I.
Studies

THE HISTORY AND DEVELOPMENT OF THE CZECH DOCTRINE OF INTERNATIONAL LAW

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Abstract: This contribution aims to present the origins and development of the Czechoslovak and Czech doctrine of international law. It starts mainly at the beginning of the 20th century. The short period from 1918 to 1938 was very fruitful in this area, giving rise to the development of an international legal doctrine at three academic centres (Prague, Brno and Bratislava) as well as to a major debate between the legal positivists and the representatives of the pure theory of law. Some of the teachings of the leading figures of the Czech doctrine are still of some interest in our time. The post-WW II period bears both elements of continuity and elements of discontinuity. During the period of so-called real socialism (communism) in the former Czechoslovakia, a number of important scholars left the country or ceased to work in academia. Nevertheless, the doctrine continued to develop even in these conditions and produced some interesting scholarly works and debates. For the purpose of this study, the following theoretical issues were singled out: (1) customary law, (2) principles of international law, and (3) so-called socialist international law. The study concludes that Czech scholarship was not only able to survive but also managed to maintain contact with the development of the doctrine of international law at least within the framework of Central Europe.

Resumé: Tento příspěvek se snaží představit vývoj čs. a české nauky mezinárodního práva od jejího vzniku na počátku 20. století. Na učení hlavních představitelů ukazuje plodný rozvoj nauky v konkurenci positivismu a normativismu v letech 1918-1938. Poválečné období pak bylo ve znamení prvků kontinuity i diskontinuity. Přes složité podmínky v období reálného socialismu domácí nauka pokračovala a přinášela některé zajímavé teoretické diskuse.

Key words: Czech doctrine of international law, history, leading personalities, customary law, principles of international law, so-called socialist international law.

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1. Introduction

In the author's view, the Czech doctrine of international did not commence in 1989 or in 1945. On the contrary, the development of the modern Czech doctrine of international law dates back to the beginning of the 20th century. As a matter of fact, the conditions that made such commencement possible were put in place with the establishment of Czechoslovakia (the first Czechoslovak republic) as an independent state in 1918. During the preceding period, under the Austro-Hungarian monarchy, there was no suitable environment for the development of international legal scholarship in the historical lands of Bohemia and Moravia (parts of the former Kingdom of Bohemia), and even less so in Slovakia.

The main reason for the weak position of the Czech doctrine of international law prior to 1918 was the fact that there was no need or incentive for such doctrine since foreign policy (including the legal service) was based in Vienna. The position of Prague was reduced to that of a provincial town. This does not mean, however, that no traces of the precursors or building blocks of the Czech doctrine were present in the country. In the pre-WW I period, the only institution from which such Czech international law doctrine could originate was Charles University in Prague, the oldest university in Central Europe (founded by Bohemian King and Roman Emperor Charles IV in 1348) and the only Czech language university in the Monarchy. Several attempts to establish a second Czech university in Brno (Brünn in German), Moravia, failed even under the relatively liberal conditions prevailing in the Austrian part of the Monarchy. In Slovakia, due to the political and cultural oppression openly exercised by the Hungarian government, no Slovak university was established before 1919.

2. The Czech (Czechoslovak) doctrine in the 1918-1939 period

The period between the two World Wars was relatively short but very fruitful for the development of the Czech doctrine of international law. Firstly, the new state, established in accordance with the principle of the right of self-determination of nations, an ally of the victorious Powers (namely France and Great Britain) and an original member of the League of Nations, had a receptive and open approach to international law. A few Czech specialists in international law, in addition to their academic activities, were called to assist the legal service, particularly at the Ministry of Foreign Affairs of the new state. Secondly, in 1919, the Czechoslovak Parliament passed laws which established two new universities, including the Faculties of Law at such universities. Masaryk University in Brno and Comenius University in Bratislava gradually became new academic centres.

Although the number of professors was quite limited, especially in the case of international law, the 1918-1939 period gave rise to competing legal doctrines. The main feature of this period was the competition between the positivism of the Prague school of law and the normativism (pure theory of law) of the Brno school

of law. In fact, Professor František Weyr, a leading figure of the Brno school, was one of the founders of the pure theory of law, along with Hans Kelsen. The Czech (Czechoslovak) doctrine at that time developed in a close relationship with the contemporary European doctrine and was of comparable quality.

2.1 Antonín Hobza and the Prague school of law

The most important Czech writer in international law was Antonín Hobza (1876-1954), who started his career as an extraordinary professor at the Czech-language Law Faculty in Prague (since 1911) and was an ordinary professor of international law since 1917. He was also a professor of canon law and confession law. However, his main sphere of research was public international law. During the first years of the Czechoslovak Republic, Hobza also worked at the Ministry of Foreign Affairs as head of the Legal Section (1920-1921). He represented Czechoslovakia in several international negotiations and was a member of international institutions. Professor Hobza was also elected a member of the Czech Academy of Sciences and Arts.

Professor Hobza wrote two textbooks, the first of these being *International Law* (Part I, 1915, Part II, 1919). His main work, titled *Introduction to International Law of Peace*, was published in two parts, in 1933 and 1935 respectively.[1] He also prepared and published a collection of the most important documents of international law (Prague, 1931).[2] After World War II, he published a *Survey of International Law of War,* with an annex on the punishment of war criminals (1946).[3]

Hobza belonged to the positivist school of legal thought. As he wrote in the introduction to his collection of documents, "international law is presently a branch of positive law. Anything not included in international (law-making) treaties or international customs is not international law".[4] Hobza reflected his philosophical views mainly in his *Introduction to International Law*. Above all, he aimed to "present all institutions in the light of what they actually mean for life in the real world, which legal doctrine can never divorce itself from without sustaining harm." He made an effort to be objective and to describe the present state of doctrine and practice.[5] Professor Hobza recommended the following method for studying international law: first, one should read international legal documents, then study the textbook, and finally one should return, *ad fontes*, to the documents in order to correctly understand their content and attempt to interpret them.[6]

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[1] See A. Hobza, *Úvod do mezinárodního práva mírového*[Introduction to International Law of Peace], Part I (Praha, 1933), Part II (Praha, 1935).

[2] See A. Hobza, *Dokumenty ke studiu mezinárodního práva* [Documents for International Law Studies] (Praha, 1931).

[3] See A. Hobza, *Přehled mezinárodního práva válečného. Dodatek: Trestání válečných zločinců* [Survey of International Law of War. Annex: Punishment of War Criminals] (Praha, 1946).

[4] A. Hobza, op. cit. 2 p. 3.

[5] A. Hobza, op. cit. 1, p. 4.

[6] Cf. A. Hobza, op. cit. 1, p. 6.

In fact, Hobza's approach was not as neutral as may appear. He developed his ideas in dissention with the pure theory of law (normativism), as represented mainly by Kelsen, Verdross and Weyr. He clearly and emphatically rejected the teachings of the Vienna school, and concurrently did not pay any express attention to the Brno school of legal thought. Having evaluated the ideas of Kelsen and Verdross, he concluded that "[i]t is purely metaphysical and scholastic. In essence it is natural law in a new form".[7]

However, the pure theory of law was not the only school of legal thought that Hobza dissented against in his theory of international law. In the final comment, he strongly criticized both the Soviet (Bolshevik) and the Nazi conceptions of international law. Both of them, in his view, "mean radical ruptures of the hitherto uniform doctrine of international law (at least as far as the basic principles are concerned). Since the end of Middle Ages, this doctrine has been built up – on the whole unanimously by writers from all nations – originally even in a common academic language (Latin). [...] Now this attack from two sides is directed at the very ideological underpinnings of international law – an attack launched not by individual writers but by two of the most powerful states in the world, and this is being done by united doctrinal and political means". Having made the foregoing statement, as early as 1935 Professor Hobza presciently foretold of a risk of fragmentation of international law into regional doctrines based on ideological or racial grounds.[8]

Hobza regarded international law as a higher legal order than national law. To him, the primacy or superiority of international law did not mean that national law would have its origin in international law or would have to follow its dictates in a subservient role. This primacy meant that the state is obliged to comply with international law even if its national law provides otherwise.[9] Concerning the relationship between international law and national law, however, Hobza maintained a dualistic position. International law has different sources, forms and principles for the creation and extinction of legal provisions than does national law. To Hobza, the dualism in the sense of two complementary legal orders was a fact, while the monistic structure was pure fantasy. The dualistic concept of law is and will continue to be the prevailing view until such time as national law and international law merge into a single global legal order with common sources and common concepts.[10]

According to Hobza's view, "the international community has so far not become a single unified whole. It is based on the unity of law, not on a uniform organization". Instead, the principle of special unions for special fields of international life applies. It is not possible to predict whether a single union of states or even a common world state will be established in the future. Nevertheless, Hobza predicted that there would at least be some progress made towards the establishment of specific supranational

[7] Ibid., pp. 54-55.
[8] Ibid., p. 511.
[9] Ibid., p. 62.
[10] Ibid., p. 58.

associations. To him, the League of Nations was a premature attempt at a universal union of states.[11]

The main subjects of international law are states. States come into being, which is a self-evident fact. In Hobza's opinion, however, this fact does not establish a state's membership in the international community. Such membership originates from achieving recognition by other states.[12] Already in 1933, Hobza spelled out ideas about the status and personality of individuals under international law. He acknowledged that in some cases individuals were bound by international norms. In his view, it was not yet possible to decide in principle whether an individual was or was not a subject of international law. Everything depends on the relevant treaty and its correct interpretation. However, he did write that "the trend of development is clear; it is moving towards a fundamental recognition of the personality of natural and juridical persons".[13]

Hobza was a direct participant in World War I, he experienced the horrors of armed conflict. Consequently he always adopted humanistic points of view. His *Introduction to International Law* includes chapters on respecting peace (the elimination of wars), on the protection of minorities and on international criminal law.

Concerning the law of war, Hobza wrote that "war is the most extreme measure of self-help, according to the present legal view it is an international crime if it is an aggressive war. A collective war action (on behalf of a supranational organization) for the maintenance of peace or international law is not a war in the hitherto existing sense but is a method of international enforcement. The only way to limit wars is through a stable international organization based on a common international morality".[14]

It should be made clear that Hobza was not the only figure of the older Czech doctrine of international law. Already before the establishment of the Czechoslovak Republic, lectures were being given on international law at the Czech-language Faculty of Law in Prague by Professor Josef Trakal (1863-1942). Later, in the period between WW I and WW II, a former student of Hobza's, Ladislav Vošta (1897-1957), became a professor at the same Faculty of Law. He wrote mainly on the problem of guarantees in international law and on the legal continuity of Czechoslovakia. His important monograph on international rivers[15] is still of some interest in our time. It is worth mentioning that Mikhail Arturovitch Zimmermann (1887-1935), a Russian émigré and graduate of the University of St. Petersburg, became a professor, first at the private Russian Faculty of Law in Prague, and subsequently, starting from

[11] Ibid., p. 206.
[12] Ibid., pp. 165-166.
[13] Ibid., p. 163.
[14] A. Hobza, *Přehled mezinárodního práva válečného. Dodatek: Trestání válečných zločinců* [Survey of International Law of War. Annex: Punishment of War Criminals] (Praha, 1946) p. 18.
[15] L. Vošta, *Mezinárodní řeky. Studie z práva mezinárodního a diplomatických dějin* [International Rivers. A study on international law and diplomatic history] (Praha, 1938).

the 1929/1930 academic year, at Masaryk University in Brno.[16] In addition to his Russian publications, starting from the second half of 1920s, he began to publish in Czech.[17]

2.2 František Weyr and the Brno school of law

As was already explained, Prof. Hobza and most other scholars at the Faculty of Law of Charles University in Prague had a very critical attitude towards the pure theory of law. The centre of the normativist doctrine was the Brno law school. Prof. František Weyr (1879-1951) was the leading figure and co-founder of this theory. He was present at the establishment of Masaryk University in Brno and became the first dean of its Faculty of Law. Prof. Weyr dealt mainly with legal theory and constitutional law but he also wrote on the field of international law. His main work in this area, *The Contemporary Struggle for a New International Law*, was written as early as 1918, i.e. before the end of WW I, but was published in 1919.[18] The title as well as the content reflect the revolutionary period in which it originated.

Weyr constructed his view of international law on the foundations of his general theory of law. The basic element of the social development of mankind are states, viewed as being some kind of social unions. States stand out from among other kinds of unions by their sovereignty. They subject all individuals within their territory to their power. The status of sovereign states puts them in a position of natural hostility vis-à-vis other unions.[19]

The concept of a legal order is based on norms which do not stipulate "what is", but "what ought to be". Norms regulating relations between states are called international law. These norms are similar to norms of national law but they differ in some aspects.[20] Weyr made a distinction between heteronomous and autonomous norms. The former are set up by an external authority, the latter are adopted by their subjects themselves.[21] While in national law, the legal order occupies a position above all subjects, there is no single legal order in the field of international law. International law is created by sovereign states, its norms are autonomous. There is no enforcement of international obligations in the sense of national law enforcement. In order to become similar to national law, international law would require the existence of a supra-state which would include all (or most) states.[22]

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[16] Cf. P. Skřejpková (ed.), *Antologie československé právní vědy v letech 1918-1939* [Anthology of the Czechoslovak legal doctrine in 1918-1939] (Praha, 2009), p. 551-553.

[17] In particular see M. A. Zimmermann, *Společnost národů, idea míru a právní organizace lidstva v minulosti, přítomnosti i budoucnosti* [League of Nations, idea of peace and the legal organization of mankind in the past, present and future] (Praha, 1931).

[18] See F. Weyr, *Soudobý zápas o nové mezinárodní právo*, [Contemporary Struggle for a New International Law] Brno, 1919.

[19] Ibid., pp. 3-4.

[20] Ibid., pp. 12-13.

[21] Ibid., pp. 1-2.

[22] Ibid., pp. 16-17.

Weyr began by analyzing the existing international law before World War I. He started from the sources of law. To him, international law was based on customs or usages to a much greater extent than any other branch of law. However, he stressed the importance of a codification of international law at two Hague conferences in 1899 and 1907.[23] Weyr gave an overview of the international law in force at that time. In particular, he pointed out the revolutionary importance of proposals concerning disarmament or limitation of arms and a mechanism for the binding settlement of disputes by arbitration.[24]

Insofar as the subjects of international law are concerned, he concluded that according to the predominant opinions and customs, only states were recognized as subjects, i.e. holders of obligations and rights. Individuals can only have internal legal relations with their state. As far as their possible relations with regard to a foreign state, the theory described (but not clearly justified) by Weyr regards this legal relation as indirect, one that is mediated by the national state.[25]

However, Weyr was rather critical of the concept of absolute sovereignty, as he found it to be a contradiction of the very idea of an international legal community. To him, only a state that waives its sovereignty could be a full and equal member of such a legal community. Otherwise, there is a risk of violence and anarchy.[26] Consequently, he rejected the principle of effectiveness and self-help in international law.

After completing the outline of the international law that was in force at the end of World War I, Weyr presented the programmatic principles of the new legal order which were arising in the contemporary diplomatic struggle at that time. He listed three main programmatic principles: (I.) the principle of the self-determination of peoples, (II.) the principle of a union of nations, and (III.) the principle of disarmament.[27]

Firstly, Weyr considered the principle of self-determination to be a principle of an international nature. He discussed the concept of a people as a subject of this right, i.e. a cultural-political entity different from both the nation (*Staatsvolk*) and the ethnic nationality.[28] At the same time, he pointed out the issue of national minorities as an issue which can be expected to emerge as a consequence of the self-determination of peoples. He saw in the principle of a "union of nations" a tool for the preservation of these minorities.[29]

Secondly, to Weyr the principle of a "union of nations" was complementary to the principle of the self-determination of peoples. It should be a union in which every civilized nation would have a right (and an obligation) to be an equal member.

[23] Ibid., p. 25.
[24] Ibid., p. 57.
[25] Ibid., pp. 78-79.
[26] Ibid., pp. 83-85.
[27] Ibid., pp. 98-99.
[28] Ibid., pp. 107-109.
[29] Ibid., pp. 113-114.

The union of nations should be a law-making entity and the individual states would be the subjects of obligations. As a result, the new international legal order would be of a heteronomous nature. Although an individual state should not intervene in the internal matters of another state, the union of nations would need to have this right.[30]

Next, the law-making activity of the union of nations should be based on the majority principle. However, Weyr was aware of the practical difficulties associated with this principle in international relations and he therefore left certain issues open (e.g. the proportion of votes to be given to individual states, the matter of a simple or qualified majority, etc.).[31] The "union of nations" should have a permanent and common law-making body which would be superior, in the matters within its competence, to national parliaments. The new international (global) law would therefore have priority over national law.[32]

Finally, Weyr was an advocate of the obligatory judicial and enforcement power of the union of nations. While an individual self-help attack by one state against the territory of another state would remain unlawful, a measure approved by the "union" would have such a right.[33] He combined the principle of a "union of nations" with the principle of disarmament as safeguards against wars. Weyr proposed partial disarmament, not an absolute abolishment of armed forces. Instead, the union of nations would need to have armed forces at its disposal in order in enforce the legal order.[34]

To sum up, it is surprising how many modern ideas can be found in the work written by Professor Weyr almost one hundred years ago. Some of them have been implemented or are still on the agenda at the United Nations or the European Union at the present time.

Among the other figures teaching at the Brno law school, we can also mention Jaroslav Kallab (1879-1942), professor of criminal law, legal philosophy and international law. In the latter area he published a monograph on peace treaties and a short textbook.[35] Another professor of international law, Bohumil Kučera (1894-1980), wrote original works on international judgments and procedure.[36]

2.3 Bohuš Tomsa and the Bratislava school of law

Dr. Bohuš Tomsa (1888-1977) started his academic career at Charles University in Prague but then became, along with other Czech professors, one of the leading

[30] Ibid., pp. 117-118.
[31] Ibid., pp. 118-119.
[32] Ibid., p. 125.
[33] Ibid., p. 120.
[34] Ibid., pp. 122-125.
[35] J. Kallab, *O smlouvách mírových* [On Peace Treaties] (Brno, 1920); *Příručka k přednáškám o právu mezinárodním* [Handbook for Lectures on International Law] (Brno, 1924).
[36] B. Kučera, *Mezinárodní rozsudek. Studie z mezinárodního procesu* [International Judgment. A study of international procedure] (Praha-Brno, 1935); *Základní problémy mezinárodního soudního procesu* [Fundamental Problems of International Judicial Procedure] (Praha-Brno, 1938).

figures who helped to establish the new Faculty of Law at Comenius University in Bratislava. After 1938, like many other Czech professors he left Bratislava and joined the Faculty of Law in Prague for a brief period of time. He lectured and wrote not only on international law but also on the philosophy of law.[37] However, Professor Tomsa's contribution to the development of the Czech (or Czechoslovak) doctrine of international law was far from insignificant. He published his main work in this field, a textbook titled *International Law*, in 1930.[38] Of course, his lectures in Bratislava as well as his book were in the Czech language.

Although Tomsa's work was written as a textbook for the Bratislava law school, it was based on theoretical grounds. Tomsa presented a definition of public international law as an independent system of legal norms, different from national law, regulating certain mutual relations between entities which were given an international legal personality.[39]

He aimed to find reasons for the binding nature of the international legal order. After having presented the existing theories of international law, i.e. the theory of natural law, the theory of legal conviction, the theory of will and contractual theory, Tomsa based his explanation on a synthesis of the theory of legal conviction (opinion) and the theory of will.[40]

His ideas seem to go beyond the usual path of voluntarist positivist thinking. International law is based on the coordinated wills of states, characterized by a recognition of the principles of international relations, either in the form of a mutual consensus or in the form of merely unilateral, parallel but identical, expressions of wills. The fact of the recognition of the common principles by several states leads to the creation of the collective will, standing in a sense above the will of individual states.[41]

Tomsa included not only states among the law-making subjects but also the League of Nations and, in exceptional cases and only with regard to specific parts of international law, also other entities such as insurgents.[42] As regards the sources of international law, he made a distinction between material sources (sources of origin), formal sources and sources of knowledge. The first of these are the extra-legal facts from which international law derives its existence. The second ones are the forms of objective norms of international law.[43]

As far as the formal sources were concerned, Tomsa differentiated between the main and the subsidiary sources of international law. To him, the main sources were legal customs, international treaties and resolutions of the Assembly and the Council

[37] Cf. e.g. B. Tomsa, *Idea spravedlnosti a práva v řecké filosofii* [Idea of Equity and Law in Greek Philosophy] (Bratislava, 1923); B. Tomsa, *Nauka o právních vědách. Základy právní metodologie* [Theory of Legal Sciences. Elements of Legal Methodology] (Praha, 1946).

[38] See B. Tomsa, *Právo mezinárodní*. [International Law] Part I (Bratislava, 1930).

[39] Ibid., p. 4.

[40] Ibid., p. 8.

[41] Ibid., pp. 16-17.

[42] Ibid., p. 17.

[43] Ibid., pp. 18-19.

of the League of Nations. He stressed the importance of customary law, as the first and the most general source of international law. Concerning international treaties, Tomsa rejected the strict distinction between (individual) treaties and (law-making) agreements. From the fact that states are both law-making subjects and concurrently the subjects-addressees of legal norms, he concluded the following: in the branch of international law, there is no exact distinction between the act of law-making and the act of the application of law.[44]

Finally, Tomsa presented as sources of knowledge all of the documents from which information about international law can be obtained. He listed official and private collections (*recueils*) of international treaties, publications and digests of international case-law, official records and publications of international organizations such as the League of Nations, protocols of international conferences (congresses), diplomatic statements and governmental papers, as well as works of eminent journalists and experts in international law.[45]

As concerns the relationship between international law and national law, Tomsa rejected the monistic theories and viewed international and national laws as two independent legal orders which differ from one other. The addressees of international law are the subjects of international law, i.e. states, not individuals.[46] He therefore did not question the necessity of transforming international norms (international treaties, for example) into national law. However, he made a distinction between the forms of such transformation. The formal act of transformation (by a bill of Parliament) is not needed where there is a reception norm that incorporates the international law or a part thereof into the system of national law. Accordingly, he called for a general reception norm.[47]

Tomsa paid theoretical attention to the issue of which entities are the subjects of international law and to the issue of international personality. To him, the subjects were the entities that possessed the capacity to have rights and obligations under international law. He made a distinction between the capacity to have rights and obligations and the capacity to perform legal acts under international law and to perform wrongful acts (international delicts). Finally, he mentioned the capacity to be a party in proceedings before international bodies, although he did not consider it to be the natural result of having an international personality.[48]

To Tomsa, states were the main subjects of international law. Indeed, he affirmed that the modern development of international law follows a trend towards extending an international personality to other entities. He stressed the importance of the act of recognition in international relations. Consequently, a subject is a subject only in

[44] Ibid., pp. 22-23.
[45] Ibid., pp. 27-29.
[46] Ibid., pp. 26-38.
[47] Ibid., pp. 38-44.
[48] Ibid., pp. 69-70.

relation to the states that have conceded a personality to it.[49] Tomsa listed certain unions of states among the subjects of international law, as well as some colonies (in particular, the self-governing dominions of the British Empire), international bodies and organizations, and insurgents. Tomsa also acknowledged that in exceptional cases, even nations could have a legal personality (if and to the extent that they were recognized by the states of the world) and that national minorities could have a certain minimal legal personality in view of their right to petition the League of Nations.[50]

With regard to the personality of individuals, Tomsa considered them above all to be subjects of national law. However, he acknowledged that it was possible for a state to transfer its power to regulate the conditions of individuals to another legal order. Then the situation of an individual could be of dual nature, as a subject of national law and concurrently a subject of international law. Indeed, many international treaties deal with the rights and obligations of individuals. However, they do not address them directly to individuals but rather to states. That is why Tomsa suggested examining the personality of individuals on a case by case basis.[51]

3. The Czech (Czechoslovak) doctrine after 1945

It is a well known fact that during the Nazi occupation (1939-1945) all Czech universities were closed. After a short period of continuity with the pre-war doctrine (1945-1948), when some works concerning particularly the law of war and the prosecution of war crimes were published by Professor Antonín Hobza in Prague and Professor Bohumil Ečer in Brno, this period bears certain marks of discontinuity. After 1948, some professors left or were forced to leave Czechoslovak universities, and some new teaching staff joined the faculties of law. Also, at the institutional level, the pre-war fruitful competition between the Prague law school and the Brno law school came to an end in 1950 when the Faculty of Law at Masaryk University in Brno was closed.

However, the *prima facie* discontinuity between the new textbooks and other writings and the scholarship that had existed before the war, was not total. On one hand, the new publications criticized the earlier doctrine of international law as "bourgeois" or "imperialist" and referred to the struggle between socialist and capitalist social systems. On the other hand, Czech authors did not accept certain extreme ideas presented in the Soviet doctrine between the 1920s and 1950s, namely J. A. Korovin's thesis about the international law of a "transitory period" or the ideas of A. J. Vyshinski, under which international law was to be degraded to an instrument of foreign policy only. On the contrary, the Czech doctrine always asserted the existence and importance of general international law, which was described as either being the result of a compromise between two social systems with an emphasis on

[49] Ibid., p. 71.
[50] Ibid., pp. 72-79.
[51] Ibid., pp. 79-80.

progressive principles or the result of the increasing power or influence of the socialist countries and developing countries in international relations. At the technical level, the presentation of many norms, particularly in the well-established areas of international law, did not indicate a sharp departure from the earlier scholarship.

3.1 The rise and fall of the Czechoslovak doctrine in the 1960s

The Czech doctrine owes this element of continuity mainly to Professor Vladimír Outrata (1909-1970), Hobza's successor at the Chair of International Law in Prague. During WW II, he worked at the London-based Ministry of Foreign Affairs of the Czechoslovak Government in Exile and at the Embassy in Moscow. His activities after 1945 included work at the Ministry of Foreign Affairs in Prague and the post of Ambassador to the United States. In 1951, he left the post of deputy-minister and became a Professor of International Law at Charles University in Prague. His work includes, in particular, a textbook titled *Public International Law*[52] which influenced the next generations of international lawyers as well as future textbooks in the area. It was the first *de facto* nation-wide textbook of international law used at all Czech and Slovak law schools. He also initiated and directed the publication of several volumes of *Documents on the Study of International Law and Politics*.

The leading textbook published by Outrata and his collaborators at Charles University in Prague, in spite of certain, rather marginal, elements having to do with the ideological approach involved, presented a moderate, compromise-oriented view of international law, one based on the consent of states and the principles of peaceful coexistence. It also stressed the general and absolute relevance of the non-intervention principle as a necessary basis for the peaceful coexistence of states and the economic and cultural development of peoples.[53]

Another important personality was Professor Rudolf Bystrický (1908-2001), who worked in the diplomatic service during 1945-1953, in particular as Ambassador to the United Kingdom, and at the Ministry of Justice. In 1953 he became a professor at Charles University in Prague. In his work he focused mainly on private international law and international trade law.[54] After the suppression of the Prague Spring in 1968 by the intervention of the Warsaw Pact, Prof. Bystrický left Czechoslovakia for exile, first in Germany and subsequently in Geneva, Switzerland, where he lectured at a university until his retirement. He died in 2001.

This was also the fate of many other Czech international lawyers who left the country after 1968. They include namely Professor Jaroslav Žourek who lectured after 1945 at the Faculty of Law of Charles University in Prague and subsequently joined the Institute of Law of the Czechoslovak Academy of Science. In 1950s, he was the first Czech member of the UN International Law Commission and the

[52] V. Outrata, *Mezinárodní právo veřejné* [International Public Law] (Praha, 1960).

[53] V. Outrata, op. cit., p. 69.

[54] *Cf. e.g.* R. Bystrický, *Základy mezinárodního práva soukromého* [Foundations of Private International Law] (Praha, 1964); R. Bystrický, *Právo mezinárodního obchodu* [International Trade Law] (Praha, 1967).

Special Rapporteur for the codification of the law of consular relations. He dealt with various subjects of international law, in particular the definition of aggression and consular law.[55] After 1968 he left for Geneva.

Among the other Czech scholars who left the country and remained in exile, we should also mention Michael Milde, who became a professor at McGill University in Montreal, Vratislav Pěchota, who became a professor at Columbia University in New York, Josef Pokštefl, who lectured in Germany, and Jiří Toman, who was the acting Director of the Institute Henry-Dunant in Geneva and later became a professor at Santa Clara University in California.

The period of the 1960s was a time of real and relatively free development of the Czechoslovak doctrine of international law. Authors dealt with many issues of international law. However, if just one topic were to be singled out, it would have to be the problem of the principles of international law. Both the Czech doctrine and the country's diplomacy not only reflected but also influenced the debate on the principles of international law that unfolded throughout the 1960s and resulted in the adoption of the Declaration of Principles of Friendly Relations (UN GA Resolution 2625 of 1970).

In a sense, the post-1968 departure into exile of leading Czech figures in this field caused even more serious losses to the Czech doctrine of international law than the political turnover that took place after 1948.

3.2 The Czechoslovak doctrine in the 1970s and 1980s

Nevertheless, the development of Czech international legal scholarship continued even in the 1970s and 1980s. In 1969, the Faculty of Law in Brno was re-established. In spite of the then-prevailing political and ideological constraints, the very existence of two law schools (Prague and Brno), along with two faculties of law in Slovakia (Bratislava and Košice) created at least some possibility for pluralism in theoretical and pedagogical matters.

The teaching of and research in international law were influenced by two leading figures. Professor Miroslav Potočný (1925-2001), one of the followers of Professor Outrata and his successor at the Chair of International Law, continued with the scheme of the textbook on *Public International Law* (1973, 1978) and later developed a *Special Part* to the textbook (1996). He also maintained the tradition of editing the *Documents of International Law*, thus continuing in the footsteps of Hobza and Outrata. As an advisor to the Ministry of Foreign Affairs, he also took part in several

[55] *Cf. e.g.* J. Žourek, *Definice agrese a mezinárodní právo* [Definition of Aggression and International Law] (Praha, 1957); J. Žourek, *Právní postavení a funkce konzulů* [Legal Status and Role of Consuls] (Praha, 1962).

international negotiations. In his work, Prof. Potočný focused mainly on the law of international organizations[56] and on the principles of international law.[57]

Professor Čestmír Čepelka (1927), another follower of Professor Outrata, developed his own critical method rather than further developing the scheme of Outrata's textbook. He has been a leading figure and the most original scholar in international law at the Prague law school. Together with Vladislav David (1927), who was a professor of international law at the Faculty of Law in Brno and later at the new Faculty in Olomouc, Moravia, he wrote an *Introduction to International Law* in 1978[58] as well as the amended second edition in 1983.[59] This theoretical publication also became a textbook at the Brno law school and an alternative textbook in Prague. It mediated much historical and theoretical information on international law, including foreign sources, which would have not been otherwise accessible to law students in the 1970s and 1980s. In contrast to the prevailing positivist approach of the Prague school of law, Čepelka's *Introduction* presented an original combination of the influence of both normativism (pure theory of law) and the sociological approach to international law. Dissenting from the Soviet doctrine (particularly that of G. Tunkin), he stressed the role of international custom and rejected a consensual interpretation of such custom.[60] He wrote on various theoretical issues of international law, in particular *jus cogens*, the responsibility of States[61] and the law of treaties.[62]

3.3 The main issues discussed in the Czechoslovak doctrine during the communist period

The next section will focus on several main issues that played a key role in debates within the Czechoslovak doctrine. At first glance, this may appear surprising, as the common view on the communist period would seem to exclude the possibility of conducting a free and open scientific discussion in legal and other social sciences in a society which was far from being free and democratic. However, the analysis presented here will attempt to show that even in the absence of democracy there was some doctrinal debate within the Czechoslovak internationalist doctrine. And this debate centered on many very important issues.

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[56] *Cf. e.g.* M. Potočný, *Mezinárodní organizace* [International Organizations] (Praha, 1971, 2nd ed. 1980); M. Potočný, E. A. Šibajeva, *Právo mezinárodních organizací* [Law of International Organizations] (Praha, 1984).

[57] *Cf.* M. Potočný, *Deklarace zásad mírového soužití* [The Declaration of Principles of Peaceful Coexistence]. Acta Universitatis Carolinae – Iuridica, Praha, 1972.

[58] Č. Čepelka, V. David, *Úvod do mezinárodního práva* [Introduction to International Law] (Brno, 1978).

[59] Č. Čepelka, V. David, *Úvod do teorie mezinárodního práva* [Introduction to the Theory of International Law] (Brno, 1983).

[60] Č. Čepelka, *Smlouva a obyčej v mezinárodním právu* [Treaty and Custom in International Law]. Acta Universitatis Carolinae – Iuridica (Praha, 1984).

[61] Č. Čepelka, *Les conséquences juridiques du délit en droit international contemporain*. Acta Universitatis Carolinae - Iuridica, Monographia, (Praha, 1965).

[62] Č. Čepelka, *Právo mezinárodních smluv* [Law of International Treaties] (Praha, 1986, 2nd ed. 1999).

Clearly, the external conditions for research in international law were difficult, probably even more so in the former Czechoslovakia than in other countries of the Eastern Bloc. This meant that Czechoslovak researchers in international law had very limited contact with the development of the doctrine taking place in the West. Mainly, they were not allowed to travel freely to these countries, to take part in international conferences or to study there. Instead, they had contact with their colleagues in other countries of the Eastern Bloc. Also, they had limited access to new international legal literature published in the West, the most used and most-frequently cited works were of Soviet provenience (in Russian). To be fair, it should be acknowledged that the older literature was available, as were the official UN publications such as the Yearbooks of the International Law Commission. These became an important source of information in the country. At least some law libraries were allowed to keep their subscriptions to certain foreign journals, some publications were received thanks to the inter-library exchange system. The main reason for these restrictions was not ideological but economic, due to the limited and centrally controlled allocation of convertible currencies.

At the same time, Czechoslovak authors additionally had rather limited possibilities for publishing their books and articles, due to the limited publication quotas of the publishing houses and journals. As to the opportunity to express and publish their ideas freely, the authors of that period were probably less limited by external censorship than by the implied limits of socialist political correctness and auto-censorship. The consequences for opponents of the regime were known well enough (the risk of not being allowed to advance in one's professional career or of losing one's employment), so the external political pressure did not need to be overt. However, in the interest of historical accuracy one must distinguish between the worse situation prevailing in the 1950s and 1970s and the better situation in the 1960s (culminating in a period of almost unrestricted travel and academic freedom during 1968-1969) and during the "Perestroika" years at the end of the 1980s.

Despite the above mentioned external restrictions, quite paradoxically the Czechoslovak doctrine of international law was able to follow at least the major impulses from foreign doctrine and to discuss certain theoretical issues. The more theoretical these issues were, the greater the freedom of some Czechoslovak authors to develop their ideas. This was very well expressed by the Austrian professor Michael Geistlinger in his contribution in the *Liber Amicorum* of Prof. Čestmír Čepelka: "It was the fate of many legal writers in the zone of influence of the former Soviet Union to have to find an arena for quiet research work without interferences by the communist party or by any allied political party when they devoted themselves to key issues of [the] dogmatic in law."[63]

[63] M. Geistlinger, International Liability and International Responsibility: Some Thoughts on the Possibility of Their Delimitation in the Field of International Nuclear Law, in P. Šturma (ed.), *Legal Consequences of International Wrongful Acts. Liber Amicorum Čestmír Čepelka* (Prague, 2007), p. 194.

Of course, any Czechoslovak author of that time who did not emigrate and wished to publish officially was obliged to respect or at least not to openly question the official political line. Consequently the theoretical disputes tended to concern mostly certain detailed issues. The main ideas were hidden under the surface. This situation stimulated a sense for detail on the one hand and for abstract thinking on the other hand. For the purposes of this study, the following theoretical issues can be singled out: (1) customary law, (2) the principles of international law, and (3) the so-called socialist international law.

The first subject was encumbered by the fact that for a long period the internationalist doctrine in the socialist countries of the Eastern Bloc adopted a rather negative attitude towards international customs. In fact, this only started to slowly change in the 1980s. The Czechoslovak doctrine mostly followed the approach of the Soviet internationalist doctrine, which clearly preferred treaty law over international custom, as expressed by, for example, S. B Krylov.[64] The same opinion was shared by Outrata's successor Prof. Potočný.[65] These ideas of Czech professors were mostly shared by the leading figures of the Slovak doctrine, such as Ján Tomko and Juraj Cúth. The opposite view was expressed at the end of 1970s and in the early 1980s particularly by Č. Čepelka and V. David.[66]

From a theoretical point of view, however, the most interesting discussion relates more to an explanation of the grounds for the emergence and binding force of international custom. According to Outrata, customary norms of international law come into existence "by the tacit consent of states, which is presumed", whereas international treaties are based on "express consent".[67] The acceptance of the consensual theory of custom by the mainstream Czechoslovak doctrine was not complete. In fact, it seems to have been more of a mixture of the traditional theory of two elements and the theory of tacit consent. This approach was criticized mainly by Čepelka, who, inspired by the older English doctrine and by Ch. de Visscher,[68] stressed the importance of the real behavior of states (*usus generalis*) and of reflecting social reality (*opinio necessitatis*).[69]

In brief, many authors in socialist Czechoslovakia (before 1990) clearly preferred, for both axiological and practical reasons, international treaties and even acts of international organizations (such as resolutions of the UN General Assembly) and considered the concept of international law, based mainly on its customary norms,

[64] See S. B. Krylov, Les Notions principales du Droit des Gens (la doctrine soviétique du droit international), *Recueil des Cours ADI*, 1947, t. 70, p. 437.

[65] Cf. M. Potočný, *Mezinárodní právo veřejné* [International Public Law] (Praha, 1978), pp. 54-55.

[66] Č. Čepelka, V. David, *Úvod do mezinárodního práva* [Introduction to International Law] (Brno, 1978), Č. Čepelka, *Smlouva a obyčej v mezinárodním právu* [Treaty and Custom in International Law]. Acta Universitatis Carolinae – Iuridica (Praha, 1984).

[67] V. Outrata, op. cit., p. 25; M. Potočný, op. cit., p. 59.

[68] Ch. de Visscher, *Théories et réalités en droit international public*, 2 éd. (Paris, 1955), pp. 188-190.

[69] Č. Čepelka, *Smlouva a obyčej*… [Treaty and Custom ...] (Praha, 1984), op. cit., p. 48.

as having been historically superseded.[70] Clearly, both sides in the debate conducted on the Czechoslovak doctrine in the 1970s and 1980s proclaimed the interests of progressive, socialist international law. On the surface, the issue was which concept fit better with the interests of socialist states. However, in their underlying *legal* arguments one could see positivist or anti-positivist approaches to explaining the concept of international custom and the grounds for its binding nature.

If just one issue typical for the doctrinal discussion conducted in Czechoslovakia during the years of communist rule were to be singled out, it would certainly have to be the issue of the principles of international law. Again, the reasons are probably both theoretical and practical. The debate started in the early 1960s and was triggered by an influential article written by Prof. Outrata.[71] The debate was subsequently harnessed to the practical needs of Czechoslovak diplomacy, which co-sponsored a draft of the future Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States.[72] It may be stated that Czechoslovak doctrinal writings followed one of two directions: either an analytical examination of the concept of the principles of international law, or comments on and interpretations of the codified principles in the 1970 Declaration.[73]

Most publications focused primarily on commenting and/or presenting a classification of the existing principles (for example, as general, fundamental, etc.). This current of scholarship, however, led to a kind of paradox. According to him, the extreme level of generalization in positive law necessarily leads to the formulation of rules which, despite remaining legal rules in theory, cease to be able to fulfill a normative function and become more on the order of political or moral postulates. The extreme level of generalization results in a state of affairs where instead of rights and obligations of states, we end up with something which could be called an objective social need that international law is supposed to conform with.[74] In the end, this did not make it possible to distinguish between *lex lata* and *lex ferenda*.

The other current of the doctrine focused on making express distinctions between several meanings (homonyms) of the term *principles of international law*. This was undertaken by Prof. Čepelka in an article he published in 1975[75] and later developed in a section of the book he co-authored with V. David.[76] In such section of the book he presented a short analytical study on this subject. In dissention with the

[70] Cf. in particular V. Kopal, Review of the book Č. Čepelka, V. David, Úvod do mezinárodního práva [Introduction to International Law], *Právník*, No. 11, 1978, p. 1030.

[71] V. Outrata, K pojmu obecných a základních zásad mezinárodního práva [On the concept of general and fundamental principles of international law]. *Časopis pro mezinárodní právo*, 1961. No. 3, p. 177 ff.

[72] A/RES/2625/XXV (1970).

[73] The other current of thought is represented in, for example, M. Potočný, *Deklarace zásad mírového soužití* [Declaration of Principles of Peaceful Coexistence]. Acta Universitatis Carolinae – Iuridica (Praha, 1972).

[74] Ibid., p. 185.

[75] Č. Čepelka, *K pojmu „zásady" mezinárodního práva* [On the concept of "principles" of international law], in Acta Universitatis Carolinae – Iuridica, 1975, No. 1, p. 17 ff.

[76] Č. Čepelka, V. David, *Úvod do mezinárodního práva* [Introduction to International Law] (Brno, 1978).

conclusion of V. Outrata, he developed his own method and made a clear distinction between five (and subsequently six) meanings of the term *principles*.

To sum up, it is a surprising paradox that in the period of communist normalization imposed in the country after 1968, a period that generally had a devastating impact on social sciences, at least a part of Czechoslovak doctrine was nevertheless able to continue with the research started in 1960s and to further advance the line of development in analytical jurisprudence. The results of the Czech debate on the principles of international law stand comparison with the list of uses of principles in international law subsequently presented by M. Koskenniemi.[77]

Another debate typical for the Czechoslovak doctrine during the examined period concerned the so-called socialist international law. This was really the issue of the relationship between general international law and particular norms. The mainstream Czechoslovak doctrine did not accept the extreme views according to which international law included two or three independent subsystems which differed in terms of their ideological content (imperialist, socialist and the so-called inter-bloc international law).[78] Instead, the founder of the socialist doctrine of international law stressed the key role of general international law, binding on all states of the international community, within the framework of which individual states may create particular norms.[79]

It should be made clear that since the 1960s the Czechoslovak doctrine welcomed and supported the concept of *jus cogens*. However, the mainstream doctrine did not perceive a clear distinction between peremptory and non-mandatory norms. Moreover, the mainstream doctrinal view of general international law was rather broad, encompassing not only customary rules but also many multilateral treaties. Under this view, general international law seemed to provide comprehensive regulation that was binding on all states, thus leaving limited scope for particular norms. This doctrine considered a particular law admissible in situations where (a) no general legal regulation of the given subject-matter had been adopted or (b) a similar historical development and similar cultural relations among states of a certain region led to particular norms, ones that nevertheless respected the framework of general law.[80]

Such a conception of general international law fails to take into consideration the fact that states are free to derogate *inter partes*, by way of treaty, from any general norm of a non-mandatory nature. Consequently, the essential function of peremptory norms seems to be in the background when it is the entire general law that must be respected. The importance of *jus cogens* was thus seen as being more on an axiological level and linked to the fundamental principles of international law. In this line of reasoning, so-called socialist international law was admissible as a kind of particular

[77] Cf. M. Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument*, Reissue (Cambridge, 2005), p. 38.

[78] V. Outrata, *Mezinárodní právo veřejné* [International Public Law], op. cit., pp. 20-21.

[79] Ibid., p. 36.

[80] V. Outrata, *Mezinárodní právo veřejné* [International Public Law], op. cit., pp. 35-36.

law in force among the communist bloc states, which shared the same historical development and ideological values. However, even such a particular law had to remain within the framework of general international law. This theoretical position should have ruled out the superimposition of the principles and rules of "socialist internationalism", a euphemistic term for the doctrine of limited sovereignty of the socialist states, over the general principles of international law.

However, the debate on the concept of socialist international law gave rise to an alternative theoretical concept, one formulated by Č. Čepelka and V. David. According to this view, the non-mandatory norms (*jus dispositivum*) of general international law were those norms that regulated relations between capitalist and socialist states. These norms were in the nature of a compromise. The norms of *jus cogens*, however, were explained as being a normative reflection of the influence of socialist states in the international community. In this sense, peremptory norms of international law do not have a mixed-class character.[81] This is a very unusual and theoretically original explanation of *jus cogens*, one that appeared not only in the Czechoslovak doctrine but also in the doctrine of other states of the Eastern Bloc. It was a logical consequence of the non-consensual theory of international customary law in general and *jus cogens* in particular.

Although subsequent developments ultimately refuted the hypothesis concerning the continually growing influence of socialist states, it is at least one interesting example of a sort of sociological approach in the internationalist doctrine. Today, one would find it difficult, if not impossible, to evaluate the actual impact of the diplomacy and doctrines of socialist states and developing states in 1960s and 1970s, the period when the concept of *jus cogens* evolved from a purely theoretical concept into positive international law. Nevertheless, any realistic doctrine should take into account not only theoretical concepts but social circumstances as well, including the balance of power in the world. This was without a doubt one of the merits of the presented alternative view.

4. Conclusions

In summary, the Czech tradition of international legal scholarship has always been connected with the doctrinal trends in Central and Central Eastern Europe. It was influenced by the heritage of positivism, by the pure theory of law (normativism) as well as by the socialist doctrine.

After WW II, the Czech (or, more precisely, the Czechoslovak) doctrine was under ideological pressure from the Soviet doctrine and was under its influence. At the same time, the national traditions of international legal scholarship survived to a partial extent but were able to continue only in hidden forms, under the superstructure of the socialist theory of international law. The plurality of doctrinal

[81] Cf. Č. Čepelka, *Pojem „socialistické mezinárodní právo" a jus cogens* [The concept of "socialist international law" and *jus cogens*], Acta Universitatis Carolinae – Iuridica, 1977, No. 1, pp. 15-16; Č.Čepelka, V. David, op. cit., pp. 18-21.

views in that time has been demonstrated on three key issues discussed during the examined period: international customary law, principles of international law and so-called socialist international law. The analysis led to the interesting conclusion that the country's political or ideological orientation tended to have little influence on the theoretical disputes. On the contrary, under the official socialist label, the theoretical debate revealed the profound differences between the positivist (consensualist) and anti-positivist currents in the Czech internationalist doctrine.

Despite three brutal interruptions to its development during the last century (in 1939, 1948 and 1968), when many eminent scholars were forced to abandon their academic careers and sometimes even had to leave their country, Czech scholarship was not only able to survive but managed to maintain contact with the development of the doctrine of international law at least within the framework of Central Europe.