drafters from limiting Article 53 to a general definition of the concept in question. The Vienna Conference, was not able, however, due to the shortage of time, to deal with such a time-consuming problem as the codification of the norms of *juris cogentis*. In the absence of a procedure for establishing the norms of *juris cogentis*, the task should have been shouldered by the most competent organ, i.e. the International Law Commission. It had two options to choose from. The first involved drawing up a full list of the norms of *juris cogentis* while the second was to include the least controversial norms of *juris cogentis* in the draft article. The more exhaustive such a list would be, the narrower the margin of uncertainty, and this would reduce the threat of international disputes arising over *jus cogens*.

From the opinion of jurists cited earlier, and the speeches of delegates at the Vienna Conference, it can be assumed that such a list should above all include the following: the prohibition on the use of force, the duty to settle disputes peacefully, the principle of sovereign equality, the principle of *pacta sunt servanda*[117] *and the principles of human rights protection. There are arguments in favour of including some other principal rules of the UN Charter (e.g. self-determination) in the list of the norms of juris cogentis*, as well as certain rules of the law of the seas and space law. In the future, the list will no doubt see the inclusion of rules of international environmental protection. The progressive development of international law would require the list to be updated every now and then. This would be best done in the form of annexes to the Vienna Convention.

The argument made against drawing up an incomplete list, and attempting to show that the norms left outside it would be depreciated,

117 Cf. a right statement—on this issue—by H. Gröpper (FRG) – UNCLT 1969, p. 96.

does not seem convincing. After all, a State invoking one of such norms could produce proof that would rebut the presumption that it is not a norm of *juris cogentis*.

The International Law Commission chose the most opportunistic option, whereby the burden of the task it failed to carry out was shifted to practice. This choice reduced the chances for the full implementation of the idea of depriving treaties contravening *jus cogens* of binding force. By ignoring the British amendment, the Vienna Conference abandoned this opportunity, thus seriously weakening the practical usability of Article 53.

2. The concept of *jus cogens* was made considerably more precise by introducing to Article 53 the expression: "a norm accepted and recognized by the international community of States as a whole." However, the expression calls for an explanation as it is not absolutely clear whether the emergence of a norm of *juris cogentis* requires the unanimous consent of all States—members of the international community—or only of a majority of States.

When asked by the delegates to the Vienna Conference, M.K. Yasseen, chairman of the drafting committee, commented on the matter.[118] He said that including the words "as a whole" in Article 53, the committee did not believe it was necessary for all States to adopt and recognise a norm. It is enough if this is done by a large majority. Thus, the chairman of the drafting committee continued, if a single State or a small number of States declined to adopt a norm, it would have no impact on the recognition of the norm as peremptory by the international community as a whole. An individual State does not have the right of veto in such circumstances.[119]

The explanation given by M.K. Yasseen actually blurs the picture. It begs the question of what the purpose of the expression "as a whole" introduced by the drafting committee was, since the concept of

118 UNCLT 1968, p. 472.

119 Ibidem, p. 471. A member of the drafting committee, S.E. Nahlik, argued in favour of interpreting the expression "as a whole" in the sense of a relative and not absolute whole (a considerable majority of States belonging to all groups), *Kodeks…*, p. 326.

the international community covers all the existing States active in the inte national arena as subjects of international law. During a discussion on the concept of the international community at the International Law Commission (1949), a view was expressed identifying it with UN membership. The view was subsequently criticised as incompatible with the concept of universality.[120] However, it appears that because of its past associations, States approved the expression "as a whole" at the Vienna Conference in an attempt to express their belief that all States had to participate in the making of a norm of *juris cogentis.* The expression "as a whole" would be unjustified in Article 53 if it could be interpreted in the sense of a relative whole.

This interpretation is founded on an artificial construction of the concept of the international community and assumes that it has supranational competences. As such, it strikes at the heart of international law, which would cease to exist if the sovereign equality of States were abolished.[121]Adopting the interpretation that a majority of States may create a peremptory norm of general international law binding *erga onmnes* would be tantamount to accepting the existence of a new source of laws binding States which are in a minority against or against their will. Such states, if they were forced to comply with norms enacted without their consent, would lose the position of equality before the law with other States. This situation would be a glaring violation of the principle of sovereignty laid down in the UN Charter.

For these reasons, the expression "as a whole" must be held to emphasise that a peremptory norm must be adopted and recognised by a universal tacit agreement or a universal international treaty by all the existing States active in the international arena. The attitude towards one or a small number of States, ignoring their will, makes it necessary to decide a difficult problem of quantity, namely, how many States make a large majority. The attitude also begets a dilemma: will a norm of *juris*

120 Cf. A. Klafkowski, *Prawo…*, p. 23.
121 Ibidem, p. 23.

cogentis arise if only a single State objects to it, but the State is a great power? There is no doubt that the position of a majority of States, in particular, of great powers, is crucial for establishing peremptory norms of general international law. However, this finding is a fact of life. In the eyes of the law, the consent of each State is equally important for the rise of *jus cogens*. Coercing a State into giving consent by presenting it with a "law accompli" would be a violation of international law.

Every State may raise an objection to the universality and peremptoriness of a legal norm. The objection may be limited to peremptoriness without challenging universality. It was in this way that the universal principles of international law that are not peremptory came into being. Their existence among the fundamental principles of international law laid down in the UN Charter does not permit, as was already pointed out while discussing departures from these principles, considering them *en bloc* as *jus cogens*. The objection of a State must be either express or implied and raised when a norm, to which some States ascribe universality and peremptoriness, is being formulated. A tacit agreement by States precludes any unilateral or multilateral action aimed at revoking it once a norm of *juris cogentis* has arisen. This would be tantamount to an attempt to derogate from it *inter se*. It appears that a newly founded State may declare its will to evade the legal consequences of the norm of *juris cogentis* that has arisen prior to its foundation. A declaration by such a State will not deprive the norm of its proper character, while the objecting State must take into account the consequences that may be brought about by its leaving the norm's sphere of influence. In the absence of such a declaration, it can be presumed that the newly founded State consents to the peremptoriness of legal norms governing the international community.

At the Vienna Conference, it was universally agreed that *jus cogens* was positive law,[122] i.e. enacted by States. The universality of the enact-

122 Still in 1963, opinions on this subject varied in the International Law Commission. A. de Luna, speaking on the concept of "positive law", maintained that if it was held to mean norms enacted by States, *jus cogens* was not positive law. In contrast, understanding positive law as norms in force in the international community justified considering *jus*

ment made it an expression of *voluntas civitatis maximae*. Any attempts to treat *pars pro toto*, i.e. to identify the will of the international community with that of a majority of States, not only have no grounds in the sphere of international law, but also pose a threat to its proper operation.

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SUMMARY

The Invalidity of International Treaties and *Jus Cogens*

The paper is an English translation of *Nieważność umów międzynarodowych* by Jan Sandorski, published originally in Polish in 1978. The text is published as a part of a jubilee edition of the "Adam Mickiewicz University Law Review. 100th Anniversary of the Department of Public International Law" devoted to the achievements of the representatives of the Poznań studies on international law.

Keywords: public international law, invalidity of treaties, *jus cogens*.

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Jerzy Tyranowski

The Economic Aspects of Sovereignty and Self-Determination in Contemporary International Law. Basic Issues[1]

I
Introductory Remarks

With the growing economic interdependence of States, with the subjection of many States to the stringent exigencies of membership in international financial organisations (IBRD, IMF), and with the integration processes in Western Europe currently extending to Central Europe, the questions of "economic sovereignty" or even "monetary sovereignty" are discussed with increasing frequency not only in economic or political reports and literature, but also in writings on international law.

The latter also feature the concept of "economic self-determination." In this connection, it can be further observed that certain important international documents, while laying down the fundamental principles of international law, formulate them in such a way that the same components reoccur in both the principles of the sovereign equality of States and the self-determination of peoples. This may result in not only the complementarity of both principles, but also their mutual competitiveness.

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1 Translated from: J. Tyranowski, *Ekonomiczne aspekty suwerenności i samostanowienia we współczesnym prawie międzynarodowym (zagadnienia podstawowe)*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1992, no. 1, pp. 25–40 by Tomasz Żebrowski and proofread by Stephen Dersley and Ryszard Reisner. The translation and proofreading were financed by the Ministry of Science and Higher Education under 848/2/P-DUN/2018.

Moreover, the conceptions of people's sovereignty and state self-determination appear in the scholarly literature devoted to international law. The two conceptions can hardly be reconciled on the plane of international law norms. Finally, is the permanent sovereignty of peoples over their wealth and natural resources a legitimate issue to discuss in the dimension of international law, as some international documents assume? All this makes for a considerable terminological and conceptual confusion as regards sovereignty and self-determination.

This article attempts to bring some order to this confusion, with special focus on its economic aspects, including coercive economic measures. The principal assumptions from which the article proceeds hold that only peoples enjoy the right to self-determination, thus the concept of self-determination of the state is rejected. Following this assumption, the rights of States are protected by the principle of the sovereign equality of States, while the position of peoples in international law is defined by the principle of self-determination. It follows that the conception of people's sovereignty founded on public international law is rejected.[2]

The present discussion concerns the self-determination of the entire population of a State, rather than individual population groups to be found within its borders. The latter situation is connected to the questions of territorial integrity, secession and the foundation of a State.[3] In this context, another assumption is made, namely, that the principle of self-determination of peoples complements, in terms of content, the principle of sovereign equality with regard to the entire population of a State. The role of the principle of self-determination is primarily to reinforce the prohibition on foreign intervention, which is a natural consequence of the principle of sovereign equality.

2 For more on these issues, see J. Tyranowski, *Zasada suwerennej równości państw a inne podstawowe zasady prawa międzynarodowego*, in: *Suwerenność we współczesnym prawie międzynarodowym*, Warszawa 1991, pp. 18–28.

3 On this issue, see J. Tyranowski, *Integralność terytorialna, nienaruszalność granic i samostanowienie w prawie międzynarodowym*, Warszawa–Poznań 1990.

II
The Right to Choose the Economic System

The Declaration on Principles of International Law concerning Friendly Relations and Co-operation Among States in accordance with the UN Charter of 24 October 1970[4] includes, among the components of sovereign equality, the right of every State to choose and develop freely its political, social, economic and cultural systems. Hence, the right to choose an economic system is an integral element of the sovereign equality of States. At the same time, the Declaration, by virtue of the principles of equal rights and self-determination of peoples, says that "all peoples have the right freely to determine freely, without external interference, their political status and pursue their economic, social, and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter." Thus, the right to choose an economic system is also an integral component of the principle of self-determination of peoples and is similarly approached in other international documents.[5]

One of the most important documents on international economic relations, and one fundamental for the present discussion, namely the Charter of Economic Rights and Duties of States adopted by the UN General Assembly on 12 December 1974[6], states that:

> Every State has the sovereign and inalienable right to choose its economic system as well as its political, social and cultural systems in accordance with the will of its people, without outside interference, coercion or threat in any form whatsoever.

4 UN General Assembly Resolution 2625 (XXV).

5 See in particular the Final Act of the Conference on Security and Cooperation in Europe of 1 Aug. 1975. Declaration on Principles Guiding Relations between Participating States.

6 UN General Assembly Resolution 3281 (XXIX). On the Charter see K. Skubiszewski, *Karta Gospodarczych Uprawnień i Obowiązków Państw*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1981, vol. 2, pp. 85–99; J. Makarczyk, *Zasady nowego międzynarodowego ładu gospodarczego. Studium prawnomędzynarodowe*, Wrocław–Warszawa–Kraków–Gdańsk–Łódź 1988, especially pp. 90–123.

The right to choose an economic system is a vital component of "economic sovereignty"; it is not, however, an independent category in international law: it is one of the aspects of sovereignty. The term "economic sovereignty" itself serves a single purpose: to indicate certain problems that shall be discussed below.

The integral connection of the right to choose an economic system with that to choose political, social and cultural systems is borne out by Chapter I, which lays down the fundamentals of international economic relations.[7] Economic relations, along with political and other relations among States, are governed by the same principles set out therein. They include the sovereign equality of States, non-intervention and the self-determination of peoples.

It follows from this that the principal assumptions on the relationship between the principles of sovereign equality and self-determination also apply to the issue under discussion. In other words, the right of a people to choose freely its economic system in this case is merely complementary to the right of a given State. This complementarity is even more evident in this context, because the Charter lists many detailed rights that stem from the right to choose an economic system; the detailed rights may be associated only with the State and only by the State can they be enforced. The detailed rights are as follows:

A) With respect to international trade and other forms of international co-operation, every State is free to choose the forms of organisation of its foreign economic relations and enter into bilateral and multilateral arrangements consistent with its international obligations and with the needs of international economic co-operation (Article 4).
B) The right to choose a development model, i.e. to choose the means and goals of development (Article 7).

7 For structural and other flaws of the Charter with respect to the formulation of the principles it lays down, see J. Makarczyk, *Zasady…*, pp. 103–120.

C) The right, in agreement with the parties concerned, to participate in subregional, regional and interregional co-operation in the pursuit of their economic and social development (Article 12).

D) The right to associate in organisations of raw-material producers.

The last-mentioned right gave rise to a controversy when the Charter of Economic Rights and Duties of States was being worked on. Today, the prevailing view holds that the burden of proof to demonstrate that cartels of raw-material producers have breached international law norms rests on the States that question the legality of such cartels. Until now, no such proof has been furnished by any State.[8]

Similar to the right of sovereign equality as a whole, the right to choose an economic system as its component is closely related to the principle of non-intervention. As was already mentioned, in Chapter I of the Charter, the principle of non-intervention is listed among the fundamentals of international economic relations. The fundamentals are related to Article 32[9], which states: "No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights."

Questions concerning the use of coercive economic measures will be discussed in Part IV. Now, a more general question needs to be tackled, one concerning "economic sovereignty" or "economic self-determination." As was pointed out earlier, the principle of self-determination may have consequences praxeologically inconsistent with sovereignty, in particular when one considers the admissibility or inadmissibility of foreign intervention. It is quite imaginable that the economic system

8 See *Progressive Development of the Participles and Norms of International Law Relating to the New International Economic Order*, Report of the Secretary – General, A/39/504/ Add. l, 23 X 1984 (hereinafter: UNITAR Study), pp. 44–45, para. 48; see also J. Makarczyk, *Zasady.*..., p. 150.

9 On this placement of the clause included in Article 32 of the Charter, see J. Makarczyk, *Zasady.*..., p. 109.

of a State may be glaringly inconsistent with the will of the people. For instance, the system is conducive to the exploitation of the State's natural resources by foreign capital or transnational corporations (this also involves the question of permanent sovereignty over natural wealth and resources, which will be discussed below). The question springs to mind of whether a foreign State can intervene militarily, when the population of the State takes up arms against this system, to preserve the existing economic system by force, following the invitation (call) of the government of the State. It can be assumed, as a matter of fact, that such an intervention will also have as its goal the preservation of the existing system of government, which—as the experience of developing States shows—is likely to be a dictatorial system.

In the light of sovereign equality, so-called intervention by invitation is admissible.[10] Is such an intervention admissible in the light of self-determination though? In fact, even if other legal aspects pertinent to such a situation are ignored (the issue of the representativeness under international law of a government of a State engulfed in a civil war), it can be said without hesitation that current international law does not allow such an intervention on account of self-determination. This conclusion applies of course to the entire relationship between the principles of sovereign equality and self-determination, and not only to the choice of an economic system. At this juncture, it must also be made clear that international law does not allow "pro-democratic intervention" either,[11] and thus an intervention in favour of the right of a people to self-determination and against the government of a State.

10 In the latest relevant literature, these issues are exhaustively discussed by L. Doswald-Beck, *The Legal Validity of Military Intervention by Invitation of the Government*, "The British Year Book of International Law" 1986, vol. LVI, pp. 189–242.

11 See in particular O. Schachter, *The Legality of Pro-Democratic Invasion*, "The American Journal of International Law" 1984, vol. 7, p. 649. The admissibility of such an intervention was ruled out by the ICJ; Case Concerning Military and Paramilitary Activities in and against Nicaragua, ICJ Reports 1986, p. 126, para. 246.

III
Permanent Sovereignty Over Natural Wealth and Resources

The emerging principle of permanent sovereignty over natural wealth and resources harks back to the old doctrines formulated by the South American jurists, Calvo and Drago, for the purpose of limiting the use of military force (military intervention) to enforce the payment of government debts owed to the citizens of another State.[12] The Drago Doctrine was proclaimed in the wake of the 1902 blockade of Venezuela by European powers to protect the interests of the creditors of the Venezuelan government.[13] As the UNITAR study mentioned already earlier says:

> The re-emergence of this issue in the United Nations in the early fifties under the new denomination "permanent sovereignty over natural resources" came in the wake of the first wave of post-war independence. It was a reflection of the spreading view that this was a necessary complement or component of the right of self-determination.[14]

There is no doubt that the origins of permanent sovereignty over natural resources are related to decolonisation, and for this reason the principle was originally held to grant the right to a people rather than the State.[15] The same tendency is seen in the Resolution of the UN General Assembly of 14 December 1962 (1803/XVII) on permanent sovereignty over natural resources. The Resolution is characterised by considerable conceptual chaos and inconsistency. To wit, according to the preamble to the Resolution, permanent sovereignty over natural wealth and resources is

12 *Zarys prawa międzynarodowego publicznego*, vol. I, Warszawa 1955, pp. 91, pp. 166, 201.
13 Ibidem, p. 201. The blockade contributed to the signing of the Second Hague Convention (so-called Porter Convention) in 1907 on the limitation of the use of force to recover debts owed under a contract.
14 UNITAR Study, p. 46, para. 53.
15 The first resolution of the UN General Assembly on this matter (no. 626/VII) dates back to 1952.

considered "a basic constituent of the right to self-determination", while throughout the dispositive part it refers to "the right of peoples and nations to permanent sovereignty over their natural wealth and resources." On the other hand, the preamble speaks of "the sovereign right of every State to dispose of its wealth and its natural resources," "the inalienable right of all States freely to dispose of their natural wealth and resources", and "the inalienable sovereignty of States over their natural wealth and resources."[16]

Characteristically, later UN General Assembly resolutions, including those concerned with the new international economic order[17], connected the concept of permanent sovereignty over natural wealth and resources only with States. For instance, the Charter of Economic Rights and Duties of States says unequivocally that "Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities" (Article 2).

The later tendency to connect permanent sovereignty over natural wealth and resources with the State, consequently, with the principle of sovereign equality of States, is thus quite clear. The same position is taken by the UNITAR Study, which states as follows:

> […] the normative content of this principle [i.e. permanent sovereignty—J. T.], which derives from sovereign equality, is the affirmation of a faculty or freedom of the States. The consequence of this affirmation is a passive obligation incumbent on all other States to respect the exercise of this faculty, capacity or freedom (i.e. not interfere with, hinder or set obstacle to, such exercise) and *a fortiori* not to take reprisals (in the legal sense) by reason of it. These legal consequences were always subsumed under the principle of sovereign equality, but were not expressly articulated in the earlier resolu-

16 See the critical stance on this matter of L. Dembiński, *Samostanowienie w prawie i praktyce ONZ*, Warszawa 1969, p. 83; also K. Doehring, *Das Selbstbestimmungsrecht der Völker als Grundsatz des Völkerrechts*, "Berichte der Deutschen Gesellschaft für Völkerrecht" 1974, H. 14, p. 20.

17 For instance, the Declaration on the Establishment of a New International Economic Order of 1 May 1974; Resolution 3201/S-VI.

tions on permanent sovereignty over natural resources. They were emphasized, however, in the resolutions relating to the NIEO.[18]

Interestingly enough, the International Law Association took the stance that permanent sovereignty followed from the principle of self-determination in the Declaration on Progressive Development of Public International Law Principles relating to the New International Economic Order (Principle 5, item 2).[19]

In the Polish scholarly literature, the conception which connects permanent sovereignty over natural wealth and resources with the principle of self-determination is strongly supported by Jerzy Makarczyk. In the context of his reasoning, this is understandable as—apparently—he connects the very principle of self-determination with the State as well.[20]

Rejecting, however, the conception of the self-determination of the State, one has to assume that permanent sovereignty over natural wealth and resources stems from the principle of sovereign equality and is an attribute of the State.

The connection made in the earlier resolutions of the UN General Assembly between permanent sovereignty over natural wealth and resources and the principle of the self-determination of peoples can be considered a *sui generis* gesture towards colonial people. It must be noted, however, that this connection could have also some negative consequences. With the opinions on the nature of the principle of self-determination of peoples being varied—as Makarczyk admits—namely if it is a norm of *jus cogens*[21], at least certain components of the principle

18 UNITAR Study, p. 60, para. 96; NIEO – New International Economic Order.

19 International Law Association, Report of the Sixty-Second Conference, Seoul 1986.

20 For instance, Jerzy Makarczyk writes: "Self-determination and political and economic sovereignty are attributes that follow directly from the essence of the State. […] There is […] no dispute anymore as to whether permanent sovereignty, as a consequence of self-determination, follows from the very essence of the State, while international law may only regulate how it is enforced by its carrier […]. However, on the issue whether the source of permanent sovereignty—self-determination of the State—can be considered a principle of *jus cogens* opinions vary." J. Makarczyk, *Zasady.*…, pp. 232, 214.

21 Cf. quotation in footnote 19.

of permanent sovereignty may be adversely affected as well. Permanent sovereignty over natural wealth and resources is thus far more strongly anchored—apart from other aspects of this issue discussed here—in the principle of sovereign equality.

What remains to be considered is the question of the rights of peoples with respect to natural wealth and resources. These rights ought to be considered on the level of the self-determination of peoples. Any such considerations are greatly helped by the provisions of both Human Rights Covenants of 1966. Article 1(2) of both Covenants (concerning self-determination of peoples) states:

> All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

The above statements have additionally been reinforced by the following twin provisions of the International Covenant on Economic, Social and Cultural Rights (Article 29) and the International Covenant on Civil and Political Rights (Article 47):

> Nothing in the present Covenant shall be interpreted as impairing the inherent right of all people to enjoy and utilize fully and freely their natural wealth and resources.

Thus, it can be clearly seen that when addressing the right of peoples to self-determination, the provisions of the Human Rights Covenants do not invoke the principle of permanent sovereignty over natural wealth and resources, but rather refer to the right of peoples to dispose freely of their natural wealth. This is where the key to solving the problem lies. In this context, it is worth remembering that the first draft of the

present Article 1(2), submitted by the Human Rights Commission in 1954, included the following sentence: "The right of people to self-determination shall cover also permanent sovereignty over their natural resources." This wording, however, was not accepted by the Third Committee of the General Assembly. It would be worthwhile to add that in the course of discussion of the draft, some States held the phrase "rights of people" to actually mean the "rights of sovereign States."[22]

In conclusion, it can be said that while States, in pursuance of the principle of sovereign equality, exercise permanent sovereignty over their natural wealth and resources, peoples enjoy—pursuant to the principle of self-determination—the right freely to dispose of their wealth and resources.[23]

The permanent sovereignty of States over natural wealth and resources and the right of peoples to freely dispose of their natural wealth are closely intertwined. Just as on the level of the relationship between the principles of sovereign equality and self-determination, in this case, too, the right of peoples freely to dispose of their natural wealth and resources complements the rights of States with regard to permanent sovereignty over this wealth. On the other hand, permanent sovereignty is to be exercised "in the interest of their national development and of the wellbeing of the people of the State concerned" (Resolution 1803/XVII). The same document continues to say that: "The exploration, development and disposition of such resources […] should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable…".

As Makarczyk observes, these provisions grant "if interpreted literally, broad supervisory powers to peoples and nations with regard to

22 J.N. Hyde, *Permanent Sovereignty over Natural Wealth and Resources*, "The American Journal of International Law" 1956, vol. 50, no. 4, p. 858.

23 Cf. M. de Waart, *Implementing the Right to Development, Annotated outline for joint research under the auspices of the ILA NIEO Committee*, International Law Association, Warsaw Conference 1988, p. 16, para. 43.

state activities."[24] Many developing countries, however, did not consider these provisions to complement and reinforce their permanent sovereignty over natural wealth and resources at all, but rather took them to constitute (or their above interpretation, to be precise) an inadmissible interference in their internal affairs.[25]

It follows that a conflict between the principle of permanent sovereignty of States over natural wealth and resources, and the right of peoples freely to dispose of them is not all that difficult to come by. A particularly disagreeable situation will arise if, as a result of a State exercising permanent sovereignty over natural wealth and resources, a people will be deprived of their means of subsistence.

At this juncture, the question arises of how a people deprived of its means of subsistence may recover its natural wealth and resources. It appears that the only possible way of recovery in such cases is the succession of governments. A new, i.e. revolutionary government, invoking the right of its people to self-determination (the right freely to dispose of its natural wealth), could make appropriate claims on the level of government succession.

The permanent sovereignty of States over natural wealth and resources as well as all economic activities[26] encompasses many questions of detail, calling for separate studies. Here, only the most important ones listed in the UNITAR Study will be discussed:

A) Control of foreign investment.
B) Nationalisation: purpose, compensation (applicable law, meaning of "appropriate" compensation, settlement of compensation disputes).[27]

24 J. Makarczyk, *Zasady*…, p. 245.
25 Ibidem, p. 241.
26 "All economic activities" was the phrase that expanded the principle of permanent sovereignty by the Declaration on the Establishment of a New International Economic Order (Resolution 3201/S-VI) and the Charter of Economic Rights and Duties of States.
27 UNITAR Study, p. 45 ff.

Makarczyk presents the major controversies relating to permanent sovereignty over natural wealth and resources as follows:

A) What restrictions, if any, can be imposed by international law on the right of a State to regulate the way its natural wealth and resources are explored and exploited?
B) Can a State waive the exercise of some of its sovereign rights so that the principle itself is not breached and, if so, in what manner? The question is if this can be done by an act that is not an international treaty. In this connection, the problem emerges of the legal status of economic development agreements. Another problem that needs to be solved in this context is the recognition of the right to renegotiate such agreements (investment agreements).
C) Nationalisation, expropriation, the transfer of ownership of foreign property; the applicability of national or international law when international law is deemed equally applicable; the responsibility of the State for damage done to foreigners; protection of acquired rights and their relation to the needs of economic development; the terms and scope of diplomatic protection. Controversies also include international law conditions for the legality of nationalisation, i.e. the issues of public interest and non-discrimination.
D) Problems relating to compensation for nationalisation or expropriation, which particularly often cause disputes between developed and developing States. Developed States invariably invoke the Hull Rule, under which compensation should be "prompt, adequate and effective", while developing States demand that the interests of their economic development be taken into account and the construction of unjust enrichment be relied upon in the first place.
E) The problem of applicable law and the manner of resolving disputes arising out of nationalisation decisions, including the question of exhausting national remedies.[28]

28 J. Makarczyk, *Zasady…*, pp. 215–217.

These problems are compounded by the complex issues involved in the activities of transnational corporations. These matters are dealt with by the auxiliary body of the Economic and Social Council—the Commission on Transnational Corporations. Additionally, the UN Centre of Transnational Corporations has been set up.

IV

Economic Coercion vs. "Economic Sovereignty"

The "economic sovereignty" of a State may be threatened and violated not only by the use of military force (especially as a result of military intervention), but also by the use of economic coercion. However, these vast issues, which have become increasingly relevant recently, are rarely studied by international law scholars. As a rule, authors writing on international economic law and the new international economic order do not go beyond acknowledging their existence. In turn, authors engaged in the study of the prohibition on the use of force usually focus on issues relating to the use of military force. The reason for this is the stubborn resistance of issues associated with economic coercion to yield to legal analysis. Meanwhile, there continue to be many doubts and ambiguities in this area. The decisive factor is, however, the firm resistance of the best-developed countries of the world to any attempts to subsume economic coercion under the concept of force, the use of which (as well as the threat of its use) is banned under the UN Charter, Article 2(4).

The most bitter conflict over this issue came to a head in the course of work on the draft Declaration of Principles (1970). It was the firm stance adopted by the States with the greatest economic potential that prevented the wording of the principle that "all States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations", from containing any mention of economic coercion. By way of compromise,

some general words on the prohibition on the use of such measures were introduced to the Preamble of the Declaration[29] and elaborated on when laying down the principle of non-intervention in the affairs falling under the internal jurisdiction of any State. The elaboration of the principle provides: "No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind."

The point is, however, this provision does not have a proper footing in the UN Charter and, therefore, cannot be held to be its binding interpretation, as the UN Charter does not expressly contain a prohibition on intervention. The prohibition on military intervention follows directly from Article 2(4), imposing the prohibition on the use of force, while the prohibition on intervention in matters that essentially fall within the domestic jurisdiction of any State, laid down in Article 2(7), applies to the Organisation itself and not relations among States. Furthermore, it is far too obvious that the prohibition of the use of economic coercion cannot be based on any customary rule of international law, because both an *opinio juris* and the uniform practice of States are lacking. Thus, the inescapable conclusion is that any provisions prohibiting the use of economic coercion thus far have remained in the sphere of *de lege ferenda* postulates.[30] The same is true of course for Article 32 of the Charter of Economic Rights and Duties of States quoted earlier.

29 A. Jacewicz is right to observe, however, that "[…] the connection between the Preamble of the Declaration and Article 2(4) of the Charter is merely presumed and does not sustain the hypothesis that the term "force" has been given a meaning covering also economic and political coercion as the only possible interpretation". A. Jacewicz, *Pojęcie siły w Karcie Narodów Zjednoczonych*, Warszawa 1985, pp. 122–123.

30 A different view is presented by J. Gilas, *Sprawiedliwość międzynarodowa gospodarcza*, Toruń 1991, p. 3. He says that there is no doubt that the prohibition on the use of economic pressure by States applies to specific situations such as imposing an economic system on other States, forcing other States to enter into unfair international treaties or exploiting their natural wealth and resources in contravention of the principle of sovereignty. Later, however, this author toned down his position by writing that the prohibition on the threat and use of economic force is only taking shape.

To compile a catalogue of economic coercion measures would be a difficult task today. Certainly, one such measure is an embargo, involving a ban on importing or exporting specific commodities in international trade. It may seriously harm the economy of the State concerned. Other such measures include reprisals, involving the repudiation of economic agreements imposing obligations to another State or the suspension of performance of obligations under such agreements.

Moreover, the concept of "economic intervention" remains unclear. Some authors go as far as to hold that this concept also means foreign assistance to a State.[31] Characteristically enough, the current discussions of economic intervention tie this concept primarily to the activities of international financial institutions and transnational corporations.

Makarczyk writes about a real impact frequently exerted by international organisations, "which, as practice has shown, may on their own or in collaboration with selected States not only infringe the right [i.e. the right to choose an economic system – J.T.], but also simply to attempt to do away with it by exerting pressure on Member States in matters which are essentially within their jurisdiction."[32] Thus discussions of the subject depart from the classic concept of intervention that has treated it solely as an action of one State (or a group of States) towards another State.

The question of economic intervention in connection with the operations of the International Monetary Fund (IMF) has been studied by Caroline Thomas. She claims that developing countries have no other choice but to join the IMF (the only other option is autarky). The IMF can intervene in these countries and often does, imposing policies on them that their governments do not approve. Hence—Thomas writes—developing countries can justifiably claim that the coercion exerted by the IMF falls within the ambit of intervention and is a violation of one of the cardinal principles of international politics—the principle of non-intervention—as formulated in the Charter of Economic

31 Cf. C. Thomas, *New States, Sovereignty and Intervention*, Aldershot (England) 1985, p. 17.
32 J. Makarczyk, *Zasady*…, p. 151.

Rights and Duties of States. This opinion is significant, because it not only extends the definition of intervention to the intangible and difficult sphere of the economy, but also claims that other entities than States may also interfere in the sphere of competence that should be reserved to sovereign States under international law.[33]

Another problem is the activity of transnational corporations. The fact of its existence is borne out by Article 2(2)(b) of the Charter of Economic Rights and Duties of States,), second sentence, under which transnational corporations may not interfere in the internal affairs of the host country. The Code of Conduct on Transnational Corporations, drafted in 1988 under the auspices of the UN Commission on Transnational Corporations stipulates:

> 7. Transnational corporations shall respect the national sovereignty of the countries in which they operate and the right of every State to exercise its permanent sovereignty over its natural wealth and resources. […]
>
> 16. Transnational corporations shall not intervene in internal affairs of host countries without prejudice to their participation in activities allowable under the law, regulations or established administrative practice of host countries.[34]

These provisions of the Code go far beyond the regular formula commanding respect for and compliance with the law of a host State. The issues associated with the operation of transnational corporations are dealt with on the level of the duty to respect the sovereignty and the prohibition on intervention in the internal affairs of a host State, i.e. on the level that has been reserved until now for relations between States. If the controversy mentioned earlier is recalled, namely whether the restriction on exercising permanent sovereignty over natural resourc-

33 C. Thomas, *New States.*…, p. 151.
34 Quoted after ILA Report of the Sixty-Fourth Conference, 1990, pp. 258–259.

es may be effected also by acts that are not international treaties, such as economic development agreements (investment agreements), it becomes apparent that we are facing a deep evolution of international law with respect to international economic relations. This involves, on the one hand, the extension of the use of force to cover economic coercion and, on the other, the realisation that not only States, but also international organisations (sanctions imposed by the UN Security Council, as a separate issue, are left out of the discussion) and transnational corporations may be capable of applying such coercion.

The problem of economic coercion is not limited of course to the sphere of international economic relations; on the contrary, it encroaches on the entire general sphere of international relations, as shown by the preamble to the 1970 Declaration of Principles, prohibiting the use of economic coercion directed against the political independence or territorial integrity of any State. The same is evidenced by the Declaration of the 1969 UN Conference on the Law of Treaties concerning the prohibition on the use of military, political or economic coercion in concluding treaties. The Declaration condemns the use—by any State in any manner—or the threat or use, of military, political or economic pressure, in violation of the principles of the sovereign equality of States and free expression of will, to force another State to perform any act connected to the conclusion of a treaty.

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SUMMARY

The Economic Aspects of Sovereignty and Self-Determination in Contemporary International Law. Basic Issues

The paper is an English translation of *Ekonomiczne aspekty suwerenności i samostanowienia we współczesnym prawie międzynarodowym (zagadnienia podstawowe)* by Jerzy Tyranowski, published originally in Polish in "Ruch Prawniczy, Ekonomiczny i Socjologiczny" in 1992. The text is published as a part of a jubilee edition of the "Adam Mickiewicz University Law Review. 100th Anniversary of the Department of Public International Law" devoted to the achievements of the representatives of the Poznań studies on international law.

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The Principle of Good-Neighbourliness in International Nuclear Law[1]

I

The principle of good-neighbourliness has become generally accepted by both international-law norms and practice. In the authoritative juristic literature on international law, which has been increasingly vocal on this issue, it is approached as a general principle of the law of nations. This, in turn, is no doubt a consequence of its express proclamation in the Charter of the United Nations.[2] There is a clear tendency to make this principle global, which means that good-neighbourly obligations are universal, irrespective of any political, social or especially economic considerations. Precise standards of good-neighbourliness, defined in positive law norms, are used in various fields of international cooperation. There is an evident tendency to introduce this concept to

1 Translated from: T. Gadkowski, *Zasada dobrego sąsiedztwa w międzynarodowym prawie atomowym*, in: *Pokój i sprawiedliwość przez prawo międzynarodowe*, ed. C. Mik, Toruń 1997, pp. 89–102 by Tomasz Żebrowski and proofread by Stephen Dersley and Ryszard Reisner. The translation and proofreading were financed by the Ministry of Science and Higher Education under 848/2/P-DUN/2018.

2 Among publications by Polish authors on this subject, there is a series of works by T. Jasudowicz, *Pojęcie dobrosąsiedztwa w stosunkach międzynarodowych*, "Sprawy Międzynarodowe" 1977, no. 4, pp. 58–72; T. Jasudowicz, *Zasada dobrego sąsiedztwa w Karcie Narodów Zjednoczonych*, "Acta Universitatis Nicolai Copernici – Prawo XXVIII", Toruń 1990, pp. 69–87; T. Jasudowicz, *"Dobre sąsiedztwo" w Konwencji Prawa Morza z 1982*, "Prawo Morskie" vol. IV, Wrocław–Warszawa–Kraków 1990, pp. 53–73.

bilateral treaties, especially ones concluded by direct neighbours, geographically speaking. This can be noticed in the treaties concluded by Poland in recent years.[3]

II

According to the classic understanding of the normative aspect of the good-neighbourliness principle, it is an embodiment of the maxim *sic utere tuo ut alienum non laedas*, representing the close interdependence of the interests of countries bordering on each other and the practice of their territorial sovereignty.[4] The principle is derived from the idea of the territorial sovereignty of States, which takes into account and respects the rights of other States, especially neighbouring ones. It has become popular in many aspects of interstate relations.[5] The theoretical fundamentals of good-neighbourliness were laid down by Huber[6] and Andrassy.[7] The latter, applying this idea to the use of international waters, made it clear that the rules of good-neighbourliness bound States independently of any treaty.[8] It would be difficult to formulate a rule

3 By way of example: Treaty of 17 June 1991 between the Republic of Poland and the Federal Republic of Germanyon Good-Neighbourliness and Friendly Cooperation (Journal of Laws of 1992, no. 14, item 56); Treaty of 22 May 1992 between the Republic of Poland and the Russian Federation on Friendly and Good-Neighbourly Cooperation (Journal of Laws of 1993, no. 61, item 291).

4 See M. Sorensen, *Principles de droit international public*, "101 Receuil des Cours de l'Academiede Droit International de la Haye" 1960, vol. III; J. Willisch, *State Responsibility for Technological Damage in International Law*, Berlin 1987, pp. 170 ff. See also works by J. Symonides, *Terytorium państwowe w świetle zasady efektywności*, Toruń 1957, p. 260 and *Międzynarodowe problemy walki z zanieczyszczeniem rzek*, "Sprawy Międzynarodowe" 1972, no. 2, p. 47.

5 See e.g. F. von der Heydte, *Das Prinzip der guten Nachbarshaft in Völkerrecht*, Vienna 1960, p. 133 ff.; for an extensive catalogue of literature on this subject, see Doc. A/CN.4/348, p. 74.

6 M. Huber, *Ein Beitrag zur Lehre von der Gebietshoheit an Grenzflüssen*, "Zeitschrift für Völkerrecht" 1907, vol. 1, p. 159 ff. (Huber's six principles are quoted, for instance, by J. Willisch, *State Responsibility…*, pp. 173–174.

7 J. Andrassy, *Les relations internationales de voisinage*, "79 Recueil des Cours…" 1951, vol. II, pp. 75 ff; see also B. Winiarski, *Principles généraux du droit fluvial international*, "45 Recueil des Cours…" 1933, vol. III, p. 79 ff.

8 J. Andrassy, *Les relations...*, p. 104 ff.

for determining the range of allowable activities by a State which could be reconciled with the good-neighbourliness principle. The activities are subject to assessment in each individual case. Therefore—as Symonides emphasised—establishing that a State has breached any legal norm applicable to neighbourly relations calls for taking into account the effects of the activities in question in each individual case, the possible claims of the neighbouring State and the degree of their satisfaction. In brief, it is necessary to assess possible damage and benefits.[9] The good-neighbourliness principle is thus undoubtedly an expression of the interdependence of the rights and interests of States bordering on each other and the requirement ensuing from this, namely that each State limit the activities that may cause damage outside its territory.

Mutual relations between States, and not only ones directly bordering on each other, should take into consideration both the freedom of one State to act in its own territory and the freedom of another from any transboundary consequences of such acts. The situation where the interests of adjoining States (following from their sovereign rule over their respective territories) often come into conflict, largely results from the fact that even if a State exercises due diligence it is not able to limit the possible harmful consequences of some kinds of activity to its own territory.[10] Of course, a State should not plan such consequences in advance and should therefore take—both at home and as part of international cooperation—appropriate measures to safeguard against any damage, and not only transboundary damage. With respect to some kinds of permissible activity, including the peaceful use of nuclear energy, such damage cannot be completely ruled out. On the other hand, nuclear energy cannot be given up entirely either. In fact, nuclear energy production—despite the awareness of potential radiation risks—has not been stopped. Moreover, the use of the sources of ionising radiation will certainly grow in many fields of

9 J. Symonides, *Prawnomiędzynarodowe problemy…*, p. 50.

10 See e.g. P.M. Depuy, *Due Diligence in the International Law of Liability*, in: *Legal Aspects of Transnational Pollution*, OECD, Paris 1977, p. 345.

science and the economy. Hence, conflicts of interest may arise between States over the implementation of the good-neighbourliness principle. It needs to be realised that the terms "good-neighbourliness principle" and "neighbouring State" are considered to be conventional concepts of a kind, in particular in relation to activities that are not prohibited by international law, such as the peaceful use of nuclear energy, or generally with respect to transboundary environmental pollution. What makes the damage potentially caused by such activities special is its wide-ranging nature, following from *distantiae loci*. Damage may be caused in areas far away from the source and the most badly affected State by no means has to be a neighbouring State.

Therefore, with respect to the damage caused by transboundary environmental pollution, the concept of a neighbouring State, as a State territorially connected to the State involved in activities causing such pollution, loses its original meaning and must be expanded to include all the States potentially at risk of suffering transboundary damage.[11] This appears to be justified if only by the provisions of the Convention on Long-Range Transboundary Air Pollution.[12] Consequently, the good-neighbourliness principle with respect to the international responsibility of a State for nuclear damage must be considered in its proper proportions, following from the transboundary and ecological character of the damage.[13]

III

The authoritative juristic literature has taken a clear stance that the good-neighbourliness principle can be a possible criterion for resolving disputes over damage related to the exploration and exploitation of the seabed and

11 For more on this subject, see M. Kloepfer, *Internationalrechtliche Probleme Grenzer Kernkraftwerke*, "Archiv des Völkerrecht" 1987, Bd 25. Heft 3, p. 279.

12 Convention on Long-Range Transboundary Air Pollution (13 Sept. 1979). The text of the Convention can be found in "International Legal Materials" 1979, vol. 18.

13 T. Gadkowski, *Odpowiedzialność międzynarodowa państwa za szkodę jądrową*, Poznań 1990, p. 84, 100 ff.

ocean floors[14] or the use of water and air.[15] However, the criterion cannot be used with respect to any damage caused by such activities. The fundamental international law regulations on environment protection make it clear that material damage is the principal prerequisite for a State's international responsibility.[16] Furthermore, the literature expresses the view that assuming that any material damage is prohibited by the good-neighbourliness principle would reduce it to the literal understanding of the maxim *sic utere tuo utalienum non laedas.* Additionally, it is assumed that the good-neighbourliness principle does in fact embody this maxim but with the reservation that it does not prohibit causing *any* damage but only significant damage.[17] This stance clearly refers to the conclusion of the decision in *Trail Smelter,* which clearly prohibits using a State territory in a manner that could cause *serious consequences* in the territory of a neighbouring State.[18] In other words, the authoritative juristic literature assumes, for instance with respect to the use of water and air, that certain damage, so-called negligible damage, is admissible in good-neighbourly relations; ergo, it admits that the principle can be applied flexibly.[19]

14 See e.g. T. Jasudowicz, *"Dobre sąsiedztwo" w Konwencji Prawa Morza z 1982*, "Prawo Morskie" vol. IV, p. 64; B. Kwiatkowska-Czechowska, *Odpowiedzialność państwa wynikająca z badania i eksploatacji dan mórz i oceanów*, in: *Odpowiedzialność państwa w prawie międzynarodowym*, ed. R. Sonnenfeld, Warszawa 1980, p. 135.

15 E.g. I. Rummel-Bulska, *Użytkowanie wód śródlądowych dla celów nieżeglownych w świetle prawa międzynarodowego*, Warszawa 1981, pp. 198 ff.

16 From the rich literature on the subject, see e.g. R. Pisillo-Mazzeschi, *Forms of International Responsibility for Environmental Harm*, in: *International Responsibility for Environmental Harm*, eds F. Francioni& T. Scovazzi, London–Dordrecht–Boston 1991, pp. 15 ff.; A. Kiss, D. Shelton, *International Environmental Law*, London 1991, pp. 541; *International Law and Pollution*, ed. D.B. Musgrave, Philadelphia 1991, p. 369; J. Ciechanowicz, *Zasady ustalania odszkodowania w prawie międzynarodowym publicznym*, Gdańsk 1989, pp. 23 ff.

17 Cf. e.g. I. Rummel-Bulska, *Użytkowanie wód śródlądowych.*…, p. 147.

18 *Trail Smelter Arbitration*, Reports of International Arbitral Awards, III, p. 1905.

19 I. Rummel-Bulska, *Użytkowanie wód śródlądowych.*…, p. 198. The author writes that 'In agreement with the good-neighbourliness principle, it is not prohibited to carry out any activity by a State in international waters, their tributaries and sub-tributaries that may cause harmful effects in the territory of other States, but only such activities that cause significant damage' (pp. 148–149). See there for relevant court decisions (p. 143).

However, the application of this assumption to the international responsibility of a State for nuclear damage should be approached with strong reservations for at least two important reasons. First, allowing certain kinds of damage and disallowing others gives rise to serious doubts when judging a specific case of actual damage. The positions adopted by interested States are of course divergent, for instance, in assessing the material damage caused by transboundary environmental pollution. Second, nuclear damage can hardly be considered negligible. Apart from the *distantiae loci* mentioned earlier, another special characteristic of such damage is its long-term consequences following from *dsitantiae temporis*, which means that they may appear a long time after the initial transboundary radiation pollution of the environment. Of course, the matter of assessing damages is also subject to controversy here, but as far as the principle itself is concerned, it must be assumed that a State is internationally responsible for all material nuclear damage.[20] Therefore, employing the good-neighbourliness principle as a possible criterion for claims for damages under a State's international responsibility for nuclear damage may not be conditional, i.e. applied only to significant or serious damage. The special nature of the activity causing damage and, above all, the special nature of the damage itself make it necessary to adopt a special responsibility regime in this case as well.

IV

The good-neighbourliness principle is not merely a theoretical construction but is actually universally invoked in international agreements, judicial decisions, and State practice.[21] States were obliged to conduct them-

20 See e.g. N. Pelzer, *The Impact of the Chernobyl Accident on International Nuclear Law*, "Archiv des Völkerrecht" 1987, Bd. 25, Heft 3; *Current Problems of Nuclear Liability in the Post-Chernobyl Period – A General Standpoint*, "Nuclear Law Bulletin" 1987, no. 39.

21 A rich list of examples can be found in: *Survey of State Practice to International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law*, ILC DOC. A/CN.4/384, pp. 15–18.

selves consistently in accordance with this principle by, for instance, the Preamble to the UN Charter, the 1970 Declaration on Principles of International Law and Article 74 of the UN Charter.[22] The obligation was straightforwardly adduced by Australia in the Nuclear Tests Case.[23] Some regional multilateral agreements also refer to the good-neighbourliness principle; for example, the Nordic Convention on the Protection of the Environment of 19 February 1974.[24] Similar clauses can be found in many bilateral agreements. This is especially true for border agreements but also others aimed at protecting a neighbouring state from the potential effects of pollution produced by allowable activity, e.g. the extraction of oil from shelf areas and ensuring information exchange on activities potentially affecting the weather. References to this principle can be also found in agreements on radiation protection in connection with nuclear energy use in border areas.[25]

Similarly to treaties, international judicial decisions also make clear references to the good-neighbourliness principle. They chiefly concern international responsibility for damage caused by industry, the use of rivers, fisheries, exploitation of the seabed and ocean floors, and nuclear arms tests.[26]

In the mutual relations between States, the good-neighbourliness principle was invoked many times as grounds for claims concerning transboundary damage in border areas caused by activity which was permitted but involved a high risk of damage. Two cases in point can be cited here: one involving damage in the territory of Switzerland due

22 T. Jasudowicz, *Zasada dobrego sąsiedztwa w Karcie Narodów Zjednoczonych*, "Acta Universitatis Nicolai Copernici" 1989, no. 196, p. 69 ff.; for international law assessment of this obligation, see *The Charter of the United Nations: A Commentary*, ed. B. Simm, Oxford 1994, p. 931.

23 *NuclearTests Case*, ICJ Reports 1971, p. 99; cf. K. Kocot, *Prawnomiędzynarodowe zasady sozologii*, Wrocław 1977, p. 40.

24 The text of the Convention can be found in *Selected Multilateral Treaties in the Field of the Environment*, ed. A. Kiss, Cambridge 1982, p. 403.

25 For examples of such agreements, see T. Gadkowski, *Odpowiedzialność międzynarodowa państwa…*, pp. 86–87.

26 For a list of decisions in these matters, see ibidem, pp. 87–88.

to an explosion in an Italian Munitions Factory in Arcisate[27]; and another also involving damage in Swiss territory due to its penetration by insecticides produced on the French side of the border.[28] In both cases, Swiss claims for damages referred clearly to the good-neighbourliness principle.

V

As was mentioned earlier, conflicts between neighbouring states over the implementation of the good-neighbourliness principle are, in principle, unavoidable. They arose in the past and will certainly arise in the future, in particular over activities in border areas that are a source of potential transboundary damage being sustained by a neighbouring State. This is—it seems—a question of a greater significance as it concerns the location of permitted activity that involves a high risk of damage. Reuter has expressed the extreme view in this connection, namely that a State has no right to take up any activity in its territory that would be *abnormally dangerous* for other States, in particular for neighbouring States. He stressed that in such a situation international responsibility of a State is triggered not by the actualisation of the risk involved in the activity in question, but by the very fact of its conduct.[29] This stance was reflected in the Swiss claim for damages in the Arcisate case. The claim alleged that *abnormally dangerous activities* carried out by the State in a border area were tantamount to a breach *per se* of an international obligation.[30]

27 On this case, see P. Gugenheim, *La pratique suisse en matière de droit intenational public 1956*, "Schweizerisches Jahrbuch für Internationales Recht" 1957, vol. 14, p. 169.

28 On this case see L. Casflisch, *La pratique suisse en matière de droit intenational public 1973*, "Schweizerisches Jahrbuch für Internationales Recht" 1974, vol. 30, p. 147.

29 P. Reuter, *Principles de droit international public*, Hague 1962, p. 592.

30 See footnote 26.

VI

Adopting this stance in respect of activity related to the peaceful use of nuclear energy is neither desirable nor possible. After all, such activity is permissible under contemporary international law.[31] This does not mean that all the potential consequences of such activity must have a similar character. Transboundary environmental pollution due to a nuclear accident, causing specific property damage to another State or other States, although related to permissible activity, is already a breach of the interest of these States protected by international law. Being permissible, the peaceful use of nuclear energy has at the same time certain special characteristics. They do not fully justify making an automatic transfer of institutions defining the international responsibility of a State for the harmful consequences of activities not prohibited by international law to the sphere of the international responsibility of a State. This is a result, first of all, of the special nature of nuclear damage. Although it admittedly has the characteristics of transboundary environment pollution, it also has consequences that are incomparable—in terms of their spatial and temporal range, and effects for people, property and the environment—with the consequences of other damage resulting from such pollution.

In addition, the very nature of the peaceful use of nuclear energy is quite different from the activity in question in the landmark decision in *Trail Smelter*. Frequently cited in the literature, this case formed an important element of the conception presented by Quentin-Baxter. The activity of the Trail Smelter, being the source of pollutants penetrating the U.S. territory, was an abnormally dangerous activity *per se*, giving rise to a special risk of transboundary damage. The industrial haze and resultant damage in the territory of the neighbouring State were thus inextricably bound to permissible —under international law—but abnormally dangerous activity in the territory of Canada. In fact, the

31 For more on this issue, see T. Gadkowski, *Odpowiedzialność międzynarodowa państwa…*, p. 55 ff.

peaceful use of nuclear energy does not involve a particularly high risk of damage. The risk, owing to the safety measures used, has been minimised, but not completely ruled out.[32] The crux of the matter lies somewhere else: on the one hand, the likelihood of damage is very low, but on the other, if it does happen after all, its potential consequences may have indeterminable proportions.[33] Moreover, nuclear damage takes place to the same or even greater degree in the territory of the State where the activity which is its source is conducted.

VII

When applied to interstate relations, in practice the good-neighbourliness principle gives rise to a variety of problems, resulting largely from the conflict of interests between neighbouring States. In connection with peaceful nuclear activity, problems are often caused by the location of nuclear power plants and other installations, especially including nuclear waste burial sites in border areas.[34] This dimension of the good-neighbourliness principle proves to be of great practical importance and its international significance has been widely discussed in the literature.[35] Actually, it is much broader, as it involves the location of such activities in border areas, which poses a major risk, especially an ecological one, to a neighbouring State, in its opinion.[36] For example, in 1973, in

32 Cf. e.g. L. de La Fayette, *International Environmental Law and the Problem of Nuclear Safety*, "Journal of Environmental Law" 1993, vol. 5, no. 1, pp. 29 ff.

33 See M. Politi, *The Impact of the Chernobyl Accident on the State's Perception of International Responsibility for Nuclear Damage*, in: *International Responsibility…*, pp. 473 ff.

34 For a rich selection of reading on this subject, see *Siting of Nuclear Facilities. Proceedings of a Symposium Jointly Organized by IAEA and NEA*, Vienna 9–13 Dec. 1974, IAEA, Vienna 1975, p. 604.

35 For the latest on the subject see P. Gramegna, *Kernenergienutzung und Staatsgrenzen aus der Sicht des Nachbarrechts*, in: *Friedliche Kernenergienutzung und Staatsgrenzen in Mitteleuropa*, ed. N. Pelzer, Baden-Baden 1987, pp. 344–358; F.W. Schmidt, *Kernenergienutzung und Staatsgrenzen aus der Sicht des Nachbarstaats*, in: *Friedliche Kernenergienutzung...*, pp. 360–363.

36 Cf. e.g. M. Bothe, *Legal Problems of Industrial Siting in Border Areas and National Environmental Policies*, in: *Transfrontier Pollution and Role of States*, OECD, Paris 1981, pp. 79–97.

connection with Lichtenstein's plans to build a refinery in the Rhine Valley, Switzerland strongly protested that owing to international law principles, in particular the good-neighbourliness principle, it could not accept the construction plans that did not guarantee suitable protection of the environment from pollution in the future.[37]

It appears that from the good-neighbourliness principle, which—as was mentioned earlier—does not prohibit a State from making peaceful use of nuclear energy in its territory, certain obligations of a State can be deduced, in connection with locating relevant facilities in border areas. Above all, the obligations include notifying a neighbouring State in advance of plans to engage in such activity and consulting them together.[38] The chief purpose of consultations is to allow the neighbouring State to take into account the information obtained when making plans for developing and using its own border area.

VIII

Therefore, it would be desirable at this juncture to consider the possibility of referring to the conception of primary obligations presented by Quentin-Baxter in his reports for the International Law Commission.[39] In this conception, the principal original norm is expressed by the maxim *sic utere tuo ut alienum non laedas*, establishing the obligation for a State to exercise its rights stemming from territorial sovereignty in

37 L. Caflisch, *La pratiquesuisse…*, pp. 263–264.

38 Cf. e.g. the provisions of Principle 20 of the Stockholm Declaration and UN General Assembly Resolution No. 2995 (XXVII) expressly referring to the good-neighbourliness principle. The obligation of mutual advance consultations in the field of environment protection is extensively discussed by K. Kocot, *Prawnomiędzynarodowe zasady…*, p. 125 ff. For the question of locating nuclear power plants in border areas and its assessment from the point of view of the very essence of the good-neighbourliness principle, see e.g. G. Handl, *Grenzenüberschreiten—des nukleares Risiko und völkerrechtlicher Schutzanspruch*, Berlin 1992, p. 35 ff.

39 *Reports on International Liability for Injurious Consequences Arising out of Actsnot Prohibited by International Law*, mentioned by Ch. Tomuschat, *International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law: The Work of the International Law Commission*, in: *International Responsibility…*, p. 37 ff.

a manner not causing damage to the interests of another State or other States.[40]The primary obligations in Quentin-Baxter's conception are made up of four principal obligations of States: to prevent, to inform, to negotiate and to repair, related to transboundary damage caused by activity not prohibited by international law. The first three obligations are covered by contemporary nuclear law as rules of prevention, whereas the fulfilment of the fourth is actually hampered as far as claims for damages are concerned, having as their grounds a State's international responsibility. It must be made absolutely clear that international norms on indemnity for nuclear damage refer to both a State's international responsibility and the civil liability of the entity operating a nuclear facility. In nuclear law, a State's international responsibility is parallel to the civil liability of the operating entity and does not replace it, but supplements it in a sense. While civil liability has been regulated in complex international norms that continue to be developed, the international responsibility of a State under the fourth obligation has not been sufficiently regulated by positive law.[41]

The main international regulations on civil liability for nuclear damage, namely the Vienna Convention of 21 April 1963[42], Paris Convention of 19 May 1960 (amended by two additional protocols of 1964 and 1982)[43], Brussels Convention of 31 January 1963 Supplementary to the Paris Convention[44] and the Joint Protocol relating to the Application of the Vienna Convention and Paris Convention of 21 September 1988[45], do not provide grounds for any specific international claims for damages as a result of nuclear damage. A proposal to amend the provisions of the

40 See ILC Doc. A/CN.4/360, pp. 23–30 (*Schematic Outline*).

41 For more on this responsibility, see T. Gadkowski, *International Liability of State for Nuclear Damage*, Poznań, Delft 1989, p. 150; J. Łopuski, *Liability for Nuclear Damage, An International Perspective*, Warszawa 1993, p. 67.

42 Convention text: UNTS 1063:265.

43 Convention text: UNTS 956:251 (Poland is not a party to it).

44 Convention text: UNTS 1041:350 (Poland is not a party to it).

45 Protocol text: *The International Law of Nuclear Energy, Basic Documents*, Part 2, Dordrecht–Boston–London 1993, p. 1369.

Vienna Convention drafted by the IAEA Special Committee does not regulate this matter either.[46] Hence, the question of adopting separate international regulation in this field remains open.

IX

The process of introducing elements of the good-neighbourliness principle to international nuclear law gained momentum after the Chernobyl nuclear power plant disaster. As a matter of fact, it was then that the norms of this law noticeably began to develop. This is true for both bilateral and multilateral agreements, concerning wide-ranging cooperation in the field of the peaceful use of nuclear energy and the activities of international organisations, especially the International Atomic Energy Agency (IAEA), and improvements made by States to their safety measures and supervisory institutions. The most important effect of these efforts is seen in two conventions prepared under the auspices of the IAEA and adopted by the IAEA General Conference at its special session on 26 September 1986. These are: the Convention on Early Notification of a Nuclear Accident[47] and the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency.[48]

Particularly important obligations, especially when viewed from the perspective of discharging of the duties following from the good-neighbourliness principle, are included in the Convention on Early Notification of a Nuclear Accident. Under Article 1, it applies in the event of any accident involving the facilities or activities of a State Party or of persons or legal entities under its jurisdiction or control from which a release of radioactive material occurs, or is likely to occur, and that has resulted or may result in an international transboundary release which is significant for the radiological safety of another State. This scope of application of

46 On the work of the Committee, see J. Łopuski, *Liability for Nuclear Damage…*, p. 25 ff.
47 Convention text: *The International Law…*, p. 1269.
48 Convention text: *The International Law…*, p. 1277.

the Convention calls for considering three important issues. First, the scope covers the entire activity of a State related to the use of nuclear energy. Hence, the Convention applies to transboundary radiological effects produced by both peaceful and military nuclear activity. Second, the Convention applies to any accident involving the facilities or activities of a State Party or of persons or legal entities under its jurisdiction or control and hence, also to any nuclear activity conducted outside the territory of a State. Third, the Convention applies to all accidents involving facilities or activities that result or may result in a transboundary release of radioactive substances possibly posing a significant risk for another State. This wording, being a practical reflection sui generis of the conclusion of the decision in *Trail Smelter* is—in the opinion of the present author—a major shortcoming of the Convention, because it admits a completely erroneous and actually dangerous possibility of grading radiological risks in terms of their harmful effects in the territories of other States. Moreover, it begs the question about the legal and moral entitlement of the State engaged in the nuclear activity that has caused an accident to decide about the degree of risk therefrom for other States.

The Convention (Article 2) makes States notify forthwith the IAEA and other States that may be physically affected by the accident about its occurrence, nature, and the time and place (Article 2(a)). Furthermore, in the case of a nuclear accident, a State has to immediately give other States and the IAEA any available information relevant to minimising the radiological consequences of the accident (Article 2(b)). Moreover, where possible, a State has to give further information without delay upon request from interested States. In addition, the Convention also provides for a duty to notify in the event of nuclear accidents other than those specified in Article 1. They may include events when no transboundary release of radioactive substances occurs to the extent that, in the opinion of the State where the incident takes place, it may pose a significant radiological risk for other States (Article 3).

The fact that the Convention provides for a complex system of notification about a nuclear accident and consequent risk of transboundary radiological contamination of the territory of other States is only to be praised. The Convention is the first multilateral international law regulation to be so clear about the obligation of a State *to inform* in connection with potential or actual nuclear damage. The Convention, admittedly, does not use the concept of nuclear damage, employing instead the broad concept of transboundary radiological consequences, which in fact may bring about specific, more or less determinable damage. The obligation of a State to notify other States that a nuclear accident has occurred and give them the information mentioned above is, therefore, a specific treaty obligation of State-Parties, clearly set out in an international agreement. Its neglect by a State may result in specific international law consequences, as in the event of non-fulfilment or improper fulfilment of other obligations.

The provisions of the Convention still, however, do not offer formal treaty grounds for claims for damages following nuclear damage under international law. In other words, a State Party's failure to meet its obligations under the Convention is not a source of its international responsibility for nuclear damage. When, however, the provisions of the Convention are compared with the existing regulations of international environmental protection law, which for the most part are soft law, or even with the Convention on Long-Range Transboundary Air Pollution mentioned earlier, considerable progress can no doubt be noticed in the development of international norms. The Convention on Early Notification of a Nuclear Accident has expressly institutionalised one of the principal elements of Quentin-Baxter's conception of primary obligations. It has been applied to a potential risk or actual occurrence of transboundary nuclear damage, and it is from this angle that the Convention should be assessed as a milestone in the development and codification of international nuclear law norms.

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However, the greatest practical importance of the Convention lies in Article 9, which states that in furtherance of their mutual interests, State Parties may consider the conclusion of bilateral or multilateral arrangements relating to the subject matter of the Convention. They may include, above all, bilateral agreements between neighbouring States on early notification of a nuclear accident and exchange of information in this regard. The practice that has evolved in this respect in the last three years deserves special praise as it entails situations where States negotiate without undue delay to establish suitable treaty obligations. An example in point is the great activity of the Scandinavian countries in this field.[49]

Against this background, Poland's treaty activity looks particularly good. Our country has entered into relevant treaties on the exchange of information and cooperation in the field of nuclear safety and radiological protection, and on the issue of early notification of nuclear accidents with eight European States, including almost all its neighbours. The first agreement was concluded with Denmark on 22 December 1987 and concerned the exchange of information and cooperation in the field of nuclear safety and radiological protection.[50] The agreements contain typical provisions derived from the Convention and others of a broader import. They oblige State Parties to inform one another about nuclear reactors that are planned, under construction and operating, and about nuclear waste burial sites and radiological risk warning systems (Article 1). Moreover, they make it incumbent on the parties to inform one another directly and without delay of accidents in nuclear facilities or nuclear-activity-related facilities if a release of radioactive substance may have consequences for the territory of another State (Article 3(1)). This obligation also covers situations of extraordinary increase in radiation levels in the territory of a given State which is not caused by

49 For more on this practice see *Bilateral, Regional and Multilateral Agreements Relating to Cooperation in the Field of Nuclear Safety*, IAEA, Vienna 1990, Legal Series No. 15.

50 For the text of the agreement see "Nuclear Law Bulletin" 1988, no. 41, pp. 49–61.

a nuclear accident or other nuclear activity conducted in the territory of this State (Article 3(2)). The agreement also provides for the obligation of State Parties to hold regular consultations on the scientific foundations and methods of radiation protection of people exposed due to their occupations, the population at large and the environment (Articles 2 & 4).

These provisions make it necessary to fulfil the typical primary obligations mentioned earlier. Similar obligations are provided for in the other seven agreements to which Poland is party. These are agreements with the following countries: Norway, Austria, Ukraine, Belarus, the Russian Federation, Lithuania and Slovakia.[51]

This set of agreements, known as the 'Post-Chernobyl Treaties', is the most representative for international nuclear law as far as the important components of the good-neighbourliness principle are concerned.

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SUMMARY

The Principle of Good-Neighbourliness in International Nuclear Law

The paper is an English translation of *Zasada dobrego sąsiedztwa w międzynarodowym prawie atomowym* by Tadeusz Gadkowski, published originally in Polish in 1997. The text is published as a part of a ju-

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