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Peaceful Ways of Solving International Disputes by the Mediation Method and Legal Security of State

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Słowa kluczowe: państwo, bezpieczeństwo, prawo, spór międzynarodowy, mediacja, pokój

Abstract

Nowadays, international disputes appear in the public space, which results, for example, from the fact that the needs are unlimited and the goods are limited. Due to its specific nature, the international environment requires a compromise between the entities operating in it. A desirable direction in case of conflicts between international entities is to resolve them by peaceful means. In the international environment, one of the largest international organizations – the United Nations – is of great significance, especially in the field of maintaining international order and peace. In turn, according to the provisions of the Charter of the United Nations, it is possible to resolve international disputes by peaceful means, and among the characteristic methods used in this type of proceedings is the mediation method, the effectiveness of which allows, in the long term, to maintain the desired state of peace, strengthening the legal security of the state.

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Streszczenie

Pokojowe rozwiązywanie sporów międzynarodowych metodą pośrednictwa a bezpieczeństwo prawne państwa

Współcześnie w przestrzeni publicznej pojawiają się spory międzynarodowe, co wynika choćby z faktu, że potrzeby są nieograniczone z kolei dobra ograniczone. Środowisko międzynarodowe z uwagi na swoją specyfikę wymaga pomiędzy funkcjonującymi w nim podmiotami kompromisu. Pożądanym kierunkiem w przypadku konfliktów między podmiotami międzynarodowymi jest rozwiązywanie ich drogą pokojową. W środowisku międzynarodowym szczególną pozycję zajmuje jedna z największych organizacji międzynarodowych – Organizacja Nardów Zjednoczonych zwłaszcza w zakresie utrzymywania ładu i pokoju międzynarodowego. Z kolei w myśl zapisów Karty Narodów Zjednoczonych istnieje możliwość rozstrzygania sporów międzynarodowych drogą pokojową, przy czym wśród charakterystycznych metod wykorzystywanych w tego rodzaju postępowaniach jest metoda pośrednictwa, której skuteczność pozwala w długoterminowej perspektywie utrzymać pożądany stan pokoju umacniając bezpieczeństwo prawne państwa.

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I. Introduction

Today, peace in an international environment is a priceless value. It is necessary to strive for such a state, and to maintain the achieved one. Nevertheless, due to the fact that human needs are basically unlimited, and the goods with which these needs can be satisfied are limited, there is a risk of the emergence of interpersonal disputes, as well as disputes in the international space between entities (mainly states) operating in this sphere[2]. Conflicts are related to a certain type of social relationship, denoting the characteristic behavior of two entities that are directed against each other, and each of which strives to pursue their own interests, encountering the counteraction of other participants.

[2] J.M. Mysłowska, S. Sosin, *The Nuclear Dispute Between the United States and North Korea*, "Torun International Studies" 2017, 1(10), pp. 71–82; J. Marszałek-Kawa, D. Plecka (eds.), Dictionary *of Political Knowledge*, Toruń 2019.

In order to resolve international disputes, it is essential to establish a dialogue between antagonists, as an appropriate communication channel creates hope for resolving the conflict or at least limiting its development. In such a formula, it is possible to use various methods of resolving disputes in a peaceful manner, an example of which is the mediation method[3].

On the other hand, the resolution of an international dispute in practice, in addition to tangible benefits for the conflicting entities, also allows building the desired state of legal security. The legal security of a state will be determined by the certainty of the law in force in a given state, and in case of an effective solution to an international dispute, it will enable long-term maintenance of the state of peace.

II. International Order and Peace as the Goal of the UN Functioning

In the contemporary space of international relations experience gained in the 1920s give impetus to the maintenance of international order and peace. Such a state is an expression of organized international coexistence, but it also implies the maintenance of common rules and procedures in international life. It also affects the balance of relations on an appropriate scale, the balance of forces between states, or the identity of the positions of a certain number of states in the area of the "system of values" and goals. Beyond any doubt, the peaceful resolution of international disputes has an impact on the level of international security, meaning not only the sum of national security, but also including the so-called collective reinforcement increasing the quality of national security of each country, improving the conditions for its simultaneous stabilization and development[4].

Nowadays, it would be difficult to build international security while tolerating disturbances for peace on a global scale, therefore efficiency in this

[3] A. Korybski, *Alternatywne rozwiązywanie sporów w USA. Studium teoretycznoprawne*, Lublin 1993, p. 20; K. Górak-Sosnowska, *Konflikty i ich kategoryzacja*, [in:] *Bezpieczeństwo międzynarodowe. Przegląd aktualnego stanu*, ed. K. Żukrowska, Warsaw 2011, pp. 49–50.

[4] P. Siemiątkowski, P. Tomaszewski, *Obszar, problematyka i interdyscyplinarność badań nad bezpieczeństwem w polskim dyskursie naukowym*, [in:] *Współczesne wyzwania polityki bezpieczeństwa państwa*, eds. Z. Polcikiewicz, P. Siemiątkowski, P. Tomaszewski, Toruń 2019, p. 16.

sphere is possible with the existence of global structures which task is to constantly fight for peace as a universal value, but also to create mechanisms enabling the resolution of disputes arising in this area[5]. Taking into account the dynamics of international processes, it is also important to determine the role and position of participants in international political relations, as it enables effective resolution of disputes that may arise in the international space. The model division of subjects of international relations allows to distinguish states and other non-state participants, and when international organizations appeared in the 20th century, the term pluralism of participation in the international environment was introduced into the general circulation. And although in the scientific literature there are also other types of divisions in the discussed scope, for the purposes of these considerations, one of the largest international organizations in the modern world – the United Nations (UN) was analyzed, paying attention to its role in the peaceful settlement of international disputes. Due to its competences, as well as an extensive network of regional representations, the United Nations in practice has the widest possibilities to detect areas not yet covered by international law regulations, and the number of members of this organization allows most countries to be covered by international legal regulations[6].

The United Nations is an example of an organization that covers the entire world. This organization performs many functions, among which are mainly the maintenance of world peace and security, as well as the development of friendly cooperation relations between all member states. The goals of the UN result in the generally applicable principles of coexistence between nations, i.e. sovereignty, non-interference, respect for human rights, fulfillment of international obligations, inviolability of borders, equality and the right of nations to self-determination, cooperation between states, as well as peaceful settlement of disputes. In turn, the Charter of the United Nations (KNZ),

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[5] K. Żakowski, *From Counterbalancing to Engaging China: Shift in Japan's Approach Toward the New International Order in the Asia-Pacific Under the Second Abe Administration,* "Torun International Studies" 2019, No. 1(12), pp. 143–155.

[6] J. Piątek, R. Podgórzańska, A. Ranke, *Polityka zagraniczna i strategie bezpieczeństwa państw w międzynarodowych stosunkach politycznych,* Gorzów Wielkopolski 2012, p. 79; M. Bielecka, *Nowe role międzynarodowych organizacji do spraw bezpieczeństwa,* [in:] *Bezpieczeństwo międzynarodowe po zimnej wojnie,* ed. R. Zięba, Warsaw 2008, p. 556.

which is the basis for the activities of the United Nations, as a legal act characteristic of the functioning of this type of organization, includes a preamble and 111 articles, which have been divided into 19 chapters. With regard to legal solutions, it is worth emphasizing that in the case of the functioning of the United Nations, the codifications of human rights underwent a significant evolution. Over time, the catalog of fundamental rights has included rules concerning, inter alia, the rights of children, women or racial discrimination. New solutions in the international protection of human rights are focused on the protection of rights in connection with the development of science and technology, and, above all, the problems of the natural environment and the right to live in peace. In particular, the area of anti-war law is developing, which is to protect future generations from armed conflict, ensure peace and influence the coordination of peaceful cooperation. Legal procedures and norms are therefore aimed at preventing the emergence of conflicts and situations that would threaten violations of international peace and security, and are an integral part of contemporary systems of collective and universal security within the UN[7].

Organizationally, the United Nations is composed of: the General Assembly, the Security Council, the Economic and Social Council, the Trusteeship Council, the International Court of Justice and the Secretariat, and subsidiary bodies may also be created if their existence is necessary (Articles 7–8 of the KNZ). The most important administrative officer of the United Nations is the Secretary General, who participates in the work of the main organs of this organization. His competences include preparing reports on major development problems, managing peace-keeping operations, mediating international disputes, or representing the UN outside[8].

The UN General Assembly is a forum for debate of member states, as it is composed of representatives of all member states, each of which has one vote. Decisions in important cases are taken by a qualified majority, in other cases by a simple majority. In practice, the General Assembly is a more open body than the Security Council. While the Security Council takes binding deci-

[7] Z. Jagiełło, *Wybrane problem bezpieczeństwa państw, narodów oraz społeczności lokalnych ma początku XXI wieku*, Wałbrzych 2008, pp. 128–129.

[8] A. Kisielewska, J. Kwiecień, *Struktury instytucjonalne w bezpieczeństwie,* [in:] *Bezpieczeństwo międzynarodowe po zimnej…*, p. 107.

sions in matters of peace and international security, the resolutions of the Assembly are only recommendations. The Security Council, on the other hand, consists of fifteen members. Five members – China, Russia, France, USA and Great Britain – are permanent members, the remaining ten are elected by the General Assembly for two years, their status being non-permanent members. The Council is responsible for the maintenance of international peace and security, and decisions relating to the settlement of international conflicts fall within the competence of this body. The Council's sanctions may include a partial or complete restriction of trade, severing communication links, as well as diplomatic relations, and in case of their ineffectiveness, also military actions carried out by the United Nations Armed Forces[9].

III. The Method of Mediation as a Peaceful Form of International Dispute Resolution in the Light of the United Nations Charter

In chapter VI. The KNZ has legal solutions regarding the peaceful resolution of disputes, from which it follows that the parties in a dispute, the continuation of which may endanger the maintenance of international peace and security, are obliged to seek its resolution through negotiations, research, mediation, conciliation, arbitration, legal proceedings, recourse to regional bodies or agreements, or by other peaceful means of its choice. If, however, the Council deems it necessary, it may summon the parties to settle the dispute by such means. The Security Council also has the power to investigate any dispute or situations that may give rise to international friction or give rise to dispute, to determine whether the continuation of these phenomena poses a danger to the maintenance of international peace and security. In addition, each member of the United Nations has the right to draw the attention of the Security Council or the General Assembly to any dispute or situation which threatens the maintenance of international peace and security, and a non-member state is entitled to draw the attention of the Council or the Assembly to any dispute to which it is a party. provided that it previously accepts, in connection with the dispute, commitments to settle them peacefully, in the manner provided for in the KNZ. The Security Council, in turn,

[9] P.D. Wiliams (ed.), *Studia bezpieczeństwa*, Kraków 2012, pp. 331–332.

has the power, at every stage of the mentioned dispute or situations of a similar nature, to recommend appropriate methods of proceeding or methods of settling it, although it should take into account the procedure of resolving the existing conflict already adopted by the parties. At the same time, when making recommendations, the Security Council should take into account the fact that legal disputes should, as a rule, be referred by the parties to the International Court of Justice.

If the Council considers that the continuation of the dispute may significantly jeopardize the maintenance of international peace and security, it has the right to decide whether to initiate action according with the provisions of Art. 36 KNZ, and recommend the method of settlement it deems appropriate (Articles 33–37 KNZ).

When considering peaceful methods of settling international disputes, special attention should be paid to the so-called brokerage (peace-making). And so, mediation is not a new phenomenon, because this institution is associated with disputes accompanying humanity from the beginning of its existence, and all forms similar to it appeared together with the creation of organized social groups and have been known to the society since ancient times, being used then. On the other hand, the proper development of mediation in the United States took place at the end of the 1970s and 1980s, mainly as a result of criticism of the activity of common courts. The manifestation of this was, among others, an increase in the number of court cases, trial costs and the extension of the waiting time for the issuance of a ruling, which in turn allowed for non-judicial solutions (including mediation) to exist as forms of resolving legal disputes[10].

On the normative basis, there is no one universal definition of mediation, although many scientific publications have already been published, as well as many legal acts dealing with the indicated institution, but most of the studies describe mediation similarly. Mediation is a method of resolving legal disputes involving a neutral third party which task is to help the parties involved in the conflict reach a mutually acceptable solution. As a result, mediation should lead the conflicting parties to a try to settle the dispute between them.

[10] E. Gmurzyńska, *Mediacja w sprawach cywilnych w amerykańskim systemie prawnym – zastosowanie w Europie i w Polsce*, Warsaw 2007; Ch.W. Moore, *The Mediation Process: Practical Strategies for Resolving Conflict, 4th Edition*, Jossey-Bass 2014.

Regardless of the nature of the case constituting the subject of the conflict, the proper selection of the mediator is of particular importance, the more so as in the sphere of international relations his leading role is to enable the parties to work out a solution that could resolve the dispute arising between the parties. Getting to the root of the problem will be a decisive factor in the fact that the parties will be able to make concessions to each other, which will consequently resolve the dispute. It also seems that an effective mediator will not order the conflicting parties to resolve their case, because antagonists may obtain a solution to the dispute in arbitration or adjudication proceedings (e.g. by a ruling of the International Court of Justice), which, however, does not guarantee the end of the dispute, apart from its resolution, because the losing party may be dissatisfied with the content of the judgment. A mediator cannot act as an arbitrator or judge in the mediation process, because this is not the essence – at least by definition – of mediation[11].

The aim of mediation, and thus the role of the mediator, should be, first of all, to show the opponents the source of their conflict, because thanks to this awareness, the parties have a chance to jointly work out a satisfactory solution for them, creating an opportunity to mitigate the dispute that has arisen, or to successfully resolve it[12]. The mediation method that is used in international disputes is an example of actions aimed at reaching an agreement between the conflicting parties, mainly by peaceful means. As indicated in the scientific literature, both preventive diplomacy (including an early warning system, analysis of conflict factors, etc.) and peace-making use similar instruments. The difference between them is that while preventive diplomacy is used when a conflict has not yet occurred, peace-making activities are undertaken when the parties are in a conflict. Peace-making activities consist in reaching an agreement and ending an international dispute by peaceful means, so that international peace, security and justice are not violated[13].

[11] M. Jurgilewicz, *Mediacja w administracji publicznej*, Rzeszów 2018, p. 35; M. Jurgilewicz, A. Dana, *Mediacja jako sposób rozwiązywania sporów prawnych*, Warsaw 2015; M. Jurgiewicz, R. Dankiewicz, K. Kmiotek, A. Misiuk, *Mediation in civil matters as an example of the method used in legal security management and optimization of costs of proceedings*, "Journal of Security and Sustainability Issues" 2019, vol. 9(2), pp. 595–602.

[12] M. Jurgilewicz, *Mediacja w administracji publicznej…*, p. 35.

[13] P. Grzebyk, *Ramy prawne użycia siły*, [in:] *Bezpieczeństwo międzynarodowe*, eds. R. Kuźniar, B. Balcerowicz et al., Warsaw 2012, pp. 132–133.

In turn, preventive diplomacy is an institution that, apart from creating, maintaining, building and enforcing peace, is used during peacekeeping operations that are military, paramilitary or non-military means to maintain or restore international peace and security. Preventive diplomacy is then an example of activities aimed at preventing the emergence and counteracting the transformation of existing disputes into armed conflicts. In addition, among the types of peacekeeping operations there are observation and mediation missions, which are mediation-monitoring, observation and surveillance-oversight, as well as military presence missions (peacekeeping and police operations), as well as enhanced military presence operations (activities of preventive forces and protective), as well as military interventions (interventions against aggression or for humanitarian purposes)[14].

Speaking about the peaceful resolution of international disputes, it is worth adding that the UN Secretary General may act as a mediator, therefore in practice the selection of this person is particularly important when filling this position. providing advisory, financial and logistic support for the conducted peace processes, strengthening the mediation capacity of regional and subregional organizations, storing knowledge, tips, etc. in this area. In order to strengthen the activity of rapid crisis response, a group of mediation experts has been operating for over ten years and in constant readiness. Its members can come anywhere in the world within approx. 72 hours to individually or jointly serve mediators both within the United Nations and outside the organization. The group of mediators has already proven themselves in mediation in Nepal, Somalia, Kenya, the Central African Republic, the Comoros, Madagascar, Iraq and Cyprus[15].

IV. The Essence of the Legal Security of the State

Legal security is not a concept developed in Poland, but comes from the German term *Rechtssicherheit*, which can be understood as legal certainty. This

[14] Z. Jagiełło, *Wybrane problem bezpieczeństwa państw…*, pp. 116–117.

[15] P. Grzebyk, *Ramy prawne użycia siły…*, pp. 133–134; K.Z. Jędrzejewska, *Hasbara: Public Diplomacy with Israeli Characteristics*, "Torun International Studies" 2020, No. 1(13), pp. 105–118.

is also justified by the fact that the concepts of legal security and legal certainty are used alternately in the scientific literature[16]. Currently, the concept of *Rechtssicherheit* encompasses security (latin *securitas*), as well as certainty (latin *certitudo*) and indicates the law as a tool to guarantee these values, but also as a guaranteed object. The German doctrine distinguishes two aspects – securing life goods by means of law, i.e. security by law, and certainty – security of the law itself[17].

On the other hand, when considering the issues of legal security of the state on the example of the Republic of Poland, one can indicate the normative solutions that determine this state of affairs. In the Constitution of the Republic of Poland of April 2, 1997[18], the legislator gave certain provisions the rank of legal principles. These will be, for example, the principle of a democratic state ruled by law (Art. 1 of the Polish Constitution) or the rule of law (Art. 7 of the Polish Constitution). Legal principles are much more important than other regulations, because their application when interpreting the law is the basis for interpreting other legal texts[19].

Considering this observation, it is possible to distinguish legal security perceived in the formal aspect, which is ensured due to the general application of normative acts of various rank regulating the sphere of public life, as well as legal security in the institutional aspect related to the legal functioning of public authorities. In this aspect, one can speak of legal certainty, because when the law is legible and understandable to its addressees, then it serves society. Therefore, a state that functions through authorized bodies will play the role of an active entity of legal security – guaranteeing security to individuals under its jurisdiction. In turn, each individual will be a passive subject of legal security, which has the right to claim legal security[20].

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[16] J. Potrzeszcz, *Bezpieczeństwo prawne a pewność prawa – perspektywa filozoficznoprawna*, [in:] *Bezpieczeństwo prawne państw demokratycznych w procesie integracji europejskiej: Polska-Słowacja-Ukraina*, eds. J. Krukowski, J. Potrzeszcz, M. Sitarz, Lublin 2016, pp. 282–283.

[17] Ibidem, pp. 283–284.

[18] Dz.U. No. 78, item 483.

[19] M. Jurgilewicz, *Rzecz o bezpieczeństwie prawnym*, [in:] *W kręgu nauki o bezpieczeństwie*, eds. M. Jurgilewicz, S. Sulowski, Warsaw 2018, p. 27.

[20] J. Potrzeszcz, *Podmiot bierny a podmiot czynny bezpieczeństwa prawnego*, "Teka Komisji Prawniczej PAN Oddział Lubelski" 2015, vol. VIII, p. 76.

To sum up, legal security is a kind of state achieved by statutory law, but also by other decisions, e.g. court judgments or an agreed settlement using the mediation method, in which the life goods and interests of individuals are protected as fully and effectively as possible[21].

V. Summary

The mediation is not a new institution, and the proceedings using this form of conflict management may in practice lead to reaching an agreement between the conflicting parties. Thanks to this, it is possible to ensure the legal security of the state. In the case of mediation, the consent of the parties to the use of the adopted solution is essential, and the nature of such proceedings clearly favors the emergence of constructive solutions to the disputes that have arisen. In the case of the brokerage method, the broker has a special role. Its basic task is to facilitate the achievement of mutual agreement and to assist the parties in the dialogue on shaping mutual relations. A mediator aims to provide a new perspective on the issues that divide the parties, as well as to explain and create relationship procedures aimed at solving their problems. An intermediary is also obliged to change the balance of power and social dynamics in the existing conflict relationship by influencing the beliefs or behaviors of the parties, providing knowledge and information, and introducing a more effective negotiation strategy[22].

Therefore, it seems that in the international sphere, the method of mediation creates concrete opportunities of effective resolving of various dispute types between international participants and entities in optimal way. It is also worth adding that resolving a dispute by the means of brokerage allows for a more durable solution to the conflict, because the shape of such a settlement is mainly determined by the conflicting parties, and as a consequence it allows to build a sense of legal certainty by individuals more effectively, as well as to build the legal security of the state.

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[21] J. Potrzeszcz, *Bezpieczeństwo prawne z perspektywy filozofii prawa*, Lublin 2013, p. 272.

[22] M. Araszkiewicz (ed.), *Mediacja. Teoria, normy, praktyka*, Warsaw 2016, p. 489.

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